

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 8, 2011

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## THIS WEEK:

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### ***Kidnapping***

*Brown v. State, S10A1709 (3/25/2011)*

Appellant was convicted of felony murder, kidnapping, and other crimes in connection with a shooting death. He contended that the evidence was insufficient to prove the “asportation” element of the kidnapping statute. The evidence showed that appellant and a co-indictee were at the victim’s apartment smoking marijuana with the victim. Appellant and co-indictee left the apartment, but came back a short time later and waited near the apartment for the victim to come outside, at which

point they asked him for a ride. Appellant then used a weapon to force the victim to drive to a dark street, where he forced the victim to walk behind some bushes and shot him.

Appellant contended that the evidence was insufficient to prove the “asportation” element of the kidnapping statute, OCGA § 16-5-40, as the state supreme court interpreted it in *Garza v. State*, 284 Ga. 696 (2008). In *Garza*, the Court adopted a four-factor test to differentiate movement that satisfies this element of the kidnapping statute from movement that is “merely a ‘criminologically insignificant circumstance’ attendant to some other crime.” The four factors are: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. Only the second *Garza* factor suggests that the movement of the victim was merely incidental to Appellant’s other crimes, but the Court found that the obvious purpose of the movement was to isolate the victim from his friends and other potential witnesses, which significantly increased the risk of harm to the victim and enabled appellant to kill him with no eyewitnesses. Therefore, the Court concluded, the evidence was sufficient for the jury to find that the asportation element of kidnapping was proven.

Note that the General Assembly amended OCGA § 16-5-40, effective July 1, 2009, adopting a somewhat different four-factor test than the one this Court set forth in *Garza*. *Garza* applies to this case because appellant committed the crimes in 1998 and was tried in 2001.

## Merger

*Ledford v. State*, S10P1859 (3/25/2011)

Appellant was convicted of murder and three aggravated batteries. He contended that the trial court erred in failing to merge the aggravated batteries. The evidence showed that appellant knocked the victim from her bicycle as she rode by his location on a recreational trail. When appellant forced his penis into the victim's mouth, she bit his penis and severely wounded it. Enraged by her resistance, appellant stomped on her face and nose, her larynx, and her ribs, which caused the victim to die from asphyxiation.

Appellant contended that the trial court erred in failing to merge the three aggravated batteries either into each other or into the malice murder. In addressing whether the aggravated batteries must be merged into each other, the Court stated that, "Georgia law prohibits multiple convictions if '(o)ne crime is included in the other.' OCGA § 16-1-7 (a) (1)." Under the express terms of that statute, however, "[t]he rule prohibiting more than one conviction if one crime is included in the other does not apply unless 'the same conduct' of the accused establishes the commission of multiple crimes." Here, the first count of aggravated battery required the State to prove that appellant seriously disfigured the victim's head and face, the second required proof that he rendered her larynx useless, and the third required proof that he deprived her of her lung. "Each count thus was predicated on different conduct by [appellant]." Therefore, the doctrine of merger did not apply, and separate convictions for each count of aggravated battery were appropriate unless they merge into the murder conviction.

Next the Court addressed whether any of the aggravated battery counts must be merged into the murder count. Citing *Drinkard v. Walker*, 281 Ga. 211 (2006), the Court found that merger of malice murder and aggravated battery may be required by Georgia's statutory definition of included offenses. *Drinkard* explained that statutory provisions concerning prohibitions against multiple convictions for closely related offenses include: OCGA § 16-1-6 (1) (one crime is included in the other where it is established by "proof of . . . a less culpable mental state"); OCGA § 16-1-6 (2) (one crime is included in the other where it differs only in

that it involves a "less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability"); and OCGA § 16-1-7 (a) (2) (precluding multiple convictions where one crime differs from another "only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct"). OCGA § 16-1-6 (2) "recognizes that a crime such as battery, which prohibits the intentional infliction of bodily injury, is included in a crime such as murder, which prohibits the intentional infliction of more serious bodily injury, i.e., death." Therefore, convictions for both offenses established by the same conduct was prohibited by OCGA § 16-1-6 (2). Accordingly, the convictions and sentences entered on the aggravated battery counts were vacated.

