

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING FEBRUARY 12, 2010

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## THIS WEEK:

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- Judicial Commentary; OCGA § 17-8-57
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## *Double Jeopardy*

*Stepp v. State, S09G0997*

Appellant was convicted of violating a county ordinance regarding animal control after her pit bull mauled a child. She was subsequently charged in state court with misdemeanor reckless conduct under OCGA § 16-5-60 (b). She filed a plea in bar on double jeopardy grounds. The trial court granted the plea and the Court of Appeals reversed. It held under *Blockburger v. United States*, 284 U.S. 299, 304, 52 SC 180, 76 LE 306 (1932), that the different levels of culpability required to support a conviction under the ordinance ("ordinary care") and the Georgia statute ("gross deviation from the standard of care") meant that each of these laws required proof of a fact which the other did not in order to support a conviction. The Supreme Court then granted certiorari.

The Court held that the Court of Appeals was correct in its decision, but wrong in its interpretation of the law because differing culpable mental states are not distinguishing "facts" that would satisfy the *Blockburger* required evidence test. Nevertheless, under *Blockburger*, the mauling incident involving appellant's dog did not constitute one offense for purposes of the county ordinance and the Georgia reckless conduct statute. Although the offenses are overlapping, each requires proof of a fact that the other does not. Specifically, a violation of the ordinance requires proof of ownership of the animal (whereas the reckless conduct statute does not), and a violation of the reckless conduct statute requires proof of actual bodily harm being caused (which the ordinance does not). As such, appellant's conviction under the ordinance would not bar her subsequent

prosecution under the reckless conduct statute in state court.

## **Judicial Commentary; OCGA § 17-8-57**

*State v. Gardner, S09G1210*

Appellant was convicted of armed robbery. During the trial, the trial court said to the prosecutor, “Prove venue. Did you prove venue?” When the prosecutor replied no, the court said, “Why don’t we go ahead and do that before we forget it.” The Court of Appeals held that this was an improper comment under OCGA § 17-8-57 and reversed appellant’s conviction. The Court granted the State’s petition for certiorari and affirmed the conviction.

As an initial matter, the Court held that any violation of OCGA § 17-8-57 will always be plain error and “[t]o the extent the ‘plain error rule’ has been articulated otherwise in the context of an alleged violation of OCGA § 17-8-57, such cases are hereby disapproved.” In order to violate OCGA § 17-8-57, the trial court’s comments must pertain to a disputed issue of fact. But, the Court held, even if the issue of venue was disputed in this case, the trial court did not violate OCGA § 17-8-57. “Although we strongly discourage the giving of direction or the use of language that could create the appearance of alignment between the trial court and either the prosecution or defense, the trial court did not ‘express or intimate [its] opinion as to what has or has not been proved,’ because its directive to ‘[p]rove venue’ was immediately followed by a question as to whether venue had been proven.”

## **Victim’s Violent Prior Acts**

*Arnold v. State, S09A1382*

Appellant was convicted of felony murder and aggravated assault. He argued that the trial court erred in not allowing evidence of the victim’s 1979 robbery conviction. The Court held that evidence of a victim’s specific acts of violence against third parties is admissible when a defendant claims justification and makes a prima facie showing thereof, follows procedural requirements, and establishes the existence of the prior violent acts by competent evidence. At trial, appellant relied on the language of the indictment associated with the victim’s 1979 conviction, offering no witnesses or other evidence to establish the facts underly-

ing the crime. The Court held that while the language of the indictment set forth certain elements of the crime of robbery, it did not provide a factual basis for determining whether an act of violence was involved in the robbery at issue. Therefore, appellant failed to meet the requirements for admission of evidence of violent acts by the victim against third parties, and the trial court did not clearly err by denying his motion.

