

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 30, 2014

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## THIS WEEK:

- **Search & Seizure**
- **Social Media Evidence; Jury Charges**
- **Sentencing; Withdrawal of Guilty Pleas**

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### **Search & Seizure**

*State v. LeJeune, A14A0422 (5/20/14)*

The State appealed after the trial court granted LeJeune's motion to suppress. The evidence showed that in the early morning hours, an officer noticed a vehicle leaving a restaurant which had a reputation among local law enforcement for being a frequent source of DUI drivers during those hours in the morning. The officer followed LeJeune for almost two miles when he notice LeJeune cross the center line and weave within his lane. The officer stopped LeJeune's vehicle and LeJeune was subsequently arrested for DUI and VGCSA.

The State first argued that the trial court erred in granting LeJeune's motion on the grounds that the officer lacked reasonable, articulable suspicion to *follow* LeJeune, and that the stop was pretextual. The Court agreed. Citing *State v. Wright*, 221 Ga.App. 202, 206(4) (1996), the Court found that there is no support for the position that an officer must have reasonable, articulable suspicion that a crime has been or is about to be committed prior to even following an individual. Instead, the focus is on the ultimate stop of the individual, not on the "following" that led to the seizure. Here, the Court found, the officer's act of following LeJeune was not a seizure. The only submission to the officer's authority occurred when LeJeune

stopped his vehicle in response to the officer's flashing lights, and the officer only initiated his lights—and the stop itself—after LeJeune failed to maintain his lane, at which point the officer had probable cause justifying the stop. Accordingly, the trial court erred in granting the motion to suppress on grounds that the officer's stop was pretextual.

The Court also agreed with the State that the trial court erred in granting the motion to suppress on the ground that the officer's decision to follow LeJeune was a violation of department policy. The heart of LeJeune's argument in this regard was that the officer "profiled" him on the basis of his having patronized a restaurant that was known to department officers as being a frequent source of drivers under the influence of alcohol. LeJeune argued that this was a violation of the department's policy prohibiting "bias-based profiling." However, the Court found, the very portion of the department policy that prohibits "bias-based profiling" acknowledges that "[p]rofilng, the generation of a set of common traits specific to a pattern of crime, can be a useful tool to officers in carrying out their duties" and specifies that "the selection of individuals based solely on a trait common to a group for enforcement action" is what is disallowed. Accordingly, the Court noted, it appeared that the policy was directed at the prevention of targeting individuals on the basis of race, religion, or other such traits, and LeJeune made no such allegation here. Additionally, the policy of the department is "to investigate suspicious persons and circumstances, and to actively enforce traffic laws." And citizens will only be stopped or detained when "there exists reasonable suspicion to believe that they have committed,

are committing, or are about to commit a violation of the law.” Since the officer stopped LeJeune based on reasonable suspicion, there was no violation of any department policy with an attendant Fourth Amendment violation to warrant application of the exclusionary rule. Accordingly, the Court reversed the trial court’s grant of the motion to suppress.

## **Social Media Evidence; Jury Charges**

*Wheeler v. State, A14A0125 (5/16/14)*

Appellant was convicted of one count of enticing a child for indecent purposes. He contended that the trial court erred in excluding a hard copy of the victim’s post on the social-media website Twitter, which would have impeached the victim’s credibility. The Court disagreed.

The Court noted that as a general rule, admission of evidence is a matter resting within the sound discretion of the trial court and printouts from electronic-computer sources are subject to the same rules of evidence as other documents. Here, while cross-examining the victim, appellant’s trial counsel asked whether she had ever posted (i.e., “tweeted”) anything about appellant on her Twitter profile page and home timeline. In response, the victim admitted to having a Twitter account, but denied ever tweeting about appellant. At that point, the jury was excused, and appellant’s counsel moved to introduce a printout of a screenshot of the victim’s Twitter profile page, in which the victim posted “my heart cries out for you. no matter how much i want you, ill [sic] never have.” Specifically, counsel argued that this tweet supported the defense theory that the victim was obsessed with appellant and that this obsession had no basis in reality. However, after noting that the victim’s tweet did not mention appellant by name, the trial court ruled that appellant had failed to establish the relevance of this tweet and denied his request. Nevertheless, the evidence showed that during cross-examination of a subsequent witness, a friend of the victim, appellant’s counsel was able to read the entire tweet to the victim’s friend, who confirmed that the victim had tweeted it and that it was about appellant—even though he was not mentioned by name in the tweet. Thus, the Court found, even assuming the trial court erred in excluding

the actual screenshot of the tweet in question, reversal was not required because the tweet was essentially admitted into evidence by being read to the jury and used to impeach the victim’s credibility through the testimony of the victim’s friend. Accordingly, it was highly probable that exclusion of the screenshot did not affect the outcome of the proceedings.

