

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 15, 2013

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Executive Director

**Todd Ashley**  
Deputy Director

**Chuck Olson**  
General Counsel

**Joe Burford**  
State Prosecution Support Director

**Laura Murphree**  
Capital Litigation Resource Prosecutor

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Domestic Violence, Sexual Assault,  
and Crimes Against Children  
Resource Prosecutor

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Traffic Safety Resource Prosecutor

**Gary Bergman**  
State Prosecutor

**Lalaine Briones**  
State Prosecutor

## THIS WEEK:

- **Search & Seizure; BOLO**
- **Speedy Trial; Barker v. Wingo**
- **Sexual Assault; Persons in Custody**
- **Statute of Limitations; Superseding Indictments**
- **Search & Seizure**
- **Judicial Misconduct; Recusal**
- **Search & Seizure; BOLO**
- **Sufficiency of the Evidence; VGCSA**

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### Search & Seizure; BOLO

*State v. Johnson, A13A1540 (11/6/2013)*

Appellant was convicted of kidnapping with bodily injury, aggravated assault, and one count of possession of a firearm in the commission of a crime. He argued that the trial court erred in denying his motion to suppress. The record reflected that one night, around midnight, appellant and three other men went to the victim's house. The victim did not know appellant, but knew one of the co-defendants. The victim agreed to drive with them to a nearby apartment complex. After waiting to enter an apartment, a co-defendant said he needed to go to an ATM, at which point, they walked back to the car, with the victim in front of appellant and the others. The victim was then struck from behind, kicked and punched, bounded by duck taped, and placed in the trunk. Around the same time, an apartment resident looked out her window and saw two men standing by a small, silver or gray-colored, four door vehicle. Based

on their movements, the resident called 911, and informed the operator that she believed the men were robbing somebody's apartment and carrying items to the car. She described the four men as black males wearing black clothing, getting into the car and driving off and turning right out of the apartment complex. While the resident talked with the operator, a nearby officer was dispatched to the location. The officer was informed by dispatch of a possible burglary, and was given the description of the men provided by the resident. Almost immediately thereafter, the officer observed a silver vehicle, which matched the description given by dispatch, approach his patrol car and turn right out of the apartment complex. As the car passed the officer, he observed that the occupants matched the description given by dispatch. The officer followed the car, where he and other responding officers conducted a stop. Eventually, the victim was found in the trunk and appellant was arrested.

Appellant argued that the resident's 911 call was insufficient to provide a reasonable articulable suspicion required for the stop. In addition, appellant further argued that the police officers were required to corroborate the information given by the caller because she was an "anonymous tipster." The Court disagreed. The Court stated that to establish reasonable suspicion to make an investigative stop, the totality of the circumstances must show that the officer had specific and articulable facts which, taken together with rational inferences from those facts provided a particularized and objective basis for suspecting the particular person stopped of criminal activity. Although the primary means by which officers acquire reasonable suspicion is personal observation, information acquired from an informant that

exhibits sufficient indicia of reliability can also be the basis for reasonable suspicion.

The Court found that the caller was in fact a concerned citizen and information received from a concerned citizen is inherently more credible and reliable than that received from an anonymous tipster. Moreover, regardless of the identity of the 911 caller, the officer who responded to the apartment complex received information about the possible burglary from dispatch. A dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene, particularly where police observations on arriving at the scene corroborate the dispatcher's report. In this regard, the Court found, even if the dispatcher's information came from a citizen or an unidentified informant, the investigatory detention was valid. Therefore, the Court concluded, based on the totality of the circumstances, the officers had the requisite articulable suspicion to justify the investigative stop.

