

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 10, 2013

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Resource Prosecutor

THIS WEEK:

- **Ineffective Assistance of Counsel; Trial Strategy**
- **Jury Charges; No Duty to Retreat**
- **Appellate Jurisdiction; Right of State to Appeal**
- **Out-of-Time Appeals**
- **Search & Seizure; Roadblock**
- **Statute of Limitations**
- **Merger; Sentencing**
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- **Newly Discovered Evidence; Cumulative Evidence**
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Ineffective Assistance of Counsel; Trial Strategy

McKay v. State, S13A0346 (5/6/13)

Appellant was convicted for the shooting death of the victim during an attempted robbery. He contended that his counsel was ineffective for failing to present evidence of other statements that showed that appellant may not have been the one who shot the victim. At the motion for new trial hearing, appellant presented four police officers who testified they had taken statements from various people who alleged in their statements either that an individual other than appellant confessed to them that they shot the victim or that someone else told them an individual other than appellant

had made a confession about killing the victim. Appellant also proffered a witness who testified his girlfriend told him that an individual other than appellant had confessed to the crime. Appellant testified he was not aware of any of the purported confessions by other individuals until after his conviction.

The Court stated that deciding what evidence to present or to forego in defending a client charged with a crime is a matter of strategy and tactics. Reasonable trial strategy does not constitute deficient performance. Here, appellant's trial counsel testified he was aware of the alleged confessions by the other individuals because the statements were provided in discovery. Counsel stated he did not proffer any evidence of these alleged confessions at trial because the statements could not be corroborated, the statements consisted of double hearsay, and the statements did not match the physical evidence in the case. Additionally, counsel testified his trial strategy was to discredit appellant's siblings who had implicated appellant in the crime rather than focusing on "red herrings" he believed would diminish appellant's defense. Counsel also testified he discussed the evidence in the case and the trial strategy with appellant. Therefore, the Court held, appellant was unable to refute the strong presumption that counsel's decision not to present the evidence in question fell within the broad range of professional conduct afforded to trial attorneys.

Jury Charges; No Duty to Retreat

Shaw v. State, S13A0061 (5/6/13)

Appellant was convicted of murder. The evidence showed that appellant was living with

the victim's former wife in an apartment they shared together. Because the victim and his ex-wife had children when they were together, the victim made arrangements to meet the wife at a gas station with the children, who had been visiting with the victim. But instead of going to the gas station, the victim drove the children to the apartment that the ex-wife and appellant shared. An argument ensued between the victim and appellant. The victim then went to get in his car and drive away. However, appellant grabbed a knife and met the victim as he was driving away from the apartment complex. The victim got out of the car and a "scuffle" between appellant and him ensued. A neighbor heard the victim say "[appellant] stabbed me" and saw the victim fall to the ground. The victim was unarmed and later died from the resulting stab wound.

Appellant contended that the trial court erred when it failed to charge the jury that one acting in defense of self has no duty to retreat. At trial, however, appellant neither requested a charge on the duty to retreat nor objected when the trial court failed to give such a charge. As such, the Court reviewed the failure to charge on the duty to retreat only for plain error. A failure to charge amounts to plain error only to the extent that the failure to charge was erroneous, the error was obvious, the failure to charge likely affected the outcome of the proceedings, and the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. A plain-error analysis, which must be distinguished from harmless-error analysis, requires appellant to make an affirmative showing that the error probably did affect the outcome below.

Here, the Court noted, appellant had a fair opportunity to present evidence of his claim of self-defense through his own testimony at trial. Additionally, the trial court charged the jury extensively on self-defense, including the circumstances in which force in defense of self is justified, the reasonableness of a belief that force is necessary, and threats or menaces that may lead to such a reasonable belief. Thus, the Court found, the charges given in the case fairly informed the jury as to the law of self-defense. Moreover, the Court held, appellant failed to affirmatively show that the failure to charge on duty to retreat probably affected the outcome of the trial.

