

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 1, 2011

Legal Services Staff Attorneys

Stan Gunter
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:

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Right to Remain Silent

Tyner v. State, S11A0253 (6/20/2011)

Appellant pled guilty to malice murder on September 25, 1984. He later said that he pled guilty because the State had indicated that it would seek the death penalty if the case went to trial. He contended that the trial court erred in failing to advise him of his right against self-incrimination as required by *Boykin*. The transcript of the plea hearing showed that appellant was advised of and waived two of his three *Boykin* rights —the right to a jury

trial and the right to confront the witnesses against him. However, he was not advised of his third *Boykin* right, the right against self-incrimination. At the close of the hearing, the prosecutor suggested that the court should “[a]dvice him of his rights I think,” apparently referring to appellant’s limited right to appeal his conviction and sentence based on a guilty plea. The court responded, “I don’t think there’s any need,” and the hearing ended. The State conceded the existing record does not show that appellant was advised of his right against self-incrimination and acknowledged that the Court’s usual course where it finds a *Boykin* violation on direct appeal is to reverse the invalid conviction and remand the case for further proceedings. The State nevertheless asked the Court not to decide the *Boykin* issue but first to remand the case to the trial court, where appellant should be required to file a motion to withdraw the guilty plea, which would give the State the opportunity to try to show that appellant’s attorney informed him of his right against self-incrimination before he pled guilty. The Court found that the State did not fulfill its duty to ensure that appellant’s guilty plea was constitutionally valid; it apparently did not ensure that he was advised of and had effective representation regarding his right to appeal his conviction; and it did not litigate the merits of appellant’s guilty plea in his habeas corpus hearings, where the record might have been expanded. Consequently, appellant’s conviction was reversed by the Court and the case was remanded for further proceedings.

Similar Transaction Evidence

Avila v. State, S11A0140 (6/20/2011)

Appellant was convicted of malice murder and possession of a firearm during the com-

mission of a crime. He contended that the trial court erred in admitting similar transaction evidence. The Court stated that evidence that a defendant has committed an independent offense or bad act is admissible if the State shows and the trial court rules that there is a sufficient connection or similarity between the independent offenses or acts and the crime charged so proof of the former tends to prove the latter. When considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate crime and the crime in question. The Court found that the evidence showed that just a month before appellant shot the victim while arguing with him, appellant had shot another victim while arguing with her. Both shootings occurred in a vehicle and involved the same gun, and on both occasions appellant gave false statements to the police. The Court therefore found the admission of the similar transaction was clearly not an abuse of discretion under the circumstances.

Crisp v. State, A11A0300 (6/16/2011)

Appellant was convicted of trafficking methamphetamine (based on manufacturing), manufacturing methamphetamine, possessing methamphetamine, and possessing altered ephedrine. She argued that the trial court erred by admitting statements from her police interview that she had purchased and used methamphetamine on two occasions prior to the arrest. She claimed that this was evidence of prior similar criminal acts and was only admissible as similar transaction evidence under the procedure outlined in *Williams v. State*, requiring notice and a hearing as to the admissibility of the evidence for proper purposes.

Premitting whether appellant's statement to police was properly admitted, the Court found that appellant's statement of prior drug use was cumulative of other unchallenged evidence. The Court held that by not making any objection to this evidence, appellant had waived any challenge to it on appeal. Accordingly, the Court affirmed.

DUI; Source Code

Davenport v. State, S10G1355 (6/20/2011)

After the trial court denied appellant's motion, filed under the Uniform Act to

Secure the Attendance of Witnesses from Without the State, OCGA § 24-10-90 et seq. ("the Uniform Act"), to obtain evidence purportedly possessed by a specified person in Kentucky, she was convicted in a bench trial of driving under the influence of alcohol *per se* based on evidence from the Intoxilyzer 5000. The evidence appellant unsuccessfully sought was the source code of the Intoxilyzer 5000, which is manufactured by the Kentucky corporation which employed the individual appellant sought to have summoned to Georgia.