### **Speedy Trial; *Barker v. Wingo***

*State v. Johnson, A13A1590 (11/7/2013)*

The State appealed from the trial court's order granting Johnson's motion for discharge and acquittal based upon a violation of her constitutional right to a speedy trial. The record reflected that following her arrest on May 12, 2010 for DUI, Johnson appeared at least three times in the municipal court, where the case was repeatedly reset because she did not have counsel. On October 26, 2010, Johnson filed her request for a jury trial. On November 3, 2010, notice was issued to Johnson to appear in state court on November 18, 2010. On November 18, 2010, the solicitor general issued an accusation charging Johnson with DUI, less safe, and because Johnson was in jail in another county on separate charges, she did not appear and a bench warrant was issued. While incarcerated on separate charges, Johnson wrote a letter explaining that she had been in jail when she failed to appear on the DUI charge and requested assistance with a plea in absentia or a court date with a production order to clear the case, so that she could participate in programs within the prison system that would help to better her as a person and prevent recidivism. The letter was filed with the clerk,

and on August 23, 2011, the clerk's office responded to Johnson in a letter indicating that the clerk did not handle production orders, and her request was being forwarded to the solicitor's office. No response from the solicitor's office was contained in the record and no production order was ever issued. Johnson was incarcerated from November 10, 2010 until September 12, 2012. Upon release from prison, Johnson, pro se, filed a motion to lift the bench warrant, which was granted on September 27, 2012. An entry of appearance was filed on November 30, 2012, and her motion for discharge and acquittal was filed on January 10, 2013. The trial court entered judgment granting Johnson's motion for discharge and acquittal based upon her constitutional right for speedy trial.

The Court stated that a speedy trial is guaranteed to a criminal defendant by the Sixth Amendment and the Georgia Constitution. The basis for determining constitutional speedy trial claims requires a two part legal analysis. First, the trial court must consider whether the accused has been subjected to a delay that is presumptively prejudicial; and if so, the trial court proceeds to the second step which determines whether the delay constituted a speedy trial violation. In determining the latter, the trial court must consider a four factors balancing test: (1) whether the pretrial delay was uncommonly long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether, in due course, the defendant asserted the right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay.

As to the length of the delay, the Court noted that three years in a misdemeanor case is significant, particularly in a simple DUI case where the investigation was completed at the time of the arrest. As to the reason for the delay, the Court disagreed with the State's argument that the delay was caused by Johnson since she was incarcerated on other charges. Instead, the Court found that the primary burden is on the prosecutor and the court to bring the case to trial and so ultimately, the State must bear the burden for the delay. But, since the delay was not deliberate, the weight was minimal.

As to the assertion of the right to a speedy trial, the Court noted that Johnson, despite appearing pro se through most of the proceedings, did timely assert her right to a

jury trial and did make continuous attempts to resolve her case. And when she finally obtained counsel, her counsel asserted the right within two months. Thus, the Court agreed with the trial court's findings that the assertion was raised appropriately and with due haste, weighing this factor slightly against the State and for Johnson.

Finally, as to whether Johnson suffered prejudice, the Court agreed with the trial court that her pending DUI charge had an impact on her incarceration in that she was not able to participate in certain programs and her inability to do so prolonged her incarceration. Furthermore, Johnson suffered anxiety and concerns while in jail above and beyond those normally suffered by defendants in a pending case. And, the Court found, her defense was hampered by the delay because the security videotape which would have shown her encounter with the police in front of a mini-mart was no longer available, nor could the identity of the clerk working there on the evening of her arrest be determined. Thus, the trial court's finding that Johnson suffered prejudice as a result of the delay was not error.

Accordingly, the Court found, the trial court did not abuse its discretion in granting Johnson's motion for discharge and acquittal.

### **Sexual Assault; *Persons in Custody***

*Ellis v. State, A13A0911 (11/6/2013)*

Appellant was convicted of aggravated sexual battery, five counts of sexual battery, and six counts of sexual assault against a patient in a hospital. The evidence showed that appellant was a respiratory therapist in a hospital who, during respiratory therapy sessions, committed the sexual assaults on his victim-patients. He contended that the trial judge erred in charging the jury on "supervisory authority." Specifically, he argued that the trial court's definition misinterpreted the statute and failed to provide the jury with appropriate guidelines necessary to reach its verdict.

