

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 22, 2010

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## THIS WEEK:

- **Jurisdiction**
- **Sentencing; First Offender**
- **Asset Forfeiture**
- **Trafficking; Methamphetamine**
- **Search & Seizure**
- **Sentencing; Sexual Exploitation of Children**
- **Inconsistent Verdict; Sentencing**
- **Sentencing; False Identification Documents**

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### **Jurisdiction**

*State v. Murray, S10M0390*

The State sought an emergency superse-  
deas with regard to a contempt order issued  
against an assistant district attorney in the  
underlying murder prosecution. The Court  
determined that the issue was whether it had  
jurisdiction because the finding of contempt  
bore no relation to the murder case. In *State*  
*v. Thornton*, 253 Ga. 524 (1) (1984), the Court  
instructed the Court of Appeals to transfer all  
murder cases, “and all pre-conviction appeals  
in murder cases,” to it. Thus, the Court deter-  
mined, the proper focus is “on the nature of the  
underlying action.” If the underlying action is  
a murder case, the Court has jurisdiction of the  
appeal, regardless of whether the order being  
appealed is based on facts having some bear-  
ing on the underlying criminal trial. Under  
*Thornton*, therefore, the Court concluded that  
it did have jurisdiction of this appeal.

Justices Melton and Nahmias dissented.  
Justice Nahmias’ interesting dissent addresses  
the history of the *Thornton* rule.

### **Sentencing; First Offender**

*Williams v. State, A10A0166*

Appellant appealed from the denial of  
his motion seeking to have his convictions  
for armed robbery declared null and void. The  
record showed that appellant pled guilty in  
Oct. 2007. He filed his motion in Jan. 2009.  
The Court held that when the term of court in  
which a defendant was sentenced pursuant to  
a guilty plea has expired, the trial court lacks  
jurisdiction to allow the withdrawal of the plea.  
In such instances, a defendant’s only available  
means to withdraw his guilty plea is through  
habeas corpus proceedings. The trial court  
therefore properly denied appellant’s motion.

Appellant also argued that his sentence  
was null and void because the trial court  
refused to consider him for first offender treat-  
ment. The Court noted that OCGA § 42-8-66  
specifically states that the First Offender Act  
does not apply to the sentences for violent  
felonies outlined in OCGA § 17-10-6.1. Under  
OCGA § 17-10-6.1 (a) (2), armed robbery is  
designated as a serious violent felony. Therefore,  
appellant’s argument was meritless.

### **Asset Forfeiture**

*Smith v. State of Georgia, A10A0191*

Appellant appealed from the forfeiture  
of his vehicle pursuant to OCGA § 16-13-49.  
The State first sought forfeiture utilizing the  
non-judicial framework of OCGA § 16-13-49  
(n). Appellant submitted a timely and sufficient  
claim but the State did not file a complaint for  
forfeiture with 30 days as required in subsec-  
tion (n) (5). Appellant argued that the trial  
court should have dismissed the complaint,  
because the late filing precluded the forfeiture.

The Court disagreed. It held that OCGA § 16-13-49 (h) (3) limits a claimant's remedy to return of the property pending further forfeiture proceedings in a case where the State fails to file a complaint within 30 days after receiving a claim as required under OCGA § 16-13-49 (n) (5).

## **Trafficking; Methamphetamine**

*Peacock v. State, A10A0444*

Appellant was convicted of trafficking in methamphetamine, conspiracy to distribute methamphetamine, and possession of methamphetamine. He challenged the sufficiency of the evidence as to each crime. The evidence showed that appellant, his wife, and two other men were standing in his yard when the police arrived. A consent to search a small trailer located behind the residence, resulted in the discovery of some methamphetamine. On the person of one of the two men, police found 157 grams of methamphetamine. Evidence also showed that this man was a large-scale drug dealer who had for some time on a weekly basis been coming to appellant's residence, each time "fronting" appellant and his wife up to five "8-balls" of methamphetamine with the expectation and experience of being paid the following week. Because of the number of "8-balls" delivered each week, this large-scale drug dealer understood that appellant and his wife were distributing the methamphetamine to others. Appellant's wife maintained a black book in which she recorded the drugs received from this large-scale drug dealer as well as the sales of these drugs to other persons who were known drug users.