Appellant argued that the trial court erred by refusing to issue under the Uniform Act an order requesting issuance of a summons to the Kentucky resident. The Court of Appeals ruled that the trial court had not abused its discretion in declining to issue the order because appellant had not carried her burden of showing that the out-of-state person was "a necessary and material witness to the case." *Davenport v. State*, 303 Ga. App. 401, 402 (2010). The Court granted appellant's petition for a writ of certiorari.

The Court expressed its strong disapproval of the Court of Appeals' repeated misreading of OCGA § 24-10-90. The Court emphasized that, according to the language of the statute, it is the out-of-state judge who must decide whether the sought-after witness is "necessary and material," whereas the Georgia trial judge must only decide whether the sought-after witness is a "material witness." The Court noted that the standard by which a Georgia trial judge should determine whether an out-of-state witness is a "material witness" had not been defined. In light of the legislative statement of intent (OCGA § 24-10-97) that Georgia's version of the Uniform Act be construed uniformly with that of the other states, the Court gave great weight to the statutory construction of Georgia's sister states. These states had adopted the definition of a material witness given in Black's Law Dictionary. Accordingly, the Court construed "material witness" as "a witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about these matters." Black's Law Dictionary (8th ed. 2004). Because the proper standard of review was not applied in this case, the Court vacated the judgment of the Court of Appeals and remanded for further proceedings.

Yearly v. State, S10G1085 (6/20/2011)

After the trial court denied her motion to obtain evidence possessed by a Kentucky corporation by means of the Uniform Act to Secure the Attendance of Witnesses from Without the State, OCGA § 24-10-90 et seq. ("Uniform Act"), appellant was convicted of driving under the influence *per se*.

The issue here was whether the Uniform Act authorized a party in a criminal proceeding to seek purportedly material evidence from an out-of-state corporate entity without naming a person within the corporation as the witness to be summoned to Georgia. The Court of Appeals held that the Uniform Act did not and the Supreme Court granted certiorari.

The Uniform Act provides that a Georgia judge may issue a certificate that "a person" located outside Georgia is a "material witness" in a pending Georgia prosecution (OCGA § 24-10-94(a)), and the Georgia court is also authorized to issue a certificate that the witness is in possession of evidence material to the pending prosecution. The Court reasoned that a corporation is an artificial person (*Eckles v. Atlanta Technology Group, Inc.*, 267 Ga. 801, 803 (1997)), and its corporate existence "implies amenability to legal process . . . Possessing the privileges of a legal entity, and having records, books, and paper, it is under a duty to produce them when they may properly be required in the administration of justice." *Jones v. State of Georgia*, 99 Ga. App. 858 (1959). Therefore, the Court held, an out-of-state corporation may be "a person" that is a material witness under the Uniform Act and may be determined to be in possession of material evidence.

The Court noted that a subpoena can be directed to a corporation itself rather than a specified human agent, and, in discovery issues governed by the Civil Practice Act, when a deposition notice or subpoena is directed to a corporation, the corporation designates the persons to testify on its behalf. OCGA § 9-11-30(b)(6) and Rule 30(b)(6), Federal Rules of Civil Procedure. Therefore, the Court held that a party should be permitted to request that a corporation, rather than its human agent, be found to be a material witness under the Uniform Act and to leave the designation of its human agent to the corporation. Accordingly, the Court held that the Court of Appeals had erred, vacated its judgment, and remanded for further proceedings.

Search & Seizure

Cridle v. State, A11A0044 (6/16/2011)

Appellant was convicted of DUI. He argued that the trial court erred in denying his motion to suppress because he was arrested outside the jurisdiction of the arresting officer. The evidence showed that appellant was found by a Holly Springs officer with his crashed vehicle halfway on his driveway and half off. Appellant claimed that while he was backing out of his driveway, his truck became stuck, and when he got out of his truck to look, it rolled down the embankment into a ditch. Appellant moved to suppress any evidence obtained as a result of his arrest, arguing that the officer arrested him outside the city limits. At the motions hearing, appellant and the State stipulated that appellant's house and property were located in Cherokee County just outside the Holly Springs city limits, and that Hickory Road (which was at the bottom of the embankment over which the truck crashed) was located within the city limits. The State presented evidence that the city right-of-way extended 100 feet from the road and introduced pictures of the truck and a map of the area. The Court found that this evidence was sufficient to allow the trial court to make a factual finding that a portion of appellant's truck was located within that right-of-way when he was arrested. Therefore, the Court held that the trial court did not err in concluding that the Holly Springs police officer was authorized to arrest appellant for DUI, and in denying appellant's motion to suppress.

