

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 20, 2011

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## THIS WEEK:

- **Robbery by Sudden Snatching; Jury Charges**
- **Speedy Trial**
- **Right of Confrontation**
- **Jurisdiction; Juveniles**
- **Search & Seizure**
- **Equal Access Doctrine; Search & Seizure**
- **Double Jeopardy**
- **Child Molestation, Venue**
- **Juvenile Adjudications; Convictions**
- **Miranda; Statements**
- **DUI; Similar Transaction Evidence**

*Hearsay; Crawford*

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### **Robbery by Sudden Snatching; Jury Charges**

*Brown v. State, A11A0103 (5/6/2011)*

Appellant was convicted of robbery by sudden snatching. He argued that the trial court erred in failing to give a requested jury instruction on the lesser included offense of theft by taking. Appellant claimed that the victim's testimony was in conflict as to whether the victim actually saw appellant take his wallet from the shopping cart. Appellant argued, therefore, that the victim was not aware of the theft until it was complete, and as a result, he was at most guilty of the lesser included offense of theft by taking. The Court explained that "[r]obbery by sudden snatching differs from theft by taking because the robbery offense requires proof of two additional elements: the thief must take the property from the victim's

immediate presence, and the victim must be conscious of the theft at the time it is committed, in other words, before the taking is complete." The Court held that, in this case, even if the victim did not actually see appellant pick up the wallet, the fact that he chased after appellant showed that the victim was conscious of the crime as it was being committed. Therefore, the evidence did not support a charge on the lesser offense of theft by taking.

Appellant also asserted error in the trial court's denial of his request to give the following charge on the definition of a forcible felony: "A forcible felony means any felony which involves the use or threat of physical force or violence against any person." The trial court, however, gave the pattern charge on robbery by sudden snatching. The Court held that because the pattern charge covered the principle of law in the requested charge, there was no error. "A trial court is not required to instruct the jury in the exact language of a requested charge, and when the principle of law is covered in another charge, that is sufficient." Because the jury convicted appellant based on a proper instruction as to how the crime of robbery by sudden snatching may be committed, the Court found no reversible error in the trial court's failure to give the charge requested by him.

### **Speedy Trial**

*Moore v. State, A11A0138 (5/6/2011)*

Appellant appealed from the trial court's order denying his plea in bar and motion to dismiss based upon an alleged violation of his constitutional right to a speedy trial. Appellant was arrested in 2004 and indicted in 2007 on charges which included statutory rape, aggravated child molestation, and child

molestation. He filed a plea in bar, moving to dismiss his indictment based on speedy trial grounds, and a special demurrer (asserting that the indictment was defective). The trial court denied appellant's plea in bar as well as his special demurrer. He appealed and the Court affirmed the denial of his plea in bar and reversed and remanded the case for a hearing on the special demurrer. On remand, the trial court granted the special demurrer.

The State subsequently re-indicted appellant on charges of statutory rape, child molestation, and false imprisonment. Appellant then filed a demand for speedy trial, plea in bar and motion to dismiss the second indictment, contending that his constitutional right to a speedy trial had been violated; he claimed the relevant time period began in 2004 and continued through the filing of the second plea in bar and motion to dismiss. In February 2010, after conducting a hearing, the trial court summarily denied his plea in bar in an order that did not include any findings of fact or conclusions of law. Because the trial court had failed to enter findings of fact and conclusions of law consistent with the *Barker v. Wingo* analysis of speedy trial claims, the Court vacated the order and remanded the case for the entry of a proper order.

### **Right of Confrontation**

*Riley v. State, A11A0041 (5/6/2011)*

Appellant was convicted of two counts of armed robbery and two counts of possession of a firearm during the commission of a felony. He argued that the trial court prevented him from exploring any pending charges against a witness, who was the victim of one of the armed robberies, for the purpose of exposing any potential for the witness's bias. During cross-examination of the witness, defense counsel asked the witness if he had had any discussion with the prosecutor. The State objected, and the trial court sent the jury out and asked defense counsel where she was going with the line of questioning. Defense counsel explained that she wanted to explore whether the witness had made any deals with the State. The trial court ruled that defense counsel could ask the witness about his request to the State for a bus token, and when the jury returned, counsel followed through with her question.

