

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 26, 2013

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Constitutional Right to Speedy Trial

State v. Takyi, A13A0236 (7/12/13)

The State appealed the trial court's grant of Elizabeth Takyi's motion to dismiss her indictment for violation of her constitutional right to a speedy trial. This was the second appearance of this case before the Court of Appeals. In the prior appeal, the Court vacated the trial court's order and remanded the case,

finding that the trial court had made factual and legal errors. On remand, the trial court again granted Takyi's motion to dismiss and the Court affirmed.

The record showed that on October 3, 2008, Takyi was arrested for driving under the influence of alcohol and ordered to appear in municipal court on November 19, 2008. The matter was continued until January 5, 2009, when Takyi appeared at an arraignment in municipal court and demanded a jury trial. As a result, the case was bound over to the state court. On January 22, 2010, counsel sent a letter to the County Solicitor-General inquiring about the status of the case and stating that his client requested "that the charges against her be brought to trial at the earliest possible opportunity, asserting her right to a speedy trial under the constitution." On February 4, 2010, 13 days later, the Solicitor-General filed formal charges against Takyi in the state court. On February 22, Takyi, through another attorney, filed a demand for speedy trial pursuant to the United States and Georgia Constitutions and pursuant to O.C.G.A. § 17-7-170. On March 15, 2010, Takyi filed a motion to dismiss on the ground that her constitutional right to a speedy trial had been violated. On April 27, 2010, the court held a hearing to address the motion, where Takyi and three of her attorneys testified. Two days later, and approximately 18 months from the date of Takyi's arrest, the trial court entered an order granting her motion to dismiss on speedy trial grounds. The State appealed and the Court of Appeals reversed. On remand here, no additional evidence or testimony was heard by the trial court.

Constitutional speedy trial claims are analyzed according to the framework laid out in *Barker v. Wingo*, 407 U.S. 514 (1972), and

Doggett v. United States, 505 U.S. 647 (1992). The analysis has two stages. First, the court must determine whether the pretrial delay is sufficiently long to be considered presumptively prejudicial. The pretrial delay is measured from the accused's arrest, indictment, or other formal accusation, whichever comes first, to the trial or, if the accused files a motion to dismiss the indictment, until the trial court denies the motion. If the delay is presumptively prejudicial, the court must proceed to the second step, which requires the application of a four-factor balancing test to determine whether the accused has been deprived of the right to a speedy trial. The four factors to be considered in the case of presumptively prejudicial delay are: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant.

Pretrial delay is presumptively prejudicial if it approaches one year. Where a trial has not occurred, the delay should be calculated from the date of arrest or other formal accusation to the date on which a defendant's speedy trial motion was granted or denied. Additionally, if the trial court enters a new order granting or denying a motion to dismiss on speedy trial grounds, the length of the pretrial delay runs to the entry of the new order rather than the original order, where an appellate court vacated the original order and remanded for the entry of a new order expressly applying the *Barker-Doggett* framework.

Although the trial court incorrectly measured the length of delay, the Court found that the delay was presumptively prejudicial. Because the trial court entered a second order subsequent to the Court's remand order, the trial court calculated the length of the delay as only the initial 18-month delay. But, the Court found, the length of the delay should have been calculated from Takyi's October 3, 2008 arrest to the trial court's August 22, 2012 order again granting her motion to dismiss after remand, adding 28 months to the length of the delay, for a total delay of 46 months. Having resolved the threshold question, the trial court correctly proceeded to the *Barker-Doggett* four-factor balancing test.

First, to determine whether a pretrial delay is uncommonly long under *Barker-Doggett* factors, the court must analyze the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. In the prior appeal,

the Court held that, although the trial court failed to clearly separate the threshold inquiry of length of the delay from the question of whether the 18-month delay was uncommonly long, the trial court properly found that the pretrial delay was uncommonly long. The trial court corrected this error in its second order and explicitly found that the 46-month delay was uncommonly long, especially for a misdemeanor traffic offense with one witness and no follow up investigation. Because there was some evidence of an uncommonly long delay, the trial court did not abuse its discretion in weighing this factor in Takyi's favor.

Second, a court must consider both the reason for the delay and whether it is attributable to the defendant or the State. Where no reason appears for a delay, the court must treat the delay as caused by the negligence of the State in bringing the case to trial. In the prior appeal, the Court found that "the definitive nature of the trial court's conclusion show[ed] that the court did not consider the evidence that Takyi knew there would be some delay" when it decided that this factor weighed in favor of Takyi. To correct this error, the trial court expressly found that Takyi sought a jury trial knowing this could cause additional delay in her case. Nonetheless, when weighing the reason for the delay, the trial court, in its discretion, did not weigh Takyi's exercise of her right to a jury trial against her. But, the Court stated, even if the trial court had done so, this minor delay would have been overcome by the State's lengthy, unexplained delay in formally accusing Takyi. Here, the record did not explain the initial 18-month delay between Takyi's arrest and the filing of the accusation. There was no evidence that the State intentionally caused the delay or sought to undermine Takyi's defense. Rather, the State admitted, it could not locate Takyi's case, citing budget cuts and limited staffing. However, the Court found, an unreasonable delay in run of the mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system were limited and that each case must await its turn. Where the State gives no reason for the delay, other than its own negligence, this factor is weighed lightly against the State. Consequently, when weighing any short delay resulting from Takyi's demand for a jury trial with the longer delay attributed to the State, the trial court properly exercised its

discretion in weighing the reason for the delay against the State.

Third, although the State had the burden to ensure that defendants are brought to trial promptly, the accused bears some responsibility to invoke the speedy trial right and put the government on notice that he or she would prefer to be tried as soon as possible. Delay in invoking this right will be weighed against the defendant. But, the accused is not required to demand a speedy trial at the first available opportunity; only to demand it "in due course." On remand, the trial court properly recognized that Takyi could have asserted her right to a speedy trial in municipal court. She did not do so. Nonetheless, the trial court found that she asserted her right "in due course." Consequently, the trial court properly exercised its discretion in weighing this factor against the State.

In evaluating the final *Barker-Doggett* factor, the court must consider three types of prejudice associated with an unreasonable pretrial delay: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired. Notably, the presumption of prejudice addressed in *Barker* strengthens with the passage of time and, as the delay increases, less specific harm need be demonstrated to conclude that the delay is prejudicial. Regarding anxiety and concern, the trial court found that Takyi suffered unusual and extreme anxiety and emotional pain due to her uncertain immigration status, such that she was frightened that at any time her unresolved immigration status could force her to leave the U.S. Accordingly, the Court concluded that in weighing all the *Barker* factors, the trial court acted within its discretion in granting Takyi's motion to dismiss.

