Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 4, 2011

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THIS WEEK:

Search & Seizure

Culpepper v. State, A11A1156 (10/18/11)

Appellant was convicted of possession of cocaine and possession of a weapon by a convicted felon. He argued that the trial court erred in denying his motion to suppress because it was the fruit of an unreasonably prolonged investigative detention. The evidence showed that at 10:00 p.m., an officer, who was patrolling a business area due to recent thefts, saw a van and car backed up to a locked gate of a business that was closed. When the officer stopped to inquire of the vehicles' occupants, he encountered appellant and Irby. Irby initially told the officer that he owned the van and that they were waiting on his father who owned a paint store behind the area where the vehicles were located. The officer then asked Irby to call his father, so that his father could verify his story. Irby claimed, however, that he could not contact his father, and both his story and demeanor then began to change. A criminal check showed that Irby had a suspended license, and that the car driven by appellant was a rental. Upon asking for the rental agreement, the officer saw a gun inside the center console which appellant tried to hide from the officer's sight. The rental agreement that appellant gave to the officer had expired. Other officers were called as back-up. The officer thereafter retrieved the gun, which was stolen, and also found a digital scale with cocaine residue. Appellant admitted that the scale was his, and that he used cocaine.

Appellant conceded that his encounter with the officer in this case was, at first, a consensual encounter. Appellant contended, however, that the encounter evolved into an investigative detention —a second tier encounter—when the officer detained him after obtaining his identifying information and confirming that no warrants for his arrest were outstanding. The Court found that by the time appellant contended the encounter had evolved into an investigative detention, the officer had found him and Irby in the parking lot of a closed business late at night, he had seen that the van that Irby was driving was parked with its back doors open to a locked, fenced enclosure in which several other cars were parked, he knew that several burglaries and thefts had occurred in the area recently, including an incident in which someone broke into and stole cars in a fenced enclosure at the business next door, he had been told that Irby had been unable to summon his father to the scene to confirm his account of why they were

in the parking lot, and he knew Irby had given conflicting explanations of their presence in the parking lot. Moreover, the officer had observed that appellant and Irby appeared to be nervous when the officer spoke with them, that they seemed to be trying to create a distance between themselves and the officer, and that they appeared to be visually scanning the area to determine if anyone else was around. This was enough reason for the officer to detain appellant, even after he ascertained that no warrants were outstanding, to further investigate what appellant and Irby were doing in the parking lot of a closed business late in the night.

Having concluded that the officer was entitled to detain appellant even after the officer ascertained that no warrants were outstanding, the Court stated that it had "little difficulty in concluding that the officer was entitled to continue to detain [appellant] for the balance of their encounter." When appellant produced a rental agreement that had expired, the officer had an independent and additional reason to detain him, so that the officer could investigate the status of the rental car. Moreover, at the time appellant produced the rental agreement, the officer saw a firearm in the center console of the rental car, which appellant tried to conceal by quickly closing the console, and when the officer asked appellant whether any weapons were in the car, appellant denied it. That too was a reason for the officer to detain him and to secure the firearm for his own safety. Finally, in the course of securing the firearm, the officer saw in plain view the digital scale with white residue, which a field test indicated was cocaine and which appellant admitted was his, affording the officer probable cause to effect a custodial arrest of appellant.

Probation Revocation

Boatner v. State, A11A0851 (10/19/11)

The Court granted appellant's discretionary appeal to review the sufficiency of the evidence in his probation revocation hearing. The evidence showed that among the general conditions of his probation, were the requirements that appellant not violate any laws, not receive, possess or transport any firearms, and avoid "persons . . . of disreputable or harmful character." The probation officer and a law enforcement officer went to appellant's trailer after hearing that he was associating with a wanted parolee. They knocked on the door and heard movement in the trailer and a child crying, but no one came to the door. Eventually, appellant's wife came to the door followed by appellant, carrying his infant daughter. Jeremy Allen, appellant's brother-in-law who was the wanted parolee, was also in the trailer. An officer testified that they found a loaded rifle outside the front porch railing of the trailer. No one admitted to owning the rifle and no ammunition for the rifle was found in the trailer. A truck on the property was searched, and officers discovered a stun gun, a tire puncher, and a small pocketknife. Officers found a wallet in the truck, but could not remember if there was any identification in the wallet. The trial court found the evidence sufficient and revoked appellant's probation for five years.