The record showed that the trial court charged the jury that "supervisory authority means the power to direct compliance," using the language from *Wilson v. State*, 270 Ga.App. 311, 313(2)(b) (2004). Appellant argued that the definition was incomplete because it

did not define supervisory authority as “the power to direct and enforce compliance” as set forth in *Randolph v. State*, 269 Ga. 147, 150 (1998). The Court noted that O.C.G.A. § 16-6-5.1(b)(4) provides that: “A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person is an employee or agent of the hospital and engages in sexual contact with such other individual who the actor knew or should have known is a patient or is being detained in the same hospital.” The Court noted that the statute clearly establishes that either supervisory or disciplinary authority is necessary to satisfy the requirements of the statute; and conjunctively, they are defined as the power to direct and to enforce compliance.

Here, appellant was charged with having supervisory authority over the victim rather than both supervisory and disciplinary authority. The statute clearly contemplates two distinct types of authority. One may have disciplinary or supervisory authority, or as noted in *Randolph*, both types of authority. The Court found that the trial court did not err in its charge by providing the jury with only the definition of supervisory authority set forth in *Randolph* and *Wilson*. Appellant was indicted for sexual assault against a patient in a hospital (O.C.G.A. § 16-5-5.1) for engaging in sexual contact while the victim was a patient in the hospital and while he had “supervisory authority” over the victims. Thus, the language in *Randolph* that defined disciplinary authority was not indicated in this case, and therefore, the Court concluded, the trial court did not err in its charge.

Appellant also contended that regardless of the definition set forth in the statute, there was no evidence to suggest that as a respiratory therapist, he had supervisory power over his patients and could then direct compliance from them. Furthermore, he maintained, the evidence did not demonstrate that he had the power over the victims to direct and enforce compliance, thus his conviction pursuant to O.C.G.A. § 16-6-5.1 could not be sustained. The Court disagreed. According to testimony from appellant’s supervisor, as a respiratory therapist, appellant assessed the patients, decided what treatments would be used per certain protocols, and directed the patients while the treatments were performed. In addition, while performing his duties he had them, among other things,

to blow into a tube, breathe through a mask, sit up, lean over, or turn on their side. The evidence demonstrated that appellant directly supervised the respiratory treatments based on individual patients’ needs, physician orders, and protocol. Therefore, the Court found, because appellant assessed the victims and directed the victims while the treatments were performed, he had the requisite supervisory authority over the victims he treated sufficient to sustain his convictions under O.C.G.A. § 16-6-5.1(b)(4).

### **Statute of Limitations; Superseding Indictments**

*State v. Outen*, A13A0869 (11/5/13)

The trial court granted Outen’s plea in bar as to one count of a two-count vehicular homicide indictment, and the Court granted the State’s application for interlocutory review. Briefly stated, the record showed that the State originally indicted Outen on March 18, 2009 for two counts of vehicular homicide arising out of a March 21, 2007 automobile wreck, in which one person was killed (the “First Indictment”). Count 1 of that indictment alleged that Outen committed first degree vehicular homicide by driving recklessly in violation of O.C.G.A. § 40-6-390(a), a felony under O.C.G.A. § 40-6-393(a). Outen filed a special demurrer as to Count 1 of the First Indictment, asserting that the language failed to sufficiently apprise him of the particular facts constituting the alleged underlying offense of reckless driving. The trial court granted the demurrer on September 17, 2009. The State appealed and ultimately, the appeal was dismissed for lack of jurisdiction and the remittitur returned to the trial court on August 31, 2011. On December 20, 2011, the State filed another indictment against Outen again alleging in Count 1 that he committed vehicular homicide in the first degree through reckless driving (the “Second Indictment”). This time, however, Count 1 alleged additional facts in support of the allegation that Outen drove “in reckless disregard for the safety of persons and property.” Specifically, the indictment alleged that Outen “drove with a known seizure condition, . . . without taking medication to prevent seizures, and . . . had a seizure while driving.” It further alleged that Outen “then failed to maintain his lane of travel, failed to brake his motor

vehicle, and failed to take any evasive action to avoid hitting [the victim’s vehicle].” Outen filed a plea in bar, asserting that the State failed to file the Second Indictment within the applicable limitation period. The trial court granted Outen’s plea in bar as to Count 1 of the Second Indictment, but issued a certificate of immediate review.

