

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 8, 2011

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## THIS WEEK:

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### **Aggravated Assault; Jury Charges**

*Cantera v. State, S10G1633 (6/27/2011)*

Appellant was convicted of aggravated assault, concealing the death of another, and possession of a firearm in the commission of a crime. The Court of Appeals affirmed. The Supreme Court of Georgia granted review to determine whether a jury instruction on aggravated assault must include an instruction on simple assault.

The Court had previously held that a charge on simple assault was not required to

be given in order to complete the definition of aggravated assault when neither negligence nor reckless conduct was an issue in the case. In the instant case, the undisputed evidence showed that appellant intentionally shot the victim and then chased him down and shot him three more times as he begged for his life. Therefore, the Court found that "Neither negligence nor reckless conduct was an issue in this case and thus, any error in the charge would not have affected the outcome of the case." Accordingly, the Court affirmed.

However, the Court drew a distinction between aggravated assault cases where injuries have been intentionally inflicted (such as this one) and those where, although there may be injuries, intent may be in question. The Court found that in cases where intent is in question, a charge on simple assault must be given so the jury can see that, although no physical harm may have been done, the defendant could still be found guilty of aggravated assault if the jury finds that he attempted to commit a violent injury or if he performed an act which placed the victim in reasonable apprehension of immediately receiving a violent injury. On the other hand, the Court stated that in cases where there is no question regarding the perpetrator's intent, there is no need for the trial court to instruct the jury on simple assault.

### **Defense of Habitation; Justification**

*Reese v. State, S11A0220 (6/27/2011)*

Appellant was convicted of felony murder, aggravated assault and possession of a firearm during the commission of a felony in connection with a shooting death. Appellant first argued that the trial court erred by failing to

give the jury his request to charge on defense of habitation. However, the Court found that there was no evidence presented at trial that the victim's act of opening the front door was in any way an unlawful entry into or attack upon the house; that he opened the door in a violent and tumultuous manner; or that appellant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house. According to the Court, evidence that the victim was intoxicated and had cursed at appellant earlier that evening did not meet the statutory standard. Therefore, the Court found that the trial court had not erred in refusing appellant's instruction on defense of habitation.

Appellant next argued that the trial court erred by failing to charge the jury on the defense of justification. The Court found no error because the requested charge was an inaccurate statement of the law.

Appellant also argued that because justification, including defense of habitation, was his sole defense, the trial court had to charge the jury on it even without a written request. During the charge conference, however, counsel for appellant stated repeatedly that he was not seeking an acquittal. Instead, counsel characterized his defense as "imperfect self-defense," a form of voluntary manslaughter that is not recognized in Georgia. See *Scott v. State*, 261 Ga. 611 (1991). Therefore, the Court found that this argument had no merit.

### **Transferred Intent; Ineffective Assistance of Counsel**

*Boatright v. State*, S11A0287 (6/27/2011)

Appellant was convicted of malice murder, burglary and other crimes arising out of a shotgun killing. He made many enumerations of error, including the trial court's charging the jury on transferred intent.

The Court found that although there was evidence from which the jury could have found that appellant shot the victim under the mistaken belief that the victim was someone else, there was no evidence that appellant was intending to shoot any other person when he shot the victim. Therefore, the facts did not fall within the typical "innocent bystander" scenario in which the doctrine of transferred intent is applied. Accordingly, the Court held that the trial court erred in charging the jury on transferred intent and defense counsel performed

deficiently by failing to object to the giving of that charge and to the prosecutor's closing argument addressing transferred intent.

However, because the evidence of appellant's guilt was overwhelming and appellant failed to show prejudice resulting from trial counsel's deficient performance, the Court found it highly probable that neither the charge nor trial counsel's performance contributed to the verdict. Accordingly, the Court affirmed appellant's convictions.

