

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 18, 2012

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## THIS WEEK:

- **Out-of-Time Appeal**
- **Search & Seizure**
- **DUI; Jury Charges**
- **Extraordinary Motion for New Trial; Guilty Plea**
- **Jury Charges**
- **Hearsay; Mistrial**
- **Guilty Plea**

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

*Osborn v. State, A12A0380 (5/10/2012,)*

Appellant was convicted on October 28, 2009, of aggravated battery, cruelty to children, and hindering an emergency phone call. He appealed from the trial court's denial of his motion for out-of-time appeal. Appellant filed a notice of appeal from his conviction on October 29, 2010. That appeal was dismissed by order of the Court of Appeals on January 7, 2011, which order also advised him that he could file a motion for out-of-time appeal with the trial court. Appellant did so on August 29, 2011, and that motion was denied by the trial court on September 20, 2011, without a hearing. The Court stated, as acknowledged by the State, that the case must be remanded to the trial court for a hearing on the issue of whether the failure to file a timely appeal was the result of a constitutional violation concerning the appeal.

### **Search & Seizure**

*Arnold v. State, A12A0453 (5/4/2012)*

Appellant was convicted of possession of a controlled substance, possession of less than

one ounce of marijuana, speeding, and felony obstruction of a law enforcement officer. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer saw a vehicle driving at a high rate of speed in a 55 mile per hour zone. His radar indicated that the car was traveling at 72 miles per hour, so he initiated a traffic stop. The officer asked for and got appellant's license. The officer returned to his patrol car, filled out a traffic citation, and performed a computer check of the license, which revealed that it was valid. The officer then returned to appellant's car to issue the citation, but just prior to doing so, he shined his light inside the car and saw, from outside the car, one or two full-length cigar wrappers and one partially smoked and flattened cigar wrapper in a cup holder on the floor in the center of the car. He clarified that the wrapper was a "Swisher Sweet" wrapper that he described as "just a cigar leaf [with which] you can roll your own tobacco"; he added, "It looks like the shell of a cigar" . . . "with no insides in it." Based on his past experience in law enforcement with drug identification, the officer believed the partially smoked item was a marijuana blunt. He had not smelled the odor of marijuana at this time.

The officer then asked appellant to step out of the car, which he did, and he asked for consent to search appellant's person and his pockets, which he gave. The officer then told appellant of his suspicion about the marijuana, and he reached in the car, picked up the blunt, and smelled it, which led him to believe that it was, in fact, marijuana. At this point, appellant said that it was his girlfriend's car (which the State conceded) and that she smoked marijuana, so it was hers. The officer told appellant that he now had probable cause to search the car, and proceeded to do. The search revealed

marijuana and crack cocaine. The trial judge found that the officer saw contraband in plain view and upon further investigation confirmed it to be contraband, which gave him grounds to search the car.

The Court found that the officer had authority to stop appellant for speeding and that there was evidence to support the trial court's finding that there was contraband in plain view. The Court stated that the officer saw, based on his experience, what he believed to be a marijuana blunt and once the officer smelled the odor of marijuana on the recovered item, he had even stronger grounds to search the vehicle. Finally, the Court found that because the officer saw the item before he had returned the license or issued the ticket, he was not exceeding the scope of the initial traffic stop by seizing the object. Here, because the officer had not returned the license or issued the ticket when he saw the suspected contraband in plain view, he did not unreasonably prolong the detention.

## **DUI; Jury Charges**

*Cordy v. State, A12A0699 (5/10/2012)*

Appellant was convicted of DUI (less safe). She contended that the trial court's failure to give a portion of one of her requests to charge was reversible error. The requested charge stated that, "I further charge you that standing alone, the mere fact of a person's having refused an officer's request to take a chemical test is not in and of itself determinative of the issue of whether the person was or was not under the influence alcohol. There may be other legal consequences of a civil nature against a person for the refusal, but *there is no inference in law that a person must be intoxicated simply because he chooses to exercise his legal right to refuse to submit to an optional test.*" The Court applied the plain legal error standard of review in reviewing the allegedly erroneous jury instruction. The Court stated that where written requests to charge are inaccurate, inapt, incorrect, argumentative, or covered in the charge as given by the trial court, the court does not err in not giving the instructions as requested. Thus, the Court held, the italicized portion of the request was inaccurate and argumentative and the charge as given by the trial court accurately covered the substance of appellant's request. According, there was no error in failing to give the requested charge.

## **Extraordinary Motion for New Trial; Guilty Plea**

*Seabrook v. State, A12A0064 (5/7/2012)*

Appellant proceeding pro se, appealed from the dismissal of his petition for a writ of error coram nobis challenging his 1994 guilty plea to the charges of aggravated assault, armed robbery, and possession of a firearm by a convicted felon. He contended that the trial court abused its discretion by dismissing his petition without holding a hearing, and that the writ of error coram nobis was the only remedy available to challenge his guilty plea and assert his claims of actual innocence and ineffective assistance of counsel. Discerning no error, the Court affirmed.

