

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 23, 2012

## State Prosecution Support Staff

**Stan Gunter**  
Executive Director

**Chuck Olson**  
General Counsel

**Joe Burford**  
State Prosecution Support Director

**Laura Murphree**  
Capital Litigation Director

**Fay McCormack**  
Traffic Safety Resource Coordinator

**Gary Bergman**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Todd Hayes**  
Traffic Safety Resource Prosecutor

## THIS WEEK:

- **Jury Charges; Plain Error**
- **Motion to Vacate Conviction**
- **Jury Charges; *Edge v. State***
- ***Miranda*; Search & Seizure**
- **Impeachment; Spoilation**
- **Jury Charges; Juror Communication**
- **Search and Seizure; Sentencing**
- **Speedy Trial; Capital Cases**
- **Jury Charges; Equal Access**
- **Similar Transactions**
- **Search & Seizure; Juvenile**
- **Search & Seizure**
- **Directed Verdict**

---

---

---

### Jury Charges; Plain Error

*Allen v. State, S12A0459 (3/19/2012)*

Appellant was convicted of malice murder and other related crimes. Appellant asserted that the trial court erred by failing to give jury charges on transferred justification and transferred intent. He conceded, however, that his counsel did not request either of these charges at trial and did not object to the court's failure to include such charges before the jury retired to deliberate. Accordingly, the Court reviewed this enumeration of error only to determine whether the court's failure to include a specific instruction on transferred intent or transferred justification constituted plain error.

The Court applied the federal four-prong test for determining the existence of plain error in jury instructions. See *Puckett v. United*

*States*, 556 U. S. 129 (II) (a) (129 SC 1423, 173 LE2d 266) (2009). First, there must be an error or defect —some sort of deviation from a legal rule that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Pretermitted whether appellant met his burden with regard to the first and second prongs of this test, the Court found the omission of specific instructions on transferred intent and transferred justification did not affect the outcome of the trial proceedings.

Regarding the trial court's failure to charge on the doctrine of transferred justification, the record made clear that the court instructed the jury on justification and self-defense, including instructions that appellant would be justified in using force intended or likely to cause death or great bodily harm if he reasonably believed such force was necessary to prevent death or great bodily injury to himself or a third person and that he would be "justified to kill or use force against another person in defense of himself or others." Considered as a whole, the court's charge made clear to the jury that it should acquit appellant if it determined he was justified in firing his weapon, regardless of whom the bullet struck. Accordingly, there is no likelihood the omission of

a specific charge on transferred justification affected the outcome of the trial, and there was no plain error.

## **Motion to Vacate Conviction**

*Smith v. State, S12A0380 (3/19/2012)*

On April 7, 1997, Appellant stabbed his girlfriend to death in her apartment; her body was found next to her crying 2-year-old son and her 1-year-old daughter. In May 1999, Appellant was convicted of felony murder and cruelty to the male child and sentenced to life in prison plus 20 years. The Court affirmed the convictions on direct appeal. Appellant filed a pro se motion in arrest of judgment, which he amended on March 7, 2011. On July 26, 2011, the trial court denied Appellant's motion without a hearing after concluding that "the motion's underlying claims have no merit."

The Court found that appellant's motion in arrest of judgment was untimely by more than ten years. See OCGA § 17-9-61 (b) ("A motion in arrest of judgment must be made during the term at which the judgment was obtained."); *Lay v. State*, 289 Ga. 210, (2011). The trial court could have dismissed it on that ground instead of denying it on the merits. Accordingly, the Court affirmed.

## **Jury Charges; Edge v. State**

*Morgan v. State, S11A1386 (3/19/2012)*

Appellant was convicted and sentenced for a 1993 felony murder. After an extraordinary 17-year delay in resolving Appellant's motion for new trial, his appeal has finally reached the Supreme Court. Appellant's only contention was that the trial court improperly curtailed the jury's consideration of a voluntary manslaughter conviction as a possible alternative to convicting him of felony murder, citing *Edge v. State*, 261 Ga. 865 (1992), and cases interpreting *Edge*. Appellant took issue with the following sentence of the jury charge: If you do not believe beyond a reasonable doubt that the defendant is guilty of murder, felony murder or aggravated assault, but do believe beyond a reasonable doubt that the defendant is guilty of voluntary manslaughter, then you would be authorized to find the defendant guilty of voluntary manslaughter . . ." Appellant read this sentence as a direction on the temporal sequence the jury had to follow in reaching a verdict, that is, only after the jury decided

that appellant was not guilty of murder could it consider whether he committed voluntary manslaughter. Thus, appellant contended that there was an *Edge* violation.