The State first argued that the trial court erred in granting Outen’s plea in bar because the Second Indictment constitutes a superseding indictment that related back to the First Indictment for purposes of the statute of limitations. The Court stated that a superseding indictment brought after the statute of limitation has run is valid as long as (1) the original indictment is still pending; (2) the original indictment was timely; and (3) the superseding indictment does not broaden or substantially amend the original charges. The State contended that the Second Indictment qualified as such a superseding indictment because all three conditions were met in this case. The Court disagreed.

Although the First Indictment was unquestionably timely and even assuming, without deciding, that it was still pending, the Second Indictment represented a substantial amendment to the original charge in Count 1. Normally, whether an amended indictment broadens or substantially amends the charges contained in the original indictment depends upon whether the new charges contain elements that are separate and distinct from the original charges. Here, however, the charges remained the same, but the State alleged additional facts, as opposed to elements, outside the limitations period. Thus, the Court stated, it was “face[d with an] . . . issue of first impression” and must decide under what circumstances does a superseding indictment broaden or substantially amend the charges by adding additional facts not set out in the original indictment. Turning to the federal courts for guidance, the Court found that for purposes of the statute of limitations, the “charges” in a superseding indictment are defined not simply by the statute under which the defendant was indicted, but also by the factual allegations that the government relied on to show a violation of the statute. Notice to the defendant is the central policy underlying the statutes of limitation. If the allegations and charges are substantially the same in the old and new indictments, the assumption is

that the defendant has been placed on notice of the charges against him. That is, he knows that he will be called to account for certain activities and should prepare a defense. Therefore, notice to the defendants of the charges, so that they can adequately prepare their defense, is the touchstone in determining whether a superseding indictment has broadened the original indictment. And in deciding whether the first indictment tolled the limitations period, the crucial inquiry is whether approximately the same facts were used as the basis of both indictments.

Here, the Court found, the First Indictment did not sufficiently apprise Outen of what he must be prepared to meet. The First Indictment failed to allege sufficient facts to allow Outen to prepare a defense to the felony vehicular homicide charge because nothing in the First Indictment put him on notice of the manner in which he allegedly violated the reckless driving statute. The Second Indictment clearly alleged additional facts because it informed him for the first time that he would have to defend the felony charge based on allegations, *inter alia*, that he had a known seizure condition and had failed to take seizure medication.

Citing *Pennington v. State*, 323 Ga.App. 92 (2013) (physical precedent only) as instructive, the Court concluded that the First Indictment did not toll the limitations period on the vehicular homicide charge in Count 1 of the Second Indictment because the First Indictment did not provide Outen sufficient notice of such a felony charge against him. The First Indictment failed to inform him of any factual basis for the underlying charge of reckless driving and gave no hint of the basis ultimately alleged in the Second Indictment. Thus, the trial court properly rejected the State's argument that the Second Indictment related back to the First Indictment for purposes of the statute of limitations.

The State also argued that the trial court erred in granting the plea in bar because under O.C.G.A. § 17-3-3, the statute of limitations was extended for six months from the time the indictment was quashed. Asserting that the trial court lacked jurisdiction to entertain a second indictment until the Court returned the remittitur to the trial court from the prior appeal, the State argued that the First Indictment was not finally quashed until August 31, 2011, the date the remittitur was

returned to the trial court. The Court again disagreed.

The Court noted that O.C.G.A. § 17-3-3 provides a mechanism for refileing charges after an indictment has been quashed or nolle prossed outside the limitation period. Under that provision, if an indictment that was originally filed within the statute of limitation is later quashed or nolle prossed, the limitation period is "extended six months from the time the first indictment is quashed or the nolle prosequi entered." This six-month saving period operates as an extension of, rather than an exception to, the statute of limitation.