### **Stalking**

*Ramsey v. Middleton*, A11A0714 (6/24/2011)

Appellant appealed following the imposition of a stalking protective order, arguing that the evidence was insufficient to establish the elements of the offense of stalking. The Court first noted that "In order to obtain a protective order based on stalking, the petitioner must establish the elements of the offense by a preponderance of the evidence. OCGA § 16-5-94 (e), 19-13-3 (c)." The Court agreed with appellant that the petitioner did not meet her evidentiary burden and that the trial court abused its discretion by issuing the protective order. According to the Court, even construed to support the trial court's findings, the evidence was clearly insufficient to establish the necessary "pattern" of harassing and intimidating behavior because there had been only one instance of the alleged stalking behavior.

Although the petitioner argued that appellant made it a point of being in the same place when she was picking up her children, and that he would look at her so as to make her fearful, she did not testify to these alleged occurrences at the hearing, and she also failed to call witnesses to testify about them. Therefore, the Court found, the petitioner did not meet her burden of proof and reversed the protective order.

### **Search & Seizure**

*Hall v. State*, A11A0640 (6/20/2011)

Appellant was convicted by a jury of trafficking in cocaine. The evidence showed that based on information from a confidential informant, the officers approached appellant and detained him. The officers then received consent from appellant to search his person and found a bag of cocaine hidden in appellant's shirt.

Appellant challenged the denial of his motion to suppress, contending that the trial court erred in finding that the CI was reliable. During the suppression hearing, the officer testified that he had known the CI for three years and that the informant had given him accurate information in two of his prior cases, both of which had resulted in drug arrests. The officer further testified that the CI was not paid or given any favors in exchange for providing the information. Appellant nevertheless argued that the informant's reliability was not established because the officer failed to ascertain the informant's criminal history and failed to provide details regarding the prior cases in which the informant assisted the officer. According to the Court, however, the fact that the CI had a criminal history did not preclude the trial court's finding that the informant was reliable based upon his prior work with police. The Court held that the officer's testimony authorized the trial court's finding that the CI was reliable in this case.

Appellant also argued that the trial court erred in finding that probable cause existed for his detention and arrest. However, the Court held that the information provided by the informant was sufficient to establish probable cause for the warrantless search of appellant's person. The Court noted that the informant had a past history of reliability leading to other drug arrests; the informant obtained his information based upon his personal knowledge and correspondence with appellant; and the officers were able to confirm the details provided by the informant when they observed appellant.

Lastly, appellant argued that the drug evidence should have been suppressed because his alleged consent to the search was not freely and voluntarily given. However, the Court found that because probable cause existed, the warrantless search was authorized with or without appellant's consent. Accordingly, the Court affirmed.

*Young v. State*, A11A0412; A11A0447 (6/23/2011)

In these companion cases, appellants appealed from their convictions of trafficking in marijuana. They argued that the trial court erred in denying their motions to suppress the drug evidence on the ground that it was unlawfully seized after the arresting officer impermissibly expanded the scope and duration

of the initial traffic stop by inquiring into the purpose of their trip, and unlawfully detaining them while waiting for the K-9 unit.

The Court explained that once a valid traffic stop has been made, the Fourth Amendment prohibits the officer from unreasonably prolonging the stop beyond the time required to fulfill the purpose of the stop without a reasonable articulable suspicion of other illegal activity. The Court stated that a reasonable amount of time includes the time necessary for the officer to run a computer check on the validity of the driver's license and registration, and to check for outstanding warrants and/or criminal histories on the driver and other occupants. The law also allows the officer to question the vehicle's driver and/or its occupants during the course of the stop, and even to "lawfully ask questions unrelated to the purpose of a valid traffic stop, so long as the questioning does not unreasonably prolong the detention." Moreover, the Court stated that an officer may order a free-air search of the area surrounding the vehicle by a K-9 unit without implicating the Fourth Amendment, if it is performed without unreasonably extending the stop.

