

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 26, 2014

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and Crimes Against Children
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Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

THIS WEEK:

- **DUI; Implied Consent**
- **Search & Seizure**
- **Extraordinary Motions for New Trial**
- **Business Records**

DUI; Implied Consent

State v. Fedrick, A14A1096 (9/16/14)

Fedrick was charged with DUI. The trial court granted his motion to suppress after finding that the police officer's inclusion of certain words during his reading of the implied consent notice altered the substance of the notice and affected Fedrick's consent to testing. The State appealed and the Court reversed.

At the motion to suppress hearing, a video/audio recording of the traffic stop, which included the officer's reading of the implied consent notice, was played for the trial court. The record showed that the officer read the notice to Fedrick twice. During the first reading, the officer recited the fifth sentence of the notice as follows (the officer's additional wording is in bold type): "After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances **for the purposes of determining** at your own expense and from qualified personnel of your own choosing." During the second reading, the officer inserted the phrase "**for the purpose**" in the same part of the sentence where he had used the phrase "for the purpose of determining."

The Court stated that the applicable implied consent notice need not be read exactly so long as the substance of the notice remains unchanged. Thus, the legislature has allowed for human error in the reading of the notice, such as the inclusion of additional wording, so long as the substance of the notice was not affected. Here, the Court found, it was clear from the substance of the notice that the purpose of the testing is to determine whether the defendant is under the influence of alcohol or drugs, and that the defendant has a right to independent testing after submitting to the state-administered test. The officer's inclusion of the phrases "for the purpose of determining" and "for the purpose" when advising Fedrick of his right to independent testing was a partial reference to the underlying purpose of the testing. Thus, the inclusion of the additional wording did not alter the substance of the notice, and therefore, the trial court erred when it granted Fedrick's motion to suppress.

Search & Seizure

Brown v. State, S14A0901 (9/22/14)

Appellant was convicted of murder and other offenses. He contended that the trial court erred in denying his motion to suppress by finding that he lacked standing to contest the search. The evidence showed that law enforcement executed an arrest warrant for a third party at the apartment of the third party. When they arrived, they found the third party and appellant. A subsequent search of the apartment revealed evidence of the offenses.

The Court found that the evidence showed that the apartment was leased to someone other than appellant and there

was no evidence of how long appellant had been in the apartment or whether he was an overnight guest. There was also no evidence of any of appellant's personal belongings in the apartment. Although one officer testified that he found "paperwork" in the apartment with appellant's name on it, the officer did not elaborate further and there was no evidence presented to show what this paperwork consisted of and why it was at the apartment. The mere presence of miscellaneous papers bearing appellant's name, without any further evidence connecting appellant to the apartment, was insufficient to create a legitimate expectation of privacy for appellant to contest the search. Accordingly, the Court held, the trial court did not err in denying appellant's motions to suppress.

Extraordinary Motions for New Trial

State v. Hill, S14A1006 (9/22/14)

Hill was convicted in 2002 of felony murder and two counts of aggravated assault. In his extraordinary motion for new trial, Hill alleged that he was entitled to a new trial because of newly-discovered evidence involving a witness named Shaneka Jackson ("Shaneka"). His claim was based on three arguments: (1) Hill's rights to due process under *Brady v. Maryland* were violated because in 2001, Shaneka told Detective Carl Fletcher, during his initial investigation, that Hill was at her house at the time of the shooting, that the State failed to disclose this information to Hill prior to trial, and that this alibi information was not included in the detective's police report or his transcribed interview with Shaneka; (2) under *Timberlake v. State*, 246 Ga. 488 (1980), if Shaneka's testimony had been admitted at trial, there was a strong likelihood that the verdicts would have been different; and (3) the newly-discovered alibi evidence showed Hill's actual innocence, and this overcame the circumstantial evidence upon which Hill was convicted. The trial court agreed with all three contentions and the State appealed.

The Court stated that the linchpin of the trial court's ruling was the affidavit given by Shaneka in 2012. However, the Court found, Hill failed to show a *Brady* violation because there was no evidence that the State either possessed or suppressed any favorable

evidence. Specifically, there was no evidence that Shaneka actually gave Det. Fletcher the alleged alibi information.

The Court also found that Hill failed to satisfy the criteria of *Timberlake* for granting an extraordinary motion for new trial because the evidence was not "newly discovered." Thus, accepting arguendo, the accuracy of the statements in Shaneka's affidavit, Hill was present and aware of Shaneka being at her home on the night and time of the shooting, and also aware of her knowledge that Hill was there as well.

Finally, the Court found, the trial court erred in finding that Hill should be granted a new trial based on a claim of actual innocence, premised upon the 1916 case of *Joiner v. State*, 17 Ga.App. 726 (1916). Even if *Joiner*, not *Timberlake* should have been applied here, *Joiner* stated that a new trial should be granted "if the conviction of the accused rests upon circumstantial evidence alone, and the newly discovered evidence is direct and positive in character as to the innocence of the defendant, and such testimony would, if the witness be credited, produce a different result on a second trial." But here, the Court found, the alleged newly-discovered evidence was far from "direct and positive" as to Hill's innocence and even if fully credited, did not refute the evidence of Hill's guilt at trial. Accordingly, the trial court erred in granting Hill's extraordinary motion for new trial.

Business Records

Kilgore v. State, S14A1099 (9/22/14)

Appellant was convicted of murder and armed robbery in connection with a video store. The State presented evidence at trial that placed appellant's cell phone near the crime scene at and around the time the crimes were committed. Specifically, the records custodian for the cell phone company testified that one of the records at issue listed the locations of all the company's cell phone towers in Georgia during a span of time that included the date of the crimes and continued until changes to the towers were made in 2009. The other records showed incoming and outgoing phone calls for appellant's cell phone and indicated which tower on the cell phone tower list handled each of those calls, usually the one closest to the cell phone at the time of the call. The custodian further testified that the records

were made in the regular course of business and that engineers with personal knowledge of the facts contained in the cell phone tower list would update that record "right away" after a new cell phone tower was added or there was any other change in the capacity of the towers.

Under former O.C.G.A. § 24-3-14(d), before a business record could be admitted, a foundation had to be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of a business at the time of the event or within a reasonable time thereafter. Appellant contended that the foundation for the records was inadequate because the records custodian could not recall the starting date for the time span that he claimed the cell phone tower list covered. But, the Court found, the record custodian testified unequivocally that the list covered the dates of the calls relevant to the case. The inability of the custodian to testify with more detail about the list went only to the weight of the evidence and the credibility of his assertion that the list showed the towers as they existed on the crime date, not to the admissibility of the records. The testimony of the records custodian provided a sufficient basis for the trial court to determine that the records—and the record custodian's testimony explaining what was contained in the records—were admissible under the business records exception to the hearsay rule.