## **Jury Charges; Possession of Weapon by Convicted Felon**

*Shivers v. State S09A1713*

Appellant was convicted of felony murder. The evidence showed that appellant, a convicted felon, got into an argument with the victim, left the house, returned a short time later with a shotgun and killed the victim. He contended that the trial court erred in failing to specifically charge the jury that self-defense may be a defense to the crime of possession of a firearm by a convicted felon. The Court held that there is no requirement that the court instruct the law of self-defense separately as to each of the various crimes alleged in the indictment. Here, the court gave an instruction on use of force in self-defense verbatim from the Suggested Pattern Jury Instructions, fully explaining the affirmative defense of justification and the burden on the State to disprove it beyond a reasonable doubt.

Appellant also contended that the trial court erred in refusing to give his requested jury charge drawn from *Ford v. State*, 262 Ga. 602, 603 (1) (1992), specifically that “[a] status felony, including the possession of a firearm by a previously convicted felon, is not inherently dangerous.” The Court held that whether the evidence presented is sufficient to authorize the giving of a charge is a question of law. It is not error for the trial court to refuse to give a requested charge that is not legally accurate and adjusted to the evidence. A felony is inherently dangerous when it is dangerous per se or by its circumstances creates a foreseeable risk of death. Depending on the facts, possession of a firearm by a convicted felon can be an inherently dangerous felony. Unlike the defendant in *Ford*, the facts showed that here, appellant intentionally aimed and shot a loaded weapon at the victim in a manner that was inherently dangerous. Thus, his

use of the weapon under the circumstances created a foreseeable risk of death. Therefore, the trial court properly denied giving the requested charge.

## **Out-of-Time Appeal**

*Johnson v. State, S09A1759*

Appellant pled guilty to multiple charges including felony murder and aggravated assault. He contended that the trial court erred in denying his motion for an out-of-time appeal. The Court held that appellant was not entitled to such an appeal because 1) the record showed that his plea was freely and voluntarily entered; and 2) the charge of aggravated assault was not void because the indictment tracked the language of the statute including the essential elements of the offense, and was sufficiently definite to advise him of what he must be prepared to confront. The Court further held that the trial court did not err in failing to grant him an evidentiary hearing on his claim that his right to appeal was frustrated by ineffective assistance of his trial counsel because the record failed to establish that the claims of error he could have raised in a timely direct appeal would have been meritorious.

## **Cross-Examination; Conspiracy**

*Mikell v. State, S09A1766*

Appellant was convicted of felony murder and multiple counts of armed robbery and aggravated assault arising out of an attack on six people at a gambling house. One of his co-conspirators struck a deal with the State and testified against him. Appellant argued that the trial court erred by not permitting him to cross-examine the witness about parole eligibility. The Court summarily held, citing *Hewitt v. State*, 277 Ga. 327 (2) (2003), that the trial court did not err in allowing appellant to question the witness about the witness’s parole eligibility because the authority to grant parole rests with the Board of Pardons and Paroles and not the district attorney’s office. Therefore, cross-examination regarding parole is irrelevant on the question of a witness’s potential bias in testifying favorably for the State. Justices Nahmias and Melton agreed with the decision but would hold that in certain circumstances, such questioning should be permitted.

Appellant contended that the trial court erred in not giving his request to charge concerning withdrawal from a conspiracy. The Court stated that it is reversible error for the trial court to decline to give a requested charge on an affirmative defense only where the charge is both a correct statement of the law and is adjusted to the evidence in the case. Appellant's request was a correct statement of the law. But the evidence showed that prior to his alleged withdrawal from the conspiracy, appellant acted to lead his co-conspirators to the home where the victims were present; told his co-conspirators, who were seeking victims to rob, about the dice game money he observed on the floor of the home; accompanied an armed co-conspirator to the home and knocked on the door; and gave his name so as to enable his armed co-conspirator to gain entry when the door was opened in response to appellant's words. Because the conspiracy to rob the victims could not have been effected without appellant's performance of these overt acts, the evidence did not support the giving of the requested charge.