The Court first found that the there was insufficient evidence that he possessed the rifle found leaning against the front porch of his trailer. The State's only evidence of appellant's possession of the rifle was the rifle's proximity to appellant's trailer. The rifle was found leaning against the outside railing of the porch on appellant's trailer. The police did not find any ammunition inside appellant's trailer or on his property, and the bullet found inside the truck that was near his trailer did not match the rifle.

The Court stated that although the State's burden of proof is lower in a probation revocation case, a probationer's mere presence in the area where a prohibited item is found will not justify a probation revocation based on possession of the prohibited item, even under the more relaxed preponderance of the evidence standard.

The Court also found that the evidence was insufficient to support a finding that appellant possessed the stun gun and other items found in the truck. Appellant testified that the truck belonged to his brother-in-law, and his wife sometimes drove it. This evidence was undisputed. Appellant denied that it was his wallet that was found in the truck. Therefore, although there was evidence that appellant had driven the truck in the past, there was no evidence that he owned the truck, had exclusive control over the truck, or drove the truck prior to the discovery of the stun gun. Thus, the State was unable to show that he had exclusive access to or was in control of the truck in the time immediately preceding the recovery of the items. Therefore, there was no presumption that appellant possessed the prohibited items.

However, the Court found that the evidence was sufficient that he violated his probation by being in the presence of Allen, a wanted parolee. Although appellant stated that he did not know that Allen was in the trailer at the time because appellant was asleep, the evidence showed that Allen live right across the street from appellant and appellant's wife (Allen's sister), that he saw Allen almost daily and appellant did not deny that he was associated with Allen.

Speedy Trial; Barker v. Wingo

Carder v. State, A11A0906 (10/14/11)

Appellant appealed from the denial of her plea in bar based on an alleged violation of her constitutional right to a speedy trial. Appellant was charged with two counts of homicide by vehicle, one court of homicide by vehicle in the second degree, two counts of serious injury by motor vehicle, one count of DUI-less safe, and one count of failure to maintain lane. Appellant was arrested in June of 2005 and not indicted until September, 2008. Thereafter, a motion in limine was held and the case was heard on appeal, *State v. Carder*, 301 Ga. App. 901 (2009). The case eventually returned to the trial court and after appearing on several trial calendars, appellant filed her plea in bar. The trial court found under the four factors of *Barker v. Wingo* that appellant's constitutional rights were not violated.

The Court found that the delay was presumptively prejudicial and that the delay was uncommonly long. It therefore found that this factor was properly weighted against the State. As for the reasons for the delay, the Court found fault with the 3 year delay in indicting appellant but weighed that lightly against the State because of the absence of evidence that the delay was to hamper the defense. The Court also found that the delay was attributable to appellant who delayed amending her motion in limine and then after losing in the trial court, sought unsuccessfully to seek a writ of certiorari from the Supreme Court. Thus, considering the procedural history, the Court found that the trial court properly exercised its discretion by weighing this factor, but not heavily, against the State.

The Court found that the trial court properly weighed the assertion of the right factor against appellant. Although appellant

did not file a statutory speedy trial request, the failure to do so may be considered against her. Appellant waited almost five years before filing her plea in bar.

Finally, the Court addressed the prejudice prong of the test. Appellant claimed that she had been going to grief counseling since sometime after the accident, and that she suffered from post-traumatic stress syndrome, "major, deep depression" and anxiety. She also testified that she had been involuntarily committed to an in-patient treatment facility. However, the Court found that this was related to the accident itself and not to the delay in her trial. Moreover, although appellant claimed that there were witnesses that were unavailable, the Court noted that these witnesses could not supply material evidence for the defense and that there were other available witnesses who were possibly in a much better position than one alleged witness to testify about her condition just prior to the accident, and could testify on her behalf for the same purpose. Thus, although the Court did not condone the State's negligence in failing to bring appellant to trial in a timely fashion, that consideration was outweighed by the facts that appellant suffered little actual prejudice to her defense, suffered no unduly oppressive pretrial incarceration and waited a significant amount of time before asserting her right to a speedy trial. Under these circumstances, the trial court did not abuse its discretion by rejecting her claim that her constitutional speedy trial rights had been violated.