Appellate Jurisdiction; Right of State to Appeal

State v. Hill, A13A0610 (4/30/13)

The State appealed from a trial court order granting Victor Keith Hill's general demurrer and dismissing 5 counts of a 37-count indictment against him. The record showed that the State sought to directly appeal by filing a notice of appeal from the trial court's order. Hill argued that the trial court should have dismissed the State's notice of appeal because the dismissal of only a portion of an indictment is an interlocutory order from which no direct appeal lies. In support of his argument, Hill cited *State v. Outen*, 289 Ga. 579 (2011), which provided that a trial court's order dismissing fewer than all counts of an indictment is not a final order; thus, a certificate of immediate review was required for an appeal pursuant to the version of O.C.G.A. § 5-7-2(a), then in effect. The State countered that *Outen* effectively was overruled by a 2012 amendment to O.C.G.A. § 5-7-2(b)(2). The amendment provides that the State need not obtain a certificate of immediate review to appeal an order described in O.C.G.A. § 5-7-1(a)(1), which includes orders "setting aside or dismissing any indictment . . . or any count thereof." (Emphasis supplied.) The trial court agreed with the State and refused to dismiss the State's notice of appeal.

The Court noted that Hill allegedly committed the crimes at issue between January 1, 2007, and June 30, 2011 and that he was indicted on January 18, 2012. The amendment to O.C.G.A. § 5-7-2 became effective July 1, 2012. Therefore, the determinative jurisdictional question was whether the amendment applied retroactively. The Court stated that a statutory amendment may be applied retroactively if the changes do not affect constitutional or substantive rights and if the legislature did not express a contrary intention. Substantive law is that law which creates rights, duties, and obligations. Procedural law, however, is that law which prescribes the methods of enforcement of rights, duties and obligations.

Here, the Court found the legislature plainly and unambiguously expressed its intent in the relevant legislative history, which provides in pertinent part, "this Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. *Any offense occurring before July 1, 2012,*

shall be governed by the statute in effect at the time of such offense." (Emphasis supplied.) Ga. L. 2012, Act 709/HB 1176, Part IX, § 9-1 (a). Thus, the version of O.C.G.A. § 5-7-2 in effect at the time the offenses were committed applies. Therefore, the Court held, because the State failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the Court dismissed the appeal.

Out-of-Time Appeals

Cosper v. State, A13A0143 (4/30/13)

Appellant appealed from the denial of his pro se motion for leave to file an out-of-time appeal. The motion alleged issues involving the indictment, jurisdiction, venue, and double-jeopardy. The Court stated that a trial court's denial of a criminal defendant's motion for an out-of-time appeal is directly appealable when the conviction at issue has not been the subject of a previous appeal, and is reviewed under an abuse of discretion standard. Additionally, the Court noted that out-of-time appeals are designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice. Here, the Court held, appellant did not allege that his failure to file a timely appeal of his conviction was due to any ineffective assistance of counsel, and therefore, appellant's motion was correctly denied.

Search & Seizure; Roadblock

Mitchell v. State, A12A0035 (4/30/13)

Appellant contended that the trial court erred when it denied his motion to suppress evidence obtained as a result of a police roadblock. He contended that the roadblock was unlawful because it was not implemented for a legitimate primary purpose, but secondary to a true purpose to conduct "general law enforcement." The evidence showed that a captain from the sheriff's department authorized the roadblock on the evening that appellant was arrested. Additionally, the captain proffered the authorization form which provided the guidelines for the roadblock. The form outlined both the objective of the stop and the requisite training required of the officers who

performed the stop. On the night of his arrest, appellant approached the stop and was asked to produce his license. When the trained officer sensed the odor of marijuana from the car, he asked appellant if he could search the vehicle. Appellant consented and the officer located marijuana in the trunk of the vehicle.

The Court stated that to examine the propriety of roadblock stops, the issue for resolution is not whether there was probable cause to stop the vehicle, but whether the roadblock stop was otherwise implemented and conducted in a manner as to demonstrate that the stop of the vehicle was reasonable under the Fourth Amendment. To justify a roadblock that serves legitimate law enforcement objectives, the State must prove that a highway roadblock program was implemented at the programmatic level for a legitimate primary purpose, that is, that the roadblock was ordered by a supervisor, rather than by officers in the field, and was implemented to ensure roadway safety rather than as a constitutionally impermissible pretext aimed at discovering general evidence of ordinary crime.

To show whether the roadblock was implemented for a legitimate primary purpose, the law only requires that some admissible evidence, whether testimonial or written, show that supervisory officers had a legitimate primary purpose for conducting the roadblock. A driver's license check has been held to be a legitimate primary purpose for a roadblock. Further, even if the roadblock was implemented for safety reasons and for sobriety purposes, as indicated by the captain's testimony, those are also considered lawful primary purposes. Thus, the Court held, there was evidence to support the trial court's finding that the roadblock was conducted for a legitimate purpose, and thus, the trial court did not err in denying the motion to suppress.

