

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 13, 2011

Legal Services Staff Attorneys

Stan Gunter
Deputy Executive Director

Chuck Olson
General Counsel

Joe Burford
Trial Services 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:

- Cocaine Trafficking, Jury Charges
- Prosecutorial Misconduct
- Search & Seizure
- Guilty Plea
- Flight; Brady

Cocaine Trafficking, Jury Charges

Harrison v. State, A11A0548 (4/29/2011)

Appellant was convicted of trafficking in cocaine in violation of OCGA § 16-13-31 (a) (1). Appellant asserted that the trial court erred when it refused to charge the jury that it could convict appellant of trafficking in cocaine only if the State proved beyond a reasonable doubt that appellant knew that the cocaine in his possession had a weight of 28 grams or more.

According to OCGA § 16-13-31 (a) (1), a person commits the offense of trafficking in cocaine when he is “knowingly in possession of 28 grams or more of cocaine or of any mixture with a purity of 10 percent or more of cocaine.” The Court noted that it was not clear from this statute if the knowledge requirement pertained only to possession of the substance (that the defendant knew he had the substance, whatever it might be, in his possession), to the nature of the substance (that the defendant knew it was cocaine or a mixture with the requisite purity), to the weight of the substance (that the defendant knew it was 28 grams or more), or to all three.

Previously, in *Barr v. State*, 302 Ga. App. 60, 61-62 (2010), and *Cleveland v. State*, 218

Ga. App. 661, 663 (1995), the Court had held that the statute required proof that the defendant knew that he possessed a substance and knew that the substance contained some amount of cocaine, but not the purity or weight of the substance. Appellant argued plausibly that the plain meaning of the statute required proof of knowledge as to all of the elements of trafficking, including weight, noting that, as the U.S. Supreme Court explained in *Flores-Figueroa v. United States*, __U. S.__ (129 SC 1886) (2009), “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.”

However, the jury charge in this case did not say that the State was *not* required to prove knowledge of weight. Instead, the charge stated that “[k]nowledge on the part of the defendant that the crime of trafficking cocaine was being committed . . . must be proven by the State beyond a reasonable doubt.” The Court reasoned that because the offense of trafficking requires a substance having a weight of 28 grams or more, a defendant could not possibly know that the offense of trafficking was being committed without knowing at the same time whether the substance met the threshold weight. In that way, the jury charge suggested that the State was required to prove knowledge of the weight. Therefore, the Court ruled, although the trial court may not have used the precise words that appellant preferred, the charge accurately and fully apprised the jury of the applicable law, and the failure of the trial court to give the requested instruction was not error. Moreover, the Court found that even if it was error, the evidence against appellant was so overwhelming that the refusal of the instruction most likely did not contribute to the verdict.

Prosecutorial Misconduct

Willis v. State, A11A0540 (4/26/2011)

Appellant was convicted of three counts of armed robbery. Appellant contended, inter alia, that the trial court erred in denying his motion for a mistrial based on prosecutorial misconduct. During cross-examination, the prosecutor attempted to challenge appellant's alibi by showing that he could not identify the highways and roads he traversed in the course of an errand he claimed to be running at the time of one of the robberies. The prosecutor asked appellant if, after he passed a mall, he took the highway entrance ramp on the right. When appellant replied, "yes," the prosecutor said, "Okay. That's [I-]285. Now we're getting somewhere." Appellant's counsel objected that the prosecutor was testifying, and the prosecutor withdrew the question and rephrased it. The prosecutor asked appellant to identify the restaurants that are near a particular entrance to the mall. When he responded that he thought there was a Checkers, a Taco Bell, and a McDonald's, the prosecutor asked, "if I were to tell you, Mr. Willis, that I lived out there, and the only thing there is a Quick Trip and a Church's, would that surprise you?" Appellant's counsel again objected to the prosecutor's testifying, and the trial court overruled the objection but instructed the prosecutor to "move on." The prosecutor again contradicted appellant's responses on a similar question, asking, "Would it surprise you to learn there's only a Home Depot and a Mrs. Winner's in that direction?" The trial court spontaneously disallowed the question. Appellant's counsel did not move for a mistrial or ask for curative instructions, nor did she object during the State's closing argument, when the prosecutor attacked appellant's credibility by referring to his inability to answer questions about his route.