Speedy Trial

Goddard v. State, A11A0215 (6/15/2011)

After being indicted for robbery in 1993 and having his case dead-docketed, appellant filed a plea in bar on both constitutional and statutory speedy trial grounds on May 19, 2010. The trial court summarily denied appellant's plea in bar on both grounds. The record showed that appellant was charged by accusation with reckless driving and fleeing and attempting to elude on December 28, 1993, during the October term of court. On January 20, 1994, during the January term of court, he filed his demand for trial pursuant to OCGA § 17-7-170. The Court found that his demand was therefore timely as it was filed in the term following the term in which

he was indicted in accordance with OCGA § 17-7-170. While the State presented evidence that appellant had failed to appear on January 28, 1994 (the date set for trial), appellant presented evidence that the notice of trial was sent to the wrong address. The Court found that under these circumstances, it could not find that the State met its burden of showing that appellant waived his statutory right to a speedy trial by a voluntary act. Therefore, the Court found that appellant did not waive his statutory right to a speedy trial on the accusations charging him with fleeing and attempting to elude and reckless driving, and since the State failed to try him during the term in which the demand was filed or the next succeeding regular term of court, appellant was entitled to an acquittal on those charges. The judgment was affirmed in part, reversed in part, vacated and the case remanded.

Brady; Jury Charges

Black v. State, A11A0242 (6/14/2011)

Appellant was convicted of DUI-less safe, DUI-per se, failure to maintain lane, and disorderly conduct. Appellant contended, among other things, that the trial court erred in failing to find a discovery violation when the State did not furnish a copy of the DUI arrest report before trial and in expressing an opinion regarding the breath test evidence during the charge to the jury.

First, appellant argued that he was entitled to a new trial on the DUI less safe charge because the trial court made an erroneous finding that the State's failure to produce a DUI arrest report prior to trial did not amount to a discovery violation under OCGA § 17-16-23 (b) and *Brady v. Maryland*. The record showed that although the State had previously provided appellant with a copy of a narrative police report that purportedly reflected information regarding the field sobriety testing, appellant asserted that a supplemental DUI arrest report had not been furnished until the day of trial. He argued that the DUI arrest report was discoverable as *Brady* material and as a scientific report to the extent that it contained information regarding the horizontal gaze nystagmus ("HGN") test. The trial court compared the DUI arrest report to the narrative police report that had previously been produced and concluded that they contained the same information. Based upon its finding,

the trial court ruled that there was no discovery violation. The Court found that because the reports at issue were not included in the appellate record by appellant, it could not review them and presumed that the evidence before the trial court supported its ruling.

Appellant further contended, under OCGA § 17-8-57 that the trial court's charge to the jury erroneously expressed an opinion regarding the evidence by explaining the difference between the alco-sensor field test and the state-administered chemical test. Again, the Court discerned no error. It held that the trial court's comments amounted to no more than an explanation that clarified its charge applicable to the alco-sensor field test. The trial court's explanation was a correct statement of the law pertaining to alco-sensor test results and did not express or intimate an opinion regarding the evidence.