The record showed that in September 1994, appellant, with the assistance of counsel, entered a negotiated *Alford* plea to three counts of aggravated assault, one count of armed robbery, and one count of possession of a firearm by a convicted felon. The trial court sentenced appellant to serve an aggregate of three years in prison and four years on probation.

On July 21, 2010, appellant filed the instant petition for writ of error coram nobis. In that petition, he argued that his 1994 convictions should have been vacated because he received ineffective assistance of counsel during the plea process; he was innocent of the charges; and he did not enter his plea intelligently, knowingly, and voluntarily. The trial court dismissed appellant's petition, concluding that the writ offered no relief since his claims were not based on newly discovered evidence. The trial court also found that it lacked jurisdiction to consider his petition as a motion to withdraw a guilty plea, and that the petition could not be considered as a writ of habeas corpus since the period for filing a habeas corpus petition had expired.

The Court found that appellant failed to point to any newly discovered evidence that would have authorized the trial court to grant the writ. The Court stated that his claims regarding the validity of his plea, his attorney's alleged ineffectiveness in the plea process, and his actual innocence "all deal with evidence which was known to appellant at the time he entered his plea of guilty. Thus, he could not properly challenge his plea under a writ of error coram nobis. Further, the Court found that if it were to consider appellant's petition as a motion to withdraw his guilty plea, he

was still not entitled to relief. The superior court's jurisdiction to entertain a motion to withdraw a guilty plea ends after the term of court in which the judgment of conviction was rendered. And it is well established that after the expiration of the term and of the time for filing an appeal from the conviction, the only remedy available to the defendant for withdrawing a plea is through habeas corpus proceedings. Moreover, even construing his petition as a writ for habeas corpus, appellant's petition was likewise untimely. Appellant had until July 1, 2008, to file a habeas corpus petition, but he did not file the present petition until July 2010. OCGA § 9-14-42 (c) (1) ("[A]ny person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until . . . July 1, 2008, in the case of a felony to bring an action" for habeas corpus relief.). Since appellant had no remedy to challenge his guilty plea, the trial court properly dismissed his petition.

## **Jury Charges**

*Plummer v. State, A12A0083 (5/10/2012)*

Appellant was convicted of aggravated child molestation, two counts of child molestation, and cruelty to children in the first degree. Appellant contended that the trial court erred in giving the pattern jury charge regarding conflicts in testimony. The record reflected that the trial court charged the jury, in pertinent part, as follows: *When you consider the evidence in the case, if you find a conflict, you should settle this conflict[,] if you can[,] without believing that any witness made a false statement. If you cannot do so, then you should believe that witnesses or those witnesses whom you think are best entitled to belief. You must determine what testimony you will believe and what testimony you will not believe.* Appellant objected to the foregoing charge at trial, and he contended that the charge was an improper comment on the evidence and witness veracity.

However, the Court stated that appellant's contention in this regard was rejected by the Court in *Johnson v. State*, 296 Ga. App. 112, (2009). As stated in *Johnson*, [t]he charge given by the court was taken verbatim from the Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, p. 13 (3rd ed. 2003). The Court was unpersuaded that this charge somehow commented on the evidence since it did not suggest that an unimpeached witness must

be believed, but merely urged the jury to attempt to reconcile conflicting evidence before considering the credibility of witnesses. The Court further noted that the charge was not a “presumption of truthfulness” charge, which was disapproved in *Noggle v. State*, 256 Ga. 383 (1986). Thus, applying binding precedents, the Court found no error in the charge given.

## **Hearsay; Mistrial**

*Windhom v. State, A12A0309 (5/11/2012)*

Appellant was convicted of armed robbery. He contended, among other things, that the trial court erred by not declaring a mistrial following an officer’s testimony. The Court agreed with appellant and therefore reversed and remanded for a new trial.

The appellant’s defense was that he was not involved with the robbery, although he was acquainted with the two individuals responsible, whereas the State sought to show that appellant was an accomplice, who helped plan the event. On direct examination for the State, an officer testified about the contents of a statement that appellant made to the officers investigating the crime. As a part of his testimony, the officer testified about statements he made to appellant at that time. One such statement was that based on the way that appellant and the robbers acted during the robbery, the victim (and possibly the officers themselves) believed that the robbers and appellant had acted in concert. The full statement was, “We told him the white female employee, Melissa Ann Amin, told us that the robbers, Christopher and Shane Bedford, laid him on the floor very gently or very easy as if they did not want to hurt him. We told him that made him believe that the three of them were together. Melissa Ann Amin believed the same thing.” Appellant objected on the ground that the statement was hearsay, which the court sustained. Appellant also moved for a mistrial and asked the court to instruct the jury that they should disregard the statement on the ground that it was improper testimony regarding whether to believe the defendant’s story and an improper invasion of the province of the jury. The court denied the motion for mistrial and denied the request for a limiting instruction. The court reasoned that the comment showed the context of the conversation and that it was not an opinion as to the believability of the defendant’s testimony.