Statute of Limitations

State v. Mullins, A13A0252 (4/30/13)

Jacqueline Mullins and her husband, Terrell Mullins, filed a plea in bar asserting that their indictment for theft was barred by the applicable four-year statute of limitation under O.C.G.A. § 17-3-1(c). The trial court granted the plea in bar and the State appealed. The State contended that the trial court erred in applying O.C.G.A. § 17-3-1(c) instead of O.C.G.A. § 17-3-2.2, which the State argued,

created a 15-year statute of limitation when the victim is over the age of 65.

The record showed that on May 17, 2010, the defendants were indicted on one count of theft by taking in that they, "on or about the 19th day of January, 2005 through the 25th day of October, in the year 2006, . . . , did then and there take a certain check and draft in the amount of \$98,480.68, . . . , the property of Gladys Griggs, with the intent to deprive the owner of that property." On May 14, 2012, a second indictment was returned by the grand jury, alleging three specific counts each of theft by taking and theft by deception from Griggs against the defendants which were alleged to have occurred on January 18, 2005, January 27, 2005, and June 7, 2005. Two of the counts of this indictment alleged that the victim was more than 65 years old. Prior to the return of the 2012 indictment, a nolle prosequi of the May 2010 indictment was approved by the trial court. The defendants then filed a successful plea in bar, contending that the 2012 indictment was barred by the four-year statute of limitation set forth in O.C.G.A. § 17-3-1(c), and that the running of that statute had not been tolled pursuant to O.C.G.A. § 17-3-2 or O.C.G.A. § 17-3-2.2.

The State contended that the trial court erred in concluding that 1) O.C.G.A. § 17-3-1 applied; and 2) O.C.G.A. § 17-3-2.2 was a statute of repose and did not create a 15-year statute of limitation for crimes against victims over the age of 65. The Court noted that O.C.G.A. § 17-3-1 (c) provides, in pertinent part, that "[e]xcept as otherwise provided in Code Section 17-3-2.1 [crimes against victims under the age of 16 years], prosecution for felonies . . . shall be commenced within four years after the commission of the crime." O.C.G.A. § 17-3-2, as relevant here, excludes from computation of statutes of limitation periods when the accused is not a resident of this state or the perpetrator or crime is unknown. O.C.G.A. § 17-3-2.2 states that "[i]n addition to any periods excluded pursuant to Code Section 17-3-2, if the victim is a person who is 65 years of older, the applicable period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute shall not begin to run until the violation is reported to or discovered by a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental

agency shall promptly report such allegation to the appropriate prosecuting attorney. Except for prosecutions for crimes for which the law provides a statute of limitations longer than 15 years, prosecution shall not commence more than 15 years after the commission of the crime." (Emphasis Supplied).

The Court found that the State's argument that the statutory history supported its theory that O.C.G.A. § 17-3-2.2 was meant to be a statute of limitation was unpersuasive in light of the Georgia Supreme Court's recent decision under *Harper v. State*, 292 Ga. 557 (2013). In *Harper*, the Supreme Court held that pursuant to O.C.G.A. § 17-3-1(c), the statute of limitations for theft under O.C.G.A. §§ 16-8-2 & 16-8-3 was four years, but the statute may be tolled under O.C.G.A. § 17-3-2.2 if the victim is a person who is 65 years of age or older, until the violation is reported to or discovered by a law enforcement agency, prosecuting attorney, or other governmental agency. Therefore, the Court held, the trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the State had failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Accordingly, the trial court did not err in granting the plea in bar.

Merger; Sentencing

Jackson v. State, A13A0337 (5/2/13)

Appellant contended the trial court erred in dismissing his emergency motion to modify and vacate a void sentence pursuant to O.C.G.A. § 17-10-1(f). In his motion, he contended that his sentence was null and void because it exceeded the statutory maximum, and that his sentence should not have been imposed consecutively. The record showed that a jury found appellant guilty of two counts of receiving stolen property (O.C.G.A. § 16-8-7(a)), and one count of operating a vehicle without a valid license plate. He was sentenced to ten years on each theft by receiving count, to be served consecutively to one another. Appellant filed an appeal of the trial court's denial of his motion for an out-of-time appeal, which was affirmed by the Court in *Jackson v. State*, 313 Ga.App. 483 (2011). Appellant applied for a writ of certiorari, which was denied by the Georgia Supreme Court on October 1, 2012. Prior to this, however, on July 16, 2012, ap-

pellant filed in the trial court his emergency motion to modify and correct sentence, which the trial court dismissed on August 16, 2012 as untimely. The remittitur from the Court of Appeals was issued to the trial court on January 8, 2013.