Appellant also argued that the trial court erred in charging the jury on the full statutory definition of enticing a child for indecent purposes rather than narrowing the definition to match the allegations in the indictment. The Court stated that it is well established that trial courts should tailor their charges to match the allegations of indictments, either by charging only the relevant portions of the applicable Code sections or by giving a limiting instruction that directs the jury to consider only whether the crimes were committed in the manner alleged in the indictment. And since appellant did not object to any portion of the trial court’s jury charges, the Court’s review was limited to whether the charge constituted plain error.

Here, the Court noted, the indictment charged appellant with the offense of enticing a child for indecent purposes by alleging that he “did take [the victim], a child under 16 years of age, to the residence of said accused for the purpose of indecent acts, in violation of O.C.G.A. § 16-6-5, contrary to the laws of said State, the good order, peace and dignity thereof.” And during its jury charges, the court instructed the jury on the enticing-a-child-for-indecent-purposes offense as follows: “A person commits the offense of enticing a child for indecent purposes when that person solicits, entices or takes any child under the age of 16 to any place for the purpose of indecent acts.” Appellant argued that in charging the jury on the full statutory definition of enticing a child for indecent purposes, the trial court committed plain error because the court allowed the jury to believe that it could convict him if he “solicited” or “enticed” the victim to his home for the purpose of indecent acts rather than limiting the jury’s consideration to whether he “took” the victim to his home for that purpose (as alleged in the indictment).

The Court stated that a criminal defendant’s right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court’s jury

instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. And the giving of a jury instruction which deviates from the indictment violates due process when “there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment.” But pretermitted whether there was evidence that appellant “enticed” or “solicited” the victim, the Court found no due process violation in this instance because while instructing the jury that a crime can be committed in a manner different from that charged in the indictment can constitute reversible error, a reversal is not mandated when, as here, the charge as a whole limits the jury’s consideration to the specific manner of committing the crime alleged in the indictment. And here, the trial court instructed the jury that the State had the burden of proving every material allegation in the indictment beyond a reasonable doubt, further instructed that the jury could only find the defendant guilty if it found beyond a reasonable doubt that he committed the offenses “as described in the indictment,” and sent the indictment out with the jury during its deliberations. Accordingly, these instructions, when considered in their entirety, cured any potential error pertaining to the enticing-a-child-for-indecent-purposes charge.

Finally, appellant argued that the trial court erred in failing to charge the jury on the definition of “indecent acts” or “purposes.” But, the Court found, the terms “indecent act” or “indecent purpose” require no further definition because they are terms that are well within the knowledge of the average person.

## **Sentencing; Withdrawal of Guilty Pleas**

*Royals v. State, A14A0279 (5/21/14)*

Appellant pled guilty to a single count of possession of methamphetamine and was sentenced to 25 years, with the first ten years to be served in incarceration and the balance to be served on probation. After her suspended sentence was revoked, appellant filed a pro se “Motion for Reduction or Modification of Sentence” and asserting that the sentence imposed by the trial court was void. The trial court denied the motion.

The Court stated that a criminal sentence is void if it imposes a period of confinement or fine greater than the statutory maximum for the offense. At the time appellant engaged in, and was indicted for possession of methamphetamine, Georgia law provided that any person convicted of possessing methamphetamine “shall be punished by imprisonment for not less than two years nor more than 15 years.” O.C.G.A. § 16-13-30(c) (2011). Accordingly, because the 25-year sentence imposed by the trial court exceeded the statutory maximum, that sentence was void and the trial court erred in denying her motion for a modification of that sentence.

Appellant also argued that because her motion was filed within the same term of court in which she entered her guilty plea and because her motion raised a claim as to her innocence, the trial court abused its discretion by refusing to treat that pleading as a motion to withdraw her guilty plea. However, the Court found, the name of the motion did not assert that it was a motion to withdraw her plea and in the motion she neither raised nor argued the question of whether she should be allowed to withdraw her guilty plea. Accordingly, the trial court did not err in failing to treat her pleading as a motion to withdraw her guilty plea.

Nevertheless, the Court stated, on remand appellant may seek to withdraw her plea even though the term of court in which she originally entered that plea had expired. A defendant has an absolute right to withdraw her plea before sentence is pronounced. Since a void sentence is the same as no sentence at all, the defendant stands in the position as if she had pled guilty and not been sentenced, and so may withdraw her guilty plea as of right before resentencing, even following the expiration of the term of court in which the void sentence was pronounced. Therefore, the Court concluded, upon remand, appellant has “the absolute right” to move to withdraw her guilty plea prior to resentencing.