In this case, the officer engaged the driver in a brief conversation while he went over his paperwork. The officer's suspicions were then aroused by the truck's condition, the strong scent of perfume emanating from the cab, one appellant's demeanor, and the other appellant's responses to his questions. The officer was then authorized to request a K-9 unit and to run criminal histories on both men. In fact, the officer was still running the criminal histories when the K-9 unit arrived and the dog alerted its handler to the presence of narcotics. The Court emphasized that the officer's actions fell squarely within his authority, and there was no evidence that he delayed any part of the investigation. Therefore, the Court held that appellants failed to establish that the officer unreasonably expanded the scope or duration of the traffic stop. Accordingly, the Court affirmed.

*Nunnally v. State, A11A0729 (6/20/2011)*

Appellant was convicted of a turn signal violation and possession of less than one ounce of marijuana. He argued that the drug evidence used to convict him should have been suppressed as fruit of an illegal seizure. The

Court agreed with appellant that the seizure was illegal and it reversed the conviction for the drug offense. The evidence showed that after a patrol officer stopped appellant for failing to use his turn signal, he requested and received from appellant his driver's license and insurance documentation. The officer testified that, during their exchange, appellant displayed fidgety hand movements and did not look him in the eye. Based on the perceived nervousness, for safety purposes, the officer called a backup unit. On that day, the patrol officer's backup was a K-9 unit. The officer recounted that, after he reached his patrol car, "[I] [h]ad dispatch run the driver's license, things such as that. I did not start on the citation at that time. I mainly focused my attention on [appellant] due to his moving around within the vehicle." The officer conducted a pat down of appellant's person and found no weapon. Once the backup officer arrived, appellant was asked for consent to search. Appellant refused and then the drug dog was walked around the vehicle. The dog alerted and the marijuana was subsequently found.

The Court noted that, even after the backup officer arrived at the scene and the patrol officer had removed appellant from his vehicle and determined that appellant did not have a weapon on his person, the patrol officer admittedly did not engage in any traffic law enforcement. For example, he did not start writing any citation or warning. The Court found that the sole justification for the patrol officer stopping appellant's vehicle was his failure to use his turn signal. It noted that "[u]nder *Terry*, an officer's actions taken during a valid traffic stop must be reasonably related in scope to the circumstances which justified the stop in the first place, and limited in duration to the time reasonably necessary to accomplish the purpose of the stop." Preempting whether it was permissible for the patrol officer to prolong the traffic stop to await the arrival of a backup unit for safety purposes, the Court concluded that the State failed to present to the trial court evidence that the later detention to allow for the dog sniff was lawful. It held that there was no evidence that, once the K-9 unit arrived, either police officer diligently pursued a means of investigation that was likely to confirm or dispel quickly any suspicion related to the observed traffic infractions. Nor was any evidence adduced that the prolonged detention was justified by

a reasonable, articulable suspicion of other criminal activity. The Court found that in order for the stop to have been constitutional, there should have been evidence either that, after the stop of the vehicle, the police diligently pursued a means of investigation likely to confirm or dispel their suspicions regarding a traffic infraction or that, during the course of a valid traffic stop, information developed that provided a reasonable, articulable suspicion to prolong the detention beyond the time reasonably required for completion of the traffic stop. The Court found that no such evidence was presented in this case, and the judgment was reversed in part.

## **Merger**

*Reynolds v. State, A11A0397 (6/24/2011)*

Appellant was convicted of aggravated assault, aggravated battery, kidnapping with bodily injury and possession of a firearm or knife during the commission of a crime. He argued that the trial court erred by failing to merge the aggravated assault, aggravated battery, and kidnapping with bodily injury offenses.

Appellant was charged with aggravated battery for intentionally and maliciously beating the victim's face; with aggravated assault for assaulting the victim with a shotgun; and with kidnapping with bodily injury for forcing the victim into the woods and "beating her about the face and/or body."

The Court found that all of these offenses required proof of a fact which the others did not. The aggravated assault count required proof that appellant assaulted the victim using a deadly weapon; the aggravated battery count required proof that appellant maliciously caused bodily harm to the victim by rendering a member of her body useless; and the kidnapping count required asportation. Therefore, the Court held that the crimes did not merge legally or factually, and it affirmed appellant's convictions.

