

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 2, 2010

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Motion to Withdraw Guilty Plea

McKiernan v. State, S09A1705

Appellant appealed from the dismissal of his motion to withdraw his guilty plea. The record showed that he pled guilty to felony murder on Jan. 27, 2007. On February 27, 2007, a letter to the trial judge from appellant was filed with the clerk of the superior court. The letter asked to withdraw his guilty plea, and requested that the court appoint new counsel for trial. On March 15, 2007, the court issued a rule nisi stating that “[t]he above stated motion is hereby scheduled for a hearing on

the 2nd day of April, 2007” The rule nisi bore the style of the case, and included: “Re: Motion to Withdraw Plea.” The hearing was rescheduled at least twice, and ultimately held on April 27, 2009. At that time, the trial court dismissed the motion as untimely.

The Court held that no statute sets forth the procedures by which a motion to withdraw a guilty plea may be entertained by the trial court after a sentence has been pronounced, but it has long been judicially recognized that a trial court may do so within the same term of court in which the plea was entered and the defendant sentenced. Appellant’s letter may serve as such a motion.

The State argued that because the letter was never served on it and the rule nisi was not issued until after the term of court had expired, the “motion” was untimely.

The Court disagreed. Looking to OCGA § 17-9-60 for guidance, the Court held that the motion must be made during the term at which the judgment was obtained and there is no requirement that the notice be given to the opposing party before the end of the term in which the judgment was obtained. Therefore, the trial court erred in dismissing the motion; the State had reasonable notice of the motion, the rule nisi being issued 18 days before it was first set for a hearing, and over two years before the hearing was eventually held. The Court vacated the trial court’s judgment dismissing the motion, and remanded the case to the trial court for a re-hearing on the motion.

Severance; Failure to Preserve Evidence

Krause v. State, S09A1453, S09A1454

Appellants Krause and Chesser, girlfriend and boyfriend respectively, were convicted

of malice murder and other related crimes. Chesser contended that the trial court erred in not severing their cases for trial. The evidence showed that the two killed the victim by first beating him with a miniature baseball bat and then shooting him in the back of the neck. The evidence showed that the cause of death was the gunshot wound. Both appellants sought to show that the other was the shooter.

A trial court should consider three factors regarding whether to sever: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses. It is not enough for the defendant to show that he or she would have a better chance of acquittal at a separate trial or that the evidence against a co-defendant is stronger. Rather, the defendant must show clearly that a joint trial would prejudice his or her defense, resulting in a denial of due process. The Court held that the joint trial did not present a significant likelihood of confusion of the evidence and law, or the possibility that evidence introduced against Krause might be improperly considered against Chesser. There were only two defendants, the law applicable to each was substantially the same, and the evidence at trial showed that Chesser and Krause acted together in killing the victim. Presentation of the evidence against Krause would not have led to juror confusion. Moreover, Chesser's own actions directly implicated him in the murder. He told the police the location of the body and admitted shooting the victim, and he also discussed killing the victim and how to dispose of the body in front of two witnesses who would have been equally available to testify against him at a separate trial. The Court found that while it was true that Krause and Chesser raised antagonistic defenses, in the sense that each of them pointed to the other as the shooter and the leader in killing the victim and disposing of his body, that alone was insufficient to require severance. Unless there is a showing of resulting prejudice, antagonistic defenses do not automatically require a severance.

Chesser also argued that the State deprived him of due process by failing to preserve the miniature bat as material evidence. He argued that with access to the bat, he might have been able to show that it was only a plastic toy bat, thereby demonstrating his

lack of intent to injure the victim, or testing might have revealed a lack of DNA on the bat, which would have shown that the victim's head wounds were not inflicted by him. Chesser further contended the State's bad faith was demonstrated by its decision to focus on the bat evidence at trial, claiming that Chesser "armed" himself with it before going to the victim's place, despite the clear evidence that the cause of death was a gunshot wound, not being struck by a bat.