The Court held that the Sixth Amendment right to confront witnesses secures the

opportunity for cross-examination, and that exploring a witness's bias is a proper function of that right. However, the Court also noted that the Confrontation Clause does not prohibit all limits on a defendant's cross-examination into a witness's bias. Instead, trial judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, or interrogation that is only marginally relevant.

In this case, the Court noted, defense counsel sought to cross-examine the witness concerning possible bias as a result of any deals the witness had with the State. But the record revealed that no deal was made and there was no evidence presented of any pending charges against the witness. Moreover, defense counsel was allowed to ask about the bus token. Therefore, the Court held that appellant could not demonstrate any improper limitation of his rights under the Confrontation Clause.

### **Jurisdiction; Juveniles**

*Hill v. State, A11A0444 (5/6/2011)*

In this case of first impression, the juvenile appellant appealed from his sentence and conviction in the superior court, arguing that the court lacked jurisdiction and should have granted his motion to transfer to juvenile court. The Court agreed. The record showed that on July 16, 2009, appellant was detained on a juvenile complaint and committed to a detention center. A petition of delinquency was filed in the juvenile court on July 20, 2009, alleging that appellant committed acts that would, in the case of an adult, constitute two counts of aggravated assault, one count of possession of a firearm during the commission of a felony, and one count of possession of a firearm by an underage person. On November 25, 2009, the juvenile court entered an order nunc pro tunc November 13, 2009, transferring appellant's case to the superior court, finding after a review of his extensive history of delinquency that the juvenile justice system had failed to correct his behavior and that he was becoming increasingly more violent.

Appellant was not indicted in the superior court until April 20, 2010. He immediately moved to return his case to juvenile court on the basis of OCGA § 17-7-50.1, arguing that he had not been indicted within 180 days of detention as provided by the statute. The

trial court denied appellant's motion without comment and denied appellant's request for a certificate of immediate review. Thereafter, appellant pled guilty to one count of aggravated assault.

The Court held that the plain language of the statute provided that a child within superior court jurisdiction "shall within 180 days of the *date of detention* be entitled to have the charge against him or her presented to the grand jury." The statute further provided that the case "shall be transferred to the juvenile court" if an indictment is not obtained within the specified time. Here, appellant was not indicted until approximately 300 days after his detention began. Therefore, the Court found, under the plain language of the statute, it was mandatory that the case be transferred back to the juvenile court.

Moreover, because the case should have been transferred, the superior court also erred in accepting appellant's subsequent guilty plea, made only after his request for a certificate of immediate review was denied. The Court also held that due to his claim under OCGA § 17-7-50.1, appellant's guilty plea did not waive his jurisdictional claim because the superior court lacked jurisdiction to enter its judgment. Accordingly, appellant's conviction was vacated.

### **Search & Seizure**

*State v. Rouse, A11A0469 (5/6/2011)*

The State appeals from the trial court's grant of Rouse's motion to suppress marijuana found in his vehicle following a traffic stop. The trial court found the following facts: Two officers were parked in the median on I-20 when one of the officers observed Rouse traveling in the right lane following a tractor trailer too closely and changing lanes without signaling. The officers stopped Rouse and requested his driver's license and insurance documents. One of the officers ordered Rouse to step out of the vehicle and Rouse complied. The officer then engaged Rouse in conversation by asking Rouse where he was coming from. The officer asked Rouse if he had any illegal drugs in the vehicle and Rouse stated that he did not. When the officer asked for consent to search the vehicle, Rouse refused. Nevertheless, one of the officers testified, he smelled a faint odor of marijuana coming from the car, although the police incident report

did not mention that fact. Subsequently, the officers conducted a free air sniff with a K-9. The dog alerted the officers and they searched the vehicle, where they found a package of marijuana inside the trunk.

The trial court granted the motion, finding that the officers had exceeded the scope of permissible investigation when they detained Rouse to conduct the free air sniff because they had no reasonable suspicion of any criminal activity other than Rouse's traffic violations. However, the Court held, the law permitted the officers to use the drug sniffing dog in the absence of any suspicion of illegal activity as long as it did not unreasonably prolong an otherwise valid stop. 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. The question therefore, was whether the prolongation of the stop was reasonable or unreasonable. While the Court accepted the trial court's findings of fact, it held that the trial court had misapplied the law. Because reasonable suspicion was not, in fact, required for a free air sniff, the Court vacated the trial court's judgment and remanded the case.