### **Speedy Trial; Double Jeopardy**

*Marshall v. State, S09A2036, S09A2037, S09A2038*

Appellant argued that the trial court erred in failing to find that the State violated his constitutional right to a speedy trial with regard to three separate offenses. The record showed that appellant was arrested and charged with felony murder in January 2004; he was indicted three months later. In December 2006, he was indicted for child molestation; and in March 2007 he was indicted for armed robbery. While he was awaiting trial for felony murder, he was housed in close proximity to Brian Nichols, the Fulton County Courthouse killer. Because the district attorney believed he was a potential witness at Nichols' trial, appellant's trial was delayed for several years, with appellant's knowledge and cooperation, to determine whether appellant could provide helpful information or testimony in the Nichols case. Ultimately, the district attorney determined that appellant would not be used as a witness. Appellant made a speedy trial demand on April 24, 2009. At that time, the felony murder prosecution was delayed more than five years; the child molestation case was

delayed approximately two and a half years; and the armed robbery case was delayed a little more than two years.

Utilizing the *Barker v. Wingo* factors, the Court found as follows: 1) the length of the delays in these cases were uncommonly long, particularly for the felony-murder prosecution; 2) the primary reason for the delay was the agreed upon exploration of whether appellant would be able to help prosecute Nichols and thus, it cannot be said that the delay can be attributed to the State; 3) appellant waited several years to assert his right to a speedy trial, until the case was nearing the time for trial, and thus this factor must be attributed against him; and 4) appellant failed to show prejudice because he was already serving a lengthy federal prison sentence, and was unable to point to any specific prejudice resulting from the delay, beyond the normal levels of anxiety and concern present in any criminal case. Therefore, the trial court did not err in denying his pleas in bar.

### **Habeas Corpus; Right to Transcript**

*Flint v. State, S09H1936*

Appellant was seeking a certificate of probable cause on the denial of his habeas petition. The case had already been before the Court once and the Court had remanded it for a hearing and ordered that the hearing be transcribed. The habeas court then had the petitioner literally phone in his testimony and did not have anything transcribed. The Court held that without such a transcript, the merits of the habeas court's final order could not be reached by an appellate court. Therefore, it held, "[i]n accordance with...[OCGA § 9-14-50], we hold that a habeas corpus petitioner is entitled to have the trial of his case transcribed by a court reporter and that an indigent petitioner is entitled to a transcript at the expense of the State." The case was again remanded to the habeas court.

### **Search & Seizure; Ineffective Assistance of Counsel**

*Devega v. State, S09A2064*

Appellant was convicted of malice murder, felony murder, aggravated assault, possession of a firearm during the commission of a felony,

and conspiracy to sell a controlled substance. He argued that his counsel rendered ineffective assistance by failing to argue that his Fourth Amendment right against unreasonable searches and seizures was violated when the police requested, without a warrant, that his cellular telephone provider "ping" his phone in order to locate him. The evidence showed that after discovering appellant had arranged to meet with and sell cocaine to the victim immediately prior to his death, law enforcement requested that appellant's cell phone provider "ping" his phone, which the officers described as sending a signal to the phone to locate it by its global positioning system (GPS). The company complied and informed the police that the phone was moving north on Cobb Parkway. Police followed the signal along the parkway and onto Dobbins Air Reserve Base where appellant was arrested. Appellant argued that this case was controlled by *United States v. Karo*, 468 U.S. 705, 104 SC 3296, 82 LE2d 530 (1984). Our Court disagreed. In *Karo*, the U. S. Supreme Court held that the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment. Instead, our Court held that this case is governed by *United States v. Knotts*, 460 U.S. 276, 281 (II), 103 SC 1081, 75 LE2d 55 (1983). In *Knotts*, the U. S. Supreme Court held that the warrantless monitoring of signals from a beeper inside an automobile traveling on public roads did not violate the Fourth Amendment because it did not reveal any information that was not also available through visual surveillance. The Court held that the GPS tracking device and "ping" information in this case was simply the next generation of tracking science and technology from the radio transmitter "beeper". Thus, appellant had no reasonable expectation of privacy while traveling in his car on Cobb Parkway and onto the base, because the warrantless monitoring of his cell phone location revealed the same information as visual surveillance. Since no Fourth Amendment violation occurred, appellant's defense counsel was not ineffective for failing to pursue a motion to suppress on these grounds.