The Court held that the prosecutor certainly should not have injected facts that were not in evidence, but also that appellant had no legal authority for his claim that the prosecutor's question rose to the level of prosecutorial misconduct. Appellant identified only one allegedly improper statement by the prosecutor where the trial court overruled his objection or refused to take requested corrective action. As to all of the other questions or statements appellant identified as constituting reversible error, the record showed that appellant either

failed to object or had an objection sustained. Therefore, the Court held that there was no ruling by the trial court that was adverse to appellant for the Court to review.

Search & Seizure

Pass v. State, A11A0536 (4/27/2011)

Appellant was convicted of theft by receiving, possession of marijuana with intent to distribute, and possession of cocaine. He first argued that the trial court erred in denying his motion to suppress because the magistrate lacked probable cause to issue the search warrant. Specifically, appellant argued that the affidavit contained insufficient facts either demonstrating the informant's reliability or corroborating the information provided by the informant and thus failed to establish probable cause to issue the warrant. Appellant maintained that the informant was not reliable because he had not previously supplied information to law enforcement.

However, the Court held that "the absence of significant information regarding reliability is not necessarily fatal to an affidavit" submitted in support of a search warrant. In this regard, "a controlled buy strongly corroborates the reliability of the informant." Here, the affidavit revealed that the informant participated in a controlled drug buy. While the absence of certain facts may render a case doubtful or marginal, the Supreme Court has cautioned that "[e]ven doubtful cases should be resolved in favor of upholding a magistrate's determination that a warrant is proper." The Court ruled that because the magistrate had a substantial basis for concluding that there was a fair probability contraband would be found at the residence specified in the warrant, the trial court did not err.

Appellant also argued that the officer's failure to leave at the premises a copy of the affidavit establishing probable cause rendered the warrant invalid. The Court disagreed. The Fourth Amendment to the U.S. Constitution states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Court held that the warrant in the case at bar satisfied the particularity requirement on its face. Specifically, the warrant contained the address of the place to be searched, a description of the home, and the

items to be seized. Therefore, the warrant did not require an affidavit.

Hardaway v. State, A11A0432 (4/27/2011)

Appellant was convicted of marijuana possession with intent to distribute and possession of drug related objects. He argued for suppression of the evidence obtained during a traffic stop initiated by a police officer, and contended that while the stop itself may have been legal, his detention during the stop was unreasonably prolonged. The police officer who stopped appellant testified that he witnessed appellant attempting to hide something in the vehicle, and that later when the officer called for a drug dog to do a free air sniff a few minutes later, the dog alerted to the vehicle and the police then found the drug evidence inside.

Appellant argued that the delay from the time it would have taken the officer to write the ticket to the time the drug dog alerted constituted an unreasonably prolonged detention. The Court found that the trial court was correct in holding that the stop was legal and that a brief detention was authorized because it was reasonable for the officer to be suspicious in light of Hardaway's furtive movement at the initial point of the stop. The Court cited *Langston v. State*, 302 Ga. App. 541 (2010), which held that the "use of a drug sniffing dog to conduct a free air search around the exterior of a vehicle during the course of a lawful traffic stop does not implicate the Fourth Amendment under the United States Constitution...so long as the stop has not been unreasonably prolonged for the purpose of conducting the search." The Court found that the stop was brief and that any prolongment was reasonable.