Statements; Hope of Benefit *Morris v. State*, A13A0054 (7/5/13)

Appellant was convicted of criminal street gang activity, criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. He argued that the trial court erred in denying his motion to suppress because one of the two interviewing detectives offered a "hope of benefit." The evidence showed that during the interview, a detective said, "[w]e sitting here asking you

about two murders and your role in it, man. Whatever you tell us, it ain't gonna make you no more or no less than what, what you got. You ain't gonna get no more charges from this interview, man, but you can—you can at least clarify what your role was and the extent of it.”

The Court stated that an accused's statement to law enforcement is admissible only if the statement was voluntary, which means that the statement must not have been induced by a “hope of benefit. A “hope of benefit” arises from promises related to a reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all. Also, the promise of a benefit that will render a confession involuntary must relate to the charge or sentence facing the suspect. Thus, generally, the “hope of benefit” has been construed as a hope of lighter punishment. Here, the Court concluded, the statement that there would be “no [more] charges” was made in the context of encouraging appellant to be truthful. Further, the detectives never promised or gave hope to appellant that he would receive a lighter punishment in exchange for a confession to the crimes with which he was charged. Thus, the trial court did not err in denying appellant's motion to suppress.

Statements; Hope of Benefit *Miller v. State, A13A0666 (7/3/13)*

Appellant was convicted of two counts of criminal attempt to commit theft by receiving stolen property. He contended that the trial court erred in admitting his custodial statement to police into evidence because it was induced by assurances of reduced charges or punishment. Under former O.C.G.A. § 24-3-50, a statement given by an accused to law enforcement is admissible against him only if the statement was voluntary, meaning that the statement must not have been induced by hope of benefit, among other things. A “hope of benefit” arises from promises related to a reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all. A “hope of benefit” may be dispelled by a statement that an officer has no influence over an accused's possible punishment.

Appellant argued that a “hope of benefit” was created by comments made by the interrogating officer that he would ask the prosecuting attorney about various plea bargain possibilities concerning the charges and punishments

imposed, including, at appellant's request, possible dismissal of the charges in exchange for appellant closing his pawn shop. However, the Court found, as the videotape of the interview and the officer's testimony at the hearing to determine the voluntariness of the statement made clear, the officer plainly told appellant that he “didn't have the authority to make deals with him in his case, that the DA's office would have to make that decision, or the Judge, and that [the officer] would in fact call them and relay to them what appellant's proposition was.” Thus, the Court held, the trial court did not err in finding that appellant's statements were not the result of a “hope of benefit” given by the interrogating officer.

Search & Seizure; Miranda *State v. Price, A13A0213 (7/10/2013)*

Mykell Price and Jonathan Anderson were indicted for trafficking in cocaine, and Anderson was also charged with operating a motor vehicle with an illegal window tint. They each filed a motion to suppress, asserting that the traffic stop was pretextual and that the traffic stop was unreasonably prolonged. In addition, Price asserted that he was placed under arrest and questioned without being advised of his *Miranda* rights. Following a hearing, the motions to suppress were granted, and the State appealed.

The evidence showed that Price and Anderson were traveling on I-16 when a deputy observed that the windows of their vehicle appeared to be illegally tinted. The deputy conducted a traffic stop, checked the windows, and determined the tinted windows were in violation of the law. The deputy also noted that the driver, Anderson, was extremely nervous, his eyes were glazed, and there was an odor of burnt marijuana coming from the vehicle. Based on these observations, the deputy summoned a police officer accompanied by a drug dog. The K-9 unit was nearby and arrived to the scene approximately five or six minutes after the traffic stop was initiated. The dog was deployed to execute a free air sniff around the vehicle and within less than a minute gave a positive response to the odor of one of the substances he was trained to detect.

When a sergeant arrived at the scene, he began an attempt to identify the passenger, Price. This process was still underway when the K-9 unit arrived. The officer had observed

that upon his initial approach, Price was very nervous and seemed to be shaking. After the dog alerted, the officer got Price out of the vehicle to continue his investigation. Price continued to be nervous and shaking, and the officer placed him in handcuffs due to concerns that he was about to flee or fight the officers. As Price was being handcuffed, the officer told him that he was not under arrest, but was being detained. After Price was handcuffed, the officer asked him whether he had anything illegal on his person. Price responded that he had some marijuana in his pocket. The sergeant testified that upon finding the contraband, Price was placed under arrest and was further searched. The search disclosed two ounces of cocaine in Price's shoe.

Because the trial court did not explain the reason for granting the motions to suppress, the Court addressed each of the potential grounds asserted in the motions to suppress, which the State contended did not support the granting of the motions. First, the Court found that the traffic stop of the vehicle was not pretextual because the undisputed evidence showed that the officer observed what he believed to be a window tint violation, and upon testing the window, the officer testified that its tint was in violation of O.C.G.A. § 40-8-73.1. But, the Court added, if an officer witnesses a traffic violation, the ensuing stop is never pretextual, regardless of the officer's subjective intention.

The Court then addressed whether the traffic stop was unduly prolonged by the attempt to identify the passenger, Price. Based upon concerns for officer safety, a police officer may check for outstanding warrants or criminal histories on the occupants of a vehicle at a valid traffic stop as long as under the circumstances they do not unreasonably prolong the stop. Here, the sergeant arrived and began the identification check on Price while the deputy who had made the traffic stop was still talking to Anderson. The sergeant had not finished when the dog arrived and alerted. The time reasonably necessary to accomplish the purpose of a traffic stop includes the time necessary to run a computer check on the driver and on any passengers. Further, the Court noted, it has upheld on numerous occasions traffic stops that were less than ten minutes to allow officers to run criminal histories and to complete any paperwork for issuing the citation. Here, the evidence showed no abandonment or deviation

by the officers from the proper purposes of a traffic stop prior to the dog alerting on the vehicle. Thus, the Court held, the traffic stop was properly conducted, and the detention was not improperly extended.