The Court disagreed and stated the jury charge as a whole did not direct the jury to consider voluntary manslaughter only after it found appellant not guilty of malice murder and felony murder, or otherwise preclude the jury from considering evidence of provocation and passion. The jury charge correctly defined malice murder, felony murder, aggravated assault, and voluntary manslaughter, including provocation and passion. Nothing in the charge suggested that the jury could not consider voluntary manslaughter until after it found appellant not guilty of murder. The Court noted that it previously found no *Edge* violation where the trial court charged the jury in essentially the same language as the sentence appellant found objectionable. See *Hill v. State*, 269 Ga. 23 (1998).

Furthermore, the court recharged the jury on the definitions of aggravated assault and voluntary manslaughter as the jury requested. Nothing in the recharge suggested that the jury was required to acquit appellant of malice murder and felony murder before considering whether he committed voluntary manslaughter. Moreover, when the jury initially returned a handwritten verdict sheet not showing a verdict on voluntary manslaughter, the trial court instructed the jury on how to return such a verdict if it so desired. The court sent the jury back to deliberate, but it ultimately decided not to return a voluntary manslaughter verdict, thus there was no violation.

## **Miranda; Search & Seizure**

*Clay v. State, S11A1956 (3/19/2012)*

The Court conducted an interim appellate review of a case in which the State sought the death penalty. Appellant was indicted for malice murder and false imprisonment. The trial court made the following factual findings: After appellant was found lying unconscious on Jessica Lane with blood on his clothes at approximately 3:30 a.m. on March 4, 2007, at which point 911 was called and an ambulance dispatched to transport appellant to the emergency room (ER). Officers were dispatched to the scene and discovered a body in one of the rooms of the hotel and learned that appellant had been in that room earlier that day. An of-

ficer was instructed to go to the hospital and "stand by" with appellant and obtain a statement from him if possible. The doctor, who attended appellant in the ER, testified that when appellant arrived at the ER at approximately 4:30 a.m., he was in an unresponsive state and could not be aroused. Appellant's toxicology tests indicated that he had consumed benzodiazepines (Valium® or Xanax®), marijuana, alcohol, and cocaine. While waiting for appellant to regain consciousness, an officer took photographs of appellant and removed appellant's items of clothing from a pink and white plastic "personal effects" bag on the counter, listed the items on a property receipt form, and placed the individual items into separate bags. It was not until 8:00 a.m. that a doctor was able to awaken appellant and an officer was in the room when he awoke. The officer and appellant engaged in a conversation (Statement 1). When appellant was discharged, he was transported directly to the police department, where an investigator conducted a video-recorded interview. (Statement 2). Appellant was placed in a holding cell for observation of his medical condition at approximately 3:15 p.m., and the investigator conducted an audio-recorded interview inside this cell (Statement 3). Fifteen days later, appellant gave a final audio-recorded interview while incarcerated at the detention center (Statement 4).

Appellant alleged that all four statements were obtained in violation of *Miranda*. Regarding Statement 1, the Court held that the trial court did not err in finding that appellant's conversation with an officer upon his return to consciousness in a hospital room violated his *Miranda* rights, where appellant awoke to find a police officer in his treatment room, the officer avoided appellant's questions regarding whether he was going to be charged, told appellant that he needed to come down to the police station to talk with the police, never told appellant that he was not under arrest or was free to leave, and called for a patrol vehicle to transport appellant to the police station. The Court concluded that the trial court was authorized to find that, under the totality of the circumstances, a reasonable person in appellant's position would have perceived that he was in custody at the time he made Statement 1.

Regarding Statement 2, the State contended that appellant made a knowing and vol-

untary waiver of his *Miranda* rights. However, the Court reviewed the videotape of Statement 2 and found that it supported the trial court's findings that the investigator read the *Miranda* warnings in such a "super-speed" manner that the warnings likely could not have been identified "as anything more than gibberish" without having a prior familiarity with *Miranda*. Although the State argued that appellant was familiar with his *Miranda* rights because he had been arrested before, the Court noted that familiarity with the criminal justices system may be one factor for consideration, but such determination depends on the totality of the circumstances. The Court found that a review of the audio recordings of Statements 3 and 4 supported the trial court's findings that no *Miranda* warnings were given prior to either of those statements. Given that appellant was in custody at the time he made those statements and that he had not made a valid waiver of his *Miranda* rights before making Statements 1 and 2, the trial court did not err in finding that Statements 3 and 4 were also obtained in violation of *Miranda*.

