

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 15, 2010

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## THIS WEEK:

- Probation Revocation
- Search & Seizure; DUI
- Best Evidence Rule; Prior Convictions

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### **Probation Revocation**

*Humphrey v. State, A10A0229*

Appellant was convicted of child molestation in 2003. He was sentenced to twenty years of probation, with two years to be served in confinement. In 2009, he filed a motion to terminate the remainder of his probation which the trial court denied. He argued that the trial court erred because the language of OCGA § 17-10-1 (a) (2) required his probation to be terminated after two years. This code section provides as follows: “Probation *supervision* shall terminate in all cases no later than two years from the commencement of probation supervision unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown; provided, however, in those cases involving the collection of fines, restitution, or other funds, the period of supervision shall remain in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever first occurs...” (Emphasis supplied). The Court held that by the statute’s specific language, supervision of probation, not probation itself, terminates after two years unless otherwise extended or reinstated. For those sentenced to probation for longer than two years, at the end of the two-year supervised period provided in the statute, the probation does not end but merely becomes unsupervised.

Appellant’s interpretation was absurd because it would require that the legislature intended to prescribe a two-year limit for the majority of probated sentences.

### **Search & Seizure; DUI**

*Ivey v. State, A10A0094*

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. Specifically, he contended that the officer did not have reasonable, articulable grounds for stopping his vehicle. The officer testified that he observed appellant driving erratically by braking for no reason, abruptly turning back into a shopping center parking lot that he had just exited, and drifting from the left side of his lane to the right side to the extent that his rear-view mirror crossed into the fog line. The Court held the officer had sufficient reason for the stop because weaving, both out of one’s lane and within one’s own lane, particularly when combined with other factors, may give rise to reasonable articulable suspicion on the part of a trained law enforcement officer that the driver is violating the DUI laws. The Court also rejected appellant’s argument that his acquittal of the charge of failure to maintain lane supported his contention that the officer had no reasonable articulable suspicion justifying the traffic stop. In fact, the Court stated, conduct forming the basis for reasonable suspicion need not even be a violation of the law.

### **Best Evidence Rule; Prior Convictions**

*Brinkley v. State, A09A1652*

Appellant was convicted of aggravated battery and possession of a knife during the

commission of a crime. He contended that the trial court erred by considering improper evidence of an alleged prior conviction in aggravation of punishment. The record showed that at sentencing, the State attempted to introduce evidence in aggravation of punishment that appellant pled guilty to second degree murder in Maryland in 1990. The State called the Maryland ADA who handled the case, but the ADA did not testify that he recalled appellant pleading guilty. Nor did the State introduce a certified copy of the prior conviction. Instead, the State, over objection, introduced three exhibits: An uncertified copy of the indictment; a document entitled "State's Version of Offense" that had been prepared by the Maryland district attorney's office which contained a notation of the guilty plea; and a computer print-out of the purported case procedural history which contained a similar notation. Appellant objected that the three exhibits were inadmissible because a certified copy of the prior conviction was the best evidence of the conviction. The trial court asked the prosecutor whether the State had attempted to obtain a certified copy of the original record of the prior conviction from the Maryland clerk of court. The prosecutor responded, "What I was told, Your Honor, was that the actual records were destroyed by a private records retention company, the original records." The trial court then admitted the three exhibits over objection.

The Court held that the burden is on the State to produce competent evidence of a prior conviction for purposes of sentencing. Under Georgia law, the best evidence of a prior conviction is a certified copy of the conviction itself. Hence, if the defendant timely objects on best evidence grounds, the State must produce a certified copy of the prior conviction in order to prove that the conviction occurred. The State may, however, introduce secondary documentary evidence or parole testimony to prove the prior conviction, if the State shows that the original record of the conviction was lost, destroyed, or inaccessible and cannot be produced despite the State's exercise of due diligence. But here, the Maryland ADA did not testify as to what had happened to the original record of the conviction, and the ADA was never asked what search he conducted or steps he took in an effort to locate the record, if any. Instead, the trial court's finding was predicated solely on the prosecutor's hearsay state-

ment that he was told that the actual records were destroyed by a private records retention company. A trial court cannot rely upon the hearsay statement of a prosecutor to establish a fact for purposes of sentencing. Therefore, the State failed to present any competent evidence that the original record of the prior conviction had been destroyed and that a certified copy of it could not be obtained despite the due diligence of the State. As a result, the trial court erred in ruling that the State could use secondary documentary evidence to prove the prior conviction in lieu of a certified copy of the original record and the case was remanded for resentencing.