## **Identification; Jury Charges**

*McCrory v. State, A11A0639 (6/21/2011)*

Appellant was convicted of aggravated assault and aggravated assault with intent to rob. Relying on *Brodes v. State*, 279 Ga. 435, 442 (2005), appellant argued that the trial court erred by giving the "level of certainty" charge in instructing the jury on the reliability

of eyewitness identification. The Court first noted that in *Brodes*, the Supreme Court of Georgia advised trial courts to refrain from instructing jurors that they may consider a witness's level of certainty. The Supreme Court further concluded that the giving of the instruction constituted harmful error under the circumstances of that case.

However, appellant did not specifically object to the giving of the "level of certainty" charge. Hence, he waived any objection to it on appeal, unless he could show that the giving of the charge constituted plain error. The Court found that appellant failed to make such a showing for the following reasons. Appellant's trial counsel thoroughly cross-examined the victim regarding his ability to have accurately identified appellant as the assailant. Furthermore, the victim interacted with appellant at close range, described him to police immediately after the attack, and positively identified him in a photographic lineup, in addition to identifying him in court. Another eyewitness, the victim's friend, also identified appellant as the attacker.

Moreover, the jury was specifically instructed that the State had to prove the identity of the assailant beyond a reasonable doubt, and that it was the duty of the jury to acquit the defendant if the State failed to meet its burden of proof in this regard. The Court held that, given these combined circumstances, appellant could not demonstrate that the giving of the "level of certainty" charge constituted plain error. Accordingly, the Court affirmed.

### **Motion to Withdraw Plea**

*Rhone v. State, A11A0677 (6/20/2011)*

Appellant entered a negotiated plea of guilty to two counts of aggravated stalking. One month later, after a new term of court had commenced, he filed a document entitled "Withdrawal of Plea," asserting ineffective assistance of counsel and requesting that the trial court withdraw his plea. The trial court treated this document as a motion to withdraw the guilty plea and dismissed it for being untimely filed outside the term of court. On appeal, appellant raised several grounds allegedly entitling him to withdraw his plea.

However, finding that appellant had not filed his motion within the same term of court in which he was sentenced, the Court held that the trial court lacked jurisdiction to consider

the motion. Accordingly, the Court affirmed the dismissal.

### **Indictment**

*Morris v. State, A11A0315 (6/17/2011)*

Appellant was indicted on the charge of voluntary manslaughter, but was convicted of involuntary manslaughter. He contended that the trial court erred by allowing the State to amend the indictment, over his objection, from voluntary manslaughter to involuntary manslaughter by the commission of the unlawful act of simple battery. He maintained that the indictment did not allege the facts necessary to establish that offense. Therefore, appellant asserted that his due process rights were violated because he was never put on notice that he could be convicted of involuntary manslaughter. The record showed that on the first day of trial, after the jury was selected, the prosecutor noted to the trial court that the single count of the indictment was captioned "voluntary manslaughter" but that the language of the count omitted any allegation that appellant acted with the intent to kill. Over objection from appellant, the trial court ruled that the case would proceed on the lesser included charge of involuntary manslaughter by the commission of the unlawful act of simple battery under OCGA § 16-5-3 (a); 16-5-23 (a). The court then instructed the jury prior to opening statements that the charge in the indictment had been "changed" from voluntary manslaughter to involuntary manslaughter. The trial court in its charge to the jury reiterated that involuntary manslaughter was the "only charge" and instructed them solely on the lesser included offense of involuntary manslaughter by the commission of the unlawful act of simple battery. The jury subsequently convicted Morris of involuntary manslaughter.

