

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 26, 2008

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THIS WEEK:

- **Merger**
- **Similar Transaction, Child Hearsay**
- **Search & Seizure**

Merger

Robbins v. State; A08A1149

Following a jury trial, appellant was found guilty of armed robbery, aggravated assault, aggravated battery, and possessing a weapon during the commission of a crime. In his sole enumeration of error on appeal, appellant contends that the trial court erred in failing to merge the aggravated assault charge with the aggravated battery charge. The record shows that the victim sold appellant \$50 worth of drugs. Later that night, appellant approached the victim and said that he needed more drugs. Appellant then pulled a gun and shot the victim in the head, injuring the victim's right eye, which later had to be removed. Afterwards, appellant demanded that the victim give him the money he had used to pay for the drugs. Following appellant's conviction for these crimes, the trial court declined to merge the offenses, and appellant was sentenced to 20 years for both aggravated assault and aggravated battery, to be served concurrently.

The Court of Appeals held that for merger purposes, the "required evidence" test is employed. The applicable rule is that 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. Here, appellant was convicted for aggravated assault and aggravated battery, two separate offenses with different elements. Whereas the aggravated assault required proof that appellant attempted to commit a violent injury with the intent to murder using a deadly weapon, aggravated battery required proof that appellant maliciously caused bodily harm to the victim by rendering a member of his body useless. In other words, the offenses were distinct, with each requiring proof of a fact which the other did not. Under these circumstances, the trial court correctly found that the offenses did not merge. Judgment affirmed.

Similar Transaction, Child Hearsay

Williams v. State; A08A1356

On appeal from his convictions for child molestation and cruelty to children, appellant argues that the trial erred in allowing two nurses to testify as to statements made to them by two of the sisters without making a finding under OCGA § 24-3-16 that the evidence was sufficiently reliable. The record shows that the victims' mother met appellant on a bus as she took her children from the shelter where her family was living. Appellant offered his home to the victims and their mother, assuring the mother that he had previously helped parents with young children and nowhere to go. The mother let her daughters, all of whom were between seven and 11 years old, go home with appellant. On the third night, appellant had forcible intercourse with one of the sisters. The trial court allowed the prosecutor to admit videotaped statements the sisters made at a hospital concerning appellant, finding that the statements contained sufficient indicia of

reliability to authorize their admittance. The Court found that the trial court did not err in admitting the videotaped statements because appellant had every conceivable opportunity to cross-examine both the victims and the nurses regarding their memories and the circumstances surrounding their out of court statements, and the jury had the opportunity to judge the alleged making and veracity of those statements. As such, the trial court did not err when it admitted the nurses' testimony concerning the same matters detailed in the victims' properly admitted and sufficiently reliable videotaped statements. Judgment affirmed.

Search & Seizure

Esposito v. State; A08A0985

Following a bench trial, appellant was found guilty of carrying weapons in a school safety zone, a violation of OCGA § 16-11-127.1. In his sole enumeration of error, appellant contends that the trial court erred when it denied his motion to suppress the brass knuckles because the officer did not have reasonable grounds under the Fourth Amendment to stop the car to investigate his suspicions. The record shows that a police officer employed by the Social Circle Department of Public Safety was patrolling a high school parking lot during a high school football game observed a vehicle driving slowly through the lot passing many empty driving spaces. The officer followed the vehicle, noticed that it had a drive-out tag that did not appear to be properly secured, and decided to initiate a traffic stop. According to the officer, he stopped appellant for two reasons: the slow movement through the parking lot and the improperly secured tag. The officer testified that he advised appellant as to the reason for the stop and then noticed a bulge in his pants pocket. The officer conducted a pat-down search for weapons and found brass knuckles in appellant's pocket.

The Court of Appeals held that the Fourth Amendment allows a police officer to stop a vehicle to investigate the officer's reasonable suspicion that the person stopped is, or is about to be engaged in criminal activity. The "totality of the circumstances" test allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available

to them that might well elude an untrained person. In the case at bar, the Court found that it was reasonable for the officer to infer, based on his training, experience, and common sense, that appellant, who drove around slowly through the parking lot without parking in one of many empty spaces, was "casing" the parking lot, looking to engage in criminal activity. Under the totality of circumstances, the brief stop was neither arbitrary nor harassing, but was based on a founded suspicion of criminal activity. Judgment affirmed.