## Jury Charges

*Watson v. State*, S10A1744 (3/25/2011)

Appellant was convicted of felony murder, aggravated assault, and possession of a knife during the commission of a felony. He contended that the trial court erred in its charge to the jury and in failing to recharge the jury. The trial court told the jury, "[y]ou may infer that a person of sound mind and discretion intends to accomplish the natural and probable consequences of that person's intentional acts. And if a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrumentality in the manner in which the weapon or instrumentality is ordinarily used, and thereby causes the death of another human being, you may infer the intent to kill. Whether or not you make any such inference is a matter solely within your discretion as juror."

In *Harris v. State*, 273 Ga. 608 (2001), the Court held that "the giving of [this] 'use of a deadly weapon' charge is error, whether or not it is accompanied by an instruction that the jury has discretion to make the inference." Even though the giving of such a charge is erroneous, however, the Court found the error to be harmless where, as here, the defendant was acquitted of malice murder and, instead, convicted of felony murder, and the evidence was otherwise overwhelming to support the intent element of the underlying felony supporting the felony murder conviction.

## Search & Seizure

*Park v. State*, A10A1799 (3/23/2011)

Appellant was convicted of trafficking in marijuana and misdemeanor possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a suspicious package addressed to appellant's residence was misdirected to appellant's neighbor, who called the police. Officers took custody of the package, identified the substance in the package as marijuana, and arranged a controlled delivery to the address that was listed on the package, which led to the arrest of appellant's roommate. The officers then entered the residence, performed a protective sweep, and secured all occupants. During the protective sweep, the officers observed a marijuana grinder, marijuana stems, and plastic baggies in plain view on a table in the bedroom identified as belonging to appellant. The officers requested and received the roommate's consent to search the common areas of the residence. Appellant arrived at the residence shortly thereafter and was arrested. The officers then requested and received appellant's consent to search his person and his bedroom.

The trial court found that appellant and his roommate freely and voluntarily consented to the search of their residence, and thus, the warrantless search was authorized. Even assuming the illegality of the initial entry and search, a party's subsequent consent to the search, which is freely and voluntarily given, may serve as an independent act of free will that purges the primary taint and authorizes admission of the evidence.

However, appellant contended that the consents were not freely and voluntarily given, but, rather, were given under coercion and duress because several officers were present and appellant and his roommate had been held at gunpoint, handcuffed, and placed on the ground during their detentions. "When the state relies on a consent search, it bears the burden of showing that the consent was voluntarily given, and not the result of duress or coercion, either express or implied." Here, the evidence showed that the officers had their guns holstered by the time the consents were requested and obtained. Even if appellant and his roommate were being detained in handcuffs when they consented to the search,

“voluntary consent may be given while a suspect is handcuffed.” While approximately six to eight officers were present at the scene, “the presence of several police officers does not require a finding of coercion, although it merits close judicial scrutiny.” Therefore, appellant’s consent to the search was an act of free will, and the evidence discovered during the search was admissible.

## **Kidnapping; Merger**

*Kirt v. State, A10A1933 (3/22/2011)*

Appellant was convicted of kidnapping, false imprisonment, criminal attempt to commit child molestation, aggravated assault, simple assault as a lesser included offense of aggravated assault with intent to rape, cruelty to children, possession of a weapon on school property, and five counts of possession of a knife during the commission of a felony. The evidence showed that appellant entered the girls’ bathroom of a middle school. When a twelve-year-old entered the bathroom, appellant ran into her stall with a knife and a roll of duct tape. The girl screamed and a school counselor entered the bathroom, at which point the appellant ran out. School officials chased appellant and called police. When appellant was arrested, he had a bag in his possession which contained, among other things, a roll of duct tape, a digital camera, and a wet t-shirt.

