

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 3, 2010

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## THIS WEEK:

- **Juries; Double Jeopardy**
- **Probation Revocation; Possession of Controlled Substance**
- **Search & Seizure**
- **Entrapment**
- **Due Process; Preservation of Evidence**
- **Juries**
- **Cross-Examination**

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### **Juries; Double Jeopardy**

*Mattox v. State, A10A1794*

Appellant was convicted of armed robbery, burglary and sexual offenses. He argued that the trial court erred in denying his double jeopardy plea in bar following a mistrial of his first trial. Specifically, he argued that the trial court improperly declared a mistrial after only 6 hours of jury deliberations in the first trial because no manifest necessity supported such a declaration. Retrial of a criminal defendant after a mistrial caused by the inability of the jury to reach a verdict does not constitute double jeopardy where there is manifest necessity for declaring the mistrial. Where the jury is hopelessly deadlocked, this constitutes manifest necessity for declaring a mistrial.

The Court held that the record supported the trial court's finding that the jury was hopelessly deadlocked. The decisive factor is not the length of the deliberation, but the inability of the jury to agree on a verdict. Here, the Court found, the jury informed the court early in their deliberations that their vote was nearly evenly split between conviction and acquittal.

In addition, at least three separate times, the jury also told the court that it was deadlocked and that further deliberations would not result in a verdict. The court even asked the jurors if reconvening after the weekend would help them reach a verdict, but none of them thought that it would. Given these circumstances, the evidence supported the trial court's determination that the jury was hopelessly deadlocked and the trial court did not abuse its discretion in declaring a mistrial.

### **Probation Revocation; Possession of Controlled Substance**

*Scott v. State, A10A1711*

Appellant appealed from the revocation of his probation for possession of a controlled substance. The evidence showed that appellant was traveling in a truck owned and driven by Gaines. An officer noticed Gaines fail to maintain his lane and activated his blue lights. The truck pulled into the parking lot of a bar, which was the intended destination of the two men. The officer received Gaines' consent to a search of his person and his truck. Nothing was found on Gaines, but inside a Pall Mall cigarette pack in the center console, the officer found two piperazine (TFMPP) pills. A search of appellant yielded no contraband. Gaines told the officer that the pills belonged to a particular person located in the bar. The officer put Gaines in the backseat of his vehicle and appellant in the backseat of another officer's vehicle. The officer then searched the truck again and went into the bar and unsuccessfully tried to locate this other individual. The officer then moved appellant to the driver's side back seat of his vehicle and transported Gaines and appellant to jail. Once there, an inventory

search of appellant revealed a pack of Camel cigarettes. The officer searched the back seat of his car and in the area where appellant was sitting, found two more TFMPP pills.

The Court found that the evidence was insufficient to support the revocation of appellant's probation for possession of TFMPP. When the officer asked permission to search appellant's person, he obliged and never attempted to flee the scene. No evidence was presented to show that an inordinate amount of cash was found on him, that he provided inconsistent statements to police about his behavior, or that he was under the influence of drugs. The only evidence linking appellant to the drugs was spatial proximity and it was at least equally likely that the pills belonged to Gaines, the owner and driver of the truck. The first two pills that the officer discovered were found in Gaines's truck and were hidden within a pack of cigarettes, a brand different from that found on appellant's person. Although more pills were also found in the officer's patrol vehicle near where appellant had been seated while being transported to jail, the evidence also showed that Gaines had been placed in the same officer's patrol car before appellant. In fact, Gaines had been put in the officer's vehicle alone while the officer continued to search Gaines's truck and while the officer searched for the individual in the bar, who Gaines had claimed owned the drugs. Thus, the evidence failed to exclude the reasonable hypothesis that Gaines possessed the pills found in his own truck and that he hid the pills found in the patrol vehicle.

## **Search & Seizure**

*State v. Sarden, A10A1392*

The State appealed from the grant of Sarden's motion to suppress. The evidence showed that a BOLO had been issued for Sarden. When an officer noticed Sarden drive by him, he followed Sarden and watched as he parked his car in a commercial parking lot. Sarden then went into a store. The officer arrested him inside the store without incident. A second officer approached Sarden's car and looked through the front passenger side window. He observed, in plain view on the center console, a clear baggy containing a white powdery substance that he suspected was crack cocaine. The second officer, who had many years of experience and who worked over 20 cases

involving crack cocaine every year, was familiar with the appearance of the drug. After seeing the suspected crack cocaine, the second officer reached through the partially opened window, unlocked the passenger door, and retrieved the baggy from the car. It was undisputed that the officer did not obtain Sarden's consent to search the car or a search warrant prior to seizing the baggy of suspected crack cocaine.

The trial court granted the motion to suppress because the officers lacked Sarden's consent, a search warrant, or exigent circumstances to search the vehicle. The Court reversed. Under the "automobile exception" to the warrant requirement imposed by the Fourth Amendment, a police officer may search a car without a warrant if he has probable cause to believe the car contains contraband, even if there is no exigency preventing the officer from getting a search warrant. Here, the second officer unquestionably had probable cause to believe that Sarden's car contained crack cocaine. The officer's observation of what he suspected, based upon his law enforcement experience, to be crack cocaine, would have led a reasonably discrete and prudent person to believe that drug contraband was in the car.

In so holding, the Court rejected Sarden's argument that the automobile exception did not apply because his car was parked on commercial property rather than along a public roadway. The automobile exception is justified on two grounds: the ready mobility of automobiles and the diminished expectation of privacy that citizens have in them. Hence, the automobile exception applies even if the car is not stopped along a highway, but is stationary in a place not regularly used for residential purposes, as in the present case, where Sarden's car was in a parking space outside a commercial establishment.

