

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 7, 2009

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## THIS WEEK:

- **Out-Of-Time Appeal**
- **Severance**
- **DUI**
- **Sex Offender Registration**
- **Ineffective Assistance of Counsel**
- **Chain of Custody**
- **Photographs; Marital Privilege**
- **Judicial Comment; Inconsistent Verdicts**
- **Jury Charges**

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### **Out-Of-Time Appeal**

*Golden v. State, A09A1442*

Appellant sought an out-of-time appeal from his guilty plea to child molestation of his daughter. Appellant argued that the evidence presented at his plea hearing was insufficient to provide the trial court with the factual basis necessary to support his guilty plea. First, appellant contended that his wife filed a victim's advocacy report indicating that she did not want to prosecute. The Court held that it wasn't her decision and therefore appellant's claim was meritless. Similarly, appellant argued that the prosecutor committed a fraud upon the court by not notifying the court that his wife wanted the charges dropped. The Court stated, "What [appellant] fails to grasp is that his wife's desire to see the charges dropped was irrelevant to the issue of his guilt...[because] Mrs. Golden was not the victim of the crime at issue."

Appellant also argued that his arrest warrant was invalid because it accused him

of violating "OCGA § 16-76-4", as opposed to OCGA § 16-6-4. The Court held that the fact that the affidavit mis-cited the statute that appellant was accused of violating was irrelevant. The plain language of OCGA § 17-4-41 does not require the affidavit to identify or otherwise reference the specific statute which appellant allegedly violated.

### **Severance**

*Fielding v. State, A09A1657*

Appellant was convicted of four counts of robbery and three counts of kidnapping. He argued that the trial court erred in denying his motion to sever. The record showed that a grand jury indicted appellant on six counts of robbery by force and six counts of kidnapping arising out of six separate business robberies which took place over a period of three weeks. Appellant argued that the trial court should have severed the six counts of robbery and the six counts of kidnapping contained in the indictment into six separate trials.

When deciding whether to join separate offenses for trial, the trial court must first determine whether the offenses at issue are joined solely because they are of the same or similar character. If not, the trial court must then consider whether, in view of the number of offenses and complexity of evidence, whether the jury can distinguish the evidence and apply the law intelligently as to each offense. Here, the six robberies of commercial establishments took place in a single county within three weeks of each other. Each involved a large male perpetrator distracting the lone female employee and then placing her in a choke hold (except one which involved shoving), whereupon he would force her to money repositories. From those repositories, he would take the

money and then would demand money from her purse. He would then seek to force her to the rear of the business and have her lie on the floor, with threats of violence if she moved or called the police. Because the modus operandi of the robberies was strikingly similar, the trial court did not abuse its discretion to deny the motion to sever. Moreover, since appellant was acquitted on two of the armed robbery counts and three of the kidnapping counts, it was clear that the jury was able to distinguish the evidence and apply the law intelligently as to each offense.

## **DUI**

*Richardson v. State, A09A1478*

Appellant was convicted of driving under the influence of drugs. He argued that the State failed to prove that he was under the influence of marijuana at the time he was stopped and that the marijuana affected his driving, because the State did not show that samples of his blood or urine had been tested by an expert and that there was, in fact, evidence of marijuana in his system. The Court held that the evidence was sufficient for two reasons. First, the State did not charge appellant with driving under the influence of marijuana. Instead, it charged him with driving under the influence of “drugs” to the extent it was less safe to drive. “[Appellant] has cited to no authority, and we are aware of none, that requires the State to present the results from scientific testing of a driver’s blood or urine in order to prove the *specific* type of drug allegedly ingested by the defendant so that the State may obtain a conviction for DUI-less safe under OCGA § 40-6-391 (a) (2).” Second, the arresting officer testified that he smelled marijuana emanating from appellant’s car; appellant admitted to the office that he smokes marijuana and that he was a regular user of marijuana; and that appellant was, in his expert opinion, under the influence of marijuana to the extent that appellant was less safe to drive.

## **Sex Offender Registration**

*Jackson v. State, A09A0840*

Appellant appealed from the denial of his motion to vacate an illegal sentence. He argued that his plea of guilty to failure to register as a sex offender was illegal because he should not have been required to register. The Court

agreed and reversed. The record showed that in 1996 he pled guilty to statutory rape under the First Offender Statute. He was given 6 years probation and discharged without adjudication of guilt in 2002. He was indicted for failing to register in 2006 and pled guilty in 2007.