The Court upheld the convictions for conspiracy and possession but reversed on the trafficking charge. The Court first found that the mere fact that the drug dealer was on appellant's property at the time he was found with the drugs was insufficient to establish constructive possession attributable to appellant. Second, the Court rejected the State's argument that as a member of the conspiracy to distribute methamphetamine, the large-scale drug dealer's action in possessing the methamphetamine could be attributed to appellant as a co-conspirator. A conspiracy to sell methamphetamine does not equate to a conspiracy to sell 28 grams of methamphetamine. Having such a large amount of methamphetamine

was not necessary to the conspiracy to sell, where much smaller amounts had always been advanced to the appellant and his wife in the past. Therefore the evidence was insufficient to support his trafficking conviction.

## **Search & Seizure**

*State v. Long, A09A2196*

Long was charged with possession of marijuana with intent to distribute. The trial court granted his motion to suppress and the State appealed. The evidence showed that Long, who was driving his vehicle in a area known for drug activity, was stopped by an officer because the officer could not read the county marked on Long's license plate. At some point after receiving Long's driver's license and insurance information, Long refused the officer's request for consent to search the vehicle. The officer requested a K-9 unit to be sent to the scene and asked Long to get out of the vehicle. The officer waited approximately 20 minutes for the K-9 unit. While waiting, the officer smelled marijuana. A marijuana pipe was handed over by Long's passenger and then the officer searched the vehicle and found additional marijuana.

The Court stated that while the police may lawfully ask questions unrelated to the purpose of a valid traffic stop, the questioning must not unreasonably prolong the detention. A "reasonable time" to issue a citation or written warning includes the time necessary to verify the driver's license, insurance, and registration, to complete any paperwork connected with the citation or a written warning, and to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. Here, the trial court found as fact that the police officer received and verified Long's driver's license and insurance information, confirmed that no warrants existed for either Long or his passenger, and only then requested permission to search the vehicle. The Court stated that while the officer did not unreasonably extend the detention of Long by requesting consent to search the vehicle, Long refused to provide such consent. Long was then detained an additional 20 minutes while the police officer waited for a K-9 unit. During that time, the police officer had apparently fulfilled the purpose of the initial stop other than handing Long his citation and returning his driver's license and insurance information.

"As we are required to do, we will defer to the trial court's finding that the prolonged detention was unreasonable, and its ruling on the motion to suppress must be affirmed."

## **Sentencing; Sexual Exploitation of Children**

*Hedden v. State, A09A2170, A09A2171*

In this consolidated appeal, appellants were convicted of sexual exploitation of children, OCGA § 16-12-100 (b) (8), by knowingly possessing photographic images stored in their computers depicting a minor's body engaged in sexually explicit conduct. Both contended that the trial erred in interpreting OCGA § 17-10-6.2 (c) (1) (F) ("Condition F"), one of six conditions authorizing the trial court to deviate from the mandatory minimum sentence in their cases, because the children whose photographs they possessed, some of whom were restrained while engaged in sexually explicit conduct, were not victims of such conduct within the meaning of Condition F which requires that "[t]he victim [not be] physically restrained during the commission of the offense." It was undisputed that appellant satisfied Conditions A-E of the § 17-10-6.2 (c) (1) conditions governing the trial court's discretion in considering a downward departure from imposing the mandatory minimum sentence in these cases.