Finally, Price asserted that he was placed under arrest when he stepped out of the vehicle and placed in handcuffs. Therefore, any incriminating statements he made without being advised of his rights under *Miranda* should be suppressed. Georgia law recognizes three tiers of police-citizen encounters: consensual encounters; brief investigatory stops that require reasonable suspicion; and arrests that require probable cause. To determine the type of encounter, a court must focus on whether the individual was formally arrested or restrained to a degree associated with a formal arrest, not whether the police had probable cause to arrest. Above all, the test is whether a reasonable person in the suspect's position would have thought the detention would not be temporary. Here, the Court found that the second-tier traffic stop was not elevated into an arrest by removing Price from the vehicle and handcuffing him while the sergeant was continuing his investigation. It was undisputed from the video recording that the sergeant told Price at the time he was handcuffed that he was being detained, but not under arrest. Under these circumstances, a reasonable person would have recognized that he was not under formal arrest, and thus, Price's statement shortly thereafter divulging his possession of marijuana was admissible even in the absence of *Miranda* warnings.

Warrant Applications; Witness Fees

Williams v. Russo, A13A0462 (7/3/13)

This appeal stemmed from a superior court's dismissal of an attorney's warrant application for a probable-cause hearing to consider criminal offenses that he alleged were committed by Russo, a Georgia Correctional Officer. Appellant argued that the trial court erred in dismissing the warrant application and, further, in quashing a subpoena that he served upon the Georgia Department of Corrections (the "Department").

The Court stated that in Georgia, arrest warrants may be procured not only by law-enforcement officials, but also by private citizens. The relevant statutory scheme, O.C.G.A.

§ 17-4-40 et seq., includes safeguards to protect against abuse of this privilege by our citizens. Thus, pursuant to O.C.G.A. § 17-4-40(b)1, upon receipt of a warrant application by a person other than a peace officer or law-enforcement officer, the judge, magistrate, or municipal officer ("judicial officer") may deny the warrant without a hearing or any other action if the application form and any testimony from the affiant provided at the time of the application do not demonstrate probable cause for issuing a warrant. Otherwise, barring special circumstances, the judicial officer must hold a probable-cause hearing and attempt to notify the person whose arrest is sought as to the date, time, and location of the scheduled hearing. Should the judicial officer find probable cause to arrest at the conclusion of the hearing, he or she may issue a warrant *instanter*. If not, the warrant application must be denied.

Also, while the foregoing statutory safeguards protect any person who is the subject of a warrant application by a private citizen, a warrant sought by a private citizen against "a peace officer, law enforcement officer, teacher, or school administrator" may be issued only by a judge of a superior court, a judge of the state court, or a judge of the probate court. This requirement ostensibly provides even greater protection to law-enforcement officers like the Georgia Correctional Officer. Thus, the Court noted, while O.C.G.A. § 17-4-40(c) specifies that arrest warrants for peace officers or law-enforcement officers "may be issued only by a judge of a superior court, a judge of a state court, or a judge of a probate court" (as opposed to a magistrate or other municipal officer), it otherwise in no way limits the applicability of the statute to those officers. Rather, it clearly contemplates the statute's application to peace officers and law-enforcement officers by mandating who may issue warrants for their arrest.

In contrast, O.C.G.A. §§ 17-7-52 and 45-11-4, the scheme advanced by appellant and relied upon by the trial court, sets forth the procedural safeguards for peace officers facing *indictment*. Further, there is nothing in the text or structure of O.C.G.A. §§ 17-7-52 or 45-11-4 to suggest that the relied on statutory scheme supplanted or limited O.C.G.A. § 17-4-40. In other words, these are two separate and distinct statutory schemes, and the trial court erred in concluding that this case was governed by

O.C.G.A. §§ 17-7-52 and 45-11-4 rather than O.C.G.A. § 17-4-40. Therefore, the Court vacated and remanded pursuant to O.C.G.A. § 17-4-40(b)1 to determine whether a probable cause hearing was appropriate and, if so, whether probable cause to arrest the Georgia Correctional Officer existed.

Appellant also argued that the trial court erred in quashing the subpoena for the production of evidence served upon the Department because the subpoena failed to include a witness fee and mileage expenses. Pursuant to O.C.G.A. § 24-10-22, one issuing a subpoena may command the person to whom it is directed to produce certain designated documents and/or other tangible evidence and, upon a written motion to quash by the subpoenaed witness, the trial court may condition a grant of the motion on the payment of reasonable costs associated with producing the requested evidence. Here, however, the subpoena was not quashed due to appellant's failure to pay costs associated with the production of the evidence requested in the subpoena. Rather, the trial court quashed the subpoena because it was not accompanied by a witness fee and mileage expenses for the person upon whom it was served. Pursuant to O.C.G.A. § 24-10-24, service of a subpoena upon a witness who resides outside of the county in which he or she is being summoned is only valid when it is "accompanied by tender of the fee for one day's attendance plus mileage of 20¢ per mile for traveling expenses for going from and returning to his or her place of residence by the nearest practical route." Additionally, it was undisputed that the Department was located outside of the county in which the hearing was to be held and that the subpoena served upon the Department was not accompanied by a witness fee or mileage expenses. Thus, the Court held that the trial court did not err in quashing the subpoena.

Search & Seizure

Felton v. State, A13A0244 (7/3/13)

Appellant was convicted of possession of marijuana. He contended the trial court erred by denying his motion to suppress. The evidence showed that a police officer responded to "a domestic disturbance in progress" dispatch based upon a 911 call from a concerned citizen about a violent, verbal dispute between a man and a woman in a white car parked in

a convenience store parking lot. A second officer arrived and began interviewing appellant. During the interview, appellant kept putting his hand in his coat pocket. The officer repeatedly ordered appellant to remove his hand from his coat pocket and noted that appellant was becoming increasingly nervous. As a result of his concern that appellant was hiding something in his pockets, the officer asked him if he could pat him down for any weapons or illegal items and when appellant did not respond, he patted down appellant and discovered a bag of marijuana.

Appellant contended that the evidence did not support a *Terry* stop. The Court stated that a *Terry* stop is a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, and must be reasonable in light of the facts known to the officer at the time. A court must take the totality of the circumstances into account and determine whether the detaining officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity. The reasons justifying an investigatory stop need not rise to the level of probable cause, but must be more than a mere hunch and must not be arbitrary or harassing. Here, the Court found, the basis for the stop was clear and the complaint by the concerned citizen provided ample basis for the conclusion that the officers' actions were neither arbitrary nor harassing. Further, the Court held that although the evidence did not show that appellant was engaging in criminal activity at the time, based upon the complaint, the officers were authorized to detain him briefly to determine whether he was about to engage in such activity.