Citing *Brown v. State*, 322 Ga.App. 446 (2013), the Court found that the filing of a notice of appeal divests the trial court of jurisdiction in some matters, but not in all. In a criminal case, the filing of a notice of appeal merely deprives the trial court of its power to execute the sentence. Generally a trial court may not alter a judgment or order while an appeal of that particular judgment or order is pending before the appellate court, nor may a trial court initiate proceedings that require a ruling on the exact matter being appealed. Here, the State's earlier appeal concerned only whether the First Indictment was valid, and the filing of a timely second indictment would not have required a ruling on the matter appealed. Indeed, the filing of a timely second indictment would have initiated an entirely separate proceeding. Thus, the trial court retained jurisdiction in this case to consider a second indictment and regardless of when the remittitur was ultimately returned to the trial court, the date that Count 1 of the First Indictment was dismissed remained September 17, 2009, for purposes of calculating the running of the limitation period. Thus, O.C.G.A. § 17-3-3 did not alter the running of the statute of limitation in this case because it has no application to a prosecution in which the charge is dismissed over six months before the original statute of limitations expires. Accordingly, the trial court did not err in granting Outen's plea in bar.

## **Search & Seizure**

*Smith v. State*, A13A1119 (11/7/13)

Appellant was charged with manufacturing marijuana and possession of methamphetamine. He argued that the trial court erred in denying his motion to suppress.

The evidence showed that officers received an anonymous tip that marijuana was being grown on appellant's property. The officers went to the residence and observed a house located at the front of the property and a double wide trailer behind it at the end of the driveway. From the driveway, the officers saw small marijuana plants growing in a tub located against the rear wall of the house. The evidence showed that the house was used for storage and appellant lived in the trailer. After knocking on the door of the trailer, the officers heard a commotion inside and noticed that the blinds had been pulled back briefly. At this point, they began to announce that they were law enforcement and two officers went to the trailer's back door to prevent escape. The officers then entered the house to conduct a safety sweep. The officers saw marijuana in plain view. A search warrant was obtained and the search revealed a small quantity of methamphetamine.

Appellant argued that the trial court erred in denying his motion to suppress because the State did not carry its burden to prove the validity of the warrant in that the affidavit supporting it was not tendered into evidence. The Court agreed. When a motion to suppress is made under O.C.G.A. § 17-5-30 challenging the validity of a search and seizure with a warrant, the burden of showing that the search and seizure were lawful is on the State. This burden is satisfied by production of the warrant and its supporting affidavit, and by showing either by those documents or by other evidence that the warrant is not subject to the statutory challenge alleged (*i.e.*, the warrant is sufficient on its face, there was probable cause for its issuance, or the warrant was legally executed). The Court stated that once the State meets its initial burden of producing the affidavit and other evidence showing the validity of the warrant, the burden shifts to the defendant to produce evidence and support the challenge to the lawfulness of the warrant. Relying on *Gates v. State*, 229 Ga.App. 766 (1997), the Court found that because the State failed to produce the affidavit presented to the magistrate in support of the warrant, the State failed to meet its initial burden.

Nevertheless, the State argued, the marijuana plants, being in plain view, were sizeable without a warrant. The Court again disagreed. Pretermittting the issue of whether

the driveway was included in the curtilage of the house and trailer, the Court found that it was apparent that the plants could not have been seized without walking across the yard of the house and trailer, which was within the curtilage and protected by the Fourth Amendment. Since the officers were within the curtilage, the question was whether the agents, having observed the plants in plain view and identified them as marijuana, had a lawful right of access to them. An officer gains lawful access to an item in plain view by obtaining a search warrant, obtaining consent to search, or the existence of exigent circumstances. The presence of contraband without more does not give rise to exigent circumstances. Here, the Court found, there was no evidence that, at the time the marijuana was seen and subsequently seized, the agents knew who, if anyone, was in the house or trailer, or even who owned the property. Thus, even with probable cause, absent exigent circumstances or proper consent, warrantless searches and seizures within a home or curtilage by officers in pursuit of their traditional law enforcement duties are presumptively unreasonable. Accordingly, the Court held, since the affidavit was not produced, and there was no evidence of consent or exigent circumstances, the seizure of the marijuana plants was illegal.