Juveniles; Aggravated Battery

In the Interest of Q. S., A11A0037 (6/16/2011)

Appellant participated in a vicious assault upon a classmate, and the juvenile court adjudicated her delinquent and ordered her into restrictive custody for 12 months. The adjudication of delinquency is based on findings that appellant committed acts that, if committed by an adult, would amount to aggravated battery, aggravated assault, and unlawful disruption of a public school. Appellant contended that the evidence was insufficient to sustain the findings of delinquency and that the juvenile court erred when it ordered restrictive custody. The Court agreed with appellant that the evidence was insufficient to sustain the findings of aggravated battery and unlawful disruption of a public school, and it reversed the adjudication of delinquency to the extent it was based on these findings.

The State asserted, and the juvenile court found, that appellant deprived the victim of her brain, inasmuch as the victim suffered from short-term memory loss and impairment of her cognitive abilities after the assault. The Court agreed that the evidence supported a finding that the victim suffered a loss of normal brain function following the assault, but it concluded that the evidence did not prove beyond a reasonable doubt that this loss of normal brain function was proximately caused by the assault that appellant and her accomplices

committed. The State pointed to evidence that the victim (who had a tumor prior to the assault) complained of a headache and dizziness soon after the assault and before any surgeries as evidence that the assault affected her tumor, but there was no testimony that dizziness is a symptom of such a tumor. The Court held that no rational trier of fact could have concluded beyond a reasonable doubt from this evidence that appellant and her accomplices caused the short-term memory loss and cognitive impairment that the victim had suffered, and for this reason, it did not sustain the finding of aggravated battery. It also found that the finding of unlawful disruption of a public school could not be sustained because the State failed to prove that the location of the assault was in fact a “public school.” The judgment was affirmed in part, reversed in part, vacated in part and remanded.

Miranda; Statements

State v. Kendrick, A11A0661 (6/13/2011)

The State appealed from the exclusion of Kendrick’s statement to a police investigator after Kendrick was charged with the burglary of a dwelling house of another with the intent to commit a theft therein. The State contended that Kendrick’s confession made to the investigator after the reading of the *Miranda* rights was admissible. The evidence showed that an officer was called to the scene and found Kendrick there in possession of a ceiling fan he had stolen from a home. Without reading Kendrick his *Miranda* rights, the officer informed Kendrick that he was going to detain him for further investigation. Kendrick voluntarily told the officer that he would be honest and show him where he had stolen the fan from. Kendrick was transported in handcuffs to the precinct and taken to a room where he was joined by the patrol officer and investigator. The investigator testified that he read Kendrick the *Miranda* warnings prior to even talking to him. Kendrick stated that he would talk to the investigator without an attorney, and Kendrick told the investigator that he had entered a house and taken a ceiling fan, adding that a door to the house was already open. The Court held that the trial court pertinently found that Kendrick’s statements to the investigator were made “close in time and [were] wholly repetitive of statements made during the un-Mirandized custodial inter-

rogation of [Kendrick] by [the patrol officer].” It held that the trial court’s factual findings were not clearly erroneous; and because the evidence showed further that “the midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda* constitutional requirement,” the trial court did not err in ruling that Kendrick’s confession repeated after the warning was inadmissible.

Sentencing

Simpson v. State, A11A0755 (6/15/2011)

Appellant was convicted of three counts of armed robbery, OCGA § 16-8-41(a). The trial court sentenced him to 20 years imprisonment for Count 1; 20 years imprisonment for Count 2, to be served consecutively; and 20 years imprisonment for Count 3, to be served concurrently. Appellant filed a “Motion to Set Aside Null and Void Conviction and Sentence.” The trial court denied the motion.

Appellant argued that the sentences were unlawfully consecutive and imposed multiple punishments “for the same offense” in violation of the prohibition of double jeopardy. The Court found that appellant’s argument lacked merit because the three counts stemmed from three different robberies that appellant committed on three different days. Because appellant’s sentence was within the statutory range and because the law allowed separate and consecutive punishment for separate criminal transactions, the Court affirmed.