Ware v. State, A11A0052 (4/27/2011)

Appellant was convicted of possession with intent to distribute marijuana and sentenced to 10 years, with one year to be served in confinement and the remainder on probation. Appellant challenged the denial of his motion to suppress, arguing that the detention and subsequent search of his person were unlawful. The Court disagreed. The evidence showed that the contact between the officers and appellant was a first-tier consensual encounter. Merely approaching an individual and requesting that

he give his consent for a search does not constitute a seizure and need not be supported by an articulable suspicion. Even when officers have no basis for suspecting a particular individual, they may request consent to search, as long as they do not convey a message that compliance with their requests is required. Here, there was no evidence that the encounter involved coercion or detention. Once appellant indicated that he did not want to remove his hands from his pockets, the deputy asked appellant for permission to do a pat-down, and appellant gave him consent. The Court emphasized that unlike a full search, a pat-down is conducted solely for the purpose of ensuring the officer's safety and that of others nearby, not to obtain evidence for use at a trial. As such, it is considered a minimal intrusion reasonably designed to discover guns, knives, clubs, or other weapons that could prove dangerous to a police officer. Accordingly, the officer may pat down the suspect's outer clothing, but he may not intrude beneath the surface of the clothing unless: (1) he comes upon something that feels like a weapon, or (2) he feels an object whose contour or mass makes its identity as contraband immediately apparent, i.e., the 'plain feel' doctrine."

The Court held that, in this case, upon feeling the soft, spongy item in appellant's pocket, the officer was not automatically authorized to search his pocket. But the officer testified that he asked for consent to search appellant's pocket, and that appellant gave his consent. A valid consent eliminates the need for either probable cause or a search warrant. Thus, the record showed that appellant consented to the search. Accordingly, the Court ruled that the officer was authorized to seize the marijuana from appellant's pocket.

Guilty Plea

Trapp v. State, A11A0451 (4/27/2011)

Appellant was convicted of theft by shoplifting and the trial court denied his motion to withdraw his non-negotiated guilty plea. The record showed that after he admitted to the shoplifting in court in the middle of his trial, appellant later argued that he was "confused" and not in his "right mind" when he made the guilty plea. He testified that he did not remember making the plea and didn't know why he would have done such a thing. The trial court denied the motion as being

"ridiculous." The Court found that since the trial court's evidence showed that appellant was motivated to plead guilty after he saw the surveillance video of himself committing the crime, the trial court did not err in finding that appellant's argument had no merit.

Flight; Brady

Durham v. State, A11A0163 (4/27/2011)

Appellant was convicted of two counts of selling cocaine. He argued that he was denied a fair trial when the jury was allowed to hear "prejudicial evidence of an unrelated arrest occurring months after the charged offenses." The record showed that appellant's trial counsel made an oral motion in limine to exclude law enforcement officers from testifying about "other offenses that they may have suspected him of or arrested him for." Following the State's argument that evidence of flight would be admissible, appellant's trial counsel acknowledged that the fact that appellant had a bench warrant or failed to appear for a calendar call on the sale of cocaine charges would be admissible as flight. A certified copy of his previous conviction was admitted at trial. The Court ruled that "Evidence as to whether a defendant tried to evade capture is admissible as evidence of flight." The Court emphasized that this holds true even if the flight is connected to a separate crime. Therefore, the Court found that there was no error in the trial court's denial of appellant's motion.

Appellant also argued that he was "[d]enied a fundamentally fair trial when the state withheld crucial impeachment evidence regarding the informant, its primary witness against appellant at trial." Prior to trial, the State made available to defense counsel all evidence then within the possession of the prosecutor. During the testimony of the deputy, however, appellant's trial counsel became aware of a file maintained by the investigation unit on each confidential informant which had not been turned over to the State or defense. According to the deputy, each file contained the forms signed by each informant, payment sheets, and a personal history sheet.

Trial counsel then moved for a mistrial. Following this motion, the trial court announced it would conduct an in camera inspection of the file for anything arguably exculpatory. Following this inspection, the trial court made available to appellant's trial counsel the

informant's criminal history, his deactivation form, and the fact that he had been used as an informant in 15 cases. After receiving this information, trial counsel renewed his motion for mistrial based on the ground that the information was provided too late.

Appellant argued that the State withheld the informant's criminal history and file during trial. However, the Court emphasized that the criminal history included in the file inspected by the trial court was turned over to trial counsel and used to cross examine the agent and the informant about the informant's criminal history and drug addiction. The Court held that to prevail on a *Brady* claim, a defendant must show that the State possessed evidence favorable to the defendant; defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; the prosecution suppressed the favorable evidence; and had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different. The Court held that appellant failed to meet this burden.