### **Judicial Misconduct; Recusal**

*State v. Wakefield*, A13A1436, A13A1494, A13A1545, A13A1599, A13A1600, A13A1622; A13A1623 (11/8/13)

The State appealed from an order granting a new trial in five separate cases. In each case, the trial court found a due process, structural error based on evidence that at the time of trial in each case, the sitting trial court judge (“Judge”) was engaged in an on-going sexual relationship with the public defender (“PD”) who represented each defendant and that the Judge failed to disclose the relationship.

The Court stated that all parties before a court have the right to an impartial judicial officer. Judicial integrity is a state interest of the highest order because the power and prerogative of a court to resolve disputes rests upon the respect accorded by citizens to a court’s judgments which, in turn, depends upon the issuing court’s absolute probity. It is vital to the functioning of the courts that the public believe in the absolute integrity

and impartiality of its judges, and judicial recusal serves as a linchpin for the underlying proposition that a court should be fair and impartial. Although the trial court analyzed the disqualification issue under the rubric of constitutional due process, including “structural error” analysis, the Court noted that it was authorized to affirm the grant of new trials if the order was right for any reason.

The Court first noted that under O.C.G.A. § 15-1-8(a), “[n]o judge or Justice of any court, magistrate, nor presiding officer of any inferior judicature or commission shall: (1) [s]it in any case or proceeding in which he is pecuniarily interested; (2) [p]reside, act, or serve in any case or matter when such judge is related by consanguinity or affinity within the sixth degree as computed according to the civil law to any party interested in the result of the case or matter; or (3) [s]it in any case or proceeding in which he has been of counsel, nor in which he has presided in any inferior judicature, when his ruling or decision is the subject of review, without the consent of all parties in interest. . . .” Here, there was no allegation the Judge had any pecuniary interest or previous experience in the matters at issue, and the relationship between the Judge and PD was not one of either consanguinity or affinity as defined by O.C.G.A. § 15-1-8(a) (2).

Thus, the Court stated, it must consider whether the Judge violated the Code of Judicial Conduct when he failed to disclose his relationship with the PD or to recuse himself from these trials. The Court noted that the Code of Judicial Conduct provides a broader rule of disqualification than does O.C.G.A. § 15-1-8. Canon 3(E)(1) provides in relevant part: “Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where . . . (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.” The Court noted that Canon 3(E)(1) is an inclusive catch-all provision for analysis of alleged disqualifying judicial conduct and sets a general standard that the appearance of partiality requires recusal, followed by specific examples of disqualifying conditions. Also, Canon 3 imposes an objective standard on questions as to a judge’s ability to be impartial:

A situation in which a judge’s “impartiality might reasonably be questioned” is one raising a reasonable perception of lack of impartiality by the judge, held by a fair-minded and impartial person based upon objective fact or reasonable inference; it is not based upon the perception of either interested parties or their lawyer-advocates. To disqualify a judge, a bias must be of such a nature and intensity to prevent the complaining party from obtaining a trial uninfluenced by the court’s prejudgment.

The Court found that while the trial court analyzed the disqualification issue under the rubric of constitutional due process, its findings of fact as to the duration of the relationship between the Judge and PD also supported the legal conclusion that the Judge’s failure to recuse himself from the trials at issue was a violation of Canon 3. In fact, the Court stated, this was not a case of mere social contact between a judge and a lawyer during a trial involving them both. Rather, the record supported a reasonable inference that the ongoing and intimate relationship during each of the five trials at issue caused the Judge to harbor a bias of such a nature and intensity to prevent the complaining party from obtaining a trial uninfluenced by the court’s prejudgment and could lead to a reasonable perception of lack of impartiality by the judge, held by a fair-minded and impartial person based upon objective fact or reasonable inference. Therefore, the Court concluded, when the Judge failed to disclose his relationship with the PD or to recuse himself from the trials at issue here, he violated Canon 3(E)(1).

Moreover, the Court determined, the Judge’s violation of Canon 3(E) was not harmless error. And, the Court added, “Although we are mindful of the suffering which new trials may cause the victims in some or all of these cases, we are nonetheless compelled to draw the legal conclusion that [the] Judge[s].... violations of Canon 3 require new trials for each of these five defendants.”