Furthermore, the Court found, while the evidence supported the trial court's finding that Statement 4 was voluntary, the trial court misconstrued the United States Supreme Court's decision in *United States v. Patane*, 542 U. S. 630 (2004). The Supreme Court in *Patane* held that the suppression of the physical fruits of a defendant's unwarned but voluntary statements is not constitutionally required and reiterated that "the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings that is generally irrebuttable for purposes of the prosecution's case in chief." Accordingly, the trial court erred in ruling that Statement 4 was admissible in the State's case-in-chief and not merely for impeachment purposes in the event appellant testifies.

The State also contended that the court erred in finding that the officer's warrantless seizure of appellant's clothing in the ER violated the Fourth Amendment. The State contended that the trial court erred in not applying the inevitable discovery doctrine to find appellant's clothing admissible. According to the State, had appellant's clothing not been seized in the ER, it would have inevitably been seized at the time of his formal arrest at the police station. The Court stated that while it is true that, if appellant's clothing had remained in the personal effects bag rather than being

placed in individual bags by the officer, a search of the personal effects bag at the time of appellant's formal arrest would have led to its discovery, the State presented no evidence to show that it was inevitable that such an inventory search would have been conducted. A thorough review of the record revealed no evidence that such searches were an invariable, routine procedure at the police department or detention center prior to the incarceration of a person. Without such evidence, the State failed to meet its burden, and the inevitable discovery doctrine could not justify the admission of the evidence.

The State also contended that appellant's clothing was admissible under the "plain view" doctrine. The Court disagreed. The evidence showed that all that was in plain view when the officer seized the bagged clothing from the counter was the pink and white personal effects bag itself and that, without opening the bag, it was not a "foregone conclusion" that the bag contained appellant's bloody clothes. Therefore, the "plain view" doctrine did not support the officer's full-blown search of the bag.

The Court also rejected the State's theory of exigent circumstances citing that the judge's decision, if supported by any evidence, is to be accepted and it found that no exigent circumstances prevented law enforcement from obtaining a search warrant to obtain appellant's clothing. Also, the Court found that the State presented no evidence that appellant freely and voluntarily consented to the search and seizure of his bagged clothing. Accordingly, because the State failed to show that the warrantless search and seizure of the personal effects bag containing appellant's clothing came within an exception to the warrant requirement, the trial court did not err in suppressing this evidence.

### **Impeachment; Spoilation**

*Clay v. State*, S11A1956 (3/19/2012)

The Court conducted an interim appellate review of a case in which the State sought the death penalty. Appellant was indicted for malice murder and false imprisonment. The State served notice of its intent to use evidence of prior convictions of appellant to impeach his credibility under OCGA § 24-9-84.1 should he testify at trial. The trial court ruled that evidence of three of appellant's prior felony convictions, which were a 1997 aggravated

assault conviction, a 1998 aggravated assault conviction, and a 1998 terroristic threats conviction, were admissible to impeach his credibility in the event he testifies. Regarding the admissibility of these convictions, the Court stated that it must determine whether the trial court correctly calculated the ten-year time limit prescribed in OCGA § 24-9-84.1 (b). The statute does not address at what point the 10-year period should stop running. The Court adopted the date the witness testifies or the evidence of the prior conviction is introduced as the end point for determining whether a conviction falls within the 10-year limit prescribed by OCGA § 24-9-84.1 (b). Accordingly, the Court found that the trial court correctly determined that appellant's three prior convictions at issue were more than 10 years old.

Appellant contended that the trial court abused its discretion in finding that the probative value of Appellant's prior convictions substantially outweighed their prejudicial effect. The Court adopted the application of the following five factors in conducting the balancing required under OCGA § 24-9-84.1 (b): (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which he is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. The Court's review of the record showed the trial court failed to make express findings in determining that evidence of appellant's prior convictions was admissible. Accordingly, the Court remanded the case to the trial court to enter express findings on the record as to whether, in the interest of justice, the probative value of appellant's three prior felony convictions at issue substantially outweighs their prejudicial effect, based on the factors set forth above and any other facts and circumstances the trial court may deem relevant.

Finally, appellant claimed that the trial court erred in denying his motion for relief due to the State's destruction of blood evidence. Pursuant to a search warrant, four vials of blood were drawn from appellant for the purposes of DNA analysis on the afternoon of March 6, 2007, more than 48 hours after the

crimes were committed. The four vials of blood were subsequently received as a “reference sample” at the GBI Crime Lab, and samples from the vials were made into bloodstain cards for the purpose of DNA testing, which was conducted. In October of 2008, appellant filed general motions to preserve all biological evidence and for access to such evidence.