### **Sentencing; Recidivists**

*Kennedy v. State, A09A1889*

Appellant entered into a negotiated guilty plea on two counts of burglary and

was sentenced as a recidivist. On appeal, he argued that the trial court erred in sentencing him under the general recidivist provisions of OCGA § 17-10-7 (c), as opposed to the specific recidivist provisions of OCGA § 16-7-1 (b). The record showed that at the time appellant pled guilty to the instant burglary charges, the State proved that he had two earlier burglary convictions, a theft by taking conviction, and a forgery in the first degree conviction. The trial court then sentenced appellant and noted that the sentence was being given pursuant to OCGA § 17-10-7 (c), rendering him ineligible for parole during his ten year incarcerated sentence. The Court held that the trial court's sentence pursuant to the general recidivist provisions of OCGA § 17-10-7 (c) was authorized, citing *Goldberg v. State*, 282 Ga. 542, 547 (2007). In *Goldberg*, the Supreme Court held that "when OCGA § 16-7-1 (b) and OCGA § 17-10-7 [(c)] are harmonized, the former specific recidivist statute applies when the defendant is a habitual burglar having only prior convictions for burglary, whereas the latter general recidivist statute applies when the defendant is a habitual felon with prior convictions for other crimes." Therefore, the Court reasoned, because appellant's conviction represented not only his third burglary conviction but also his fifth felony conviction, he fell squarely within the ambit of OCGA § 17-10-7 (c). Consequently, the trial court properly sentenced him as a recidivist under the general recidivist provisions.

### **Character Evidence; Mistrial** *Hood v. State, A09A1716*

Appellant was convicted of trafficking in cocaine. He contend that the trial court erred by not granting a mistrial after a State's witness put his character into evidence. The evidence showed that a detective received information that someone named "Butch" was selling drugs. When asked how he determined that "Butch" was appellant, the detective stated "[he] had received information that Butch had just recently got out of prison for a federal offense." The trial court sustained appellant's objection. At the conclusion of the detective's testimony, appellant moved for a mistrial. The trial court offered instead a curative instruction, but appellant declined.

The Court held that presupposing that the motion for mistrial was timely, there was

no error because 1) appellant waived the issue for appellate review when he declined the court's invitation for a curative instruction; and 2) in any event, an offer to give curative instructions to the jury rather than grant the mistrial request following the introduction of bad character evidence is within the discretion of the trial court and is not error.

### **Restitution**

*Wright v. State, A10A0258*

Appellant pled guilty to numerous charges including aggravated assault, false imprisonment, rape, kidnapping, obstruction of a law enforcement officer, and criminal damage to property in the first degree. The trial court sentenced him to 50 years imprisonment, with the first 30 to be served in confinement and the remainder on probation. As a condition of probation, the trial court entered an order requiring him to pay restitution of \$31,911.56. He moved to modify the restitution order which the trial court dismissed without prejudice under the theory that a motion seeking modification of the restitution order could not be made until appellant was released on probation and paying restitution.

The Court reversed. The Court held that the law does not require the expiration of a defendant's prison term or the actual commencement of restitution payments before a defendant can move for modification of a restitution order.

### **Search & Seizure; Inevitable Discovery**

*Davis v. State, A10A0520*

Appellant was convicted of possessing cocaine and for driving while cocaine was in his blood. He contended that the trial court erred in denying his motion to suppress the bag of cocaine found in his pants pocket. The evidence showed that appellant was stopped at a roadblock. The officer believed appellant may have been under the influence and asked him to pull his vehicle over to the side. Once out of his vehicle, the officer frisked appellant and found the baggie of cocaine. The trial court found that the cocaine would have been discovered under the inevitable discovery doctrine.

The Court agreed. Under the inevitable discovery doctrine, if the State can prove by a preponderance of the evidence that evidence

derived from police error or illegality would have been ultimately or inevitably discovered by lawful means, then the evidence is not suppressed as fruit of the poisonous tree. The elements of this doctrine require that there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct. Here, the Court found, before the officer removed the cocaine from appellant's pocket, the officer was actively pursuing a DUI investigation based upon 1) appellant's suspicious behavior as he approached the road block and interacted with the officer; 2) the smell of marijuana emanating from his vehicle; and 3) his dilated eyes. During that investigation, appellant's poor performance on the field sobriety tests and his physical manifestations of drug influence gave the officer probable cause to arrest appellant for DUI. Since a lawful search of appellant's person would have been performed incident to his arrest, the cocaine inevitably would have been revealed.