The Court stated that the "State's failure to preserve the bat evidence [was] regrettable," but the claim was without merit. The State's failure to preserve evidence discovered in the course of a criminal investigation can, in limited circumstances, violate a criminal defendant's right to due process. In dealing with the failure of the State to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. While the bat was clearly potentially useful evidence, it was not material exculpatory evidence: 1) there was no apparent reason for the police to think that the bat would tend to exonerate rather than further inculpate Chesser (or Krause); 2) the cause of death appeared to be a gunshot wound, not a bat, and 3) other evidence linking both Chesser and Krause to the murder was strong. Furthermore, Chesser did not even argue bad faith failure to preserve the bat evidence at trial, much less produce any evidence of bad faith on the part of the State. Therefore, Chesser's due process rights were not violated.

Failure to Preserve Evidence; Expert Testimony

Sharp v. State, S09A2025

Appellant was convicted of malice murder and many other offenses and sentenced to life without parole. The victim was found tied to a tree in a cemetery. Several condoms were found in the cemetery. Most were old and brittle, but one fresh condom, with bodily fluids inside, was discovered about 150 feet from

the victim. The crime lab lost that condom before appellant was arrested and linked to the murder, so the fluids could not be compared to his DNA. Appellant contended that the condom was the only physical evidence with the potential to provide a direct link to the rape and murder of the victim, that DNA testing on it could have exonerated him, that the condom constituted material exculpatory evidence, and that its loss amounted to a denial of due process.

In dealing with the failure of the State to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Here, appellant failed to show a violation of his due process rights because it was not apparent that a condom found 150 feet from the crime scene, in a location frequented by prostitutes, would contain evidence of exculpatory value. Nor was there evidence that the State acted in bad faith in losing the condom, which occurred before he was arrested and identified as a suspect. In so holding, the Court "decline[d] [appellant's] invitation to adopt a rule requiring a finding of a due process violation any time possible exculpatory evidence is lost, without regard to constitutional materiality or bad faith. That rule would be a dramatic and unwarranted departure from the precedent of this Court and the United States Supreme Court."

Appellant also contended that the trial court erred in permitting a GBI forensic scientist to testify that the strap found on the left wrist of the victim matched the strap on a pair of binoculars found inside the vehicle that appellant drove the night of the murder. The Court found that the expert testified that her examination was based on the laws of chemistry and physics, in particular the laws of force and separation, and that the type of examination at issue had been the subject of expert literature. Appellant presented no expert testimony or other evidence to undermine her testimony, the theory it discussed, or the application of that theory in this case. The trial court therefore did not abuse its discretion in

applying the analysis prescribed by *Harper v. State*, 249 Ga. 519, 525-526 (1982), and concluding that the testimony was admissible.

Search & Seizure

Daniel v. State, A09A2245

Appellant was convicted of possession of cocaine, attempting to remove a firearm from a police officer, and obstruction of an officer. Appellant argued that the trial court erred by denying his motion to suppress the evidence because the circumstances did not support the officers' warrantless entry into his hotel room. The Court disagreed. Whether exigent circumstances existed is a question of fact and police actions must be reviewed from the standpoint of a hypothetical reasonable officer and must measure those actions from the foresight of an officer acting in a quickly developing situation and not from the hindsight of which judges have benefit. Here, the evidence showed that while responding to an early-morning call regarding a neighboring hotel room, the officers heard a woman yelling and sounds of a struggle near the door of appellant's hotel room, as well as witnessed what appeared to be thwarted attempts by someone to open appellant's hotel room door and flee. Because a reasonable officer could interpret the circumstances to be a threatening situation to the woman yelling within the hotel room, the evidence authorized the warrantless entry into the residence. Therefore, the Court held, the trial court did not err in denying appellant's motion to suppress.

State v. Parrish, A09A2173

Parrish was charged with possession of a gun by a convicted felon. The State appealed from an order granting his motion to suppress. The evidence showed that while Parrish was out of town, an officer went to his house on an unrelated matter. The officer obtained consent to search from Parrish's wife. A locked gun cabinet inside the master bedroom revealed a weapon and ammunition. Only Parrish had the key to this cabinet.

The consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. Common authority rests on mutual use of the property by persons generally having joint access or control

for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. Here, it was undisputed that Parrish's wife lived at the residence and had common authority to consent to a search of the residence's common areas. But, the Court found, the evidence did not support a finding that her authority extended to Parrish's locked gun cabinet. She had informed the officer that the gun cabinet belonged to Parrish. Parrish had locked the gun cabinet to prevent access, and he was the only one who had a key. Moreover, there was no evidence that Parrish's wife ever had accessed or used the gun cabinet. By locking the gun cabinet and maintaining possession of the only key, Parrish manifested his intent to maintain exclusive control over the gun cabinet and his expectation of privacy in it. Because the evidence known to the officer established that Parrish's wife did not have joint access or control over the gun cabinet, her consent to its search was invalid and the trial court did not err in granting the motion to suppress.

State v. Neese, A09A2188

Neese was charged with possession of methamphetamine. The State appealed from the grant of Neese's motion to suppress. The evidence showed that Neese was fishing when he was approached by a police officer who was patrolling the area in response to a suspicious person alert. The officer asked Neese for his identification. Neese, who was carrying a fishing pole and a backpack, told the officer that the officer could retrieve his identification from the backpack. Prior to opening the backpack, the officer asked Neese whether "there was anything else in the backpack that [he] need[ed] to be concerned about." Neese replied, "No. You can check it." The officer then searched the backpack and found, among a large number of fishing supplies, Neese's identification card and a flashlight with a screw-on tail cap. He opened the tail cap, and found crystal methamphetamine inside.

The Court stated that the intrusiveness of a consent search is limited by the permission granted, and only that which is reasonably understood from the consent may be undertaken. The standard for measuring the

scope of a suspect's consent is that of objective reasonableness—what would a typical reasonable person have understood by the exchange between the officer and the suspect? Here, the officer did not inform Neese that he was looking for narcotics prior to seeking his consent to enter the backpack. Neese's consent could reasonably be construed to extend only to a search for weapons. This limited consent thus authorized the officer to search all areas of Neese's backpack where a weapon might reasonably be found. Because it was unlikely that a weapon would be found inside a small handheld flashlight, the officer's search exceeded the scope of Neese's consent. Therefore the trial court did not err in granting the motion to suppress.

DUI; Sufficiency of Evidence

Head v. State, A09A2039

Appellant was convicted of DUI-less safe, in violation of OCGA § 40-6-391 (a) (2). He was also convicted of driving with a controlled substance in his blood (alprazolam and cocaine), in violation of OCGA § 40-6-391 (a) (6). He contended that the evidence was insufficient to support his less safe conviction. The Court agreed. The evidence showed that appellant's vehicle collided with a bus, but only the bus driver was cited. During the investigation, the officer determined that appellant had a clear line of sight and what appeared to be time to avoid the accident, yet he saw no evidence that appellant attempted to stop prior to the collision and had made only a last moment attempt to swerve. The officer smelled alcohol on appellant and cited him for DUI-less safe.

The Court held that to sustain a conviction on DUI-less safe, it is not sufficient to show merely that appellant was driving after having ingested, at some point in time, alprazolam and cocaine. Rather, the State must prove that appellant was a less safe driver as a result of being under the influence of these drugs. Here, the State presented evidence that appellant had alprazolam and a cocaine metabolite in his blood, and further presented the officer's opinion testimony that appellant should have been able to avoid the collision. But, the Court found, the record contained no evidence tending to explain the significance of the alprazolam and cocaine metabolite present in appellant's blood, i.e., whether the quantity

of the drugs was considered sizeable; whether the quantities indicated recent or merely past usage of the drugs; or what effect the level of drugs found in his blood would have on the average person, specifically whether those drugs would cause any physical and/or mental impairment. Appellant also elicited expert testimony that the presence of benzoylcegonine in one's blood is not indicative of any impairment because it is the after-effect of cocaine. The Court concluded that the record was completely devoid of any evidence tending to show that appellant was a less safe driver as a result of being under the influence of alprozalam and cocaine, and therefore reversed his conviction on this count.