Appellant contended that the evidence was insufficient to support the asportation element of kidnapping. The Court agreed and reversed. Given that the only difference between kidnapping and false imprisonment is asportation, “an expansive construction of asportation effectively eviscerates the distinction between [the two crimes].” Accordingly, the *Garza* Court adopted four factors for determining whether movement constitutes asportation. The Court found that the facts here failed to pass the *Garza* test because: (1) the girl’s movement had extremely short duration - a push of at most three or four feet; (2) the movement occurred during at least three separate offenses —false imprisonment, criminal attempt to commit child molestation, and cruelty to a child; (3) pushing the girl in the stall was not, however, an inherent part of these offenses; and (4) the push did not present a significant danger to the victim independent of the fact that a man with a knife and duct

tape was already in the stall blocking a sixth-grade girl from leaving.

Appellant also argued that the trial court erred in failing to merge Count 10 (possession of a knife during the commission of the felony of criminal attempt to commit child molestation), Count 11 (possession of a knife during the commission of the felony of aggravated assault), and Count 13 (possession of a knife during the commission of the felony of cruelty to children in the first degree) because there was only one victim. “[W]here multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree.” The sentences on Counts 10, 11, and 13 should have merged with Count 8 (possession of a knife during the commission of the felony of kidnapping). Therefore, the convictions and sentences imposed on Counts 10, 11, and 13 were vacated. The sentence on Count 8 was vacated, and the case was remanded for resentencing on Count 8.

## **Ineffective Assistance of Counsel**

*Word v. State, A10A1690 (3/23/2011)*

Appellant was convicted of armed robbery. He contended that defense counsel was ineffective for failing to object to a police officer’s comment on the credibility of the victim. Appellant specifically complained of trial counsel’s failure to object when the prosecutor asked if the police officer believed that the victim was telling the truth and the officer said “yes.” During a hearing on appellant’s motion for new trial, appellant’s original trial counsel testified that he probably should have objected because the question may have bolstered the credibility of the only eyewitness.

To establish ineffective assistance of counsel under *Strickland v. Washington* a defendant must demonstrate (1) that his trial counsel’s performance was deficient, and (2) that counsel’s deficiency so prejudiced his defense that a reasonable probability exists that the result of the trial would have been different but for that deficiency. The Court of Appeals held that a witness, even an expert, can never bolster the credibility of another witness as to whether the witness is telling the truth. Given this well-settled law, trial counsel’s failure to

object to this clearly objectionable testimony when it first occurred constituted deficient performance. Having found trial counsel’s performance deficient, the Court next examined the prejudice prong of the *Strickland* test and found that the outcome of the trial could have been different but for this deficiency. Thus, the Court found, the evidence was not overwhelming; the victim was the only witness who identified appellant as the robber; no video of the incident was available; and no other evidence connecting appellant with the crime was introduced. Further, the victim’s credibility was very much at issue. Therefore, reversal was required.

## **Aggravated Assault; Simple Battery**

*In the Interest of D.M., A10A2353 (3/21/2011)*

Appellant was adjudicated delinquent for acts which, if committed by an adult, would have constituted aggravated assault. He contended that the evidence was insufficient to support his adjudication of aggravated assault. The evidence showed that appellant approached the victim in the hallway of their school, stuck his hands in the victim’s pockets, and said, “What’s in them pockets?” The victim was “scared” and did not resist or fight back, but he did tell appellant “to get his hands out of my pockets.” During the trial, the victim testified that, other than putting his hands into his pockets, appellant didn’t touch the victim.