According to the Crime Lab’s policy, after blood samples are maintained for a period of 12 months, they are destroyed at the beginning of the next calendar year unless a request is made to maintain them. As the Crime Lab had received no such request in Appellant’s case, the blood samples were destroyed “in the normal workings of business” on January 21, 2009, while the bloodstain cards that were created from the blood samples were retained. Earlier on the same day that the samples were destroyed, the court orally granted appellant’s motion to preserve evidence at a hearing on non-evidentiary motions in appellant’s case.

Appellant contended that the State was obligated to preserve the vials of blood under OCGA § 17-5-56. Subsection (a) of that provision requires the State to “maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime.” However, subsection (a) also provides that “[b]iological samples collected directly from any person for use as reference materials for testing . . . shall not be preserved.” Thus, OCGA § 17-5-56 requires the preservation of biological materials “that relate to the identity of the perpetrator,” not samples that a defendant may seek with regard to an issue unrelated to identity, such as his level of intoxication. Accordingly, because the blood samples were reference materials, they were not required to be preserved.

Furthermore, appellant failed to show that the State acted in bad faith in allowing the vials of blood to be destroyed. The State did not violate any statutes by allowing the destruction of the blood vials according to standard GBI procedures. Further, the requests to which appellant referred were generalized form motions and, thus, were insufficient to put the State on notice of the samples’ alleged exculpatory value. Moreover, the record clearly established that the blood samples were destroyed just a few hours after the trial court orally granted appellant’s general motion and before the hear-

ing was concluded and that the blood samples were never mentioned at the hearing, despite the trial court’s inquiry of defense counsel at that time as to what specific items appellant desired to be independently tested. Accordingly, the Court stated that it found nothing in the record from which it could be concluded that the exculpatory value of blood drawn from appellant more than 48 hours after the commission of the crimes for the purposes of DNA analysis was obvious or evident to the prosecutor or any other State actor before the vials of blood were destroyed.

### **Jury Charges; Juror Communication**

*Shank v. State, S11A1973 (3/19/2012)*

Appellant was convicted for malice murder and other crimes. Appellant contended that the trial court erred in refusing the jury’s request to be recharged on reasonable doubt. The Court affirmed.

An hour into its deliberations, the jury sent a note asking for clarification on reasonable doubt. The court responded in writing, “I cannot clarify or define ‘reasonable doubt’ other than to simply read the charge that I gave you again. What is your response?” After three more hours of deliberations with no response from the jury, the State raised the issue, but appellant objected to a recharge at that time, and the court did not recharge. Appellant contended that the court erred in not recharging the jury, but the Court found that appellant invited the alleged error, and it therefore provided no basis for reversal. Appellant also argued that the court erred in allowing the jury to rehear portions of the trial testimony during deliberations. In its note about reasonable doubt, the jury asked the court two added questions. The court responded in writing that it would have the court reporter locate the requested testimony, which was then read to the jury after a lunch break. The Court found that a trial court, in its discretion, may allow a jury to rehear requested parts of the evidence after deliberations have begun. Furthermore, the Court noted that while not required, the trial court gave a cautionary instruction addressing appellant’s concern after the requested testimony was read to the jury and the court’s instruction adequately addressed his concern.

Lastly, appellant maintained that the court erred in denying his motion for a mistrial

based on improper juror contact. A defendant is entitled to trial by a jury untainted by improper influence but to upset a jury verdict, the improper communication must have been “so prejudicial that the verdict is deemed inherently lacking in due process.” The communication arose when a juror walked into the break room on the second day of deliberations and saw the witness sitting half-asleep at a table with his head propped up on one hand. Without lifting his head, the witness said to the juror in a joking manner, “We’re waiting on y’all.” The juror cut the witness off, saying “I’m going upstairs,” and then turned around and went back to the jury room. The Court held that the trial court conducted a thorough inquiry into the matter, found the exchange was momentary, and had no effect on the verdict.

### **Search and Seizure; Sentencing**

*Hatcher v. State, A11A2416 (3/15/2012)*

After law enforcement officials found child pornography on his personal computer, appellant was convicted of sexual exploitation of a child and sentenced to a term of imprisonment under the mandatory minimum sentencing provisions of OCGA § 17-10-6.2. Appellant contended that the court erred when it denied his motion to suppress information obtained from an internet service provider and when it concluded that it was without discretion to depart downward from the mandatory minimum sentence. The Court found no error in the denial of his motion to suppress, but vacated his sentence and remanded for reconsideration in light of *Hedden v. State*, 288 Ga. 871 (2011).