The Court was unpersuaded by appellant's argument that simple battery under OCGA § 16-5-23 (a) (2) requires proof that the defendant acted with the specific intent to cause physical harm to another, and that therefore the indictment in this case could not be construed as encompassing that form of simple battery because it did not expressly allege any intent component at all. He further contended that because the jury returned a general verdict, it may have convicted him of involuntary manslaughter predicated upon simple battery under OCGA § 16-5-23 (a)

(2), and thus he may have been convicted of a crime not embraced by the indictment and of which he did not have sufficient notice prior to trial. The Court found that in the present case, the indictment alleged that appellant "cause[d] the death of [the victim] . . . by striking [the victim] with his fist . . . contrary to the laws of said State, the good order, peace and dignity thereof", and thus sufficiently alleged all of the essential elements of simple battery. Accordingly, the lesser offense of involuntary manslaughter in the commission of the unlawful act of simple battery was included as a matter of fact in the charged greater offense of voluntary manslaughter. The Court held that the trial court committed no error in allowing the State to amend the indictment to charge involuntary manslaughter rather than voluntary manslaughter.

### **Juror Qualification**

*Valdez v. State, A11A0430 (6/23/2011)*

Appellant was convicted of trafficking in cocaine. He contended that the trial court abused its discretion in failing to excuse a prospective juror on the basis of his alleged bias. The record showed that following voir dire, defense counsel raised a challenge to a prospective juror, whose son was an agent involved in the undercover operation and was a trial witness for the State. Counsel asserted that the potential juror had expressed that he would believe his son over other witnesses in the case. The State argued that notwithstanding the prospective juror's initial response, his further responses reflected that he could listen to the evidence and be impartial in deciding the case. The trial court denied the defense challenge, recalling the voir dire responses and finding that the prospective juror had emphatically stated that he could be objective. Since his challenge was unsuccessful, appellant exercised a peremptory strike to excuse the juror. He contended that in light of the familial connection and the expressed belief in his son's veracity, the prospective juror should have been excused. Notwithstanding his contentions, the Court found no abuse of the trial court's discretion had been shown. The Court held that "[r]elationship to a witness is not *per se* a ground for excusing a prospective juror." It ruled, therefore, that the familial relationship between the prospective juror and the deputy involved in the case did not mandate

that the juror be excused, and the judgment was affirmed.

### **Child Hearsay Statute; Character Evidence**

*Puckett v. State, A11A0066 (6/20/2011)*

Appellant was convicted of child molestation for inappropriately touching his step-daughter. Appellant argued that the trial court erred by excluding proffered hearsay testimony that the victim had previously told her mother that another child at her daycare had touched her private parts. Appellant had proffered the evidence in response to testimony from a physician who had treated the victim for a urinary tract infection the year before the incident in this case. During that testimony, the State elicited testimony from the physician about the possible causes of the infection, which included a “dirty hand.” To rebut any inference that appellant’s hand caused the infection, appellant proffered the hearsay testimony. The trial court excluded the evidence based on relevance and hearsay grounds, noting that appellant was not accused of touching the victim on that occasion and that the evidence lacked sufficient indicia of reliability required by the Child Hearsay Statute. The Court found that the record supported the trial court’s findings.

Appellant also argued that the trial court erred by admitting a brief reference in his confession to police that he had been sexually assaulted when he was 16. Appellant contended that this statement improperly placed his character at issue by implying that, as a victim of abuse himself, he had a propensity to abuse children. Appellant did not move to exclude that evidence at trial, but on appeal he asserted that, based on *Putnam v. State*, 231 Ga. App. 190 (1998), the reference to the prior sexual assault was plain error requiring a reversal despite his waiver. However, the Court found that *Putnam* provided no basis for a reversal in this case. The Court explained that, in *Putnam*, the error was the admission of improper bolstering evidence that went to the ultimate issue of the case (i.e. whether or not Putnam was guilty of the molestation) and invaded the role of the jury. Here, by contrast, the Court found that the challenged evidence did not go to the ultimate issue of the case. Accordingly, the Court found no reversible error and affirmed appellant’s conviction.