Recidivist Sentencing

Jefferson v. State, A11A0025 (6/13/2011)

Appellant was convicted of possession of marijuana with intent to distribute and reckless conduct. He argued that he was improperly sentenced as a recidivist. Specifically, he contended that the trial court failed to exercise discretion by imposing the maximum sentence under law for his fourth felony conviction. The Court disagreed, finding that based upon appellant’s three prior felony convictions, his sentencing was governed by both OCGA § 17-10-7 (a) and (c), which compel the trial court to sentence a criminal to the maximum time upon his fourth conviction. The Court also recognized that although OCGA § 17-10-7 (a) allows the trial court to probate or suspend part of a recidivist’s sentence, the court is not

required to do so. Therefore, the Court held that the trial court properly exercised its discretion. Accordingly, the Court affirmed.

Statute of Limitation; DNA

Scales v. State, A11A0506 (6/15/2011)

Appellant was convicted of rape, OCGA § 16-6-1 (a) (1); kidnapping, OCGA § 16-5-40 (a); and false imprisonment, OCGA § 16-5-41 (a). He argued, inter alia, that his prosecution was barred by the statute of limitation and that the trial court committed errors that required a new trial.

Appellant first argued that his prosecution was barred because the statute of limitation period had expired as to each of the offenses alleged. The Court first noted that the burden of proof was on the State to prove that the statute of limitation period had not run. In this case, the State argued that because the person who committed the crime was “unknown” under OCGA § 17-3-2 (2), the tolling period ended when the State acquired “actual knowledge” of the defendant’s identity. Therefore, the limitation period applicable to each offense was tolled from the date the crimes were committed through January 2007. The Court agreed, finding that the State had indicted appellant within two months of learning of his identity, well within the applicable limitation periods.

Appellant also argued that the trial court erred in denying his motion in limine to exclude testimony concerning the fact that his DNA profile was in the CODIS database. Appellant maintained that the fact that his DNA profile was in the CODIS database constituted improper “other crimes” character evidence, the prejudice of which outweighed its probative value. According to appellant, a juror would inevitably draw the conclusion that, because his DNA profile was in the database, he must have committed another crime. However, the Court analogized a DNA profile to a fingerprint card, emphasizing that such evidence is only prejudicial if it actually indicates prior criminal activity. The Court reasoned that the admission of evidence indicating that the defendant’s fingerprints matched those in a database *alone* “does not introduce character into evidence, particularly where crime-identifying information has been redacted.” Therefore, the Court held, evidence of a matching DNA profile in a government

database does not, in and of itself, constitute impermissible character evidence when no reference is made as to why the matching sample was collected or stored and when no reference is made linking the defendant's DNA profile to other criminal activity. Accordingly, the Court affirmed appellant's convictions.

Impeachment Evidence; Similar Transaction Evidence

Chandler v. State, A11A0662 (6/14/2011)

Appellant was convicted of two counts of felony forgery. He first argued that the trial court erred in admitting for impeachment purposes his prior conviction for cocaine possession. The trial court held a hearing pursuant to *Quiroz v. State* in order to determine the admissibility of the conviction under OCGA § 24-9-84.1 (a) (2). The Court held that the trial court properly exercised its discretion in finding that the probative value of the prior conviction substantially outweighed the prejudicial effect. The Court found that even though the trial court did not use the exact language of OCGA § 24-9-84.1 (a) (2), it correctly applied the standard set forth in that Code section and made the express finding required.

Appellant next argued that the trial court erred in allowing the state to introduce evidence of other crimes as part of the *res gestae*. Appellant's accomplice testified at trial that about a week prior to the events at issue here, he and appellant and another accomplice performed the same check-cashing scheme at another Wal-Mart. The Court held that trial court did not abuse its discretion in admitting the witness's statements as *res gestae* evidence because they showed the planning process for the forgeries in question.

Appellant also argued that the trial court erred in allowing a witness's testimony to be admitted as similar transaction evidence because it was not similar enough to the charges being tried and because there was no evidence that the checks in that incident were fraudulent. However, the Court found that that incident was clearly similar to the incident at issue in the present case: in both incidents appellant invited others to Wal-Mart in an attempt to induce them to cash checks there for a portion of the proceeds; both incidents involved checks in similar amounts; and both incidents involved the presence of a man known as G

Money. Further, the Court held that it did not matter that there was no evidence that the checks in the similar transaction were forged. The Court emphasized that a prior bad act does not have to result in a criminal charge to be admissible; it must merely be relevant to the crime charged in the present case.