### **Similar Transactions**

*Conyers v. State, A09A1646*

Appellant was convicted of possession of cocaine. He argued that the trial court erred in admitting a similar transaction at trial. The evidence showed that the cocaine was found in the motel room that he had rented and that he was present when the cocaine was discovered. Appellant denied possession of the cocaine. The State also introduced a similar transaction that four years earlier, appellant was discovered in possession of cocaine during a traffic stop.

The Court held that the similar transaction was properly admitted. First, the State offered the prior conviction for the proper purpose of showing appellant's course of conduct and bent of mind. Second, it was undisputed that appellant committed the prior act. Lastly, the two incidents were similar in that they both occurred in a known drug area in the county, involved the same drug in a possession amount and the presence of drug paraphernalia. Further, the facts of both offenses supported a finding that appellant was in constructive possession of cocaine. The Court found as inconsequential that the prior

offense involved a traffic stop whereas the instant offense occurred in a motel room.

## **Cross-Examination**

*Haggard v. State, A10A0144*

Appellant was convicted of trafficking in methamphetamine. The evidence showed that an officer stopped a vehicle with three occupants. Appellant got out of the vehicle and dropped the drugs into the bed of a near-by truck he went to stand besides. At trial, appellant claimed that the other male passenger in the vehicle placed the drugs in the bed of the truck. The State then called that other passenger in rebuttal. Appellant contends that the trial court erred in restricting his cross-examination of the witness by prohibiting him from asking the witness about the passenger's knowledge concerning the minimum penalty for a trafficking offense in methamphetamine.

The Court first held that appellant waived his right to assert error because after the trial court refused to allow the question, appellant, instead of objecting, stated "All right. I don't have any questions." But, the Court added, even if he had objected, his argument was meritless. The passenger-witness had no deal regarding his charges or sentence with the State in exchange for his testimony. The trial court did not prohibit appellant from eliciting that the witness had been charged with the same crimes as appellant nor whether those charges were still pending. Moreover, the court did not prevent appellant from asking the witness whether the witness hoped to gain favorable treatment on the charges due to his testimony, or whether the witness felt in any other way favorably disposed to the prosecution.

## **Videotape; Hearsay**

*Smith v. State, A10A0131*

Appellant was convicted of trafficking in cocaine and possession of a firearm by a convicted felon. He contended that the trial court erred in admitting into evidence a videotape made by a police informant in conjunction with a cocaine transaction that occurred earlier on the day in question, because: 1) given that he had not been charged with a crime in connection with that transaction, evidence of it was highly prejudicial; and 2) to the extent the tape was admitted as similar transaction evi-

dence, the trial court failed to hold a hearing as required by Uniform Superior Court Rule 31.3 (b). The evidence showed that officers placed audio and visual recording equipment on a CI and sent him into a motel room to make a controlled buy. This occurred in the afternoon. The audio portion of the tape recorded a conversation between the CI and appellant's co-defendant. The video portion showed appellant "cooking" crack cocaine. Later that day, the officers came back to the motel and a search revealed the trafficking amount of cocaine in the motel room. The Court held that even though a defendant is not charged with every crime committed during a criminal transaction, every aspect of it is relevant to the crime charged may be presented at trial. This is true even if the defendant's character is incidentally placed in issue. Here, the videotape showing the earlier drug sale was relevant and material to the drug trafficking and firearm charges to establish appellant's connection to the motel room and to the large amount of cocaine seized from that location. The Court further held that the evidence concerning the previous drug sale was not similar transaction evidence, and so there was no requirement to comply with the procedural rules set forth in USCR 31.3. Instead, the evidence showed the circumstances surrounding the charged offenses and was therefore admissible as part of the *res gestae*.