Ineffective Assistance of Counsel; Recidivism

Smith v. State, A11A1107 (10/20/11)

Appellant was convicted of two counts of rape, two counts of robbery by force, and kidnapping. He alleged he was denied due process of law because he had a conflict with his appointed defense counsel. Specifically, he contended that because he was abused by his African-American grandmother, he had an "unworkable relationship" with his female African-American public defender. Before trial, appellant informed the court of his dissatisfaction and asked the court to replace her. At his competency trial, his public defender informed the court that appellant would not talk to her and sought permission to withdraw. The trial court deferred ruling on the request, and subsequently denied counsel's request to withdraw.

Appellant contended under *Ross v. Kemp*, 260 Ga. 312 (1990), that prejudice should be presumed in his case. The Court disagreed. There are only three instances in which a defendant is authorized to rely upon a presumption of ineffective prejudice: (1) an actual or constructive denial of counsel, (2) government interference with defense counsel, and (3) counsel who labors under an actual conflict of interest that adversely affects his performance. The Court found that only the first instance could possibly apply here, but appellant was not actually denied counsel, and constructive denial is only present when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. To meet this test, the attorney's failure must be complete and must occur throughout the proceeding, not merely at specific points. Since this was not a case in which counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, appellant was not constructively denied counsel.

Appellant also contended that his sentence of life without parole was not authorized because the judge failed to mention OCGA § 17-10-7 when he orally pronounced sentence, but included the code section in the written final disposition. The Court disagreed. While the court cannot increase a defendant's punishment in its written sentence, in this case Smith's sentence did not change. He was still sentenced to life in prison without parole. He also argued that neither the State's notice of evidence in aggravation of sentence nor his written sentence specified which subsection of OCGA § 17-10-7 was being applied to him, but that the trial court had the discretion to sentence him under subsection (b) to a term of years because none of his previous convictions were for a violent felony. But the Court stated that the case law was clear that subsections (a) and (c) of OCGA § 17-10-7 must be read together and the record was clear that both subsections apply in this case. The State introduced certified records of appellant's six prior felony convictions, about which it had given notice, and argued that appellant should be sentenced to two consecutive life sentences without the possibility of parole plus another 60 years, consecutive to the life sentences, under OCGA § 17-10-7 (c). Under the applicable version of OCGA § 17-10-7, the trial court was required to sentence appellant to life imprisonment without eligibility for parole. While it might have been the better practice for the trial court to plainly indicate on its final disposition which subsection of the repeat offender statute applied to his recidivist sentence, the failure to do so did not amount to reversible error.

DUI; Search & Seizure

Mayberry v. State, A11A1886 (10/19/11)

Appellant was convicted of DUI. She argued that the trial court erred in denying her motion to suppress and motion in limine to suppress the breath test results. The undisputed evidence showed that as the officer, travelling eastbound, negotiated a curved section of a highway, a vehicle driving westbound approached the curve and veered towards his lane of travel. The driver and sole occupant of the vehicle was appellant. After the officer passed her vehicle, he looked in his rearview mirror and observed the left-side tires of the vehicle cross over the double yellow lines in the center of the highway by at least one foot. The officer then turned his patrol car around and initiated a traffic stop. The officer approached the vehicle and spoke with appellant, who had a strong odor of an alcoholic beverage on her breath. Appellant admitted to the officer that she had consumed a "couple" of alcoholic beverages, and she submitted to an alco-sensor test, which was positive for the presence of alcohol. The officer did not perform any field sobriety tests because of safety concerns "due to location and conditions."