The evidence showed that an investigator learned that someone was using a computer in the county to share child pornography on the internet, ascertained the Internet Protocol (IP) address used and asked Comcast to provide certain information about the account of that customer. Comcast disclosed the name of the customer and her billing address. The investigator obtained a warrant to search the residence at the billing address for certain evidence of child pornography, including any computers or electronic data storage devices that he might find there. When the investigator went to the home, he confirmed that it was occupied by a family that subscribed to Comcast internet service and learned that

the family used a wireless router to access the Internet, and discovered that appellant lived in the basement of the home and used the same wireless router. The investigator interviewed appellant, and another officer examined his computer and found files that appeared to contain child pornography and a forensic examination confirmed.

Appellant moved the court to suppress the customer information that the investigator obtained from Comcast®, but the court denied his motion. Appellant argued that the request for information amounted to an unreasonable search in violation of the Fourth Amendment. The Court held that an internet service subscriber does not have a reasonable expectation of privacy in the subscriber information that he voluntarily conveys to an internet service provider in order to obtain internet service and furthermore, appellant was not the subscriber whose information was requested from Comcast®.

The Court then addressed appellant's sentencing since the trial court sentenced appellant under the mandatory minimum sentencing provisions of OCGA §17-10-6.2. The trial court concluded that it was without discretion to consider a downward departure from the mandatory minimum. Recently, however, in *Hedden*, 288 Ga. at 873, the Georgia Supreme Court addressed whether a sentencing court has discretion in a child pornography case to consider a downward departure, and the State conceded that *Hedden* applied here. Consequently, the Court vacated the sentence, and remanded for the court below to reconsider the question of sentencing in light of *Hedden*.

### **Speedy Trial; Capital Cases**

*Walker v. State, S11A1449 (3/19/2012)*

Appellant was indicted for malice murder, felony murder, armed robbery, and theft by taking a motor vehicle and challenged the trial court's denial of her motion for discharge and acquittal under the speedy trial statute for capital cases, OCGA § 17-7-171. The Court was required to decide whether, following a defendant's demand for speedy trial, § 17-7-171 (b) required only two, or more than two, full terms of court to pass without a trial before the defendant was entitled to discharge and acquittal (assuming the other requirements of the statute have been met). Several prior appellate decisions involving § 17-7-171 have said in

dicta that only two terms must pass, however § 17-7-171 (b) plainly says that "more than two" terms of court must expire, and the Court held that it must follow the statutory text instead of those inaccurate dicta and affirmed the trial court's ruling that appellant's motion for discharge and acquittal was premature.

During the August 2009 term of the court, appellant was indicted and during that same term filed a statutory demand for speedy trial. Because she was charged with three crimes that are "capital offenses" for speedy trial purposes, her demand was governed by OCGA § 17-7-171. In the two following terms of court, no trial occurred. The third term (August 2010) also expired without a trial; however, during that term, the State filed a notice of intent to seek the death penalty. On February 1, 2011, in the fourth term (November 2010) following the one in which appellant's demand was filed, appellant filed a motion for discharge and acquittal, contending that, because two terms had expired after the filing of her demand, she was entitled to be automatically discharged and acquitted under OCGA § 17-7-171 (b). The parties stipulated that at all of these terms of court juries were "impaneled and qualified to try the defendant."

The Court found that the State's filing of a notice of intent to seek the death penalty typically resets the statutory speedy trial clock, which will not start over "until the convening of the first term following the completion of pretrial review proceedings in the Supreme Court under Code Section 17-10-35.1." OCGA § 1-7-171 (c). However, the filing of a death penalty notice cannot reset a speedy trial deadline that has already expired. Thus, if OCGA § 17-7-171 (b) required the discharge and acquittal of a defendant when two terms of court have expired after the filing of a statutory demand for speedy trial in a capital case, appellant was entitled to be discharged and acquitted by operation of law at the close of the March 2010 term of court.. However, if § 17-7-171 (b) required that more than two terms of court expire, then the State's filing of the death penalty notice during the third term had the effect of resetting the statutory speedy trial clock.

The Court held that under the correct interpretation of OCGA § 17-7-171 (b), appellant was not entitled to be discharged and acquitted until the August 2010 term of court had expired. That was when "more than two

regular terms of court [would have] convened and adjourned after the term at which the demand for speedy trial [was] filed." Because the State filed its notice of intent to seek the death penalty during the August 2010 term, which was before appellant was entitled to be discharged and acquitted, the notice reset the statutory speedy trial clock. See OCGA § 17-7-171 (c).