OCGA § 42-8-62 (a), which addresses the probation and discharge of defendants who have been sentenced as first offenders, provides in relevant part: “Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. Except for the registration requirements under the state sexual offender registry [as provided in OCGA § 42-1-12] and except as otherwise provided in Code Section 42-8-63.1, the discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties; and the defendant shall not be considered to have a criminal conviction.” OCGA § 42-1-12 (a) (8) provides that “[a] defendant who is discharged without adjudication of guilt and who is not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall be subject to the registration requirements of this Code section for the period of time prior to the defendant’s discharge after completion of his or her sentence or upon the defendant being adjudicated guilty. Unless otherwise required by federal law, a defendant who is discharged without adjudication of guilt and who is not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall not be subject to the registration requirements of this Code section upon the defendant’s discharge.” Thus, the Court held, OCGA § 42-1-12 (a) (8) clearly distinguishes between first offenders who have committed certain sexual crimes and who have not been discharged (in other words, those who have not completed their probations, who are still confined, or who have been adjudicated guilty) from first offenders who have been discharged: The former must register under the statute, but the latter do not have to register unless it is required by federal law. Therefore, the trial court erred in finding that appellant was required to register as a sexual offender after he was discharged without an adjudication of guilt under the First Offender Act.

## **Ineffective Assistance of Counsel**

*Pointer v. State, A09A1146*

Appellant was charged with committing aggravated child molestation, child molestation, and incest upon his daughter C. P., and committing two counts of child molestation upon his daughter A. P. A jury found him guilty only of one count of child molestation against A. P. and one count of sexual battery (as a lesser included offense of child molestation) against A. P. He argued that these convictions should be overturned because his counsel was ineffective in that his counsel failed to object to expert testimony that improperly bolstered the credibility of the victim and invaded the province of the jury. Specifically, he asserted that his attorney should have objected to expert testimony that his evaluation “strongly suggests that [A.P.] had been sexually abused as alleged.” He also argued that trial counsel was ineffective for failing to request a curative instruction or move for a mistrial when the prosecutor immediately thereafter asked the expert, “(a)nd that sexual abuse was perpetrated upon her by her father. Is that correct?” The expert responded, “(t)hat is correct.”

The Court agreed and reversed because the expert’s testimony that his evaluation “strongly suggests that [A.P.] had been sexually abused as alleged” was inadmissible. There is a difference between expert testimony that “the victim’s psychological exam was consistent with sexual abuse,” and expert testimony that “(i)n my opinion, the victim was sexually abused.” In the first situation, the expert leaves the ultimate issue for the jury to decide; in the second, the expert makes a factual conclusion which invades the province of the jury by providing a direct answer to the ultimate issue: Was the victim sexually abused? The “strongly suggests” language here fell somewhere between the two types of testimony. The expert stopped just short of stating his opinion that the victim was sexually abused, but he went beyond merely stating that the evidence was consistent with sexual abuse. Considered in context, with the “as alleged” language, the testimony amounted to a factual conclusion (regarding whether the child was in fact sexually abused and, if so, whether appellant was the abuser) which invaded the province of the jury. The jurors were fully capable of deciding

from the evidence, on their own, whether the child was in fact sexually abused as alleged. The admission of this testimony over proper objection would have demanded reversal and therefore trial counsel was deficient in failing to object to this testimony.

The Court then moved to the second prong of the *Strickland v. Washington* test. The Court found that the evidence was not overwhelming and relied heavily on the credibility of the witnesses. Therefore, the expert's opinion that the evidence strongly suggested that A. P. had been "sexually abused as alleged" was not superfluous; it usurped the jury's authority. Consequently it was highly probable that counsel's failure to object to this testimony contributed to the verdict and a new trial was necessary.

## **Chain of Custody**

*Kuykendall v. State, A09A0932*

Appellant was convicted of four counts of child molestation and one count of statutory rape. He contended that the trial court erred in admitting into evidence a bed sheet over his chain-of-custody objection. The evidence showed that during a 6-week period, appellant repeatedly had sexual intercourse with the 14-year-old victim in a particular bedroom in the victim's house. The evidence showed that in all but one occasion, appellant used a condom; the other time, he ejaculated onto the sheet. An investigator seized the sheet and held it securely in her custody but could not see the semen stain on the sheet. Eventually, she gave the sheet back to the victim's mother. The mother took it back to her house and had the victim point out where the stain was located. The mother then circled the stain and gave the sheet back to the investigator a few days later. Forensics was able to match the DNA from the semen to appellant's DNA.

Appellant specifically argued that because the victim's family had possession of the sheet after it was seized, the State failed to rule out the possibility that someone had tampered with the evidence. Appellant also argued that, even if the sheet itself was not a fungible item for which the State had to show a chain of custody, the semen on the sheet was fungible, and the State failed to rule out the possibility of tampering. The Court disagreed for a number of reasons. First, the sheet is a non-fungible physical object that

is readily identifiable. Second, there was no evidence that the victim's family substituted a matching sheet for the one originally seized by the investigator while the sheet was in their possession and, even if the victim's family had had the opportunity to substitute or tamper with the sheet while it was in their custody, there was no evidence to even suggest that they had access to a sample of appellant's semen and were able to plant it onto the sheet. "Any suggestion to the contrary is outrageous and patently unreasonable." Third, the inculpatory aspect of the semen evidence was not simply that there was *semen* on the sheet, but that the *DNA* of that semen matched appellant's DNA. Thus, the Court held, DNA, like a fingerprint, is unique to a single individual and, therefore, is distinguishable from other DNA samples. Therefore, DNA evidence may be admitted without demonstrating a chain of custody, since it can be readily identified by reference to the defendant's DNA. Finally, defense counsel vigorously cross-examined the witnesses about the handling of the sheet and, during closing arguments, emphasized appellant's explanation of the semen while still suggesting that someone may have tampered with the sheet.