Appellant argued that the only determination made by the officer was that she had consumed some amount of alcohol, and that the officer had no knowledge or no reasonably trustworthy information available to him that her level of consumption rendered her less safe to drive. She emphasized that after the officer stopped her vehicle, he failed to conduct any field sobriety tests or observe any manifestations of impairment such as slurred speech, bloodshot eyes, or unsteadiness on her feet.

The Court was "unpersuaded" in light of the officer's observations of her manner of driving. When there is evidence that the defendant has been drinking, the manner of her driving may be considered on the question of whether she has been affected by alcohol to the extent that she is less safe to drive. A traffic violation may suggest the negative influence of intoxica-

tion on the operation of the vehicle by the defendant driver. Here, the undisputed evidence that appellant veered towards the opposing lane of traffic and failed to maintain her lane, when combined with the other undisputed evidence that she had consumed alcohol, was sufficient to create probable cause for her arrest.

Child Pornography; Search & Seizure

James v. State, A11A1253 (10/18/11)

Appellant was convicted of 26 counts of sexual exploitation of children (OCGA § 16-12-100). On appeal, appellant contended that the trial court erred in denying his motion to suppress evidence seized as a result of a search warrant authorizing entry into his home and the seizure of his computer. Specifically, he alleged that the warrant was insufficient to establish probable cause. The GBI agent's affidavit showed that the National Center for Missing and Exploited Children (the "NCMEC") contacted the GBI with information that an Athens, Clarke County, suspect had posted images of child pornography on a specified internet website. According to the NCMEC, its information was provided by a named internet security specialist employed by the host of the website, Google, Inc. (the "Google Employee"). In her referral to the NCMEC, the Google Employee "identifie[d] the subject operating the website . . . to have an address in Athens, Clarke County, Georgia." According to the agent's affidavit, the NCMEC's referral to the GBI identified the internet protocol (IP) address associated with the subject website, and using the WHOIS internet database, it was determined that Charter Communications was the internet service provider for this IP address. The agent subsequently obtained a court order to require Charter Communications to provide the subscriber information pertaining to the IP address. Charter Communications identified appellant, at a physical address in Athens, Clarke County, as the registered user of the IP address at the time the alleged illegal activity occurred. The agent also reviewed the information that was provided to the GBI by the NCMEC Cyber Tip line and was informed that the IP address uploaded and posted six images depicting child pictures onto a Google webpage. The agent conducted an additional investigation into appellant's employment and educational background, and he also conducted drive-by surveillance of appellant's residence.

Appellant argued that the affidavit was insufficient because the agent did not contact anyone at Google to confirm the identity of the Google Employee, corroborate that a person from Google had made the report to the Center, or verify the contents of that report. Nevertheless, the Court found hearsay can be the basis for issuance of a warrant so long as there is a substantial basis for crediting the hearsay. In determining the credibility of hearsay, the declarant's veracity and basis of knowledge are still major considerations. Here, the NCMEC forwarded the information it received from the Google Employee to the GBI, and there was no reason to doubt that it did so accurately. The NCMEC is a "national resource center and clearinghouse" and operates a national network which allows it to "transmit images and information regarding missing and exploited children to law enforcement across the United States and around the world instantly." 42 USC § 5771 (9) (A), (C). Electronic communication service providers and remote computing service providers, who have knowledge of certain crimes involving child pornography, are required to report the facts or circumstances of the apparent crime to the NCMEC's Cyber Tip Line.

The affidavit also set forth facts which showed both the reliability and basis of knowledge of the Google Employee. The affidavit contained the name of the Google Employee and explained the source of her knowledge —that Google hosts the website on which the child pornography appeared. Further, in making the disclosure to the NCMEC, the Google Employee was a witness to a possible crime and acting in the role of a concerned citizen, who is afforded a preferred status insofar as testing the credibility of her information. Even if the agent could have done a more thorough job in investigating the information received by the GBI, his inference that the reporting individual was actually a Google employee was a reasonable one and stronger than a mere uninformed and unconfirmed guess. Thus, the Court concluded, the affidavit provided a sufficient basis for the issuing judge to make a practical, common sense decision that there was a fair probability that evidence of the crime of sexual exploitation of children would be found at appellant's residence.

