Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 7, 2007

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director
for Legal Services

Tom Hayes
Regional Offices Director

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Lalaine Briones
Trial Support

Laura Murphree
Capital Litigation

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:

- Evidence-Disorderly Conduct
- Law of the Case Rule
- Search and Seizure
- Venue in Accusation

Evidence-Disorderly Conduct

Talmadge v. State, A07A1639, (8/22/07)

Appellant was convicted of disorderly conduct by using fighting words. On appeal, appellant argued that evidence of a long standing history of animosity between himself and the victim was improperly excluded from trial, because such evidence was important for the jury to consider in its final judgment. The Court of Appeals reversed the trial court, stating that "Evidence is relevant and, therefore, admissible if it tends to prove a material issue in the case." Brown v State, 270 Ga. 601 (1999). The Court found that provocation can be shown not just with contemporaneous facts and circumstances but also with evidence of the preexisting "relationship of the parties [and] the state of feeling existing between them." The Court held that the state had the burden of proof to show "Lack of provocation to justify the defendant's use of the fighting words" as that is an element of the offense.

Law of the Case Rule

Bass v State, A07A1564 (8/20/07)

Appellant was convicted of DUI, unlawful blood alcohol level, failure to maintain lane, and open container. On appeal, appellant argues that the trial court erred in denying his plea in bar based upon an alleged denial of his right to a speedy trial. The court held that the issue had already been determined by the Court of Appeals. The issue went to the Court of Appeals after an evidentiary hearing by the trial court in which the trial court denied the appellant's motion. The court determined in the current instance that although the 'law of the case' rule has been statutorily abolished, a decision by the Supreme Court or the Court of Appeals is binding in any and all further proceedings in that case in both the lower court or the Supreme Court or the Court of Appeals. Due to the fact that the issue had already been determined by the Court of Appeals the decision was binding on the trial court during the remainder of trial and on the Court of Appeals when the case was once more appealed. For these reasons the Court of Appeals affirmed the judgment.
Pierce v State, 278 Ga. App. 162 (2006).

Search and Seizure

Carter v State, A07A0891 (8/21/07)

In an interlocutory appeal, appellant argues that the trial court erred in denying his motion to suppress. The facts of the case are as follows: On March 27, 2006, officers responded to a report of an armed individual in a hotel parking lot between 2:00 and 3:00 in the morning. The report was based on an anonymous tip, with no suggestion of reliability. The tip informed the officers of a description of the suspect including his race and what he was wearing with a fair amount of specificity. Upon arriving on the scene,

the officers found only the appellant in the parking lot. The appellant matched the description given in the anonymous tip. The appellant was standing outside of his vehicle when the officers made contact. Appellant proceeded to shut the front door of his vehicle and then reached into the open rear door. Appellant shut the rear door and began to approach the officers with a briefcase in his hand. The officers gave two verbal warnings for the appellant to either show his hands or to raise them above his head. The appellant ignored the command and continued to walk towards the officers. The officers, fearing for their safety, drew their weapons and pointed them at the appellant. Appellant set the briefcase on the ground turned around and placed his hands behind his back. The officers placed the appellant in handcuffs and frisked him for weapons. The officer's located a pistol on the appellant. Appellant claimed to have a gun permit in his wallet which was located in his vehicle. Appellant gave the officers permission to enter the vehicle and retrieve his wallet so that they could locate the gun permit. When one officer went to the car to retrieve the appellant's wallet he found another handgun and a fully loaded 9mm magazine in plain sight. The officer also found suspected narcotics in an unlocked gun case. Appellant was then placed into custody. In a search of the appellant's person and his vehicle incident to arrest another handgun, tasers, black jacks, an asp baton, throwing knives, and ammunition were located.

Appellant was indicted and filed a motion to suppress on the basis that a Terry stop was unjustified because there was no indicia of reliability regarding the anonymous tipster and insufficient information to predict the appellant's future actions. The Court held that based on the time of day, the nature of the call, and appellant's action at the scene the officers acted reasonably. The Court of Appeals held that based on Florida v. J.L., 529 U.S. 266 (2000), where police respond to an anonymous tip of an armed individual, that information alone is enough to justify a temporary seizure and pat-down. Furthermore, as here, where a suspect's action reasonably raises concerns as to the officers' safety, officers are fully justified in making a Terry stop.