Appellant also argued that testimony by the officer who listened to the audiotape as it was being recorded was inadmissible hearsay. The Court held that a witness may testify as to the substance of a conversation he overheard, provided: (1) the witness can identify those who were speaking; and (2) the statements overheard by the witness fall within an exception to the hearsay rule. Here, both requirements were met. First, the detective could identify both the CI and appellant's co-defendant as the persons having the conversation and the statements attributed to the co-defendant were admissible as voluntary, incriminating admissions.

## **Justification; Rape Shield Evidence**

*Morgan v. State, A09A1853*

Appellant was convicted of kidnapping, kidnapping with bodily injury, family violence aggravated assault, and false imprisonment.

He was acquitted of rape. He argued that the trial court erred by (1) refusing to give his requested charge on justification; and (2) excluding letters from the victim to him while he was in jail, awaiting trial. The Court found that the trial court did not err in failing to give a justification defense instruction even if it was appellant's sole defense. The evidence showed that appellant attacked and kidnapped his pregnant girlfriend. He argued that he was justified in doing so because he was afraid the unborn baby would be harmed by the victim's methamphetamine use. He pointed to evidence of harm regarding a prior child born to the victim. The Court, however, held that a charge on a defendant's sole defense is mandatory only if there is some evidence to support the charge. A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force. Here, even if such evidence was relevant, appellant made no showing of evidence that the victim used or threatened to use methamphetamine while she was pregnant with his child or to otherwise harm herself or the baby. Because there was no evidence of any imminent threat of harm, the trial court did not err in refusing to give a jury charge on justification.

Appellant also argued that the trial court improperly excluded letters written by the victim to appellant. The State contended in a motion in limine that the letters, which contained comments about specific sexual activities between the parties before the charged crimes and sexual acts that the victim wanted to perform on appellant when he was released from jail, were irrelevant and barred by the Rape Shield Statute. The trial court stated that the letters may be admissible but only after the procedure outlined in the statute was followed. The Court held that the trial court did not abuse its discretion in its ruling. First, the trial court indicated that it would consider any future proper attempt to admit the evidence but appellant declined to do so. Second, the Rape Shield Statute bars the admission of evidence relating to the victim's past sexual behavior unless it directly involves the accused's participation and supports an inference that the accused could have reasonably believed that the victim consented to the conduct at issue. Here, the evidence which appellant wanted

from the letters was cumulative of evidence he had already produced from different sources. Finally, appellant was acquitted of the rape charge and the evidence in the letters that the victim had a previous sexual relationship with him before the incident and wanted to have one with him in the future was not relevant to the charges for which he was convicted.

## **Search & Seizure; Expert Witnesses**

*Clark v. State, A09A2082*

Appellant was convicted of rape, aggravated assault, false imprisonment, and battery. He argued that the trial court erred in denying his motion to suppress. The evidence showed that the officers had reason to believe that appellant had dragged the victim by the hair to a particular trailer. The officers also had information concerning an out-of-state arrest warrant for appellant. The officers located appellant and the victim in the crawl space beneath the trailer after the officers pushed open a door that was ajar to this crawl space. The Court stated that assuming without deciding that the crawl space was a part of the residence, there was no error. First, a warrantless arrest is constitutionally valid if at the time of the arrest the arresting officer has probable cause to believe the accused has committed or is committing an offense, and probable cause exists if the arresting officer has knowledge and reasonably trustworthy information about facts and circumstances sufficient for a prudent person to believe the accused has committed an offense. Second, reasonable concern for a victim's welfare is an exigent circumstance that justifies a warrantless entry into a residence. Here, the evidence showed that the officers were told by eyewitnesses that appellant had forced the victim out of a vehicle and dragged her toward a specific trailer; they learned through investigation that appellant had been seen at the trailer following the incident; they knew of an outstanding out-of-state arrest warrant for him; and while attempting to locate him at the trailer they observed evidence that electricity was being routed to a crawl space underneath it. Based upon these facts, it was reasonable for the officers to believe that the exigent circumstance of protecting the victim's welfare existed, which justified their acts of pushing open the ajar access door and looking into the crawl space. Their observation of ap-

pellant and another person in the crawl space, combined with the above facts, constituted probable cause to believe that appellant had committed an offense, justifying their arrest of him.