First, appellant contended that the trial court incorrectly dismissed as untimely his motion to modify and vacate sentence. Under O.C.G.A. § 17-10-1(f), a court may modify a sentence during the year after its imposition or within 120 days after remittitur following a direct appeal, whichever is later. As shown by the chronology set out above, the Court held that the trial court's dismissal of appellant's motion to modify and correct sentence as untimely was error.

Second, appellant contended that the trial court erred in imposing consecutive sentences. The State conceded and the Court agreed that the separate counts of theft by receiving stolen property may merge as a matter of fact and appellant could not be sentenced for two consecutive 10 year terms. This is so because with respect to receiving or concealing stolen property, if articles stolen at different times from several persons are received and concealed by the same act, there is but one offense. Therefore, the Court remanded the case to the trial court for re-sentencing.

Prior Difficulties; Jury Charges

Hudson v. State, A13A0711 (5/2/13)

Appellant was convicted of criminal trespass by entering the premises of another person after he had received notice that such entry was forbidden. The evidence showed that the premises at issue was a hair salon owned and operated by the mother of appellant's out of wedlock child whom he had fathered. Appellant had not legitimized the child and began a series of protests outside the hair salon to inform patrons of an adverse result of his prior paternity petition against the mother. Several times he carried signs and handed out fliers outside the business. On December 30, 2011 appellant entered the salon and the mother/owner called the police. When the police arrived, an oral warning was given to appellant not to come on to the premises unless he had with him documented proof of his right to be there or he would go to jail. But on February 1, 2012, appellant went inside the salon, even

though he had not been invited back there. He announced to the mother/owner that he was there to see his child. After she grabbed her phone and called the police, appellant fled the scene.

Appellant contended that the trial court erred by allowing the State to show the jury the fliers he had distributed and a picture of the sign he had displayed, asserting that the evidence was more prejudicial than it was probative. Evidence of prior difficulties is "admissible to show that past actions may be indicative of the defendant's actions at the time of the offense charged." Evidence of prior difficulties between a defendant and a victim is generally admissible when the crime charged was perpetrated against the victim and the evidence demonstrates: (1) the relationship between the defendant and victim, and (2) the defendant's motive, intent or bent of mind.

Here, the Court held, the images and language incorporated into the sign and fliers that appellant displayed or distributed concerning his child's mother at or near her workplace most certainly demonstrated the state of the relationship between appellant and his child's mother, and were "highly relevant" to show his "abusive bent of mind toward her." Therefore, the Court held that the trial court did not abuse its discretion in admitting the evidence.

Next, appellant contended that the trial court erred by charging the jury on the custody of children who have not been legitimized. The record showed that the trial judge proposed giving a "charge on legitimation and the rights of a father to a child who has not been legitimated, which are none." Appellant's attorney objected, asserting that the issue was not related to a criminal trespass prosecution and that the instruction would only confuse the issues for the jury. The judge overruled the objection, thereafter charging the jury: "[O]nly the mother of a child born out of wedlock is entitled to custody of the child unless the father first legitimates the child as provided by Georgia law. Otherwise, the mother may exercise all parental power over that child."

The Court stated that to authorize a jury instruction on a subject, there need only be produced at trial slight evidence supporting the theory of the charge. Here, evidence at trial had raised the issue as to whether appellant was authorized to enter the premises based upon a legal right he had to the proprietor's child. Moreover, the charge given to the jury

was a correct principle of law. Additionally, the Court held that even if the evidence adduced at trial was insufficient to authorize a charge on that principle, the true question was whether an abstractly correct charge not authorized by the evidence was calculated to confuse and mislead the jury. Here, the Court held, the final charge, viewed in its entirety, was not likely to confuse the jury regarding appellant's guilt or innocence of the charged offense of criminal trespass. Thus, the court did not err in giving the charge.