Indictments; Motion for New Trial

Gaston v. State, A09A2318

Appellant was convicted of aggravated stalking, burglary, kidnapping, and criminal trespass. Appellant argued that the trial court erred in denying his pretrial demurrer as to aggravated stalking because the indictment failed to specify the exact court order that he allegedly violated. The Court held that the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. Here, the aggravated stalking count of the indictment alleged that on June 26, 2006, appellant "did unlawfully contact [the victim], without [her] consent . . . , for the purpose of harassing and intimidating [her], in violation of a court order, which prohibited such behavior by [the] accused." Thus, the indictment closely tracked the language of the aggravated stalking statute, and clearly informed appellant that he was charged with inappropriately affirmatively contacting the victim in violation of a prior order, which was sufficient.

Following his conviction on all counts, the trial court granted appellant's motion for

new trial. The State then moved for reconsideration. In support of that motion, the State filed two exhibits: (1) a notarized letter from the victim detailing appellant's attempts to contact her after the trial, stating that appellant is "not going to stop [contacting her] . . . he never will"; and (2) an unsigned, handwritten statement by the victim to the parole board detailing physical and sexual abuse by appellant and indicating that the writer was frightened of him. The trial court then granted the motion for reconsideration and denied appellant a new trial without holding a hearing. Appellant contended he was entitled to a hearing and the Court agreed. Although the trial court had discretion to set aside its order for any meritorious reason, it erred to the extent that it based its ruling on consideration of the exhibits attached to the State's motion because appellant did not have the opportunity to confront and challenge the victim's statements. Thus, the trial court's order was vacated and the case remanded to the trial court.

Jury Charges

Woods v. State, A10A0038

Appellant was convicted of entering a motor vehicle with intent to commit a theft. She argued that the trial court erred in refusing to give her requested charge on the lesser included offense of criminal trespass. The Court held that the trial court did not err for two reasons. First, the record showed that her written request tracked, verbatim, subsections (a) and (b) of the criminal trespass statute, OCGA § 16-7-21 which together, describe five different ways in which an individual may commit the offense of criminal trespass. Appellant argued that the trial court should have given only the portion of the instruction quoting OCGA § 16-7-21 (b) (1) because the jury might have concluded that she entered the victim's truck for an unlawful purpose other than to commit a theft. But, if any portion of a requested charge is inapt, incorrect, misleading, confusing, not adequately adjusted or tailored, or not reasonably raised by the evidence, denial of the charge request is proper. The trial court therefore properly denied giving the requested charge.

Second, even if the requested charge was properly drawn, the trial court still was correct in refusing to give it. Appellant contended that she never entered the truck for any purpose, lawful or unlawful. Therefore, the evidence

showed that she either completed the crime as alleged or no crime at all.

Mistrial; Prosecutorial Misconduct

Allen v. State, A09A1737

In opening statements, the prosecutor stated that he suspected "the defense may call witnesses to testify on his behalf." The trial court granted a mistrial and thereafter, appellant filed a plea in bar alleging prosecutorial misconduct, which the trial court denied. When a prosecutor goads the defense into making a motion for a mistrial in order for the prosecution to avoid reversal of the conviction because of prosecutorial or judicial error or to otherwise obtain a more favorable chance for a guilty verdict on retrial, the Double Jeopardy Clause will stand as a bar to retrial. The Court stated that it is the objective of the prosecutor's conduct which is critical. Unless a prosecutor is trying to abort the trial, his or her misconduct will not prohibit a retrial.

Appellant contended that the "burden shifting" statement of the prosecutor was one not even a rookie prosecutor would make and that it was so egregious that intent should be presumed. However, the Court found that the comment did not rise to the level of prosecutorial misconduct. The Court noted that in the order granting the mistrial, the trial court stated that the prosecution "inadvertently and unintentionally" made an "improper inference" about the defendant calling witnesses to testify. The prosecution had witnesses present to testify at trial and was ready to proceed. The prosecutor believed the statement could be used to address possible defenses. Therefore, because no evidence existed of any *intentional* prosecutorial misconduct, the trial court's findings support its conclusion, and the denial of the plea in bar was affirmed.