### **Jury Charges; Equal Access**

*Murphy v. State, A11A2337 (3/12/2012)*

Appellant was convicted of possession of cocaine. He contended that the trial court erred in denying his motion for a directed verdict, in failing to charge the jury on equal access, and that his trial counsel was ineffective. The Court affirmed. The evidence showed that an officer was surveiling a house because the owner had complained that trespassers would sometimes sit on his front porch, and he was afraid to confront them because of possible retaliation. The officer observed appellant sitting on the front porch of the house. Appellant walked to the side of the house, removed an item from the top of the electrical meter box, and gave the item to another individual who was standing near the rear of the house. The officer observed the individual shake the object and walk off. Appellant walked back to the side of the house, placed an object back on the electrical meter, and returned to the front porch.

The officer testified that based on his belief that he had witnessed a "hand to hand drug transaction," he contacted his lieutenant who was stationed about a block away. The lieutenant approached appellant, who was sitting on the porch of the house, and an accompanying officer secured the object, a plastic bag containing three rock-like substances, that was on top of the electrical meter box. The contents of the bag were later tested and confirmed to be three rocks of crack cocaine. Police searched appellant and recovered a cell phone and \$20.

Appellant contended that the trial court erred by failing to charge the jury on equal access. In declining to give the charge, the trial court relied on *Wiggins v. State*, 258 Ga. App. 703 (2002), which held that the equal access principle is applicable when the State relies on the presumption that the owner of the premises is in possession of all its contents. But here, the State was not relying upon appellant's

ownership or control of the residence to prove that the cocaine found on the electric meter belonged to him. Therefore, no presumption of ownership arose and the equal access defense was not available.

Appellant also asserted that the court erred in denying his directed verdict motions because there was insufficient evidence that he possessed any cocaine. He contended that the evidence did not establish that he exercised sole or joint control over the drugs found on top of the electric meter. The evidence revealed that appellant was the only person observed making contact with the electric meter box, both before the contraband was discovered and afterward. The officer testified that the meter was under his surveillance the entire time, and that no other person came in contact with it. There was no evidence that any other object was found on top of the electric meter other than the cocaine. Although appellant argued that no cocaine was found on his person, “[a]ctual possession requires only direct physical control over a substance; it does not require that the substance be on the defendant’s person.” Hence, the jury was authorized to reject appellant’s hypothesis that someone else put the drugs on the meter, and thus, the evidence was sufficient to support a rational trier of fact’s finding of guilt beyond a reasonable doubt.

## Similar Transactions

*Bishop v. State, (3/15/2012) A11A2140*

Appellant was convicted of robbery by intimidation, robbery, terroristic threats, and criminal trespass. He contended that the trial court erred in admitting similar transaction evidence, and in failing to tailor the charge on similar transaction to the specific purpose for which it was admitted. The Court affirmed. The evidence showed that on the afternoon of September 2, 2008, a man entered a CVS Pharmacy® and asked the store clerk if his identification was there. After the clerk checked and informed him that his identification was not in the store, the man asked her for help locating bandages. The clerk testified that the man had a bloody bandage on his arm. When she rang the purchase up, the man told her not to close the cash drawer, jumped over the counter, and took the money out of the register. The clerk testified that the man was carrying a book bag, and that although she knew that he was a “black man,” she could not identify

him. A customer was on the phone outside the door when the robber ran out. He knocked her down, grabbed the car keys from her hand, and when she tried to stop him, threatened to “kill [her]” if she did not move. The woman identified appellant as the man she saw run out of the store and take her car. Another customer in the parking lot testified that she saw appellant run out of the store with a “wad of money in his hand and . . . a bandage around his arm.” She testified that after he knocked a woman down and grabbed her keys, he jumped into a green truck. The witness said she tried to block his escape with her Jeep, but appellant rammed her vehicle and another truck before speeding out of the parking lot.

In two related enumerations, appellant contended that the trial court erred in admitting the similar transaction evidence. He maintained that when the State filed its notice of intent to present evidence of similar transaction, it did not attach any documentation, and thus he had no notice of what he had to defend against. Appellant maintained that the trial court failed to factually find that he was the perpetrator of the similar transaction or that it was sufficiently similar to the offense charged.

During the hearing, the State presented evidence of a robbery captured on videotape that had occurred in Alabama only days before the CVS® robbery that showed appellant had gone to a gas station, threatened the clerks with a gun, jumped behind the counter, and taken the money out of the cash register. Appellant viewed the videotape before the hearing, and eyewitnesses from the Alabama robbery were present to identify appellant. The State included the arrest warrant with its notice because the case had not yet been indicted in Alabama, given that appellant was arrested in the CVS® robbery before the Alabama warrant had been issued.