State v Lanes, A07A0929 (08/21/07)

The State appealed the grant of a motion to suppress. The facts of the case show that an officer approached a vehicle that was parked in the parking lot of a closed gas station. Upon making contact with appellee, the officer noticed that appellee was leaning forward staring at a contact lens case. The officer tapped on the window twice before the appellee slowly looked over and finally rolled down the window. Appellee stated that he was having trouble with his contacts and was trying to let his eyes rest. Appellee further stated that he had been at a club and had consumed a few beers but had not smoked marijuana. The officer noticed that the appellee had red and watery eyes, but the officer could neither smell alcohol nor marijuana. The officer asked the appellee for his license and the officer confirmed there were no outstanding warrants for the defendant. The officer then asked the appellee to step out of the car and received permission for a consent search.

The Court of Appeals held that due to the fact the appellee gave a reasonable explanation for being stopped in the parking lot and for his red and watery eyes, the officer had no articulable suspicion and could not give a particularized and objective reason for suspecting the appellee of illegal activity. Lacking this articulable suspicion, the officer had no reason to raise the stop from a "tier one" Terry stop to a "tier two" Terry stop and that the subsequent detention of the appellee and the search of the vehicle were illegal and the trial court was correct in suppressing the evidence obtained from the search. Ward v State, 277 Ga. App. 790 (2006).

State v Stafford, A07A1396 (08/20/07)

The State appealed the grant of a motion to suppress evidence seized at a traffic stop. The officer in this case was on routine patrol and noticed a car parked in the middle of the street with several people standing on both sides of the car. When the officer approached in his own car, the individuals standing around the car fled and the car began to drive off. The officer conducted a traffic stop and as he exited his vehicle he noticed the appellee fumbling with something under his seat. The officer in reasonable fear for his safety asked the appellee to step out of the car. The officer patted down the appellee for weapons and upon finding none he told appellee that he would need to sit in the patrol car until the investigation was concluded. The appellee tried to force the door of the patrol car open as the officer was shutting it and the officer was forced to use pepper spray to subdue the appellee. The officer at that point considered the appellee under arrest for obstruction. The officer subsequently searched the car and found cocaine and a 'crack pipe'. In his testimony at the motion to suppress hearing, the officer said that he could not remember the code section that prohibited parking in the middle of the street but he knew he had read the code section and knew that the defendant was violating the code section. The trial court found that the stop was invalid because it occurred on a residential street, as opposed to an interstate.

The Court of Appeals found that there was enough evidence to justify the traffic stop and that the trial court had erred. The Court of Appeals held that:

> "If an officer acting in good faith believes that an unlawful act has been committed, his actions are not rendered improper by a later legal determination that the defendant's actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute. The question to be decided is whether the officer's motives and actions at the time and under all of the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing."

The evidence showed that the officer reasonably believed that parking in the middle of a residential street was a crime. There were specific and articulable facts which, together with reasonable inferences based on those facts, justified a limited inquiry. The State demonstrated some basis from which the court could determine that the detention was not pretextual, arbitrary or harassing, and not based upon mere inclination, caprice, or a "hunch" by law enforcement. Therefore, the Court of Appeals concluded the trial court had no legal basis for finding that the traffic stop was invalid. Furthermore, the officer's actions were proper

in elevating the stop to a "tier two" stop while he completed his investigation. At that point, the appellee was no longer free to leave and his resisting did reach the level of obstruction.

Venue in Accusation

Gordy v State, A07A1233 (8/22/07)

Appellant was convicted of DUI and possession of an open container. On appeal, appellant argued that the accusation was improper in that it failed to properly state venue. In this case, the accusation listed the name of the county in its heading. Although the individual counts did not contain the name of the county, the individual counts contained the language, "for the county and state aforesaid." Thus, by using that incorporating language, the state adequately alleged the county in which the incident occurred. Therefore, the trial court properly denied the motion to quash, and appellant's conviction was affirmed. The Court of Appeals urged that prosecutors clearly allege venue in the body of each count as it reduces unnecessary appeals and unnecessary costs.