Severance

Miller v. State, A09A2400

Appellant was convicted of two counts of criminal attempt to commit armed robbery. He contended that the trial court erred in denying his motion to sever the offenses for trial. The Court held that an absolute right to severance exists only where offenses have been joined solely because they are of the same or similar character. Where, however, joinder is

based on a series of acts connected together, severance lies within the sound discretion of the trial court. The trial court should sever the offenses if severance is appropriate to promote a fair determination of guilt or innocence as to each offense. Here, the charges constituted a series of connected acts. Appellant committed both attempted armed robberies by approaching cashiers at party supply stores and pointing what appeared to be a gun covered with a white shirt. He wore the same clothing in both crimes, which were committed within a week of each other in the same area. Under these circumstances, appellant was not automatically entitled to a severance. Accordingly, the trial court did not abuse its discretion in denying the motion to sever the offenses.

Mistrial; Juror Misconduct *Semega v. State, A09A2255*

Appellant was convicted of rape. He argued that the trial court erred in excusing a juror and replacing that juror with an alternate. The record showed that after the jury had deliberated for only a couple of hours, they sent out a note saying they were at an impasse. The court had them continue. They sent out another note saying they were hung. The trial court had them continue. The trial court also gave them an *Allen* charge. Then the foreman sent out a note saying that one juror was holding them up and failing to consider all the evidence. The trial court spoke to the foreman and then spoke to the allegedly uncooperative juror. That juror said that he listened to every word and considered all the evidence but believed appellant was not guilty. The trial court then dismissed that juror and replaced him with the alternate.

OCCA § 15-12-172 provides: "If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated." The established procedure for addressing the question of removal of a juror for cause is as follows: The trial court must exercise its discretion in removing a juror, and it may affect such a removal even after deliberations have begun. There must be some sound basis upon which the trial judge exercises his discretion to remove the juror. A

sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Where the basis for the juror's incapacity is not certain or obvious, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion.

However, alternate jurors do not serve to substitute for minority jurors who cannot agree with the majority. A holdout juror is not subject to dismissal for failing to acquiesce to the other juror's conclusions regarding the persuasiveness of the evidence. There must be some sound basis upon which the trial court exercises its discretion to remove the juror. Dismissal of a juror for want of any factual support, or for a legally irrelevant reason is prejudicial. Here, the trial court did not have legal cause to remove the lone holdout juror because evidence was not presented that the juror was incapacitated or otherwise legally unfit to remain on the jury. The trial court therefore abused its discretion in denying appellant's repeated motions for a mistrial on the ground that the jury was deadlocked. His conviction was reversed and the case remanded for a new trial.

Juveniles; Appellate Jurisdiction *In the Interest of JLK, A09A2308*

Appellant was adjudicated a delinquent for simple assault in October. Thereafter, appellant filed two motions for reconsideration. In his second motion, appellant essentially raised two statutory arguments for reconsidering the trial court's order. He argued that his motion was justified under OCCA § 15-11-70 (d), which provides that a court "may terminate an order of disposition of a child adjudicated as delinquent or unruly . . . if it appears to the court that the purposes of the order have been accomplished." Second, the invocation of "further evidence" in support of the motion, as well as the allegation of new psychiatric results, necessarily raised OCCA § 15-11-40 (a) (3), which provides that a juvenile court order shall be set aside if newly discovered evidence so requires. Appellant appealed from the March denial of this second motion.

The Court first addressed the issue of its own jurisdiction. It found that the denial of a motion to modify the disposition in a delinquency matter under either OCCA § 5

15-11-40 or 15-11-70 is a final judgment and directly appealable. It further held that the appellant on appeal from the March ruling on disposition may also challenge the original October finding of delinquency.