### **Similar Transaction Evidence**

*Downer v. State, A11A0367 (6/17/2011)*

Appellant was convicted of three counts of child molestation. He argued that the trial court erred by admitting similar transaction testimony regarding his prior molestation of his stepdaughter. Specifically, he argued that the State did not articulate some substantive similarity between the alleged molestation of his stepdaughter and the victims in the case during the pre-trial hearings on similar transaction admissibility.

However, the Court found that the State properly fulfilled the requirements for introducing similar transaction evidence set forth by the three prong test in *Williams v. State*. First, the State sought to introduce the evidence to show bent of mind, course of conduct, and the defendant’s motive, all of which have been held to be permissible reasons. Second, the State presented sufficient evidence that the step-daughter’s testimony would show that appellant had committed the act. Finally, there was ample evidence to show that the similar transaction evidence in the instant case was sufficiently similar. “[S]exual molestation of young children, regardless of sex or type of act, is of sufficient similarity to make [the] evidence admissible.” Furthermore, the Court noted that “similar transaction evidence that shows a pattern of sexual abuse against several generations of members of the same family is admissible. . . .” Based on the testimony in the record, the Court concluded that the trial court did not abuse its discretion in determining that there was sufficient similarity between the prior acts and the crime charged. Moreover, the Court held that the State’s proffer prior to trial was sufficient. Accordingly, the Court affirmed.

### **Juror Qualification; Expert Witnesses Testimony**

*Amador v. State, A11A0563 (6/23/2011)*

Appellant was convicted of aggravated assault, aggravated battery, and two counts of first degree cruelty to children for acts committed against his two-year-old daughter. He argued that the trial court erred in failing to strike a prospective juror for cause and in allowing an expert witness to testify to an issue within the jury’s province.

Appellant first challenged the trial court’s refusal to strike a prospective juror

for cause. The prospective juror had indicated that, because the case involved a child, she would have difficulty being impartial and was leaning toward the State. She stated that she could follow the court’s instruction that the defendant was presumed innocent until proven guilty and the instruction on reasonable doubt. However, when asked whether she could base her decision in the case solely on the evidence and the court’s instructions, she replied: “I believe so, but I do have very strong—it’s hard for me to say without knowing the material evidence that’s going to be presented and the facts and how they’re going to relate, but I would hope that I would be able to do that, I just can’t say that with certainty at this time.”

The Court emphasized that for a juror to be excused for cause, it must be shown that he or she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court’s charge upon the evidence. The Court also noted that neither a prospective juror’s expression of reservation about her partiality, nor her statement that she would “try” to decide the case based upon the court’s instructions and the evidence, requires her to be excused. The Court explained that the trial court bases its decision on “findings of demeanor and credibility which are peculiarly in the trial court’s province, and those findings are to be given deference” absent a manifest abuse of discretion. In this case, therefore, the Court found that the trial court did not abuse its discretion.

Appellant also argued that the trial court erred in allowing the State’s expert witness to testify that one of the victim’s injuries was most likely caused by significant blunt force trauma to the abdomen. Appellant cited *Dunagan v. State*, 255 Ga. App. 309 (2002) in support of his claim of error. In *Dunagan*, the Court held that it was error to admit, over a proper objection, a physician’s testimony that a child’s physical injuries most likely resulted from an intentional act of molestation. However, the Court noted that in this case, in contrast, the expert testified that one of the victim’s injuries was caused by blunt force trauma without opining as to how such trauma occurred. Therefore, the Court held that the trial court did not abuse its discretion in allowing the testimony.

## Expert Witnesses; Identification

*Cannon v. State, A11A0281 (6/23/2011)*

Appellant was convicted of bus hijacking, possession of a firearm during the commission of bus hijacking, aggravated assault with a deadly weapon against the bus driver, and possession of firearm during the commission of aggravated assault. He argued that the trial court erred in limiting his expert's testimony regarding the phenomenon of "transference." He maintained that the expert testimony as to transference could have established that the bus driver "may have seen [appellant] in the area at the time that the alleged incident took place, but incorrectly transferred [appellant's] image onto that of the actual perpetrator."