Appellant also contended that the trial court erred in not providing funds for an expert witness on blood evidence. The Court held that a motion for funds to obtain an expert witness requires a reasonable showing to the trial court, by the defendant, why the expert's services are required, what services are to be performed by such expert, the identity of the expert, and the cost to provide the needed services. The defendant must also demonstrate that without the assistance of the expert, the defendant's trial would be rendered fundamentally unfair. The court found that while appellant asserted that his trial was fundamentally unfair because the scientific evidence was critical, the record showed that the State did not present any evidence of blood samples or any other scientific evidence to link appellant to the crimes. Therefore, the trial court did not abuse its discretion in denying his motion for funds for an expert witness.

## **Pretrial Photographic Identification; Hearsay**

*Wright v. State, A09A2389*

Appellant was convicted of aggravated assault. He contended that the trial court erred in admitting evidence of the victim's pretrial identification of him. The evidence showed that after appellant shot the victim, an officer came to the hospital where the victim was recovering, showed the victim a photograph of appellant and asked if the person depicted was the assailant. The Court stated that a conviction which relies on eyewitness identification at trial following a pretrial photographic identification will be reversed only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Generally, the display of a single photograph to a witness is impermissibly suggestive. But here, the victim had an independent basis for his identification of appellant as he previously met him through appellant's sister and also attended a social gathering with appellant just two days prior to the shooting. Further, the victim had observed appellant with dread locks on the date of the shooting, and indicated to

the officer that appellant had dread locks, as depicted in the photograph. The Court held that even if a pretrial identification is tainted, an in-court identification is not constitutionally inadmissible if it does not depend upon the prior identification but has an independent origin. The officer's display of a single photograph to the victim was error but, the Court found, under the totality of the circumstances, it was harmless.

Appellant also contended that the trial court admitted hearsay which denied him a fair trial. The record showed that when the State asked the victim why he took the gun from appellant, the victim responded, "Cause I was . . . told that he was gonna shoot somebody else with it." The Court held that this was not hearsay because the State was not seeking to prove the truth of the matter asserted, but merely to explain the victim's conduct in hopes that the appellant would not harm another.

## **Double Jeopardy; Sentence Modification**

*Surh v. State, A09A2219*

Appellant appealed from an order denying his plea in bar under double jeopardy. The record showed that he was arrested and charged with misdemeanor possession of marijuana, two counts of aggravated assault, and two counts of aggravated assault upon a police officer. On December 17, 2008, he entered a negotiated nolo contendere plea to the possession of marijuana charge in the county Drug Court. Appellant's plea was accepted by the Chief Magistrate of the county who had been specially designated by a superior court judge to preside in the Drug Court on that particular day as a judge of that court *pro hac vice*. On January 26, 2009, the Chief Judge of the Superior Court entered an order "withdrawing" appellant's plea on the basis that the Chief Magistrate had no authority to nolle pros the aggravated assault charges. Appellant argued that because the magistrate had "full authority" to accept his plea and sentence him, his plea was valid, and his subsequent prosecution by the State was barred.

The Court agreed with appellant, but affirmed the trial court on other grounds. First, the Court held that the designation of a magistrate to assist a requesting court "cloak[s] the magistrate with statutory and constitutional authority to exercise the judicial

power of the superior court.” Based on the record and the fact that the State offered no objection whatsoever to the Chief Magistrate accepting appellant’s plea and sentencing him, the magistrate judge was authorized to accept the plea.

Nevertheless, the Court stated that “[t]his case presents in a unique procedural posture.” Although the Chief Magistrate orally pronounced appellant’s sentence, the judge did not sign a written sentence. When the written sentence came before the superior court judge for her signature, she found the negotiated sentence unacceptable. Under OCGA § 17-7-93 (b), she then properly advised appellant that she intended to impose a more harsh sentence and gave him the option of withdrawing his plea in lieu of resentencing. When appellant refused to select either option, the trial court was authorized to set aside his plea rather than impose a sentence that was harsher than the negotiated sentence.