Appellant further contended that the affidavit contained misleading information and omitted other material information. But, the Court stated, even if it were to assume that the affidavit contained the misrepresentations and omissions identified by appellant, and the affidavit was re-examined with the alleged false statements omitted and the truthful material included, the information conveyed to the judge issuing the warrant was substantially the same. The agent reviewed the information transmitted to the GBI by the NCMEC and averred that it contained images of children engaging in sexually explicit poses or scenes, and thereby independently confirmed the likelihood that a crime has been committed. Additionally, the IP address associated with the subject website was discovered through an independent internet database (WHOIS). Further, the affidavit shows that the NCMEC received its information in a referral from the Google Employee and consistently couched the information in the context of that referral. The inclusion of the NCMEC disclaimer in the text of the affidavit would not have significantly clarified the role of the NCMEC in passing the information received from the Google Employee on to the GBI. Finally, the agent's testimony at the suppression hearing indicated that the differences in the email addresses were not significant because a person can have a variety of email addresses, and that the imperative thing was having the IP address. Accordingly, appellant's arguments as to the alleged misrepresentations and omissions did not alter the conclusion that the affidavit presented the magistrate with a substantial basis for finding probable cause to issue the warrant.

Due Process; Motion to Withdraw Plea

Ford v. State, A11A1391 (10/14/11)

Appellant appealed from the denial of his motion to withdraw his guilty plea for alleged ineffective assistance of counsel. The record showed that appellant appeared at the motion hearing pro se although he did request appointment of counsel. He contended that the trial court erred in failing to appoint him counsel. The Court agreed and reversed. A proceeding to withdraw a guilty plea is a critical stage of a criminal prosecution, and that the right to counsel attaches when a defendant seeks to withdraw a guilty plea, thus entitling that defendant to assistance of counsel. The trial court has an obligation to provide counsel

or to obtain a constitutionally valid waiver of counsel from the defendant who sought to withdraw his guilty plea. Where the trial court has failed to do either, the absence of counsel is prejudicial and the harmless error doctrine would be inappropriate where, as here, the defendant had asserted that his guilty plea was not knowingly and voluntarily entered. Because appellant was not appointed counsel for his motion to withdraw his plea, the record did not reveal that the court informed him of his right to counsel, and no waiver of counsel appeared in the record, the Court reversed and remanded the case to the trial court for a re-hearing on appellant's motion to withdraw his guilty plea.

Appellate Jurisdiction

Gomez-Oliva v. State, A11A0952 (10/18/11)

Appellant was convicted of attempted rape. Prior to the entry of his conviction, he filed a motion for new trial. He later filed an amended motion for new trial. The trial court denied his motion, and he filed this appeal. The Court held that because appellant's motion for new trial was filed prior to the entry of the judgment on the verdict, it was premature and invalid. Although appellant subsequently filed an amended motion for new trial, no amendment could be filed to such void motion. Moreover, if the Court was to consider his amendment to the motion as a motion for new trial, it was filed long after the time allowed for filing the motion. But, even though the motion for new trial was premature, this prematurity will not serve to deprive the appellate court of jurisdiction to review the merits of the appeal in the face of a timely notice of appeal from the order finally disposing of the motion. Because appellant filed his notice of appeal within 30 days after the trial court denied his motion, his appeal was properly before the Court.

Voir Dire

Edwards v. State, A11A0781 (10/19/11)

Appellant was convicted of two counts of armed robbery and two counts of possession of a firearm during the commission of a crime. Appellant contended that he was entitled to a reversal of his conviction since the trial court erred in denying his request to reconstitute the jury panel to ensure the random nature of the panel. The Court disagreed. At trial, appellant objected to the trial court's practice of placing deferred jurors at the top of the jury list. Appellant nevertheless acknowledged that the deferred jurors had previously been randomly selected, and he agreed with the trial court's finding that the jurors had been deferred regardless of their race or gender. Appellant further confirmed that he was not challenging the array of the panel.

