

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 25, 2009

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## THIS WEEK:

- Appeals; Void Judgments
- Statements; Jury Misconduct
- Sentencing; Banishment
- Business Records
- Character Evidence

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### Appeals; Void Judgments

*Doyle v. State, A09A0987*

Appellant appealed from an order denying his motion to correct an allegedly void judgment under OCGA § 17-9-4. This statute provides: "The judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." The Court held that to qualify for consideration as a motion filed pursuant to OCGA § 17-9-4, a motion to vacate a conviction as void must allege a ground upon which the judgment of conviction entered against a criminal defendant can be declared void. The denial of the motion is directly appealable if the convicted defendant raised in his motion allegations which would render his conviction void. If the ground raised is not one which would void the conviction, the motion does not qualify as a § 17-9-4 motion. In the latter circumstance, a convicted defendant must raise the issue in a direct appeal from the judgment of conviction, an extraordinary motion for new trial, a petition for writ of habeas corpus, or a

motion in arrest of judgment. Here, appellant contended in his motion that he received ineffective assistance of counsel; that his plea was involuntary; that he was denied an evidentiary hearing in violation of his due process rights; and that the trial court improperly enhanced his sentence with prior guilty pleas. Because none of these asserted errors would void his conviction, the Court dismissed his appeal.

### Statements; Jury Misconduct

*Tolbert v. State, A09A1813*

Appellant was convicted of armed robbery and aggravated assault. He contended that the trial court erred in refusing to suppress his incriminating statements because those statements were made during an illegal arrest. Specifically, he contended that detectives arrested him without probable cause when, during their investigation into a string of armed robbery attempts, they asked him to go to the police station to answer some questions and drove him to the station in the back of an unmarked police car. Thus, he contended, the inculpatory statement he gave at the police station, after being advised of his *Miranda* rights was inadmissible because the statement followed that illegal arrest. The Court found otherwise, holding that the record did not support his arguments. Instead, it revealed that appellant was not under arrest when he accompanied the detectives to the police station because he did so voluntarily with the belief that, after his interview was over, he would be leaving with his girlfriend, who followed the detectives to the station in her car. Although appellant accompanied the detectives to the station in their car, his freedom of movement was not restrained; he was not handcuffed,

and he was free to request that the officers take him back to his girlfriend's residence or that they pull over and allow him to leave with her. At this point, no reasonable person in the appellant's position would have believed his detention was anything other than temporary because his movement was not restricted and he planned to leave after the interview. Therefore, his statements were not the product of an illegal arrest.

Appellant also contended that the trial court erred in denying his motion for mistrial because a sitting juror made improper statements about his guilt before jury deliberations took place and that this subconsciously influenced the decisions of the other jurors. He further argued that the discharge of the juror in question was not an adequate remedy for the misconduct. The record showed that during the trial, the trial court was informed by the bailiff that two jurors reported that some of the jurors had made statements concerning appellant's guilt prior to deliberations. The judge questioned the jurors who came forward and then as a precautionary measure, asked the each of the twelve jurors individually, under oath, if they heard any inappropriate statements that were made about appellant or discussed anything prematurely. After questioning each juror and finding that each juror could remain fair and impartial, the trial court denied appellant's motion for a mistrial. Nevertheless, the trial court discharged juror no. two sua sponte, pursuant to OCGA §15-12-172, because that juror made comments that she "might know" the appellant, and because the trial court wanted to ensure sure appellant received a fair trial.

The Court held that a decision to remove a juror for jury misconduct lies within the sound discretion of the court. Here, the trial judge thoroughly questioned each individual juror under oath about what they said, heard, and whether he or she had the ability to remain a fair and impartial juror and found that no misconduct occurred and that each juror could remain impartial. As such, appellant's argument that any of the comments made by jurors two and three subliminally influenced any of the jury members was purely speculative. Moreover, dismissing juror two and replacing her with an alternate juror was an adequate remedy authorized by OCGA §15-12-172 and did not deprive appellant of a fair trial.

## **Sentencing: Banishment**

*Shook v. State, A09A1320*

Appellant argued that the portion of his sentence banishing him from all areas of Georgia north of Interstate 20 was illegal as it served no logical rehabilitative purpose. The Court held that a trial court has discretion to banish a defendant from designated areas within the State where it is a reasonable condition of probation. But, banishment conditions are not unlimited and such conditions must not be unreasonable or otherwise fail to bear a logical relationship to the rehabilitative scheme of the sentence. Here, the record established that appellant had a twenty-year criminal history of drug and alcohol-related convictions in at least five counties situated north of I-20. He also had been arrested again for drug possession in one of those counties after he failed to appear at the first scheduled trial in this case. The trial judge's sentence of banishment allowed for appellant to receive rehabilitative services while at the same time removing him from an area where he committed his prior crimes and presumably had access to illegal drugs. Accordingly, appellant's sentence could not be said to bear no logical relationship to the rehabilitative scheme of his sentence.

## **Business Records**

*Loyal v. State, A09A1894*

Appellant was convicted of theft by taking. He argued that the trial court erred by admitting into evidence the security log of his former employer, without requiring the State to establish a proper foundation for the log. The evidence showed that appellant worked at a warehouse in which inventory had disappeared. The trial court admitted the security log after a warehouse vice-president testified that: (1) the log was kept electronically, in the regular course of business; and (2) the data in the log reflecting when and by whom the warehouse was locked and unlocked was entered into the log contemporaneously with the events themselves. Appellant argued that the State failed to demonstrate that the vice-president was familiar with the method for keeping the security log, because he did not assign the employee PIN numbers recorded in the log and he did not "monitor" the security log. The Court held that State laid a proper foundation. Citing its recent case of *Hamilton v. State*, 297

Ga. App. 47(2009), the Court held that the business records exception does not require that the person laying the foundation for the admission of business records be the custodian of the records. Instead, it requires only that the record offered to prove an act or transaction be made in the regular course of business and that it is the regular course of business to make the record at the time of the act or transaction. The witness's lack of personal knowledge regarding how the records were created does not render them inadmissible, but merely affects the weight given to the evidence.

## **Character Evidence**

*Hampton v. State, A09A0809*

Appellant was convicted of trafficking in cocaine, possession of cocaine with intent to distribute, and possession of cocaine. He argued that the trial court erred in admitting extraneous evidence of another crime unrelated to the offense for which he was on trial. The Court agreed and reversed. At trial, the State was allowed to elicit testimony by the officer who stopped appellant on a traffic offense that appellant in response to the officer's question of whether appellant was on probation or parole, stated that he was on probation for cocaine. The Court held that appellant's probation for an unspecified prior offense involving cocaine had no bearing on his guilt or innocence of the offense charged, particularly in the absence of any motion by the State to introduce it as a similar transaction. This was particular true in this case because appellant vigorously denied guilt or any knowledge of the drugs or money found in the car, and made no other statement to the police. The Court also noted that although appellant did not make a contemporaneous objection when the evidence was admitted at trial, the issue was preserved for appeal because appellant raised the issue, albeit unsuccessfully, in a pre-trial motion in limine.