Newly Discovered Evidence; Cumulative Evidence

State v. Simmons, A13A0193 (5/1/13)

Following a jury trial, Corey Simmons and Samuel Johnson (collectively "defendants") were convicted of two counts of armed robbery. Shortly thereafter, both filed motions for new trial based on newly discovered evidence, which the trial court granted. The evidence at trial showed that two victims were robbed outside a nightclub in the Midtown area of Atlanta. After one of the victims realized that he had a cell phone application that allowed him to track his cell phone, the victims pursued the GPS signal to a motel in College Park, Georgia. Police were called to the motel and the suspects were identified, arrested, and the victims' property was recovered. The defendants were jointly tried. During their trial, Johnson called no witnesses on his behalf, but one of Simmons's friends testified that she, her brother, and Simmons went to a nightclub in East Point at approximately 11:30 p.m. on the night of the robbery in Midtown and that they stayed there until shortly before the club closed at 3:00 a.m. In addition, one of the East Point nightclub's security guards recalled Simmons arriving sometime between 11:30 p.m. and 12:00 a.m. but conceded that he did not know what time Simmons left.

After the evidence was closed, the trial court charged the jury and directed the jury members to begin deliberations. However, less than two hours later, at around 5:00 p.m., the trial court adjourned for the day and instructed the jury that it could continue deliberations the next morning. That morning, after the jury reconvened for its deliberations, Simmons's counsel informed the trial court that Simmons's mobile phone company contacted

his office late the previous day to inform him that records for Simmons's phone reflecting its usage on the night of the robbery—which the company previously claimed did not exist—had in fact been located. Simmons's counsel further explained that these records further corroborated Simmons's alibi that he was at the nightclub in East Point at the time the robbery occurred in Midtown. Accordingly, counsel requested a mistrial so that the newly discovered evidence could be introduced at retrial. However, the trial court was unwilling to halt the jury's deliberations and denied Simmons's request. Shortly thereafter, the jury found Simmons and Johnson guilty on both counts of armed robbery.

One month later, Simmons and Johnson filed separate motions for new trial, in which they both argued that the newly discovered mobile phone records warranted a new trial. And during the ensuing hearing, Simmons's primary witness was a representative of his mobile phone company. The representative first explained how the company's cell towers can determine the location from which a phone on the company's network is used and that this information, as well as the number called and time of the call, was retained by the company and kept in its records. The representative then provided detailed testimony about the records for Simmons's mobile phone on the night of the robbery, stating that at 6:33 p.m., the phone was used from a location in Douglasville, and at 9:09 p.m., it was used from a location in Riverdale. The representative further testified that at 12:09 a.m., 12:40 a.m., 12:58 a.m., 1:00 a.m., 1:59 a.m., and 2:52 a.m. Simmons's phone was used from a location in East Point. And at 3:06 a.m. and 3:10 a.m., it was used from a location in College Park off of Old National Highway.

The Court stated that a defendant seeking a new trial based on newly discovered evidence must satisfy (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. All six factors must be satisfied to secure a new trial.

The State contended that trial court abused its discretion in granting Simmons and Johnson's motions for new trial based on newly discovered evidence, arguing that the newly discovered mobile phone records were not so material that they would probably produce a different verdict. The Court disagreed. The testimony of the cell phone company representative corroborated the testimony of Simmons's witness, who claimed that he was at the East Point nightclub with her and her brother the time the robbery occurred. Additionally, the records on their own cast doubt on Simmons's participation in the robbery. If the crime occurred sometime after 1:00 a.m., as the State asserted, finding Simmons guilty would necessarily require concluding that Simmons either left his mobile phone with someone else at the nightclub, or that he committed the crime within a very compressed time frame that entailed leaving East Point after 1:00 a.m., driving the approximately 15 or 20 minutes the State conceded it would take to travel to Midtown, finding parking nearby, approaching the victims on foot before robbing them, and then driving back to East Point before 1:59 a.m. Therefore, the Court did not find that the trial court abused its discretion in finding that Simmons's newly discovered mobile phone records were so material that they would probably produce a different verdict.

Second, the State contended that that the newly discovered mobile phone records did not warrant the grant of a new trial because such evidence was merely cumulative of the testimony of those witnesses who stated that Simmons was at the East Point nightclub on the night of the robbery. The Court stated that the true test as to whether evidence is cumulative depends not only on whether it tends to establish the same fact, but it may depend on whether the new evidence is of the same or different grade. And it is only when newly discovered evidence either relates to a particular material issue concerning which no witness has previously testified, or is of a higher and different grade from that previously had on the same material point, that it will ordinarily be taken outside the definition of cumulative evidence.

