

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 12, 2008

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- **Entering an Automobile, Remote Conviction**
- **Child Molestation, Guilty Plea**
- **Merger, Armed Robbery, Aggravated Assault**
- **Radar, Hearsay, Res Gestae**

Entering an Automobile, Remote Conviction

Love v. State; A08A1546

A jury found appellant guilty of entering an automobile. On appeal, appellant argues that the trial court erred in allowing the State to impeach his trial testimony with evidence of his 1989 burglary conviction because it was over 10 years old. The evidence shows that on direct examination, defense counsel asked appellant whether he had “been in trouble with the law before.” Appellant responded, “Yes, sir. Plenty of times.” Appellant then testified that he had almost completed a 20-year sentence for one of these convictions. On cross-examination, the prosecutor briefly questioned appellant about the 1989 incident, establishing that he had been convicted of burglary, had received a 20-year sentence, and had been paroled.

The Court of Appeals found that the trial court did not error in allowing the state to impeach appellant’s testimony with evidence of his 1989 burglary conviction because the trial court admitted the conviction evidence only after appellant testified about his criminal past. Judgment affirmed.

Child Molestation, Guilty Plea

Likely v. State; A08A1396

Appellant appeals the trial court’s order denying his motion to withdraw his guilty plea to one count of child molestation. On appeal, appellant contends that the withdrawal of his plea is necessary to correct a manifest injustice because he is innocent of the charges against him and the state failed to show that his guilty plea was entered intelligently and voluntarily. The record shows that appellant, represented by counsel, entered a negotiated guilty plea to one count of child molestation. At the guilty plea hearing, appellant told the trial court that he understood that he was charged with child molestation. Appellant stated that he understood that he had not yet been indicted for the crime of child molestation, that he had the right to insist upon indictment by a grand jury and he understood that, upon his entry of a guilty plea, he would be waiving the right to a trial by jury and other attendant rights. When the trial court asked him if he was pleading guilty of his own free will, appellant answered, “My own free will.” When the accusation against him was read aloud, appellant stated that he understood the charge against him, that he had done the act described in the accusation, and that he was pleading guilty because he was, in fact, guilty. Two weeks later, appellant filed a pro se motion to withdraw his guilty plea asserting that he was innocent of the charges against him and that he had never wanted to enter a plea of guilty.

The Court of Appeals found that when a defendant enters a plea of guilty, and subsequently challenges the validity of the guilty plea, the state may meet its burden of dem-

onstrating that the plea was intelligently and voluntarily entered by showing on the record of the guilty plea hearing that the defendant was cognizant of all of the rights he was waiving and the possible consequences of his plea. Here, the record demonstrates that that the trial court made careful inquiry showing that appellant fully understood the nature of the charge against him, the rights he was relinquishing, and the consequences of his plea. Thus, the state met its burden of demonstrating that the plea was intelligently and voluntarily entered. Judgment affirmed.

Merger, Armed Robbery, Aggravated Assault

Reed v. State; A08A1024

A jury convicted appellant of armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Appellant was sentenced to ten years each on the armed robbery, aggravated assault, and burglary offenses, to be served consecutively and five years on the possession of a firearm charge to serve consecutively to the thirty years. On appeal, appellant contends that the trial court erred in not merging the armed robbery and aggravated assault charges for sentencing purposes, and thus, the sentence imposed should be vacated. The record shows that appellant, holding a shotgun stood outside of the victim's window and demanded money. Appellant then kicked in the door of the victim's home, came inside without permission and used the gun to take money.

The Court of Appeals concluded that aggravated assault is not a lesser included offense of armed robbery as a matter of law, and the two offenses rarely merge as a matter of fact. To determine whether one crime is included in another as a matter of fact the "required evidence" test is applied: where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. The important question is not the number of acts involved, or whether the crimes have overlapping elements, but whether, looking at the evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to

establish the commission of the other crime charged. Here, the Court found that appellant used the gun to demand money from the victim from outside of his window and then unlawfully entered the house, using the gun to take the money. Because the two convictions were based on the same conduct (pointing the gun at the victim with the intent to rob him), merger was required. Sentence vacated in part and case remanded for re-sentencing.

Radar, Hearsay, Res Gestae

Segel v. State; A08A1092

After a jury trial, appellant was convicted of speeding, fleeing and attempting to elude. Appellant contends that the trial court erred by allowing the state to introduce radar speed detection evidence because the officer did not inform him that he had a right to ask the officer to check the accuracy of the speed detection device. Appellant further contends that the trial court violated *Crawford v. Washington* by allowing the officer to testify to what a bystander had asked him since he could not cross-examine the unidentified person who was not called at trial. The record shows that a traffic patrol officer observed a blue Corvette traveling in excess of the posted speed limit of 65 miles per hour. The officer used his radar unit, which showed that the car was traveling 87 miles per hour. The officer activated the patrol car's siren and pursued the Corvette. About a quarter of a mile later, the officer lost sight of appellant. A bystander asked the officer whether he was searching for a blue Corvette and then pointed the officer to the rear of a subdivision. At trial, appellant's attorney asked him how fast he was traveling that day. He answered, "I would probably estimate I was probably close to 80."

The Court of Appeals found that pursuant to OCGA § 40-14-5(b), each county law enforcement officer using a radar device shall notify each person against whom the officer intends to make a case based on the use of the radar device that the person has a right to request the officer to test the radar device for accuracy. In this case, the Court found that even if the officer had not complied with the Code provision, in view of other evidence that appellant was speeding, any error the trial court may have committed in allowing evidence of the radar results was harmless. The Court also found that because the primary purpose of the

exchange between the officer and the bystander was not testimonial but rather to enable the officer to address an ongoing emergency. The trial court, therefore, did not abuse its discretion in allowing the testimony under the res gestae exception. Judgment affirmed.