Appellant argued that the evidence was insufficient to support his adjudication of delinquency for aggravated assault because the State failed to prove that he placed the victim in reasonable apprehension of immediately receiving a violent injury. “Central to the offense of aggravated assault is that an assault as defined in OCGA § 16-5-20 be committed on the victim.” Under OCGA § 16-5-20, “[a] person commits the offense of simple assault when he or she either: (1) [a]ttempts to commit a violent injury to the person of another; or (2) [c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury.” An assault under OCGA § 16-5-20 (a) (2) is complete “if the assailant has made such a demonstration of violence, coupled with an apparent ability to inflict injury so as to cause the person against whom it is directed reasonably to fear the injury unless he retreats to secure his safety.”

Here, the evidence was insufficient to show that appellant assaulted the victim by “attempt[ing] to commit a violent injury to the person of another.” There was no evidence that appellant displayed a weapon or other object that might have been used to inflict a violent injury, demonstrated violence through physical acts or gestures, or demonstrated violence through verbal threats such that the victim would reasonably fear injury unless he retreated to secure his safety. Although the State contended that the victim’s testimony that he was scared during the incident was sufficient to show that he had been placed in reasonable apprehension of receiving a violent injury, the Court held that “[r]easonable apprehension of injury is not the same as simple fear.” Here, the victim’s fear was based on a concern that appellant would take his personal property, not an apprehension of injury.

Absent any evidence that appellant’s act of putting his hands in the victim’s pockets was a forcible act or accompanied by an angry or threatening demeanor such as to convey the potential for imminent harm, the State failed to show a demonstration of violence, coupled with an apparent present ability to inflict injury upon the victim, necessary to complete a simple assault under OCGA § 16-5-20 (a) (2). Therefore, the Court found, the evidence was insufficient to prove aggravated assault. However, the evidence was sufficient to find appellant delinquent of the lesser included offense of simple battery. “A person commits the offense of simple battery when he . . . [i]ntentionally makes physical contact of an insulting or provoking nature with the person of another.” OCGA § 16-5-23 (a) (1). Here, appellant’s act of placing his hands in the victim’s pockets despite the victim’s protests to remove his hands was a prohibited act under OCGA § 16-5-23 (a) (1).

### **Extraordinary Motion for New Trial; Expungement**

*Hight v. State, A10A1782 (3/22/2011)*

Appellant appealed from the order denying, among other things, his extraordinary motion for new trial. Pursuant to OCGA § 5-5-41(a), “[w]hen a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court.”

Appellant, in essence, asserted in his extraordinary motion for new trial that he was forced to proceed at trial without the assistance of counsel, and he was not apprised of the “disadvantages and dangers of self-representation.” The Court found, however, that the record belied this contention as it reflected that after appellant’s private counsel withdrew from the case, the trial court appointed appellant a public defender, but appellant refused representation. Clearly appellant’s failure to file a motion for new trial was a circumstance created entirely by his refusal to accept appointed counsel. Thus, the Court ruled that appellant had not demonstrated a sufficiently good reason to grant an extraordinary motion for new trial, and the trial court did not err in denying such.

Appellant also argued that the trial court erred in denying his “motion for an order expunging blank and untried indictments from defendant’s files.” However, the procedure for expungement of criminal records is set forth in OCGA § 35-3-37 (c), and there was no indication in the record that appellant complied with its requirements.

### **Character; Ineffective Assistance of Counsel**

*Lee v. State, A10A1965 (3/24/2011)*

Appellant was convicted of aggravated assault, armed robbery, and concealing the death of another person, in connection with a shooting death. The record showed that over appellant’s objection, the trial court permitted a witness to testify that she had seen appellant pullout a gun while in a group of people at a shopping mall the day before the crime. No forensic evidence was presented that the gun seen by the witness was the gun with which the victim was shot, though it was a similar size. Appellant contended that this improperly placed his character into evidence.