Finally, the Court determined that the trial court mischaracterized the State’s actions with regard to the four assault charges. Although the trial court found that the nolle prosequi in the Drug Court of the aggravated assault charges was void, the record did not contain a nolle prosequi. Instead, the State elected to list only the marijuana charge in the accusation and specifically indicated that it “decline[d] to prosecute” the assault charges. Since the decision of whether to prosecute and what charges to file are decisions that rest in the prosecutor’s discretion, the only charge pending against appellant in this case was the count alleging possession of marijuana.

## **Evidence; Bolstering**

*McGill v. State, A10A0273*

Appellant was convicted of the rape and aggravated sexual battery of a victim who suffers from Down Syndrome. He contended that the victim’s testimony was improperly bolstered by testimony including (a) her own previously videotaped statement, (b) the testimony of a forensics interviewer concerning the victim’s description of the crime to him, and (c) the testimony of the nurse who performed the initial examination of the victim. The Court held that the victim’s credibility was put at issue in cross-examination and thus any relevant prior statements by her were not hearsay and were admissible. The Court noted

that appellant’s objection to the forensic interviewer’s initial testimony that the victim’s story was not the product of coaching was sustained. Thereafter, he failed to object to any of the interviewer’s testimony, including her answer to the question whether the victim was telling a “repeated” or an “original” story. Therefore, the issue was not preserved for review. Finally, OCGA § 24-3-4 provides:

“Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment[,] shall be admissible in evidence.” Even if the victim’s identification of appellant as her attacker was “not reasonably pertinent to her diagnosis or treatment,” the testimony was cumulative of other evidence as to his identity.

## **Hearsay**

*Marcia-Hernandez v. State, A09A1606*

Appellant was convicted of attempted armed robbery and aggravated assault. He contended that the trial court erred in admitting hearsay evidence. The record showed that appellant and two co-defendants assaulted the victim on the street and attempted to rob him at knifepoint. He argued that the trial court erred in admitting a detective’s testimony that there were two knives recovered from the scene on the basis that such testimony constituted impermissible hearsay because the detective was not present when the evidence was collected. The Court held that the detective’s testimony that he personally observed two knives at the police station was not hearsay. Moreover, even assuming that the trial court erred in admitting the testimony, its admission was harmless given the overwhelming evidence of guilt.

## **Character Evidence; Impeachment**

*Love v. State, A10A0032*

Appellant was convicted of burglary and misdemeanor criminal trespass. The evidence showed that the night before appellant committed the burglary, a security guard at the apartment complex where the burglary had taken place had issued him a criminal trespass warning. The guard testified that he gave the

warning to appellant because appellant told the guard that appellant was at the complex to buy drugs. Appellant argued that this impermissibly placed his character in evidence. The Court disagreed. It held that inherent in OCGA § 16-7-21 (b) (3)’s notice provision is a requirement that notice be reasonable under the circumstances. Consequently, the testimony was relevant to explain why appellant had been forbidden to enter the premises.

Appellant also contended that the trial court erred under OCGA § 24-9-84.1 (a) (2) in allowing the State to impeach his testimony with his prior convictions of burglary and attempt to commit burglary, arguing that the prejudicial effect of those convictions outweighed their probative value. The Court held that given appellant’s defense to the current charges was that he believed he had permission to remove the property from the burgled apartment, the trial court did not abuse its discretion in admitting the two prior convictions, which indicated a probable lack of veracity by appellant.

Finally, appellant argued that the trial court erred in allowing the State to use his prior convictions for purposes beyond the scope of mere impeachment when it overruled his objection to the State’s cross-examination of him regarding the details of those convictions. The Court noted that appellant discussed his prior convictions of burglary and attempted burglary during his direct examination. He testified he had not actually committed the crime of attempted burglary but only pled guilty in order to quickly resolve the case. Thus, when the prosecutor asked him on cross-examination where the attempted burglary had allegedly occurred, the question was permissible given his attempt to rehabilitate his character by claiming that he had not committed the offense.