### **Equal Access Doctrine; Search & Seizure**

*Arroyo v. State, A11A0493 (5/5/2011)*

Appellant was convicted of trafficking in methamphetamine, illegal window tint, and driving without a license. He argued that under the equal access doctrine, the evidence was insufficient to prove that he possessed the methamphetamine found in the car's trunk. The car was co-owned and used by appellant and others. However, the Court found that the doctrine was not applicable in this case because the evidence of appellant's possession of the methamphetamine went beyond his mere possession of the car, including his statement that he was transporting the methamphetamine. Thus, the issue of whether the drugs belonged to appellant or one of the other occupants was for the jury's determination, and the evidence was sufficient for a rational trier of fact to find appellant guilty beyond a reasonable doubt.

Appellant also argued that because the evidence was undisputed that the document he gave the deputy was a valid, international driver's license, he could not be convicted of driving without a license. However, the

Court found that there was no evidence in the record that the document was an international driver's license. The deputy had characterized the document as an ID. When defense counsel specifically asked the deputy whether appellant had given him an international driver's license, the deputy responded, "Not that I recall." Moreover, the deputy was unable to verify that appellant had a driver's license. The deputy's testimony was sufficient to support the jury's conclusion that appellant did not have a valid driver's license.

Appellant further argued that the trial court erred in denying his motion to suppress because the deputy impermissibly extended the duration of the traffic stop to conduct a search of the vehicle. However, the deputy's testimony supported the conclusion that he asked for consent to search the vehicle while he was issuing the traffic citations. Therefore, the Court found, that the deputy's questioning had not extended the duration of appellant's detention.

### **Double Jeopardy**

*Dean v. State, A11A0525 (5/2/2011)*

Appellant was convicted of several charges that arose from her erratic driving in May of 2009. The record showed that appellant collided with a car on the highway, and then proceeded to drive through the city limits of Ringgold, where she collided with another vehicle. Both a Georgia State Patrol Trooper and a Ringgold police officer responded to the incidents and so appellant received citations from both officers. While the charges resulting from the citation by the State Trooper were resolved in probate court in 2009, appellant still had charges pending in superior court for her Ringgold city citations. In June of 2010, appellant moved for the Ringgold city charges to be dropped on the basis that resolution of the State Trooper citations precluded further prosecution of the Ringgold offenses.

Appellant argued that the prosecution on the Georgia State Patrol citations and on the Ringgold city citations both rose from the same conduct and could not be prosecuted more than once under OCGA § 16-1-7 (b), which provides: "If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a

single prosecution." The State argued that the charges against appellant arose from distinct and independent criminal conduct that cannot be characterized as a single transaction. Using the language of *Anderson v. State*, 200 Ga. App. 530, which held that when such actions "gave rise to several offenses, all of the offenses arose out of one course of conduct, i.e., there was only one transaction. . . .", the Court agreed with appellant that all of the charges arose from the same conduct for purposes of OCGA § 16-1-7 (b). The Court reversed the judgment, and held that the probate court's resolution of the State Trooper citations barred the superior court prosecution.

*Hernandez v. State, A11A0556 (5/5/2011)*

Appellant was a juvenile who was convicted of theft by receiving stolen property and misdemeanor obstruction of a police officer. He argued that since he had been adjudicated in juvenile court, his prosecution in superior court was barred by the protections against double jeopardy. Specifically, that his charges had been adjudicated because he was present at a hearing in juvenile court to determine the appropriate jurisdiction for handling the charges. The Court found that because the juvenile court did not actually hear the merits of the case or decide on a verdict, the hearing did not result in adjudication, and therefore appellant's charges had never been adjudicated prior to appearing in superior court. In order to transfer a case to superior court without jeopardy attaching, a juvenile court could not hear the merits of the case but must determine that reasonable grounds existed to believe the child committed the criminal act, and that is just what the juvenile court did in appellant's case. Since there was no prior adjudication for the charges, the Court held that there was no double jeopardy in issue and affirmed the judgment.