Appellant also contended that the trial court erred in finding that the pat-down was authorized. The Court agreed and reversed. When conducting an investigatory stop, an officer is entitled to conduct a limited pat-down of the suspect for weapons if the officer reasonably believes that the suspect poses a threat to his safety or that of others. It is not required that the officer be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Thus, the controlling issue was whether the officer had objectively reasonable grounds to believe or

suspect that appellant may have been armed. Here, the officer who conducted the pat-down of appellant's outer clothing never testified that he believed that appellant was armed and dangerous. Instead, the officer merely asserted that he believed that people who kept their hands in their pockets could be hiding something. Accordingly, the State failed to establish that the officer was authorized to conduct a pat-down of appellant. Hence, the trial court erred by denying the motion to suppress.

Waiver Of Right To Counsel; Juveniles

In The Interest of S. M., A13A0807 (7/3/13)

Appellant sought relief from the juvenile court's dispositional order following his adjudication of delinquency on several counts, including one act which, if committed by an adult, would have constituted the crime of theft by taking a motor vehicle. The record showed that after determining that this was appellant's second adjudication of delinquency for motor-vehicle theft, a designated felony act under O.C.G.A. § 15-11-63(a)(2)(E), the juvenile court conducted a dispositional hearing and imposed restrictive custody pursuant to O.C.G.A. § 15-11-63(b). Appellant argued that the juvenile court erred in adjudicating him as a designated felon because he did not knowingly and voluntarily waive his right to counsel in a 2011 prior adjudication.

The Court noted that the designated felony statute, O.C.G.A. § 15-11-63, defines a "designated felony act" as an act which constitutes "a second or subsequent violation of Code Sections 16-8-2 through 16-8-9, relating to theft, if the property which was the subject of the theft was a motor vehicle." Designated felony acts are those which the General Assembly has deemed serious enough to authorize the juvenile court, after conducting a hearing and making certain statutory findings of fact, to confine the juvenile to restrictive custody. Here, in addition to the present delinquency adjudication, appellant had been adjudicated delinquent in December 2011 after admitting to an act which, if committed by an adult, would have been the crime of theft by taking a motor vehicle. It was the prior adjudication that rendered appellant's second motor-vehicle theft a designated felony.

It is well-established that a juvenile has a right to counsel during a dispositional hearing,

although that right can be waived. However, the State has a "heavy burden" of proving, under the totality of the circumstances, that a juvenile knowingly and voluntarily understood and waived his or her right to counsel. The standard for determining whether the waiver of a non-indigent juvenile was valid is the same as that used for an adult. Thus, when presented with a non-indigent defendant who has appeared for trial without retained counsel, the trial judge has a duty to delay the proceedings long enough to ascertain whether the defendant has acted with reasonable diligence in obtaining an attorney's services and whether the absence of an attorney is attributable to reasons beyond the defendant's control. Also, a juvenile court must make the juvenile aware of the danger of proceeding without counsel.

Here, the Court noted that during the December 2011 dispositional hearing, the sole inquiry into appellant's lack of counsel came from the assistant district attorney: The State: "[Appellant], do you wish to represent yourself today and proceed with this matter or do you want an opportunity to hire a lawyer?" [Appellant.]: "I'll go on—myself." Appellant then proceeded to admit to the acts set forth in the delinquency petition, including theft by taking of a motor vehicle. The Court held that the brief and cursory exchange was not sufficient to ensure that appellant understood his right to an attorney, or that he knowingly and intentionally waived that right. No inquiry was made into the reason for his lack of counsel, nor was any information given to ensure that he understood the danger of proceeding without legal representation. Therefore, appellant met his burden of proving that his waiver of counsel in the prior dispositional hearing was neither knowing nor voluntary.

Next, the Court addressed whether appellant's collateral attack on the December 2011 delinquency adjudication rendered that adjudication inadmissible in the present case for the purposes of the designated felony statute. A first or prior violation is an element of the designated felony act that must be proven beyond a reasonable doubt before restrictive custody may be imposed under O.C.G.A. § 15-11-63(a)(2)(E). In addition, an admission of guilt that is itself invalid cannot constitute proof beyond a reasonable doubt of the acts admitted. Here, the State presented no evidence of the prior adjudication except that of the dispositional hearing transcript. Thus,

the juvenile court's imposition of restrictive custody based upon its rendering of appellant's current adjudication of delinquency as a designated felony act pursuant to O.C.G.A. § 15-11-63(a)(2)(E) could not stand. The Court therefore vacated the dispositional order and remanded the case to the juvenile court for entry of a new disposition order consistent with the opinion.

Statute of Limitations; Actual Knowledge

Jannuzzo v. State, A13A0683 (7/9/13)

Appellant was found guilty by a jury of one count of theft by conversion in violation of O.C.G.A. § 16-8-4, and one count of violation of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act in violation of O.C.G.A. § 16-14-1. Appellant asserted that the State failed to carry its burden to prove that the charges were brought within the applicable statute of limitations. The record showed that the indictment was filed on June 12, 2009, and alleged in the RICO count that, while appellant was general counsel for Glock, Inc., he acted in violation of O.C.G.A. § 16-14-4(a) and (c) by unlawfully conspiring with another Glock employee, to engage in a pattern of racketeering activity by which they unlawfully acquired and maintained, directly and indirectly, interest in and control of personal property, including money, belonging to Glock, Inc., its founder, Gaston Glock, and companies associated with Glock, Inc.

As to the felony theft by conversion, appellant was alleged to have converted a LaFrance pistol. O.C.G.A. § 17-3-1(c) required that prosecution for this offense "shall be commenced within four years after the commission of the crime. . . ." Here, however, the State alleged in the indictment that, because the accused and the crime were unknown to the State, the four-year statute of limitation was tolled under the exception set forth in O.C.G.A. § 17-3-2(2), which provides that the limitation period is tolled while "[t]he person committing the crime is unknown or the crime is unknown." Under this exception, the statute of limitation is tolled until the victim has actual knowledge of the crime—what the victim actually knew. Constructive knowledge—what the victim should have known—does not extinguish the tolling period. For purposes of this exception, the actual knowledge of the victim is im-

puted to the State. Accordingly, the four-year statute of limitation for the prosecution of this offense began to run on the date that the victim, Glock, Inc. had actual knowledge of the offense. Because the indictment was filed on June 12, 2009, to prove that appellant was indicted for theft by conversion within the four-year limitation period, the State had the burden of producing evidence that Glock's first actual knowledge of the offense occurred within four years prior to that date—no earlier than June 13, 2005.