The Court found that its decision in *Morgan v. State*, 271 Ga. 885, 886 (2) (2000) to be controlling. The decision in *Morgan* held that the trial court's practice of placing jurors who had been excused during the previous term of court at the top of the jury list did not affect the randomness of the jury panel. The trial court was authorized to find that there was no purposeful or systemic discrimination, because the jurors were deferred for various reasons unrelated to their race or gender and it was entirely random as to which jurors were going to be deferred from one week to a different week. As such, no error had been shown.

Statements

Nowell v. State, A11A1101 (10/19/11)

Appellant was convicted of possession of cocaine with intent to distribute. He contended that the statements he made to officers after his arrest were not voluntary because they were induced by a hope of benefit. He also argued that the trial court erred in denying his motion in limine to redact from his statement references to previous drug transactions.

The Court found from the evidence that upon beginning the interview, appellant immediately told officers he was willing to work with them if they were willing to work with him. Officers responded by stating they had no authority to make promises but would listen. Later, an agent promised that he would talk to the DA about the help appellant provided. In each instance, appellant asked for officers to work with him, and each time officers informed him they did not have the power to make any promises regarding his potential sentence. The Courts have consistently construed the "slightest hope of benefit" as meaning the hope of a lighter sentence. Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the "hope of benefit" sufficient to render a statement inadmissible under OCGA § 24-3-50. Likewise, the officers' statements that appellant should "man up" and "own up" to the charges and that his assistance would go a long way in helping him out also do not constitute promises of a lighter sentence.

Appellant also argued that the trial court erred in not granting his motion in limine seeking to redact references in his statement to previous drug transactions. He claimed that this impermissibly put his character in issue. The record showed that appellant moved to redact from his statement a colloquy concerning his ability to set up a drug buy from a certain drug dealer. The officers told appellant that they wanted to know who was supplying him with the drugs. Appellant told investigators "I guarantee I can get you Nick." Investigators then asked, "What's the most you have ever ordered up from Nick?" Appellant replied, "About two ounces." Appellant argued that the foregoing should have been redacted from his statement because it put his character at issue.

The Court held that relevant and material evidence is not inadmissible because it incidentally puts the defendant's character in issue. What is forbidden is the introduction by the State in the first instance of evidence whose sole relevance to the crime charged is that it tends to show that the defendant has bad character. The statements here were an integral part of a criminal confession, and such statements are not rendered inadmissible because the language used therein indicated that the accused had committed another and separate offense.

Motion for Mistrial

Robinson v. State, A11A0971 (10/18/11)

Appellant was convicted of burglary. He contended that the trial court erred in denying his motion for mistrial. The evidence showed that appellant and Johnson were charged with burglary for entering the building that housed a laundry and dry-cleaning business, and Johnson pled guilty to the burglary charge before trial. She did not testify against appellant at trial, but the prosecuting attorney nevertheless elicited testimony about her guilty plea from the officer who had found appellant and Johnson in the building: "Q: Are you aware that [Johnson] pled guilty to burglary last week? A: Yes, sir, I'm aware. Q: And are you aware that she pled guilty to theft by receiving stolen property?"

Defense counsel objected and moved for a mistrial. The trial court correctly sustained the objection because Johnson did not testify

and, as the State conceded on appeal, evidence of her guilty plea was inadmissible. The trial court denied the motion for mistrial, however, and instead gave a remedial instruction to the jury. In light of this remedial instruction, the Court found that the trial court did not abuse its considerable discretion when it denied the motion for mistrial. The utterance of such inadmissible testimony does not always require a mistrial, so long as the trial court gives an adequate, corrective instruction that the jury cannot consider it as evidence of the guilt of the accused. Trial courts have broad discretion in fashioning a remedy to alleviate a problem created by the utterance of inadmissible evidence, and its exercise of this discretion may not be reversed unless abused. The remedial charge in this case, which repeatedly admonished the jury that Johnson's guilty plea was not to be considered in any way with respect to the guilt of the accused, was sufficient to remedy the error and render a mistrial unnecessary. Accordingly, the trial court did not err when it denied the motion for mistrial.