Generally, evidence of a criminal defendant’s bad character is not admissible unless the defendant first puts his character in issue. The State argued that the witness’s testimony was not evidence of appellant’s bad character because gun ownership and the custom of carrying a gun do not, by themselves, impute bad character. The jury, however, was presented with more evidence than simply that appellant owned or carried a gun; the witness testified that appellant —whose youth the jury could

observe —had pulled out the gun while in a group of people at a shopping mall. The Court ruled that this testimony imputed bad character to appellant. Moreover, the Court found that the record did not support the trial court’s contention that appellant had opened the door to testimony about his character; therefore, the trial court erred in allowing this testimony. However, the Court found that ultimately this error was harmless because the evidence of appellant’s guilt was overwhelming, and there was no reasonable probability that the admission of the bad character testimony contributed to the verdict.

Appellant also argued that the trial court erred in denying him the opportunity to present evidence in support of his claim of ineffective assistance of counsel that he raised in an amendment to his motion for new trial. The trial court dismissed the claim as exceeding the scope of an earlier restriction that the court had placed upon appellant, even though appellant’s counsel at the time had a conflict of interest. When appellant procured new conflict-free counsel, he attempted again to present evidence of ineffective assistance of counsel, but again the court upheld the prior restriction.

The Court ruled that a criminal defendant has a constitutional right to representation by conflict-free counsel through which to raise claims of ineffective assistance of trial counsel in a motion for new trial. Moreover, a party may amend a motion for new trial at any time before the ruling thereon, which appellant did. He was entitled to a hearing on the merits of those claims. The Court further ruled that under these circumstances, the trial court’s failure to consider the claims was error. Accordingly, the Court vacated that part of the order denying the motion for new trial that concerned the ineffective assistance of counsel claims, and remanded the case for an evidentiary hearing on those claims, or for other proceedings not inconsistent with their opinion.

### **Rape Shield Statute**

*Robinson v. State, A10A1968 (3/18/2011)*

Appellant was convicted of two counts each of child molestation and sexual battery. He argued that the trial court erred by instructing the jury to disregard evidence that the victim had sexual relations with her brother based on the rape shield statute. The record showed that, in addition to the evidence

of appellant molesting the victim, there was evidence that the victim was having sexual intercourse with her 12-year-old brother.

The Court agreed with appellant that the trial court's instruction to the jury violated the rape shield statute. OCGA § 24-2-3 states that "[i]n any prosecution for rape, evidence relating to the past sexual behavior of the complaining witness shall not be admissible..." The State argued that the evidence concerning the victim should not be considered according to the dicta in *Purvis v. State*, 301 Ga. App. 648 (2009), which stated that OCGA § 24-2-3 (b) is applicable in child molestation cases. Here the Court rejected that statement in the *Purvis* dicta, and explained that it was contradictory to the express language of the statute. The Court instead applied the reasoning and principles set forth in *Abdulkadir v. State*, 279 Ga. 122 (2005), which concluded that "[w]hile there may be compelling policy reasons to apply the rape shield statute in prosecutions for crimes other than rape, the statute's terms state only that it applies to prosecutions for rape." Accordingly, the Court held that child molestation is not included as a crime covered by the rape shield statute and therefore the evidence concerning the victim in this case should not have been disregarded. The Court reversed appellant's conviction.

### **Character Evidence**

*Coleman v. State*, A10A2254, A10A2255 (3/24/2011)

Appellants' were convicted of cruelty to children for depriving their infant son of nutrition. Appellants contended that the testimony of a DFACS employee improperly put their character at issue and gave a misleading impression to the jury. The record showed that the prosecutor asked the DFACS employee if he knew where the neglected child was at that time and the employee replied that he believed the child had been in foster care.

The Court agreed with appellants that the statement made by the witness implied to the jury that some court had removed the infant from their home because they committed the acts charged in the indictment. Since generally a court order would remove a child from their parents' home based upon a finding by the court that continuation in the home would be contrary to the welfare of the child, the statement made by the witness could have given the jury the impression either that appel-

lants were guilty of the crime charged, or that a court determined that living in appellants' home was contrary to the child's welfare for some other reason. The Court therefore held that the statement concerning foster care was prejudicial and that appellants' were entitled to a new trial.