A mistrial for admission of improper evidence is reviewed by examining factors and circumstances for abuse of discretion, including the nature of the statement, the other evidence in the case, and the action taken by the court and counsel concerning the impropriety. Here, the relevant testimony was hearsay from the victim that based on the way that appellant and the robbers acted during the robbery, the victim and, implicitly, the officers, believed that the robbers and appellant had acted in concert. The ultimate issue in this case was that very question. Furthermore, the Court noted that the testimony came in as sworn testimony, not just recorded interrogation comments. Also, the victim did not testify to the same information that the officer reported. She did not testify that appellant’s or the robbers’ behavior during the robbery made her believe that appellant was an accomplice. In fact, she specifically denied that he did anything during the robbery to give her the impression that he was trying to help the robbers, although she did testify that the fact that he left afterwards gave her an indication that he might be involved. Even so, the officer’s testimony was not duplicative of the victim’s and therefore not duplicative of other admissible testimony. Thus, the Court concluded that the evidence should not have been admitted. Without a limiting instruction, the harm was not mitigated, and given that the only direct evidence of appellant participating in the crime was the testimony of a co-defendant who had been declared incompetent to stand for his own trial, the Court could not find the error harmless; therefore the trial court abused its discretion and should have granted the mistrial. Accordingly, appellant was now entitled to a new trial.

## **Guilty Plea**

*Cruz v. State, A12A0476 (5/10/2012)*

Appellant was granted an out-of-time appeal to challenge the denial of his post-sentencing motion to withdraw his guilty plea to aggravated child molestation, child molestation, and burglary. Appellant contended that the trial court erred in denying his motion to withdraw his guilty plea since his counsel provided ineffective assistance during the plea negotiations and proceedings.

The record showed that subsequent to appellant’s arraignment, the State proposed a plea

offer involving the dismissal of the aggravated child molestation charge, entry of a guilty plea to the child molestation and burglary charges, and a sentence of 20 years to serve 10 years in prison and the balance on probation. Defense counsel testified that he advised appellant of the plea offer, the terms, and options, and that he communicated through an interpreter to make sure that appellant understood. Appellant asked counsel to put the offer in writing, so that he could review it more thoroughly. Accordingly, counsel sent appellant a letter that fully explained the plea offer’s terms and his options. Counsel stated that he met with appellant again, with the assistance of an interpreter, to review the letter and to ensure that appellant fully understood his rights.

At a hearing held on July 1, 2002, the terms of the plea offer were expressed to appellant again on the record, and the State advised that the plea offer would expire on July 5, 2002. The State further stated that if appellant did not accept the plea offer prior to its expiration, it would proceed to trial on all of the charged offenses. The possible sentencing ranges for each offense were also explained. Appellant’s counsel stated that he had advised appellant of the plea offer, but that appellant wanted to present a counteroffer for less time in prison and otherwise decided that he wanted a jury trial. Since appellant did not agree to the sentencing terms of the State’s plea offer, his counsel raised the option of a non-negotiated plea; counsel explained that the trial court would not be bound by the parties’ sentencing recommendations, but that appellant would have an opportunity to make a persuasive case for the imposition of a lesser sentence. Counsel advised, however, that he could not guarantee any outcome and wanted appellant to understand the possible sentence that he was facing, so that he could decide whether to accept the State’s plea offer before its expiration. Appellant was asked whether he understood the terms and his options, and he replied, “Yes, sir.” Appellant rejected the State’s plea offer. Subsequently, in September 2002, a non-negotiated plea hearing was conducted. Appellant was advised that the trial court could impose any sentence allowed by law.

Appellant entered a non-negotiated plea of guilty to each of the charged offenses, acknowledging that he had in fact committed the offenses. Appellant testified under oath that he understood the charges of the indictment,

the rights that he was waiving by entering the guilty plea, the sentencing ranges for the charged offenses, and the conditions of probation. Appellant further affirmed that no promises or threats had been made in exchange for his guilty plea, that he entered his plea freely and voluntarily, that he was satisfied with his counsel's services, and that he understood all of the questions that he had answered during the plea colloquy. The trial court accepted appellant's guilty plea, and imposed an aggregate sentence of 30 years to serve 20 years in prison, along with general and special conditions of probation. Appellant thereafter filed a pro-se motion to withdraw his guilty plea, contending that he did not understand what had transpired at the plea hearing. Following an evidentiary hearing, the trial court denied appellant's motion.

Appellant contended that his guilty plea was not voluntarily and knowingly entered. The Court stated that when the validity of a guilty plea is challenged, the State bears the burden of showing that the plea was voluntarily, knowingly, and intelligently made. The State may do this by showing through the record of the guilty plea hearing that (1) the defendant has freely and voluntarily entered the plea with (2) an understanding of the nature of the charges against him and (3) an understanding of the consequences of his plea. In this case, the State met its burden through the record reflecting appellant's sworn testimony given at the non-negotiated plea hearing. The Court held that since the evidence established that appellant freely and voluntarily entered his non-negotiated guilty plea, the trial court did not err in denying his motion to withdraw the plea. Appellant's dissatisfaction with the imposed sentence afforded no basis for reversal.