### **Child Molestation, Venue**

*Prescott v. State, A11A0695 (5/6/2011)*

Appellant was convicted of child molestation and argued that the State failed to prove that the individual he was involved with was under 16 and failed to prove proper venue. The Court agreed as to venue and reversed. The record showed that during the trial a witness testified that the victim was under 16 but no witness testified as to what county the crime

occurred in. Appellant argued that the witness' statement about the victim's age was inadmissible hearsay evidence and did not properly prove that the victim was under 16. Appellant also argued that since no one testified that the location of the molestation (Screven County High School) was in Screven County, the county failed to establish venue there.

Under OCGA § 16-6-4 (a), proof that the victim was under the age of 16 is an essential element of the crime of child molestation. "Where a witness testifies to a conclusion of fact which could be within his knowledge and such testimony is admitted without objection, it cannot be attacked on review as being incompetent or insufficient..." Here, the witness' testimony as to the victim's age appeared to be based on personal knowledge and not hearsay. This along with the fact that appellant's counsel did not object to the testimony during the trial led the Court to the decision that the testimony was admissible and the age of the victim was sufficiently proven.

However, the Court found that appellant's contention about the lack of proper venue was correct because the State did not at any time establish that Screven County High School was located in Screven County. Because the State did not prove venue beyond a reasonable doubt as required under Ga. Const. of 1983, Art. VI, Sec. II, Para. VI, the Court reversed appellant's conviction.

## Juvenile Adjudications; Convictions

*In the Interest of J.W., A11A0491 (5/3/2011)*

Appellant appealed his delinquency adjudication for possession of a firearm by a convicted felon. The sole issue on appeal was whether his previous juvenile delinquency adjudications for armed robbery and aggravated assault constituted "criminal convictions" sufficient to support a conviction or delinquency adjudication for possession of a firearm by a convicted felon under OCGA § 16-11-131 (b).

OCGA § 16-11-131, provides that "[a]ny person who is on probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42 or who has been convicted of a felony by a court of this state or any other state . . . and who receives, possesses, or transports any firearm" commits the offense of possession of a firearm by a convicted felon. The statute further provides that a "felony" for this purpose

"means any offense punishable by imprisonment for a term of one year or more. . . ."; the statute does not define the term "convicted."

The Court noted that in *A. B. W. v. State*, the Georgia Supreme Court held that "a [j]uvenile [c]ourt cannot convict a juvenile of a crime as defined by Georgia [l]aw. A [j]uvenile [c]ourt convicts a child for being delinquent, and such an adjudication is not a conviction of a crime or crimes. . . . [T]he commitment of a juvenile to any authorized facility is not commitment for conviction of a crime. Such commitment is only for rehabilitation or treatment." The Court also noted that the Georgia Supreme Court has also stated that "[u]nder Georgia law, when a juvenile is adjudicated to be a delinquent by a juvenile court, the adjudication is not regarded as a criminal conviction." Relying on the unequivocal language of the Georgia Supreme Court, the Court concluded that an adjudication of delinquency does not constitute a criminal conviction. Therefore, the Court ruled that the evidence against appellant was not sufficient to support a conviction or delinquency adjudication for possession of a firearm by a convicted felon.

## Miranda; Statements

*Dunson v. State, A11A0158 (5/5/2011)*

Appellant was convicted of kidnapping with bodily injury, aggravated child molestation, aggravated anal sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children. Appellant first argued that the trial court erred in admitting incriminating statements he made to police during his pre-arrest interview because the police did not inform him of his *Miranda* rights. The Court stated that *Miranda* warnings are a prerequisite to admission of evidence from interrogations conducted after a person has been "taken into custody."

Appellant argued that the police circumvented *Miranda* using the question-first interrogation procedure identified and condemned by the U.S. Supreme Court in *Missouri v. Seibert*, 542 U. S. 600 (2004). The "question first" procedure is one "in which police first question a suspect without administering *Miranda* warnings, gain a statement from the suspect, then administer *Miranda* warnings, and have the suspect repeat that which the suspect has already related." Here, the evidence showed that appellant was assured that although he was

a suspect, he was not under arrest and could leave at any time. The investigating officers did not inform appellant of his *Miranda* rights prior to the pre-arrest interview. During the interview, which took place in an administrative office, the officers again assured him that he could leave if he wished. Appellant continued speaking with police and eventually made several incriminating statements.