Extraordinary Motion for New Trial; DNA

Wright v. State, A11A0088 (6/16/2011)

In 1994, appellant was convicted of committing twelve crimes against four women, including rape, aggravated sodomy, kidnapping, and armed robbery. He was sentenced to three life sentences plus four twenty-year terms.

In 2006, appellant filed a motion pursuant to OCGA § 5-5-41 (c) for post-conviction DNA testing of the semen sample obtained from K. W., one of the victims. The trial court granted the motion, and the testing revealed that appellant could not have been the donor of the semen. Consequently, appellant, proceeding pro se, filed an extraordinary motion for new trial on all twelve counts. The trial court granted the motion as to the four counts relating to K. W., but denied the motion as to the counts for the other three victims. Appellant argued that the trial court erred in denying his request as to those other counts.

Appellant's primary contention was that the four criminal episodes bore such strong similarities that they must have been committed by the same two perpetrators, and since the new DNA evidence exonerated him of the crimes against K. W., he could not have been the perpetrator of any of the other offenses. However, the Court rejected appellant's premise that the DNA evidence exonerated him of the crimes against K. W. The Court explained that the new evidence showed only that appellant had not ejaculated in K. W., not that he had not raped her. In fact, there was fingerprint evidence that implicated appellant in the crimes against K. W. Moreover, the Court rejected appellant's argument that the DNA evidence demonstrated that appellant could not have committed any of the crimes against the other three victims. There was strong evidence that appellant had committed the crimes, including his alleged accomplice's testimony, a victim's courtroom identifications, and the fact that one of the rapes had occurred in appellant's house.

Therefore, the Court found that although the new DNA evidence might lead to a different verdict on the counts relating to K. W., appellant failed to demonstrate how the new evidence would persuade a jury that he was not guilty of the counts pertaining to the other victims. Accordingly, the Court affirmed the trial court's grant of appellant's motion as to the counts relating to K. W. and the trial court's denial as to the other counts.

Identification; Res Gestae

Greenwood v. State, A11A0707 (6/14/2011)

Appellant was convicted of theft by taking a motor vehicle, theft by receiving stolen property, entering an automobile with intent to commit theft, and criminal damage to property in the second degree. He was also found guilty of four misdemeanors.

Appellant first argued that the trial court should have declared a mistrial sua sponte when the State questioned appellant's girlfriend as to whether she had visited him while he was in jail. The trial court denied the motion because the jury was already aware from similar transaction evidence that appellant had been in jail at some time in the past. The Court found no abuse of discretion.

Appellant also argued that the trial court erred in admitting evidence of the special task force formed by the police to address the many car break-ins which had occurred in the area. The record showed that when the police investigator began to give a narrative explanation of the task force, appellant's counsel objected on grounds of relevancy, and the objection was sustained. The prosecutor then elicited testimony concerning a series of three car thefts, each theft followed by abandonment of the stolen vehicle in another neighborhood and a theft of another vehicle nearby, eventually leading to the abandoned and stolen cars in this case. The Court held this evidence was part of the *res gestae* of the crimes of which appellant was convicted.

Finally, appellant argued that the trial court erred in allowing an eyewitness to testify that he was "certain . . . without a doubt" that the person he saw driving the stolen car was appellant. However, the Court found that "Georgia law does not prohibit an identification witness from testifying about his or her level of certainty or restrict the state from inquiring about the same."

Polygraph Evidence; Expert Witnesses Qualification

Jones v. State, A11A0316 (6/14/2011)

Appellant was convicted of armed robbery and possession of a firearm by a convicted felon. He challenged the qualifications of the police lieutenant who had administered his polygraph test, who was permitted to testify as an expert. At trial, when the State sought to qualify the lieutenant as an expert to give testimony concerning the polygraph test, appellant objected to his qualifications on the grounds that he had not been certified, never been tendered as an expert, and had never testified in a similar state court proceeding. The trial court overruled appellant's objection and permitted the lieutenant to testify as an expert on polygraph examination.