Here, the Court held that the mobile phone records were not cumulative of the testimony of the witnesses who stated that Simmons was in the nightclub in East point the night the victims were robbed. Rather,

the records constituted a "higher grade of evidence" that corroborated the testimony and provided independent and objective support for Simmons's claim that he was at the nightclub in East Point at the time the robbery was committed in another part of town. Therefore, the Court held that the trial court did not abuse its discretion in finding that the mobile phone records were not cumulative of other evidence. Accordingly, the trial court did not err in granting the defendants' motion for a new trial.

Search & Seizure; Plain View

Myers v. State, A13A0544 (4/30/13)

Appellant was convicted of burglary. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer was on patrol when he observed a gold vehicle with tinted windows exiting the rear parking area of a Days Inn. As the officer was passing by in his patrol car, the gold vehicle came halfway out of the motel exit and stopped in the middle of the roadway. He thought that the vehicle's actions were strange and suspicious, as if the driver was reacting to the sight of his patrol car. Because the officer was on his way to assist another officer at the time, he could not stop and investigate the suspicious vehicle. Six hours later, the same officer received a dispatch to respond to a burglar alarm at the Coach store at the outlet center, which was in close proximity to the Days Inn. While en route, the officer used his radio to issue a BOLO for the gold vehicle that he had observed earlier. At the scene of the burglary, the officer noticed that several Coach purses had been stolen.

After receiving the BOLO radio announcement, two other officers spotted the gold vehicle inside the Days Inn parking lot. These officers' suspicions were heightened by the fact that the vehicle was parked crooked and backed in against the embankment. Additionally, the interior dome light was on and the door was slightly ajar. Upon approaching the vehicle, they were able to look through the window where they spotted several Coach purses in plain view sticking out from underneath a blanket in the back seat. When the officers confirmed that the bags in the vehicle matched the description of those stolen from the store, they obtained a search warrant for the vehicle and the driver's hotel room at the

Days Inn where evidence from the crime was recovered.

Appellant contended that the trial court erred in denying his motion to suppress, arguing that the plain view doctrine could not have been used to support the subsequent search warrant because the officers were not lawfully in the Days Inn parking lot at the time they observed the purses inside the vehicle. Under the plain view doctrine, a law enforcement officer has a right to visually search the entirety of a car from his vantage point on a street or roadside. Additionally, the viewing need not be motivated by any articulable suspicion. On the contrary, law enforcement officers simply have the right to look into automobiles, so long as they have a legitimate reason and are looking from a place in which they have a right to be.

Here, when the officers looked into the vehicle, they were not on a street or a roadway. However, the Court noted that the officers were in the Days Inn parking lot, which was readily accessible and openly used by the public. Furthermore, the evidence showed that the parking lot had multiple entrances and exits, and that motorists frequently used the parking lot as a “cut-through” when driving towards the outlet mall where the Coach store is located. Additionally, the officers had a legitimate reason for approaching the vehicle because it matched the description given over the police radio, and the vehicle was parked in a suspicious manner with its interior dome light on. Although the vehicle had tinted windows, the interior of the vehicle was illuminated, making the incriminating evidence in the vehicle plainly visible to anyone walking by in the parking lot. Therefore, the Court held, it was clear from the facts that the officers were not required to obtain a search warrant or permission before entering the Days Inn parking lot to look for the vehicle. And, as the officers were in a place they were lawfully entitled to be when they observed the stolen purses in plain view inside appellant’s vehicle, their observations were properly used as the basis for obtaining the warrant to search appellant’s motel room.

Search & Seizure; Confidential Informants

Reid v. State, A13A0302 (4/26/13)

Appellant was convicted of VGCSA. First, he contended that the trial court erred in deny-

ing his motion to suppress on the basis that the search warrant was not supported by probable cause. The Court stated where the State seeks to establish probable cause through information provided by unidentified informants, the informants’ veracity and basis of knowledge are major considerations in the probable cause analysis. An affidavit submitted in support of a search warrant must set forth sufficient facts from which the magistrate or judge can independently determine the reliability of both the information and the informant. In determining whether an affidavit provided sufficient probable cause, the issuing magistrate or judge must make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. When reviewing a magistrate’s decision, the Court must give substantial deference and determine if the magistrate had a substantial basis for concluding that probable cause to issue the search warrant. Additionally, a presumption of validity attaches to an affidavit supporting a search warrant and doubtful cases should be resolved in favor of upholding search warrants.