Upon review of the October adjudication of delinquency, the Court reversed the juvenile court's findings. The only witness called was a police officer. He testified that he did not witness the alleged assault. The Court therefore found that the only evidence was hearsay and hearsay evidence is without probative value and will not establish a fact in issue even in the absence of a timely objection. Consequently, the evidence was insufficient to support the finding of delinquency.

Mistrial; Sentencing *Hight v. State, A09A2005*

Appellant was convicted of two counts of burglary, four counts of theft by taking and criminal trespass. He argued that the trial court erred by denying his motion for a mistrial after jurors viewed him in restraints. The evidence showed that during trial, a juror entered the jury room at the same time appellant was in the hallway in restraints. Appellant moved for a mistrial, contending that the juror could have been biased by the sight of him in restraints. After interviewing the witness, the court offered to excuse the juror, which remedy appellant declined, and the trial court denied the motion for mistrial.

The Court held that although a defendant has the right to be free of the atmosphere of partiality created by the use of excessive guards or shackles in the courtroom, the mere fact of seeing an indicted accused in custody, not in the courtroom, is not grounds for an automatic mistrial, but is addressed to the sound discretion of the trial court. Here, the trial court asked the juror whether she saw appellant in the hallway, and the juror responded that she had not noticed anybody. The bailiff also offered that he stopped the juror's progress in the hallway and discreetly positioned his body to obstruct her view of the area where appellant was present. Appellant also did not proffer evidence from any jurors to demonstrate prejudice. Therefore, the trial court properly denied of the motion for a mistrial.

Appellant also argued that the trial court erred by deciding his sentence before holding the sentencing hearing. The record showed

that after hearing from the victims and from appellant himself, the trial court stated he had already decided appellant's sentence prior to the hearing and then sentenced appellant to two consecutive terms of twenty years to serve in confinement, based on the two guilty verdicts of burglary (merging the remaining counts of the indictment) and appellant's recidivism (prior convictions were proved on twenty-four felony counts in eight different indictments). The Court found that because the trial court explicitly explained that it was "exercising discretion to sentence to two terms of twenty years consecutive, all to serve," which is within the statutory limits, appellant had no cause for complaint.

Discovery

Day v. State, A09A2256

Appellant was convicted of two counts of aggravated child molestation, statutory rape, and six counts of child molestation. He contended that the trial court erred in admitting in evidence the final report of the nurse over his objection because he received it less than ten days before the trial. This report differed substantially from her initial report delivered 18 months prior to trial because the original stated that the examination of the victim was normal and without evidence of sexual abuse, but the new report stated there was a suspicion of sexual abuse.

The Court found no error. First, the report was never offered or admitted into evidence. Second, the record showed that the prosecution became aware of the second report when the prosecutor spoke with the nurse on the Wednesday before the trial was to begin the following Monday. Until that time, the prosecution had the same understanding as defense counsel that only one report existed. During that conversation, the prosecutor learned that a final report existed and immediately had the nurse fax him a copy of the report. Within minutes of receiving it, the prosecutor personally handed a copy of it to defense counsel. Thus, the prosecution complied with OCGA § 17-16-4 (c) by promptly notifying appellant of the final report's existence and provided a copy to him. Defense counsel did not seek any of the several remedies available in the two business days remaining in that week or before the trial began. Instead, counsel announced ready for trial and did not raise this issue until after the

jury was selected, three other witnesses had testified, and the nurse was called to the stand. Therefore, the trial court did not err by refusing to exclude the nurse's testimony.

Search & Seizure; Judicial Appointments

State v. Kelley, A09A2402

Kelly was charged with 20 counts of sexual exploitation of children. The State appealed from the trial court's grant of Kelley's motion to suppress evidence of child pornography found on his office computer. The record showed that when an agent requested search warrants for the Kelley investigation, the judge she first applied to was not comfortable signing off on the warrant and wanted another judge to be appointed to handle the case. A judge from another county was brought in, the agent met with that judge, and the judge signed the warrant.