Here, the indictment alleged that on February 12, 1999, while Glock employed appellant, Glock gave him temporary custody of a LaFrance pistol; that when appellant left employment with Glock on or about February 13, 2003, he did not return the pistol to Glock; that, after appellant left employment with Glock, he denied having possession of the pistol; and that, when appellant was later arrested on August 26, 2007, on an unrelated charge, the pistol was found in his possession. On these allegations, the indictment charged that appellant committed the offense of theft by conversion of the pistol between February 12, 1999, and August 26, 2007. At trial, evidence showed that Glock was required by the ATF to keep extensive records of pistols lent out to employees for demonstration. Also, records showed that appellant never returned his pistol nor did he deny having the pistol after talking to his superior. Further, the evidence showed that Glock was aware of that fact after appellant left his employment in 2003. Thus, construing the four-year limitation period in favor of repose, and construing the tolling provision narrowly and in favor of appellant, the Court found no evidence that could support a finding by the jury that Glock's actual knowledge of the theft by conversion occurred any later than February or March of 2003—more than six years prior to the June 12, 2009 indictment. Therefore, the Court held, the State failed to carry its burden to prove appellant's indictment fell within the four-year statute of limitation.

Next, appellant challenged the statute of limitation set forth in O.C.G.A. § 16-14-8, a five year statute of limitation pursuant to the RICO count alleged in the indictment. As set forth, the RICO count of the indictment alleged that appellant was part of a conspiracy to engage in a pattern of racketeering activity that consisted of various predicate offenses,

the last of which was theft by conversion of the LaFrance pistol, which the State alleged occurred between February 12, 1999, and August 26, 2007. The predicate offenses for the RICO charges were based on acts of appellant while he was still employed at Glock until 2003. Here, the State argued that there was evidence supporting acts that amounted to obstruction of justice following the end of appellant's employment. However, the Court noted that Glock was aware of appellant's actions and the knowledge element required to toll the statute of limitation was imputed by Glock to the State.

Further, the State specifically alleged that it was relying upon the exception in O.C.G.A. § 17-3-2(2) to toll the limitation period with respect to the theft by conversion predicate offense. With respect to the other predicate offenses, the State made no specific allegation in the indictment of reliance on O.C.G.A. § 17-3-2(2). Nevertheless, the introductory paragraph of the RICO count contained a general allegation that the RICO offense occurred "between the 28th day of August, 1991, and the 26th day of August, 2007, the exact dates being unknown to the Grand Jury, as contemplated by O.C.G.A. § 17-3-2(2)." The Court noted that the indictment likely intended to allege that the exception in O.C.G.A. § 17-3-2(2) tolled the limitation period with respect to *other* predicate offenses occurring during appellant's employment with Glock because the State lacked knowledge of the offenses. (Emphasis added.) Even assuming that presumption, the Court held, the record showed that the State did not prove the exception. In any event, the State did not make this argument on appeal, and the record showed that appellant's co-conspirator at Glock testified for the State and confessed to Gaston Glock in October of 2003 that he and appellant had conspired to steal from Glock. Thus, the evidence showed that the victims (and therefore the State) had actual knowledge of these offenses more than five years prior to the June 12, 2009 indictment, and the State produced no evidence or argument to the contrary.

Waiver of Right to Jury Trial; Search & Seizure

Beville v. State, A13A0796 (7/3/13)

Appellant was convicted after a bench trial of trafficking in cocaine and possession of

less than one ounce of marijuana. The evidence showed that an officer was on patrol watching westbound traffic on I-20 for moving violations. The officer observed appellant driving a vehicle that the officer believed had an illegal window tint, so he executed a traffic stop. The officer approached the vehicle and immediately smelled the odor of burnt marijuana as appellant rolled down his window. Appellant exited the vehicle and consented to a search of his person, warning the officer of three knives in his pocket. While retrieving the knives, the officer felt a plastic bag in appellant's pocket. The officer suspected the bag to be marijuana based on his training and experience. The officer then placed appellant under arrest for possessing the marijuana, and because appellant was alone and the vehicle was on the side of a highway late at night, the officer began an inventory search of his vehicle. The search revealed a cigar tube containing burnt marijuana cigarettes, as well as a black grocery bag containing 498.78 grams of cocaine. Appellant admitted to the officer that the bag contained cocaine.

Appellant contended that the State did not carry its burden to show that he knowingly waived the right to a jury trial. The Court disagreed. The Court stated that a defendant's right to trial by jury is a fundamental constitutional right that the defendant must personally, knowingly, voluntarily, and intelligently choose to waive. When a defendant challenges a purported waiver of the right to a jury trial, the State bears the burden of showing the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. Here, the record contained a waiver form executed by appellant stating that he "freely and voluntarily waive[d] his right to a jury trial." The record also contained a colloquy by the trial court confirming appellant's waiver, as well as counsel's thorough explanation of his discussions with him and his reasons for proceeding with a bench trial. Moreover, the trial judge's own observations of appellant's demeanor during the hearing supported the finding that he intelligently, knowingly and voluntarily waived his right to a jury trial.

Appellant also contended that the trial court erred by failing to suppress the evidence

from the traffic stop because the traffic stop was not based upon a reasonable articulable suspicion of criminal activity. The Court stated that before stopping a car, an officer must have specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. But a traffic offense provides the necessary facts for such reasonable suspicion and when an officer witnesses a traffic offense, a resulting traffic stop does not violate the Fourth Amendment, regardless of the officer's subjective intent. Further, when an officer observes that a vehicle has darkly tinted windows and he reasonably believes them to be in violation of O.C.G.A. § 40-8-73.1, an ensuing traffic stop is justified by this reasonable articulable suspicion of criminal conduct. Here, appellant argued that the officer could not reasonably believe his windows were illegally tinted. But, the officer observed appellant's car drive by his post, and he could not see into the vehicle, even with his headlights turned on, due to the dark tint of the windows. The officer tested the vehicle's window tint using a handheld meter and discovered the violation. Because of this reasonable suspicion of criminal conduct, the Court held that the traffic stop was lawful.

Appellant nevertheless argued that the stop was unlawful because the State did not prove that his arrest was effectuated in the jurisdiction in which the officer was authorized to make arrests. The Court noted that appellant did not raise this issue at trial. However, the Court held, even if the warrantless arrest in this case was illegal because the officer was outside his jurisdiction, suppression of the fruits of that arrest would not be required because the arrest was made with sufficient probable cause.