## **Entrapment**

*Jackson v. State, A10A1236*

Appellant was convicted of the sale of cocaine. He argued that the trial court erred in denying his motion for a directed verdict of acquittal because the confidential informant involved in the drug deal entrapped him as a matter of law. The Court disagreed. The evidence showed that the CI wanted to purchase drugs from Rhoades, a targeted drug dealer. Rhoades would not deal directly with the CI. The CI requested appellant act as a go-between and appellant did so.

The Court held that entrapment consists of three distinct elements: (1) the idea for the commission of the crime must originate with the state agent; (2) the crime must be induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant must not be predisposed to commit the crime. A defendant's conduct leading up to and during a drug sale can show that he was a willing participant who was predisposed to commit the crime. Furthermore, the fact that a defendant procures contraband after a request or even repeated requests by a state agent, without more, is insufficient to prove entrapment. Here, there was evidence that the idea for the drug transaction originated with the informant, but the State's evidence rebutted any claims by appellant that he was induced by undue persuasion and that he was not predisposed to commit the crime. The uncontroverted testimony of the CI and a surveillance recording showed that appellant had the previously established ability to purchase cocaine from Rhoades and that he willingly participated in the drug deal. Because there is no entrapment where a CI merely furnishes an opportunity to a defendant who is ready to commit the offense, the trial court properly concluded that the evidence did not demand a finding of entrapment and that the issue was for the jury's resolution.

## **Due Process; Preservation of Evidence**

*Walker v. State, A10A0803*

Appellant was convicted of numerous crimes related to the armed robbery of two finance companies. He contended that he was denied due process by the failure of the State to preserve as evidence a loan application made out by another suspect. The evidence showed that on two separated occasions, a person entered a finance office, filled out a loan application using fictitious information and then robbed the employees and office at gunpoint. Suspicion first fell on another individual before the investigation turned toward appellant, who was eventually caught and convicted. During the course of the investigation, detectives learned that the initial robbery suspect had previously filled out a loan application at one of the finance companies. An unidentified individual from the police department picked up the loan application from the finance company, but the detective

who was supposed to receive the application testified that he was never informed that the application had been picked up, never saw or received the application, and did not know what had happened to the application. The finance office could not locate any other copies of the loan application.

Appellant argued that the State's failure to preserve the application violated his right to due process because the initial robbery suspect's loan application had potentially exculpatory value in that the signature and information in the application could have been compared to the fictitious loan applications completed in this case. The Court held that a State's failure to preserve evidence discovered in the course of a criminal investigation can, in limited circumstances, violate a criminal defendant's right to due process. In dealing with the failure of the State to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence.

Pretermitted the materiality question, the Court found that appellant failed to show that the State acted in bad faith in losing the loan application. There was no allegation that the application was lost due to any intentional action on the part of the State, and no evidence that the State attempted to deny appellant access to the application knowing that it would be exculpatory. The acts of obtaining and then losing the loan application, standing alone, were insufficient to establish bad faith. Moreover, there was no evidence that the unidentified person from the police department who picked up the loan application was involved in the investigation of the robberies or was otherwise aware of the potential relevance of the application. Furthermore, even if the State's loss of the loan application indicated "careless, shoddy and unprofessional investigatory procedures," such procedures in and of themselves did not reflect a bad faith effort to prevent appellant from obtaining exculpatory evidence. Therefore, appellant's due process rights were not violated.

## Juries

*Reed v. State, A10A1434*

Appellant was convicted of two counts of armed robbery. The evidence showed that he

robbed two convenience stores. He contended that the trial court erred when it allowed the jury during deliberations to rehear portions of the victims' testimony identifying him as the perpetrator of the robberies. Specifically, he argued that the court abused its discretion because it allowed the jury to rehear only the witnesses' direct testimony identifying him as the robber, rather than the entire direct examinations and cross-examinations of the witnesses.

In *Byrd v. State*, 237 Ga. 781, 783 (1) (1976), the Supreme Court held that "the jury should be permitted to limit what they rehear to what they desire to rehear, absent special circumstances which might work an injustice." Furthermore, where, on cross-examination, a witness "remained steadfast in her identification of [the defendant], . . . [n]o special circumstances appear . . . requiring the cross examination to be replayed." Here, the Court found, on cross-examination neither witness changed his testimony identifying appellant as the robber, and appellant alleged no other special circumstance that would have required the witnesses' entire testimony to be replayed. Therefore, the trial court did not abuse its discretion.

## Cross-Examination

*Bush v. State, A10A1136*

Appellant was convicted of possession of cocaine with intent to distribute. He argued that the trial court improperly limited his cross-examination of the case agent. At trial, the State moved to restrict appellant from asking the officer about criminal charges brought against other persons involved in the underlying incident. Bush objected to this motion on the ground that he wanted to use the anticipated answers to impeach the officer. Specifically, he argued, this limitation prevented him from demonstrating that "one of the other parties may have sold the drugs to the purchaser." The Court held that a criminal defendant may introduce evidence that another person committed the crime for which he is tried, but the proffered evidence must raise a reasonable inference of the defendant's innocence. Here, appellant did not show that allowing cross-examination about whether another party was charged with the offense of selling cocaine would have raised a reasonable inference that appellant was not guilty of the

separate offense of possession of cocaine with intent to distribute. The limitation imposed by the trial court concerned only the issue of charges brought against other parties; otherwise, appellant was allowed to and in fact did continue to cross-examine the officer and to attempt to impeach the officer with prior inconsistent statements. Accordingly, the trial court did not manifestly abuse its discretion in limiting the cross-examination.