OCGA § 15-1-9.1 (b) (1) provides that: "If assistance is needed from a judge outside of the county, a superior court judge of this state or the chief judge of a class of courts other than an appellate court may make a request for judicial assistance in the court served by said requesting judge to the administrative judge of the judicial administrative district in which said requesting judge's court is located." Further, "The written designation shall identify the court in need of assistance, the county where located, the time period covered, the specific case or cases for which assistance is sought if applicable, and the reason that assistance is needed." OCGA § 15-1-9.1(f). Here, the Court found, the order appointing the judge who signed the search warrant stated: "The temporary assistance of a Judge in order to provide for the speedy and efficient disposition of the aforesaid Courts having been requested, and the aforesaid Judge having consented to assist this Court, It is ordered that the Honorable Tracy Moulton, Jr., Senior Superior Court Judge, State of Georgia, is hereby designated and appointed to serve in the Superior Court of Jasper County, October 26, 2007, until the same be finally concluded. He is hereby vested with all the power and authority of a regular Superior Court Judge of the Ocmulgee Judicial Circuit, and he is authorized to hear all matters that may properly come before him until the same is finally concluded."

The Court held that this order failed to specify the scope of the assignment, the case to

which the judge is assigned, or the time period covered. By failing to specify either the scope or length of the assisting judge's service, his order of appointment violated the standards required to obtain temporary judicial assistance. Because the order of appointment was invalid, the judge who signed the search warrant lacked authority to act in the case and the lack of jurisdiction to issue the warrant resulted in a nullity. Therefore, the trial court did not err in granting the motion to suppress.

Character Evidence

Cobb v. State, A09A1971

Appellant was convicted of aggravated assault. She argued that the trial court admitted improper character evidence throughout her trial. The evidence showed that appellant and her male co-defendant went to the victim's house and knocked on the door. When the victim answered, the co-defendant pulled a gun on the victim. A struggle ensued and the gun went off, injuring the victim. Appellant and her co-defendant fled but were caught together in a motel room 16 hours later.

Appellant first contended that the trial court erred in failing to grant a mistrial when in response to a question to the victim, appellant's ex-boyfriend, why he was avoiding appellant, he said she had track marks on her arm indicating the use of meth. The defense objected. The trial court gave a curative instruction and specifically polled the jury to make sure that each member understood the instruction. Moreover, the trial court found that the prosecutor did not expect that response and the mention of alleged drug use was inadvertent. Therefore, the Court held, the trial court did not abuse its discretion in refusing to declare a mistrial.

Appellant also contended that the trial court erred in admitting evidence that when she was arrested, she had a Derringer pistol in her possession. The Court stated that generally, all the circumstances connected with a defendant's arrest are admissible as part of the *res gestae*. Relevant evidence will not be excluded merely because it incidentally shows the commission of another crime, puts the defendant's character at issue, or is prejudicial, where that evidence is admitted for the purpose of showing the circumstances of the arrest. Here, the evidence was admissible because the Derringer was loaded and found at the scene

of her and her co-defendant's arrest along with the nine-millimeter handgun matching the description of the one used on the victim. Further, appellant testified that her co-defendant had purchased the Derringer for her, which had relevance to the nature of her relationship with her co-defendant, who accompanied her to the victim's home and who principally carried out the assault on the victim.

Finally, appellant contended that the trial court erred in allowing the prosecutor to use her May 2007 conviction for possession of methamphetamine for general impeachment purposes during trial, which took place in April 2008 trial. Under OCGA § 24-9-84.1 (a) (2), if a defendant testifies, "[e]vidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant." The trial court expressly found that the nature of the offense was not so similar that it would give rise to the improper inference that appellant had the propensity to commit the aggravated assault at issue in the trial. Instead, the Court found, the prior conviction's probative value went to appellant's credibility and the likelihood or not that someone convicted of a felony might disregard the duty to testify truthfully. Also, the trial court instructed the jury that the prior felony conviction was to be considered only for impeachment purposes. Because appellant testified and denied knowledge that her co-defendant had a gun, her credibility was highly relevant to the jury's decision. Therefore, under these facts, the trial court did not abuse its discretion in permitting the admission of this impeachment evidence.