Motion in Arrest of Judgment

Ashmore v. State, A13A1413 (07/19/13)

Appellant was convicted of aggravated sexual battery, three counts of child molestation, attempted child molestation, attempted aggravated child molestation, and statutory rape. Appellant contended that the trial court erred in denying his motion in arrest of judgment with regard to the attempted aggravated child molestation charge. The Court disagreed.

A motion in arrest of judgment is an appropriate remedy only when an indictment is absolutely void in that it fails to charge the

accused with any act made a crime by the law, and, upon the trial, no demurrer to the indictment is interposed and the accused is convicted under the indictment and judgment is entered on the verdict. An indictment is not void if it is sufficient to place the defendant on notice of the charges against him and enables him to prepare an intelligent defense. When attacking an indictment after the verdict, every presumption and inference is in favor of the verdict. Here, in failing to file a demurrer before trial, appellant waived his right to a perfect indictment. And where an indictment alleges an offense, alleges that the act was unlawfully committed and contrary to the laws of the State, and employs language from which it must necessarily be inferred that criminal intent existed, the indictment is not void for failing to expressly allege the requisite criminal intent.

Here, the indictment charged appellant with attempted aggravated child molestation based on his act of asking the victim "if she sucked." The indictment referred to O.C.G.A. §§ 16-4-1 and 16-6-4(c), and specifically alleged that the victim was under the age of sixteen, the act was unlawful and contrary to the laws of this State, appellant had the intent to commit the crime of aggravated child molestation, and the act constituted a substantial step toward the commission of that crime. In the context of aggravated child molestation, the words "if she sucked" would alert a defendant that he was being charged with attempting to commit an immoral or indecent act involving an act of oral sodomy. Thus, the indictment sufficiently placed appellant on notice of the charges against him and enabled him to prepare an intelligent defense. Accordingly, the Court held that the trial court did not err in denying appellant's motion in arrest of judgment.

Similar Transactions; Continuances Based on Witness Unavailability

Janasik v. State, A13A0253 (7/9/13)

Appellant was convicted of DUI (less safe), failure to maintain lane, and a violation of Georgia's safety belt law. Appellant contended that the trial court erred in admitting a similar transaction without first weighing the danger of unfair prejudice. Specifically, he argued that this error was compounded

by the prosecution's improper "propensity" arguments stemming from this evidence. Prior to trial, the State filed a notice of its intent to present an earlier DUI conviction as similar transaction evidence for purposes of "identity, motive, scheme, bent of mind, course of conduct, and/or absence of accident," and appellant filed a motion in opposition to the State's notice. Following a hearing, which was not transcribed, the trial court denied the motion. The Court noted that since the trial occurred in 2011, the old rules of evidence allowed an individual's course of conduct and bent of mind as appropriate purposes for which similar transaction evidence could have been introduced. Because there was an absence of a transcript of the similar transaction hearing, the Court presumed that the State made the requisite showings for the introduction of this evidence and that, after hearing the evidence, that the trial court correctly exercised its discretion in denying appellant's motion.

Next, appellant contended that the trial court erred in failing to grant a continuance, by failing to compel a witness's appearance and testimony, and by denying appellant's request for a mistrial. The record showed that appellant's counsel indicated to the trial court at 5 p.m. on the first day of trial that his expert witness would not be able to testify the following day. The trial court agreed to accommodate the defense by allowing the witness to testify electronically. Although the next morning the defense counsel had indicated that the electronic set-up had "worked great", there were issues regarding the wireless connection. Further, defense counsel could not locate the witness and the trial court gave the defense over an hour to allow the defense to locate him. At that point, the trial court told appellant to rest his case unless he had any other witnesses.

The Court stated that to require a continuance based upon a witnesses absence, appellant was required to demonstrate under O.C.G.A. § 7-8-22 that (1) that the witness is absent; (2) that he has been subpoenaed; (3) that he does not reside more than 100 miles from the place of trial; (4) that his testimony is material; (5) that the witness is not absent by permission of the movant; (6) that the movant expects to be able to procure the testimony of the witness at the next term of court; (7) that the continuance is not requested for purposes of delay and, (8) the facts expected to be proved by the absent witness must be stated. The

Court held appellant failed to make all of the required showings. Although appellant's trial counsel represented that the witness was under subpoena, the Court noted that no evidence of this subpoena existed in the record. Moreover, the trial court also found no evidence of such a subpoena. In any event, appellant's counsel conceded that he released the expert from his subpoena after the first day of trial, even if he did so because he expected the witness to testify electronically. Further, appellant failed to establish the witness's place of residency or his availability by the next term of court. And although appellant's counsel indicated that they could not win the case without this expert's testimony and the defense had built its entire defense around him, appellant failed to provide the trial court with the facts he expected the witness's testimony to prove. He stated only that the testimony "wrapped up the testimony of [the defense's other expert] and the video as well as [the] Trooper as well as the medical records that we procured for purposes of him to review [that] predated—this incident," without providing the court any indication of the content of his testimony. Accordingly, the Court held, appellant failed to establish for the trial court that the witness's testimony was material. Under these circumstances, the Court could not say that the trial court abused its discretion in denying the motion for continuance.

Obstruction; Character Evidence

Thomas v. State, A13A0308 (7/9/13)

Appellant was convicted of robbery and misdemeanor obstruction. He argued that he was entitled to a mistrial because of improper admission of character evidence and that the evidence did not support his convictions. The evidence showed that after the robbery, a man resembling the suspect walked by an investigating officer. The officer recognized the man as appellant, whom he had seen at that location multiple times before. He called out, "Hey, come here for a second," or "Come here, sir, let me talk to you for a second," but appellant turned and walked away. Appellant then began running and the officer started chasing him, but he got away. He was eventually caught.

Appellant contended that the evidence was insufficient to support his misdemeanor obstruction charge. O.C.G.A. § 16-10-24(a) provides that "a person who knowingly and

willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor." The indictment charged appellant with obstruction for fleeing the officer. The misdemeanor obstruction statute was made purposefully broad to cover actions which might not be otherwise unlawful, but which obstructed or hindered law enforcement officers in carrying out their duties. However, this does not make any actions which incidentally hinder an officer a crime; the accused must have knowingly and willfully obstructed or hindered the officer. Further, a person has a constitutional right to walk away from some encounters with police. Hence, the Court noted that it must construe Georgia's obstruction statute in accordance with the U.S. Supreme Court's construction of the Fourth Amendment. The Supreme Court of the United States has construed the Fourth Amendment so as to set forth three tiers of police-citizen encounters. These encounters involve communication between police and citizens involving no coercion or detention, brief seizures that must be supported by reasonable suspicion and full-scale arrests that must be supported by probable cause. Thus, when a court analyzes police-citizen encounters and determines whether defendants could lawfully leave those encounters, it must follow the framework provided in *Terry v. Ohio*, 392 U.S. 1 (1968). If a first tier encounter involved no detention but simply communication, then the defendant has a right to walk away. If the encounter is raised to a second tier, it involves a lawful attempt to seize the defendant, and he cannot lawfully flee.