The record also showed that the court admitted evidence that showed appellants to be marijuana users. Appellants contended that the evidence submitted regarding their marijuana use was irrelevant to the charges and was therefore improper evidence concerning their character. The Court agreed with appellants on that issue as well and found that the marijuana evidence was inadmissible. The prosecution argued that the evidence was admissible because appellants commented on their poverty during the investigation, but then spent money to purchase marijuana. The Court responded that since appellants never claimed or argued that poverty disabled them from feeding their child or had anything to do with their child's health, evidence that related to their poverty was unrelated to the cruelty to children charge and was inadmissible. Due to the prejudicial witness statement and inadmissible character evidence, the Court held that the trial court erred in several ways and reversed appellants' conviction.

### **Aggravated Assault; Cross-Examination**

*Chambers v. State*, A11A0034 (3/24/2011)

Appellant was convicted of aggravated assault. The evidence showed that appellant beat the victim (who was his girlfriend at the time), choked her with his hands around her throat, and threatened to kill her. Appellant's sole defense at trial was justification.

During trial, the court limited the cross-examination of the victim on behalf of appellant and did not allow questioning about prior details of their relationship. Appellant argued that the details of the relationship were relevant because the victim mentioned in her testimony that there was tension in their relationship. The Court held that while appellant did have the right to a thorough and sifting cross-examination of witnesses against him, the trial court is vested with discretion to limit the scope of cross-examination to matters that are material to the issues. It found that appellant failed to explain how the details of

the relationship were at all relevant to appellant's defense of justification. The defense of justification is an affirmative defense whereby the defendant admits acting with the intent to inflict an injury, but claims that he did so while in reasonable fear of suffering immediate serious harm to himself or another. Further cross-examination about the relationship would not have shed any light on whether the victim was the aggressor in the assault, and so the Court agreed with the trial court's decision that the evidence was irrelevant.

Appellant also contended that the jury should have been given the instruction to consider a lesser charge of reckless conduct instead of aggravated assault. Appellant argued that the act of putting his hands around the victim's throat could have also been a defensive action and not an aggressive one, and his wrong was in allowing the victim to perceive that the action was violent aggression. The Court held that there was absolutely no evidentiary support for a finding that appellant's conduct in putting his hands around the victim's throat was the result of anything less than deliberate intention, and his request to instruct the jury on the offense of reckless conduct was based on mere speculation and conjecture.

### **Search & Seizure; Sentencing**

*Carter v. State*, A10A2232 (3/24/2011)

The trial court denied appellant's motion to suppress drug evidence, and the Court affirmed the denial. The record showed that appellant was arrested after police discovered his methamphetamine lab during the service of an arrest warrant on appellant's brother. A police officer went to the back of appellant's brother's residence, to prevent the brother from possibly escaping arrest, and happened to see an open door to the methamphetamine lab. Appellant contended that the police were planning to search the residence and just used the arrest warrant as a pretext, and that therefore the search was unlawful and evidence produced by it should have been suppressed.

The Court relied on the trial court's factual finding that the police had not entered the residence with the intention of searching it for a drug lab. An arrest warrant implicitly carries with it the limited authority to enter a dwelling in which the suspect lives where there is reason to believe the suspect is within. The Court

agreed with the trial court that the police had a right to be in the back of the house because the officers were believed that the suspect was living there and could possibly escape through the back of the house. Appellant relied on cases in which the police had no warrant of any kind, and the Court distinguished those cases from appellant's because the police in this case did have a proper arrest warrant which gave them the right to be on the property.