Here, the Court noted that the evidence showed that police officers sought a search warrant based on information he received from the confidential informant that appellant was selling drugs out of the suspected home. In the search warrant affidavit, the officer stated that the confidential informant took a position against his penal interest by reporting to officers that he had bought drugs from appellant, and that the confidential informant had no known reason to lie. Additionally, the officer stated that he confirmed the information supplied by the confidential informant by conducting three controlled drug purchases from appellant, including two from the home where appellant was located. The Court found that these controlled buys strongly corroborated the reliability of the informant and demonstrated a fair probability that contraband would be found at that particular home. Therefore, the Court held, the trial court did not err in denying appellant’s motion to suppress on this ground.

Next, appellant contended that the trial court erred in denying his motion to order the State to reveal the identity of the confidential

informant. The Court noted that former O.C.G.A. §§ 24-9-21(4) and 24-9-27(d) provide for a privilege against disclosure of the identity of a confidential informant who was not an eyewitness to the offense that forms the basis for the prosecution, although he or she may have seen the defendant in possession of the contraband at an earlier time, but did not participate in the offense.

Here, the Court noted the confidential informant’s sole involvement in the case was providing information to the police officer and making controlled drug buys from appellant. The police officer then relied upon those controlled drug buys to obtain a search warrant for the residence. The State did not indict appellant for the multiple sales of cocaine to the informant. Rather, the State indicted him for cocaine trafficking and possession of marijuana with the intent to distribute based on the drugs found during the execution of the search warrant. The confidential informant was not present during the execution of the search warrant and was not a witness to the offenses that formed the basis of the instant prosecution. Therefore, the Court held the trial court was authorized to conclude that the informant was a mere tipster whose identity was absolutely privileged.

Judicial Comment

Rolland v. State, A13A0081 (4/30/13)

Appellant was convicted of DUI (less safe), DUI (per se), and failure to maintain a lane. He contended that the trial court impermissibly commented on the evidence in the presence of the jury “about the history and accuracy of Georgia’s Intoxilyzer machines.” Under O.C.G.A. §17-8-57 “[i]t is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused.” The Court stated that regardless of whether defense counsel objected, if the trial court violated this statutory provision, the Court is “required to order a new trial, and there can be no finding of harmless error.”

The record showed that during defense counsel’s cross examination, she asked a series of questions about the history of the Intoxilyzer 5000 model. When the testifying officer could not attest to the exact year the model was implemented in Georgia, defense counsel

asked “Would it surprise you to know that it’s been used for over 25 years in Georgia?” The question prompted the State to respond “I don’t believe that that’s correct information that she’s giving the witness. There [have] been other models of the Intoxilyzer that have been used, but this officer can’t testify as to what was used prior to his becoming a police officer. I think this is an improper line of questioning.” The trial court then commented “I think that your question is inaccurate to begin with because there have been various models since the fifties that have been breath testing instruments.” Appellant contended that this colloquy between the trial court and defense amounted to a violation of O.C.G.A. § 17-8-57.

The Court held that the statements as a whole were aimed at redirecting defense counsel away from a series of questions about the history of the Intoxilyzer 5000 that required the testifying officer to speculate and that assumed facts not in evidence about how long that model had been used in Georgia. Additionally, O.C.G.A. § 17-8-57 does not prohibit a trial court from inquiring into the direction defense counsel is going with a particular line of questioning and encouraging counsel to move forward.

Nevertheless, appellant specifically complained that the trial court’s statements “several models since the fifties,” and “I don’t think that the instrument that’s being used and has been used most recently has been in use for 25 years” went beyond redirecting the defense’s line of questioning because those statements were not backed up by any testimony. The Court conceded that O.C.G.A. § 17-8-57 is violated when “the court’s comment assumes certain things as facts and intimates to the jury what the judge believes the evidence to be.” However, a statement by a trial court concerning a fact that is uncontested or is not in dispute does not constitute a violation of this statute. Here, the record reflected that when the trial court made its comments regarding the history of the Intoxilyzer, defense counsel expressly agreed with them and then clarified her question about the history of the Intoxilyzer to the patrol officer. Therefore, the Court held that there was no violation of O.C.G.A. § 17-8-57 because the “complaining party agree[d] with the remarks when they [were] made” by the trial court.