The Court agreed that this evidence was admissible for the purpose of showing a common scheme or plan, that there was sufficient evidence to find that appellant was the person who committed the act, and that there was sufficient similarity between the Alabama crime and the crimes charged.

## Search & Seizure; Juvenile

*In the Interest of J.B., A11A2074 (3/9/2012)*

The juvenile court found 16-year-old appellant delinquent for committing the offenses

of carrying a concealed weapon, possession of a handgun by a minor, and loitering. Appellant argued that the court erred in denying his motion to suppress unlawfully obtained evidence and in finding that the evidence was sufficient to prove beyond a reasonable doubt that he committed the offense of loitering. The Court reversed the denial of appellant’s motion to suppress and the adjudication of delinquency.

The evidence showed that around 3:00 p.m. on February 22, 2011, four officers were on patrol in two separate squad cars when they observed several young males, including appellant, gathered in a vacant lot. Because the officers were aware that illegal drug and street gang activities frequently occurred in the lot itself and surrounding area, the officers decided they would investigate the young men if they were still gathered in the lot after the officers turned around. The officers in the first squad car then turned around, while the officers in the second car drove around the block, parked near a path leading to the back of the vacant lot, and exited on to an adjacent street that is routinely used by pedestrians walking to a nearby apartment complex. As the officers in the first squad car returned to the front of the vacant lot, parked, and exited their vehicle, three of the young men, including appellant, began traipsing away via the path at the back of the lot. However, before they reached the street where the path exited, they encountered the two officers who had parked there. Appellant and the other two young men — who were a “good distance” behind him — stopped, and one of the officers asked appellant, who appeared to be sweating and out of breath as if he had been running, “what’s your hurry?” and who he was running from. When appellant failed to reply, the officers directed him to walk back down to the vacant lot. Recognizing one of the young men as a gang member, previously arrested on a weapon’s charge, the officer proceeded to do a pat-down search of the young men. The officer noticed that appellant was attempting to keep his knees and feet close together, so the officer ordered him to spread his feet apart. After a minor skirmish, appellant was handcuffed and the officer resumed his pat-down, which caused a small caliber handgun, concealed inside appellant’s pant-leg, to fall to the ground.

Appellant contended that the juvenile court erred in denying his motion to suppress, arguing that the police officers had no reason-

able articulable suspicion that he was engaging in criminal activity so as to justify detaining and searching him. The Court found that the initial encounter between appellant and the police officers occurred when he was walking away from the vacant lot on the path leading to another street. At that point in time, the only objective observations the officers had made regarding appellant was that he was a “good distance” ahead of the other two young men and appeared to sweating and out of breath. But instead of merely questioning appellant regarding what he was doing, the officers stopped him and directed him to return to the vacant lot. The Court found that no reasonable person in appellant’s position would have felt free to decline the officers’ request or otherwise terminate the encounter. Thus, the officers’ stop of appellant was a second-tier, investigative detention that required the officers to have a particularized and objective basis for suspecting that appellant was about to be involved in criminal activity.

The Court noted that mere presence in an area known to the police for criminal activity, without more, is insufficient to support a reasonable suspicion that one is engaged in or about to engage in criminal activity. And here, the only other objective observation made about appellant by the police was that he was walking away from the officers in the vacant lot and appeared to be sweating and out of breath as if he had been running when the other officers first made contact with him. But walking away or even running from police officers, without more, does not justify a second-tier encounter. Thus, appellant’s presence in this area coupled with the fact that he walked away from the officers when they initially approached the lot and appeared sweaty and out of breath when the detaining officer stopped him does not amount to a reasonable articulable suspicion that appellant was either committing, or was about to commit, a crime.

## Search & Seizure

*Rowe v. State, A11A2119 (3/12/2012)*

After appellant was charged with trafficking in cocaine, he moved to suppress evidence obtained as a result of a police traffic stop of his vehicle. The Court granted appellant’s application for interlocutory appeal. Appellant contended that the officer lacked a reasonable articulable suspicion to conduct the traffic stop

and expanded improperly the scope of the stop beyond its original purpose.