Here, there was no evidence that the officer used language or tone of voice indicating compliance with the officer's request might be compelled. Moreover, the officer did not explain to appellant that he wished to speak with him as part of a pending investigation. Although the officer did have a particularized and objective basis for suspecting appellant of criminal activity, he did not command him to stop. Had he done so, the Court noted, the encounter would have been elevated to the second tier. The competent evidence introduced at trial established only that the officer said, "Hey, come here for a second," and "Come here, sir, let me talk to you for a second." The Court noted that those were not commands, but rather requests. Although at trial, the prosecutor asked questions that implied the

officer had commanded appellant to stop, a question that assumes facts not in evidence does not constitute competent evidence. Thus, because there was no evidence of a command, the Court concluded that the encounter was a first-tier encounter and therefore that appellant did not knowingly obstruct the officer.

Appellant also contended that the trial court erred in failing to declare a mistrial after a witness placed his character at issue. A detective, in explaining how she compiled the photographic lineup, testified that when the officer gave her the name of appellant the day after the robbery, she “went to the county web site, Sheriff’s Department web site—” Defense counsel immediately objected and moved for a mistrial on the ground that the reference to the sheriff’s department placed appellant’s character into issue. The trial court instructed the jury to “disregard the last statement made by the witness about going to the county web site.” He asked the jurors whether they could disregard the reference, and the jurors answered yes. Defense counsel renewed his motion for mistrial. The trial court again instructed the jurors to “disregard any statement previously made by this witness about going to a web site by the Sheriff’s Department.”

The Court held that the reference to the sheriff’s department did not place appellant’s character into evidence. A mere reference to the fact that appellant’s photograph was already in police records, without more, did not inject his character into evidence. And even if the reference had placed appellant’s character into issue, the trial court did not abuse its discretion in refusing to grant a mistrial. Further, the Court noted, the reference to the sheriff’s office was inadvertent and not the result of improper questioning by the State. Finally, the trial court’s curative instructions were promptly given and clearly informed the jury that it should disregard the improper testimony. Therefore, the Court held, the trial court did not abuse its discretion by giving curative instructions, rather than declaring a mistrial.

Continuance; Lack of Time to Prepare for Trial

Roberts v. State, A13A0500 (7/3/13)

Appellant was found guilty of two counts of aggravated assault, armed robbery, burglary, theft by taking an automobile, theft by receiving stolen property (a shotgun), and

possession of a firearm during the commission of a crime. He contended that the trial court erred in denying his motion for a continuance because trial counsel was forced to proceed while unprepared. The Court stated that a motion for a continuance predicated on the basis of counsel’s lack of preparation for trial is left to the sound discretion of the trial court and a ruling denying such a motion will not be interfered with unless the court has abused its discretion in denying the motion. Mere shortness of time does not by itself show a denial of the rights of the accused, and mere shortness of time will not reflect an abuse of the trial court’s discretion in denying a continuance, where the case is not convoluted and is without a large number of intricate defenses. Additionally, when there is no showing that a continuance would have benefitted the defendant, he has not established harm in the denial of the continuance.

The record showed that appellant did not exercise due diligence to retain trial counsel. Between his March 16, 2009 indictment and September 9, 2012 trial, appellant discharged three attorneys before making the decision to retain counsel the afternoon before trial. Additionally, appellant failed to offer any explanation for his numerous discharges of attorneys or last-minute change of counsel beyond lacking funds to secure his retainer. Moreover, appellant’s attorney of record immediately prior to trial reported that appellant was “extremely uncooperative and antagonistic” toward the case and that he would have been prepared to go forward with the trial had appellant cooperated with him. Thus, the Court noted if trial counsel was unprepared to proceed in the matter, any lack of preparedness was directly a result of appellant’s lack of diligence.

In addition, appellant contended that a continuance was necessary for trial counsel to subpoena his co-defendant to testify on his behalf at trial. The Court held that the trial court did not abuse its discretion in refusing to grant the requested continuance because appellant had ample opportunity to obtain his requested witness prior to trial. The Court noted that appellant did not call the co-defendant to testify at the hearing on his motion for new trial, so he failed to present any probative evidence that he would have testified for him or that, if so, such testimony would have been exculpatory. Without the testimony of the particular witness, it was impossible for appellant to show

there was a reasonable probability the results of the proceedings would have been different if the trial court had granted a continuance and permitted him to obtain the co-defendant. Therefore, the Court held, the trial court did not abuse its discretion by denying the motion to continue.

Field Sobriety Testing; Admissions Against Interest

Johnson v. State, A13A0397 (7/3/13)

Appellant was found guilty of DUI-less safe, and improper lane change. The evidence showed that an officer observed appellant make an erratic lane change. The officer pulled him over and noticed the smell of alcohol emanating from appellant’s vehicle. After medically qualifying appellant, the officer performed the HGN test, which he had conducted on “thousands” of individuals, and he detected six out of six clues of impairment. Based on his observation of appellant’s driving, as well as his observation of his physical presentation and his performance on other administered field sobriety tests, the officer arrested appellant for DUI-less safe. At trial, the State presented to the jury a copy of the officer’s dashboard video. The officer’s patrol car had an audio recording device activated when he arrested appellant, and the recording captured appellant stating to himself, “I’m really f—ed. I mean, I’m really, really, really, really f—ed.” while in the back of the patrol car.