The Court reasoned that there was evidence to support the trial court's determination that the police had not used improper interrogation procedures and that a reasonable person in appellant's place would have believed that he was free to leave. Therefore, the Court found no error in the trial court's determination that appellant's statements were not subject to *Miranda* because he was not "in custody." The fact that appellant knew before the interview that he was a suspect was not determinative.

Alternatively, appellant argued that his pre-arrest statements were involuntary because he made them for "a hope of benefit." Specifically, he claimed that the officers gave him a hope of benefit when, after he disclosed that he had been molested as a child, they offered to secure counseling for him. However, the Court found that this argument was without merit. The Court reasoned that the officers' offer to obtain counseling for appellant involved only a collateral benefit. Furthermore, the "hope of benefit" must be induced by someone else. The Court noted that a hope that "originates in the mind of the person making the confession... [will] not exclude a confession." *Ramos v. State*, 198 Ga. App. 65, 66 (1990). Appellant offered no evidence that the officers offered him a hope of benefit. Therefore, the Court held that the trial court properly found appellant's statements voluntary and admissible.

## DUI; Similar Transaction Evidence

*Massey v. State, A11A0674 (5/5/2011)*

Appellant was convicted of driving under the influence of alcohol, reckless driving, fleeing and attempting to elude, speeding, three counts of passing in a no-passing zone, and two counts of disobeying a traffic control device. At trial, appellant claimed that he was not driving the car. However, in addition to the arresting officer's testimony, the State offered similar transaction evidence that appellant had previously pled guilty to driving under

the influence of alcohol in circumstances that, like the situation in the present case, involved recklessness at a high rate of speed.

Appellant maintained that the issues in this case revolved around identity, i.e. who was driving the car. He further claimed that although the State could have sought admission of the similar transaction evidence to prove identity, it did not, and thus the prejudicial impact of the evidence outweighed its probative value.

The Court rejected appellant's argument, finding that the trial court admitted the similar transaction evidence for the limited purpose of showing appellant's bent of mind and course of conduct, and that those were proper purposes for doing so. The Court also found that because the State was required to prove that appellant drove the car under the influence of alcohol to the extent it was less safe for him to drive, "[e]vidence of a prior DUI offense... is logically connected with a pending DUI charge as it is relevant to establish that the defendant has the bent of mind to get behind the wheel of a vehicle when it is less safe for him to do so." Accordingly, the Court held that the trial court properly admitted the similar transaction evidence.

## **Hearsay; Crawford**

*Francois v. State, A11A0744 (5/2/2011)*

Appellant was convicted of aggravated battery, possession of a firearm during the commission of a felony, and five counts of aggravated assault with a deadly weapon. He argued that the trial court erred in admitting hearsay evidence at trial. To support his claim, appellant pointed to the testimony of two officers who investigated the shooting. The State asked one officer whether, during the course of his investigation, any witnesses connected appellant to a white Impala. Appellant objected on hearsay grounds, but the officer was allowed to testify that two individuals who did not appear at trial had seen appellant in the car. The State also asked another officer whether his investigation revealed that appellant was driving a white Impala. Appellant again objected on hearsay grounds, but the officer responded "yes" before the court sustained the objection. The State then asked the second officer what another witness had told him.

Appellant first argued that the trial court improperly allowed the officers to link him to

the white Impala through the hearsay statements of witnesses who did not appear in court. The Court held, however, that even if the trial court erred in admitting the officers' testimony, reversal was not required. As explained by the Georgia Supreme Court, "[t]he erroneous admission of hearsay testimony is not reversible error where the hearsay is cumulative of legally admissible evidence of the same fact." *Belmar v. State*, 279 Ga. 795, 797 (2005). In this case, other evidence connected appellant to the car, including the victim's testimony. Moreover, the record showed that the second officer had testified on cross examination by defense counsel that two witnesses placed appellant in the car. Appellant did not object to this testimony. Thus, the jury heard essentially the same testimony that he challenged on appeal. The Court therefore held that admission of the testimony did not harm appellant and did not require reversal.

Alternatively, appellant contended that admission of the officers' hearsay testimony violated his Sixth Amendment right to confrontation, requiring reversal under *Crawford v. Washington*, 541 U. S. 36 (2004). However, the Court found that appellant had failed to preserve this claim of error for review because at trial he had objected to the officers' testimony on hearsay grounds only.