Venue

Bizzard v. State, A11A1386 (10/20/11)

Appellant was convicted following a bench trial for aggravated battery. Appellant contended that the State failed to prove venue. The Court agreed and reversed. The Court found that the record was devoid of any evidence establishing that venue was proper in Liberty County. Indeed, Liberty County was not mentioned by any witness, and the State showed only that the crime occurred on Strickland Street. A street name, standing alone, however, is never sufficient to establish venue, because streets frequently run through more than one county. Additionally, and despite the State's assertion to the contrary, the fact that the prosecutor noted in his opening statement that Strickland Street was a block from the Liberty County Courthouse did not establish that the crime scene was in Liberty County. Similarly, the fact that officers with the City of Hinesville Police Department responded to the scene was also insufficient to establish venue in Liberty County. Proving that a crime took place within a city without also proving that the city is entirely within a county does not establish venue.

In so holding, the Court rejected the State's arguments that there was sufficient evidence of venue, despite the lack of any direct testimony on that issue. First, the State argued that it introduced a map at trial. The Court found that what the State referred to as a map, however, was in reality an aerial photograph of a portion of Strickland Street, showing the house numbers of various residences. At trial, this photograph was introduced for the purpose of showing the relative locations of the homes of the victim, her neighbor, and her mother, all of which were situated on that portion of Strickland Street shown in the picture. The photograph in this case contained nothing which indicated the city, county, or state in which the area depicted was located, and the State failed to elicit any testimony on this issue. This photographic exhibit, therefore, failed to establish that the crime occurred in Liberty County.

The State also pointed to the fact that, when the prosecutor noted during opening statements that Strickland Street was approximately one block from the courthouse, the trial judge responded that he was familiar with the location of Strickland Street. The State argued that this response shows that the trial court took judicial notice of the fact that the crime occurred in Liberty County. The Court disagreed. If a trial court intends to take judicial notice of any fact, it must first announce its intention to do so on the record, and afford the parties an opportunity to be heard regarding whether judicial notice should be taken. Here, in an effort to expedite opening argument, the trial judge merely stated that he was familiar with the location of Strickland Street and its proximity to the Liberty County Courthouse. This statement, made before the presentation of evidence had even begun, cannot be construed as an announcement that the judge was taking judicial notice of the fact that the crime occurred in Liberty County.

Right of Confrontation; Judicial Comments

Ferrell v. State, A11A1176 (10/18/11)

Appellant was convicted of cocaine trafficking and possession of MDMA (Ecstasy). She contended that her right of confrontation was violated by inadmissible hearsay testimony by Lawrence Sullivan, the testifying GBI chemist, regarding another chemist's testing of the drugs. The Court disagreed. Sullivan testified at trial because Shelly Davis, the analyst who tested the drugs, was no longer with the GBI. Appellant argued that this testimony was inadmissible hearsay, but the Court found that the record did not support this argument. Rather than being a mere conduit for Davis's findings, Sullivan testified that he reviewed the examination, notes and materials created by Davis during her analysis of the substances, and based on that, his expert opinion was that the solid material was positive for cocaine and the tablets were positive for MDMA. An expert may base his opinions on data gathered by others. Accordingly, Sullivan's testimony was properly admitted into evidence.

A cellular phone containing text messages was admitted to show that the phone was used to facilitate drug trafficking. The trial court declined to allow the cell phone to go out with the jury during deliberations. When the jury asked to have the cell phone while they deliberated, the trial court informed them that "[t]here are other things on that cell phone which are not admitted into evidence. They have no relevancy to this case to that extent —and to some extent may be prejudicial to the parties involved." Appellant contended that the trial court expressed an impermissible opinion, in violation of OCGA § 17-8-57.

Although appellant did not object at trial, the Court noted that judicial comments fall within the plain error exception and may be reviewed on appeal. On appeal, the issue is simply whether there was such a violation. Therefore, the Court addressed appellant's contention but found there had been no violation of OCGA § 17-8-57. In denying the jurors' request, the trial court was merely instructing jurors that only the admitted portions of the cell phone's contents were available for their consideration. Because the court's comment was limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue in the trial, it did not constitute a basis for reversal.