Appellant argued that the trial court erred by denying his motion to exclude evidence of the HGN test because the officer improperly performed the test. Specifically, appellant argued the trial court should have excluded the results of his HGN test or instructed the jury to disregard those results based on the testimony of his expert witness, who stated that the officer performed the equal tracking portion of the test “too quick.” Evidence of a defendant’s performance on an HGN test is considered to be evidence based on a scientific principle or technique. Such evidence is admissible upon a showing by the party offering the evidence that (1) the general scientific principles and techniques involved are valid and capable of producing reliable results, and (2) the person performing the test substantially performed the scientific procedures in an acceptable manner. Here, the officer testified that, appellant was medically qualified to receive the

test, he appropriately performed the tracking portion of the HGN test and that he appropriately performed the remaining portions of the HGN test, which showed six out of six clues of impairment. The Court noted that any conflicting expert testimony or video evidence challenging the officer's performance of the test went to the weight of the HGN test results and the officer's conclusions of appellant's impairment, not the admissibility of the HGN test results themselves. Therefore, the Court held, the trial court committed no error in admitting evidence of the HGN test.

Appellant also contended that the trial court erred by admitting the post-arrest statements he made in the back of the officer's cruiser because the statement's probative value was outweighed by its prejudicial effect. The Court stated that O.C.G.A. § 24-3-3 provides that declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the *res gestae*. Here, appellant's recorded utterance made while in the back of the patrol car fell within the *res gestae* of the arrest. In addition, a defendant's incriminating statement is admissible when it constitutes an admission against the defendant's penal interest because a defendant's declaration against penal interest is the admission of a party opponent. Hence, appellant's contention that the statement was ambiguous—that the object of his statement may have been the collateral consequences affecting his medical licensure rather than the fact that he was actually less safe to operate a vehicle because of his level of intoxication—was an issue for the jury. Therefore, the Court held that appellant's enumeration was without merit.

DUI; Roadblocks

State v. Conner, A13A0371 (7/3/13)

The State appealed from the grant of Conner's motion to suppress. The evidence showed that around 1:00 a.m. on October 28, 2012, police officers implemented a traffic-safety roadblock. Approximately ten officers wearing reflective safety vests and carrying flashlights manned the roadblock, with some assigned to ensuring that approaching motorists slowed down and others assigned to screening the motorists as they were stopped. Shortly after 3:00 a.m., Conner was stopped at the roadblock,

and one of the screening officers asked to see his license. As Conner complied, the screening officer smelled an alcoholic-beverage odor on Conner's breath. Consequently, Conner was arrested subsequently charged with one count of DUI-less safe and one count of DUI-per se. He thereafter moved to suppress, arguing that the roadblock was unlawful. The trial court granted Conner's motion, finding that the roadblock was indeed unlawful because it was not "well-identified as a police checkpoint."

The Court noted that the requirements for determining the constitutionality and lawfulness of a police roadblock under Georgia law was set forth in *Lafontaine v. State*, 269 Ga. 251 (1998). One of the *Lafontaine* factors is that the roadblock operation is well identified as a police checkpoint. The Court also noted that the *Lafontaine* factors are not general guidelines, but minimum constitutional prerequisites. The State contended that the roadblock was well identified as a police checkpoint as required by the *Lafontaine*. The record showed that two officers testified that the roadblock was well-lit by several police vehicles and spotlights and was manned by ten officers wearing reflective vests and carrying flashlights. Nevertheless, because the officers had different recollections regarding the presence of cones at the roadblock, the trial court found that there were no cones present at the scene, and cited their absence as a reason for granting Conner's motion. In addition, the trial court found that there were no signs identifying the roadblock. While the Court noted that cones and signs are certainly characteristics in determining whether a roadblock is identified, there was no precedential authority demonstrating that the Fourth Amendment required officers to identify roadblocks with orange cones. Similarly, the Court found no authority requiring roadblocks to be identified by signs.

The Court found that the roadblock was identified by six police vehicles with their blue lights flashing and ten policemen wearing reflective vests and carrying flashlights. The Court noted it has previously held such roadblocks with similar identifying characteristics to be well identified as a matter of law. Although the trial court also based its order on testimony from one of the officers, in which the officer stated that he could not say whether a driver from 200 yards away would be able to discern whether the significant police presence up ahead was a roadblock or the scene of an ac-

cident, the Court found no precedent placing such importance on the *subjective* perception of stopped motorists as to whether they are aware of the *specific* details pertaining to the police presence. (Emphasis added.) Instead, previous decisions have used *objective* criteria in determining whether a police checkpoint was well identified.

Thus, the Court took the opportunity to emphasize that in answering whether a roadblock is "well identified as a police checkpoint" under the *Lafontaine* framework, a court must answer the inquiry by objectively evaluating the totality of the circumstances surrounding the roadblock. Additionally, the Court expressly rejected the notion that the absence of any one item, such as cones or signs, renders a police roadblock unlawful. The Court noted that the purpose of the "well identified" requirement is simply to lessen the amount of fright or concern to drivers and permit those drivers to see visible signs of the officers' authority, not to advertise the checkpoint as if it was a coming attraction. At the least, the law requires that a roadblock be well identified as a police checkpoint, not that it be explicitly identified as such. Thus, the Court concluded, the roadblock at issue was sufficiently well identified as a police checkpoint and reversed the trial court's order granting Connor's motion to suppress.

Rape Shield

Johnson v. State, A13A0199 (7/2/13)

Appellant was convicted of false imprisonment, rape, aggravated assault for striking the victim about the head with a hammer, and three counts of aggravated battery for inflicting upon the victim disfiguring injuries to her skull, nose, and hands. The evidence showed that the victim and appellant were acquaintances and had known each other for about eight months prior to the night in question. Additionally, appellant was 6'2 and 190 pounds and the victim was 5'1 and 95 pounds.

First, appellant contended that the trial court erred by granting the State's motion in limine to exclude evidence that he and the victim had a prior consensual sexual relationship. The Court noted that the Rape Shield Statute bars the admission of evidence relating to the victim's past sexual behavior unless it directly involves the accused's participation and supports an inference that the accused could have

reasonably believed that the victim consented to the conduct at issue. The evidence may also be admitted on a finding that it was so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence.

The Court noted that during the hearing on the matter, the State urged the court to bar certain evidence under the Rape Shield Statute in light of the violence inflicted upon the victim, asserting also that any prior instances of consensual sexual conduct were too remote in time. Although defense counsel argued that the evidence should be allowed, the trial court granted the State's motion, finding no inference, given the circumstances surrounding the episode that gave rise to the charges, that appellant could reasonably have believed that the victim consented to sexual intercourse, even if she had previously consented to it. The Court agreed and held that in light of the victim's testimony, the crime scene, and the evidence of the victim's injuries, it could not say that prior consensual sex with the victim substantially supported the conclusion that appellant reasonably believed she consented on the night of the offense. Therefore, the Court declined to find that the trial court abused its discretion in excluding the evidence of previous consensual sex.