## **Photographs; Marital Privilege**

*Pike v. State, A09A1396*

Appellant was convicted of three counts of child molestation against his daughter. He argued that the trial court erred by admitting into evidence numerous pictures that depicted his wife in various stages of undress and showed her tattoos because the photographs were irrelevant and protected by the marital privilege. The Court held that the photographs complained of supported the State's theory that appellant had a bent of mind and lustful disposition that involved taking pictures of family members in various stages of undress. Thus, the photographs were relevant to the child molestation allegation that appellant took nude photographs of his daughter, and the trial court did not abuse its discretion in allowing the admission of the photographs.

The Court also held that no violation of the marital privilege occurred. The marital privilege excludes the admission of communications between husband and wife. But the right to assert the marital privilege belongs to

the witness, not the accused. Here, appellant's wife did not testify and the photographs did not divulge any privileged communication between appellant and his wife. In any event, under OCGA § 24-9-23 (b), the marital privilege does not apply "in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged." Thus, the Court held, even if the photographs could have been considered an inter-spousal communication, the marital privilege would not have attached because appellant was charged with a crime against a minor child and the photographs were relevant to show appellant's bent of mind and lustful disposition toward taking pictures of family members in various stages of undress.

## **Judicial Comment; Inconsistent Verdicts**

*Artis v. State, A09A1377*

Appellant was convicted of three counts of robbery by intimidation (as a lesser included offense of armed robbery) and four counts of aggravated assault. He argued that the trial court violated OCGA § 17-8-57 by expressing an opinion as to his guilt. The record showed that during direct examination of the officer who first arrived at the scene of the robbery, the prosecutor showed the officer one of the victim's wallets and asked him if he recognized it. When the officer responded that he did, the prosecutor asked him how he recognized it. The officer answered, "Because I had to pick up all the wallets that had been stolen from the Latino males that night." Appellant's trial counsel immediately objected that the officer's response invaded the province of the jury. The trial court sustained the objection and stated, "He's objecting to wallets that were stolen from the Latino males." The Court held that the trial court's comment after sustaining defense counsel's objection was merely an explanation of what was improper about the officer's testimony and thus why the court sustained the objection. A ruling by a trial court on a point of law is not an expression of opinion; neither are remarks by the trial court explaining the court's rulings.

Appellant argued that the jury rendered an unlawfully inconsistent verdict when it acquitted him of armed robbery but found

him guilty of aggravated assault with a deadly weapon. He also argued that in light of this inconsistent verdict, the trial court should have directed a verdict of not guilty as to the aggravated assault counts. The Court disagreed. It noted that Georgia abolished the inconsistent verdict rule 25 years ago because inconsistent verdicts could be the result of jury mistake, compromise, or lenity, but it would be unknown whether the mistake, compromise, or lenity was exercised in favor of the defendant or the prosecution. An exception to this abolition therefore occurs when instead of being left to speculate about the unknown motivations of the jury, the appellate record makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges, and thus, there is no speculation. While Georgia continues to recognize the rule against mutually exclusive verdicts, such rule applies to multiple guilty verdicts which cannot be logically reconciled; the rule is not implicated where, as here, verdicts of guilty and not guilty are returned. Here, the evidence was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt as a party to aggravated assault with a deadly weapon. Therefore, the trial court did not err in failing to direct a verdict of acquittal on the aggravated assault counts.

## **Jury Charges**

*Artis v. State, A09A1377*

Appellant was convicted of three counts of robbery by intimidation and four counts of aggravated assault. Appellant argued that the trial court erred in refusing to explain to the jury some of the legal terms contained in a trial exhibit after the jury requested such an explanation during its deliberations. The record showed that the State introduced, without objection, a co-conspirator's guilty plea and sentence form as an exhibit after cross-examining appellant regarding whether he knew that the co-conspirator had pled guilty. During its deliberations, the jury sent the trial court a note that read: "We would like clarification on the charges that [the co-conspirator] pleaded. Is it armed robbery or robbery by intimidation. Please also clarify nolle-prosequi. The statement also indicates guilty on 1, 2, 3 and 4, we are unsure of the clarity of that statement." The trial court responded to the jury that "these questions regarding the sentenc-

ing of [the co-conspirator] are not relevant to your consideration of the guilt or innocence of defendants." The Court held that the jury's questions to the trial court regarding this guilty plea were not requests for recharge on a point of law but rather were requests that the trial court explain evidence. Thus, the trial court did not abuse its discretion in refusing to provide such an explanation.