The officer testified that he initiated the traffic stop because appellant was traveling in the leftmost lane at a speed less than the maximum speed limit, impeding the flow of traffic, and creating the risk of an accident. The Court held that notwithstanding appellant’s challenge to the officer’s estimate of his speed, the trial court was authorized to find that the officer’s speed assessment was credible, and that the officer had a reasonable basis to investigate a traffic violation. Appellant next contended that, even if the initial stop was valid, the officer impermissibly expanded the scope of the stop. Appellant asserted that the officer fulfilled the purpose of the traffic stop when he first informed appellant that he would not be issuing a citation, and that he would allow appellant to get back on his way. However, when the officer first informed appellant that he would not be issuing a citation, the officer had requested only appellant’s driver’s license, and had not yet checked its status or otherwise requested registration and insurance documentation. As part of the stop, the officer was permitted to question appellant about his driver’s license, origination, and itinerary, so that he could investigate and determine whether appellant was entitled to continue operating the vehicle and whether he was in lawful possession of the vehicle.

Appellant next asserted that he was unlawfully detained after the officer told him he was free to go. However, the evidence showed that after the officer informed appellant that he was free to go, appellant agreed to answer more of the officer’s questions and remained on the scene. During this exchange, there was no evidence that appellant was mandated to wait or otherwise impeded from leaving, thus, asking appellant if he minded speaking further with the officer did not extend the initial traffic stop detention. Furthermore, the officer sought appellant’s consent to search the vehicle, which appellant refused to provide. His refusal to provide consent and the officer’s order that appellant step behind the patrol car re-escalated the encounter into a second detention which the Court found was reasonable, since the officer had previously smelled an order of burnt marijuana; observed extremely nervous behavior from appellant and the passenger; and learned that neither appellant nor the passenger were authorized to drive the rental

vehicle, which was not permitted to be driven in Georgia and should have been returned two weeks earlier. Based on the totality of the circumstances, the officer was authorized to detain appellant for further investigation, including a free-air search. Moreover, the continued detention to perform the free-air search was minimal given that the drug dog was already present at the scene.

## Directed Verdict

*Harris v. State, A11A1615 (3/15/2012)*

The trial court denied appellant’s motion for directed verdict of acquittal in his prosecution for misdemeanor obstruction of a law enforcement officer. The Court reversed and held that the evidence was insufficient to support the conviction.

The accusation charged appellant with “unlawfully knowingly and willfully obstruct[ing] and hinder[ing], a law enforcement officer, in the lawful discharge of [her] official duties. . . .” A detective testified that on July 29, 2009, the Department of Family and Children Services (“DFCS”) notified the police that they needed to go to appellant’s house to check on the welfare of a 10-day-old infant, C. H., and if she was there, to take her into protective custody. Appellant is C. H.’s father and her mother is Kayla Bagwell. The officers had a document reflecting a bond condition for a domestic violence case that restricted appellant’s and Bagwell’s contact with each other. The residence was the address Bagwell had listed with the police, the courts, and DFCS; and the bond condition stated that appellant could not be at the residence. Officers went to appellant’s house, knocked on the door, and identified themselves. Appellant exited the house and shut the door. An audio recording of the encounter was played for the jury and entered into evidence. From the knock on the door to the arrest, the entire encounter lasted 95 seconds. Appellant made no threats and was not violent. At trial, appellant testified that “I made a choice that day to not cooperate. I didn’t stand in the way and tell them they couldn’t come in my house; I just didn’t invite them into my house and wasn’t going to.”

At trial, after recounting the events leading up to appellant’s arrest, an officer described his conduct as “basically, just refusing to cooperate.” On cross-examination that officer conceded that the basis for appellant’s arrest

was “only . . . two things . . . he did not allow [the officers] in the house and he didn’t answer questions about the child.” Appellant argued that the trial court erred in not granting his motion for directed verdict because he did not obstruct the police but instead stood on his rights under the First, Fourth and Fifth Amendments to the United States Constitution. The Court agreed with appellant that his conduct did not constitute obstruction under the statute.

Although the Court has held that words alone can constitute obstruction, they stated they found no case upholding an obstruction conviction based solely upon a defendant’s act of speaking to, remonstrating with, or even criticizing an officer during the performance of his duties. Appellant did not refuse to comply with an officer’s directive or command. No officer ever asked to enter his house. No officer ever asked him to produce the child. Appellant was not threatening or violent. The audio recording showed that there was never any mention of entry into appellant’s house without his consent. It also established that the officers made clear the arrest was for refusing to answer questions about the child. The officers presented appellant with a choice between answering their questions or being arrested for obstruction. Appellant was arrested for peaceably asserting his constitutional rights as he understood those rights. The Court found that this cannot be obstruction as a matter of law and therefore his conviction could not stand.