The Court first noted that both parties had stipulated to the results of the polygraph test; consequently the results were admitted as evidence for the jury to consider. The Court then explained that there are two components to a polygraph test: the graphs made by the machine, and "the opinion of the examiner as to what those responses indicate." Thus, the Court reasoned, appellant had agreed by his stipulation to the admission of the lieutenant's opinion testimony concerning the polygraph examination, and failed to provide any reason he should not be bound by his agreement. Therefore, the Court considered this enumeration of error to be waived.

Appellant also argued that the lieutenant was not qualified to testify as an expert witness because he had very little experience testifying in court. The Court noted that the lieutenant had been a polygraph examiner for six years; was certified by the American International Polygraph Institute to administer polygraphs; and had routinely completed more than 20 hours per year of continuing training in order to retain his certification. As of the day he testified in this case, the lieutenant had conducted nearly 300 polygraphs. Therefore, the Court found, the trial court had not abused its discretion in relying upon the lieutenant's training and practical experience, rather than his experience testifying in court.

Guilty Plea; Continuance

Earley v. State, A11A0517 (6/16/2011)

Appellant pleaded guilty to one count of theft by receiving and one count of attempt-

ing to elude a police officer. Two months later, and after obtaining new counsel, he moved to withdraw his guilty plea, which the trial court denied. Appellant argued that the trial court erred in denying his motion for a continuance of the plea hearing.

At the outset, the Court noted that while a guilty plea may be withdrawn anytime before sentencing, once a sentence has been entered, a guilty plea may only be withdrawn to correct a manifest injustice. Appellant argued that the court's denial of his pro se motion for a continuance of the plea hearing constituted a manifest injustice. However, the Court found that the trial court did not err in denying appellant's pro se motion for a continuance because appellant was represented by counsel when he filed his pro se motion. The Court stated that it was well established that "[a] criminal defendant does not have the right to represent himself and also be represented by an attorney." Therefore, appellant's motion was of no legal effect whatsoever.

Moreover, the Court stated that even if it were to consider appellant's motion on its merits, the trial court did not err in denying it. The record showed that the trial court had determined that appellant was seeking a continuance solely for purposes of delay and not for any substantive reason. Under these circumstances, the Court found no basis for concluding that the trial court abused its discretion. Accordingly, the Court affirmed.

Character Evidence; Hearsay

Moore v. State, A11A0488 (6/16/2011)

Appellant was convicted of one count of possessing cocaine with intent to distribute, one count of possessing cocaine, one count of failure to use a turn signal, one count of escaping from law enforcement, and two counts of obstruction.

Appellant argued that the trial court improperly allowed the admission of character evidence when sheriff's deputies mentioned his previous run-ins with the law. Appellant contended that the deputies' statements were more than mere passing references and were instead repeated commentary that placed his character squarely at issue. The trial court denied appellant's motions for mistrial. The Court noted that an officer's testimony regarding general familiarity with a criminal defendant does not impermissibly place that defendant's

character at issue because "the mere fact that an officer is familiar with a defendant does not necessarily suggest prior criminal conduct." Additionally, the Court found that none of the trial testimony at issue remotely suggested that appellant had ever been convicted of a past crime. Moreover, the Court found that even if the challenged testimony had impermissibly placed appellant's character at issue, any such error would have been harmless due to the overwhelming evidence of appellant's guilt.

Appellant's second enumeration of error was that the trial court admitted impermissible hearsay testimony when it allowed a sheriff's deputy to testify that a known drug user said appellant was bringing him drugs but thereafter refused to permit the known drug user to testify regarding this conversation. However, premitting whether the deputy's prior testimony was inadmissible hearsay, the Court held that any such error was harmless given the overwhelming evidence that appellant possessed cocaine with the intent to distribute. Accordingly, the Court affirmed appellant's convictions.