However, the Court found that the trial court was permitted to exclude the expert testimony because there was extensive evidence corroborating the bus driver's identification of appellant as the hijacker. For example, the car driven by the perpetrator was registered to appellant's mother; the same car was found in appellant's driveway; fingerprints matching appellant's were found in the vehicle; a handgun matching the description of that used by the perpetrator was recovered from appellant's house; clothing fitting the description of that worn by the perpetrator was recovered from the car in appellant's driveway; and the bus driver unhesitatingly picked appellant out of a photographic lineup and identified him in court.

Further, appellant presented no evidence indicating that the bus driver saw or could have seen any other person at the time the instant offenses took place. Consequently, the Court held that there was no factual basis for allowing the testimony about transference theory, and the trial court did not abuse its discretion in rejecting such testimony. Accordingly, the Court affirmed.

## Probation Revocation; Judicial Notice

*Gaddis v. State, A11A1105 (6/20/2011)*

Appellant was convicted of two counts of child molestation and was sentenced to serve seven years in confinement, followed by 13 years on probation. The trial court revoked appellant's probation on the ground that he had tested positive for marijuana and thereby violated his probation. Appellant argued that the trial

court erred in taking judicial notice of another superior court ruling that found the drug test in question to be of verifiable certainty.

The Court first noted that in *Harper v. State*, 249 Ga. 519, 525 (1982), the Georgia Supreme Court held that it is proper for the trial court to decide whether a scientific procedure or technique has reached a scientific state of verifiable certainty, as long as the trial court relies on evidence presented to it rather than on a consensus in the scientific community. The Court found that in this case, the trial court properly determined the reliability of the drug test based on the evidence presented at the revocation hearing, which included extensive testimony by an expert witness.

Consequently, the Court held that this case was controlled by *Cheatwood v. State*, 248 Ga. App. 617 (2001), in which the State presented expert testimony establishing the verifiable certainty of a drug test to prove a probation violation. Based on the ruling in *Cheatwood*, the Court concluded that the trial court in this case did not err in admitting the drug test results into evidence.

Furthermore, the Court held that the trial court did not err in taking judicial notice of another court's ruling. "[I]f a trial court intends to take judicial notice of any fact, it must first announce its intention to do so on the record, and afford the parties an opportunity to be heard regarding whether judicial notice should be taken." The Court found that the trial court in this case did just that. The Court also emphasized that the trial court judicially noticed the ruling in addition to receiving other evidence, such as the testimony of the expert witness, the probation officer and various exhibits. Accordingly, the Court held that the trial court did not violate the requirement that it base its determination on the evidence presented to it.

## Telephone Conversations; Foundation for Admitting Evidence

*Lowe v. State, A11A0505 (6/22/2011)*

Appellant was convicted of trafficking in cocaine. He argued that the trial court erred by admitting the recordings of the telephone calls he made from the jail because the State failed to lay a proper foundation prior to the admission of this evidence.

The Court first explained that the State may lay a proper foundation for admission of a

recorded telephone conversation of an inmate by showing that: the recording device was working properly and that the recording was accurately made; the manner in which it was preserved; that no alterations have been made to the recording; the identity of the speakers; and that the inmate was aware that the conversation was subject to being recorded.

Appellant specifically argued based on *Davis v. State*, 279 Ga. 786, 788 (2005) that this evidence was improperly admitted because the custodian of the records did not testify at trial. However, the Court emphasized that *Davis* did not mandate that only someone with the title of "custodian of records" can establish the authenticity and correctness of recordings such as those at issue in this case. In this case, an investigator employed by the jail testified about its procedures, including how inmates make calls from the jail and how those calls were monitored and stored by the computer, her training and experience in searching the computer for the inmates' outside calls, her specific knowledge of this case, including listening to the recordings and identifying the numbers called as well as the speakers, and a co-indictee's testimony identifying appellant as the other voice on the recording. Due to the investigator's testimony, the Court was unpersuaded by appellant's arguments that the State had failed to lay a proper foundation. Accordingly, the Court affirmed.