It was undisputed that certain of the photographs in both cases depicted children who were physically restrained when they were photographed while engaged in sexually explicit conduct. Appellants nevertheless argued entitlement to a deviation downward from mandatory minimum sentencing pursuant to Condition F because the children in issue were not victims of the offense of which they were convicted. The Court disagreed. The Court held that Condition F focuses entirely on the victim. Thus, for purposes of Condition F, it is irrelevant whether appellants personally restrained the children whose photographs they possessed. A reading of OCGA § 16-12-100 shows that the victim of the crime of which appellants were convicted is the child who is sexually exploited by photographs taken of the child while engaged in sexually explicit conduct, whether restrained or unrestrained when photographed. Appellants' crimes were not victimless; the minors whose pictures they possessed, among them photographs

of children who were physically restrained while engaged in sexually explicit conduct, were continuing crimes against the children depicted. Since they possessed photographs of children thus restrained and victimized, the trial court properly concluded that Condition F had not been satisfied. Consequently, the trial court did not err in imposing the mandatory minimum sentence. Moreover, the Court added, “given the permissive nature of the trial court’s authority to deviate from mandatory minimum sentencing pursuant to OCGA § 17-10-6.2 (b) and the evidence of record, it would not be otherwise even had Condition F been satisfied.”

### **Inconsistent Verdict; Sentencing**

*Jamale v. State, A09A1781*

Appellant was charged with armed robbery, burglary, obstruction and other offenses. He was convicted of the lesser offense of robbery by intimidation and burglary. He contended that the trial court erred in: (i) sentencing him upon his conviction of robbery by intimidation, as a lesser included offense of armed robbery, because he was acquitted of theft by taking the alleged object of the robbery, and (ii) in explicitly considering that he possessed a firearm during the commission of the offenses when the jury acquitted him of all counts associated with such possession. The Court found that appellant was in essence arguing that the verdicts were inconsistent but Georgia abolished the inconsistent verdict rule in criminal cases years ago. Moreover, based on the evidence, a reasonable jury could have concluded that appellant aided a co-defendant in the commission of the offense of robbery by intimidation even while it acquitted him of the theft by taking count, finding that the co-defendant, not he, had actually taken the property which was the object taken in the robbery. Furthermore, at sentencing, a trial court may consider any lawful evidence of which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes. Here, one aspect of appellant’s conviction of robbery by intimidation was the victim’s testimony that appellant held him at gunpoint in the kitchen while a co-defendant went after the victim’s valuables elsewhere in the apartment.

### **Sentencing; False Identification Documents**

*Garcia v. State, A09A1641*

Appellant entered a guilty plea to six counts of knowingly manufacture false, fraudulent or fictitious identification documents in violation of OCGA § 16-9-4. Appellant contended that she was illegally sentenced because she should have been sentenced for a misdemeanor pursuant to OCGA § 16-9-4 (c) (1) for her “first offense” conviction on Count 1 and that under the rule of lenity, she should have been sentenced to no more than three years on each of the remaining offenses pursuant to OCGA § 16-9-4 (c) (2). The Court, however, agreed with the State that the punishments that appellant contended were applicable to her were for violations of OCGA § 16-9-4 (b) (2), whereas appellant was convicted for violating OCGA § 16-9-4 (b) (5). The punishment for violating OCGA § 16-9-4 (b) (5) is specifically set forth in OCGA § 16-9-4 (c) (4), which specifies a range of one to five years imprisonment. And a first offense for violating OCGA § 16-9-4 (b) (5) is not listed among those that should be treated as a misdemeanor pursuant to OCGA § 16-9-4 (c) (1). Therefore, appellant was not entitled to the sentence she contended was applicable on Count 1. Likewise, OCGA § 16-9-4 (c) (2), which specifies punishments for second or subsequent offenses for violations of certain other subsections of OCGA § 16-9-4 (b), does not apply to a violation of OCGA § 16-9-4 (b) (5).

Nevertheless, the Court held, the case must be remanded for resentencing because the range of punishment for a violation of OCGA § 16-9-4 (b) (5), as set forth in OCGA § 16-9-4 (c) (4), is one to five years imprisonment, not the 10 years imposed by the trial court.