While the denial of the motion to suppress was affirmed, the Court vacated the portion of the trial court's judgment that convicted appellant for one count of possession of methamphetamine. Under *Snoke v. State*, 237 Ga. App. 686, 688-689 (1999), the Court held that since the same evidence had been used for the possession of methamphetamine count and the manufacture of methamphetamine count, the sentence for the possession count needed to be corrected.

### **Sixth Amendment Confrontation Right**

*Philpot v. State*, A10A2245 (3/22/2011)

Appellant was convicted of burglary and other crimes. At trial, the State introduced a prior burglary as a similar transaction. Appellant argued that the trial court erred by admitting out-of-court statements made by the victim of his prior burglary to the officer who investigated that crime. Specifically, appellant argued under *Crawford v. Washington* that allowing the investigating officer to testify as to what the prior victim told him about the past burglary violated his right of confrontation under the Sixth Amendment to the United States Constitution.

The evidence showed that the officer who investigated the prior burglary responded within a few minutes to a report that a burglary had occurred only moments ago at the home of the prior victim. Upon the officer's arrival at the prior victim's home, she told him that she heard a noise in her kitchen, and that when she went to investigate it, she saw a young man (later identified as appellant) climbing into her home through the kitchen window while holding a knife. She further told the officer that once she began screaming, the young man fled. The Court concluded that the prior victim's statements to the officer were primarily offered to enable police assistance to meet an ongoing emergency, and were therefore nontestimonial

in nature. Accordingly, the Court ruled that the prior victim's statements to the officer were admissible as part of the *res gestae* of the crime and did not fall under the protections of the Confrontation Clause.

### **Constitutional Materiality of Evidence; Due Process**

*State v. McNeil*, A10A1674 (3/23/2011)

McNeil was indicted on one count each of possessing cocaine, possessing less than an ounce of marijuana, and possessing an open container of alcoholic beverage in a motor vehicle. The evidence showed that she was a passenger of a vehicle that was stopped for a traffic violation. The driver was arrested for suspended license. Appellant was a little too intoxicated to drive, so one of the officers volunteered to drive her home. As a safety precaution, the officer asked to look in her purse. After appellant agreed, the officer saw the drugs in the purse and she was arrested.

Appellant claimed that, upon her arrest, the driver of the vehicle "chivalrously" yelled from the patrol car that the drugs in appellant's purse actually belonged to him. Appellant's counsel made arrangements with the DA to view the master DVD footage of the traffic stop at the DA's office to determine if appellant's claim was true. Prior to the meeting, an officer previewed the DVD. He later testified that the DVD footage began with the traffic stop and ended before appellant's arrest. As a result, the recording did not include her companion's alleged statements. When appellant's counsel arrived at the DA's Office for the viewing of the DVD, the DVD player would not work. After repeated attempts to play the DVD, the player reformatted the DVD, erasing its contents. The State could not explain how or why the machine had done this. Appellant's counsel was present during the entire incident and filed an amended motion to dismiss the following day. At the hearing on the motion, the trial court stated that while it did not believe the State had intentionally destroyed the master DVD in bad faith, it could have contained exculpatory evidence such as appellant claimed. Therefore, the trial court granted appellant's motion to dismiss the State's charges against her.

The State argued that the trial court erred in dismissing the charges. The Court agreed, ruling that in order to rise to the level of con-

stitutional materiality, the exculpatory value of the evidence must be apparent before its loss or destruction, and the evidence must be "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." The Court held that in this case, the master DVD did not rise to the level of constitutional materiality because it was at best potentially exculpatory. The Court reasoned that because the master DVD did not contain the statements alleged by appellant, it had no apparent exculpatory value. The Court also held that appellant could obtain comparable evidence by cross-examining the officers regarding her companion's alleged statements regarding ownership of the drugs in question, and she could also call her companion himself as a witness at trial. Finally, the Court held that because the DVD was only potentially useful, its destruction did not—in the absence of a showing of bad faith on the part of the State—amount to a due-process violation. Accordingly, the Court reversed the trial court's dismissal of the charges against appellant.