### **Search & Seizure; BOLO**

*McBurrows v. State*, A13A1558 (11/7/13)

Appellant was convicted of two counts of armed robbery and two counts of possession of a firearm during the commission of a felony based on two separate incidents. The evidence

showed that in each instance, appellant followed the female victim home after the victim left a check-cashing store. Appellant then robbed the victim at gunpoint, got into an older model Ford Thunderbird and drove off. Eventually, appellant was caught in the vehicle sitting across the street from the check-cashing store.

Appellant argued that the trial court erred in denying his motion to suppress because the officers lacked a reasonable suspicion to conduct the stop. The Court stated that a law enforcement officer may make a brief, investigatory stop of a vehicle when he has a reasonable, articulable suspicion that the person stopped has been, or is about to be, engaged in criminal activity. This specific, articulable suspicion must be based on the totality of the circumstances. The evidence showed that the detective investigating the armed robberies compared the similarities between the two armed robberies. The detective went to the check-cashing store and to other nearby businesses to ask for their help in apprehending the individual involved in the rash of robberies in the area. The detective informed local business that he was looking for a black male between 5'8" and 6'1" and between 210 and 250 pounds, and he was also looking for a dark blue or black two-door Ford Thunderbird. The detective asked business owners to call him or 911 if they saw a vehicle matching that description in the area between the hours of 10:30 p.m. and 2:00 a.m. At about 10:30 p.m. one night, the detective received a call from a local security guard that the guard saw a dark colored Ford Thunderbird parked across the street from the check-cashing store and that two people were sitting inside the vehicle. The detective broadcast a be-on-the-lookout ("BOLO"), and dispatch then sent some units to the location. Police officers subsequently stopped the two-door black Thunderbird across the street from the check-cashing store, and appellant was detained and subsequently arrested.

The Court found that the BOLO broadcast by the detective provided a reasonable basis to stop the vehicle in which appellant was a passenger. The BOLO provided particularized information describing the color, manufacturer and model of the vehicle, the number of occupants, and the location of the vehicle. Additionally, the identified vehicle was practically identical to the one involved

in the armed robberies, the vehicle was in the area where the armed robberies had occurred, and the hour the vehicle was spotted was at about the same time that the other robberies had occurred. Furthermore, the Court stated, to the extent appellant contended that reasonable suspicion could not be based solely on the detective's testimony, and that the officers who conducted the stop were required to testify, his argument was without merit. Reasonable suspicion need not be based on a responding officer's knowledge alone, but may exist based on the "collective knowledge" of the police when there is reliable communication between an officer supplying the information and an officer acting on that information. In this regard, police are authorized to stop an individual based on a BOLO dispatch or even a radio transmission from another officer who observed facts raising a reasonable suspicion of criminal activity or a traffic violation. Thus, the Court concluded, based on the totality of the circumstances, the officers had a reasonable suspicion to believe that the vehicle and its occupants were about to be engaged in criminal activity, and therefore, the stop was valid.

Nevertheless, appellant contended, the trial court should have granted his motion to suppress because the stop was unreasonably prolonged. The Court stated that to determine this issue, it must decide whether the officer's action was justified at its inception, and if so, whether it was reasonably related in scope to the circumstances which justified the interference in the first place. In assessing whether a detention is too long in duration to be justified as an investigative stop, a court must consider whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Here, the evidence showed that upon arriving at the location of the stop, the detective observed that appellant matched the description of the armed robber at the center of his investigation. The detective informed appellant that he was investigating the robberies and he asked appellant for his name and identification. Appellant stated that he did not have any identification and provided a false name. The detective was unable to verify appellant's identity with the name and date of birth provided. Appellant

also provided a residential address, but officers and the detective went to that location, and people there said that no one by the name of appellant gave lived at the residence. When the detective returned, he placed appellant under arrest for providing a false name and false address.

The Court noted that the detective testified that he spent about 15 to 20 minutes attempting to verify appellant's name and address, and that a total of about 30 minutes had elapsed from the time he gave the BOLO report until the time he placed appellant under arrest. There was no evidence that the officers were failing to diligently pursue the investigation to confirm or dispel their suspicions quickly. Moreover, given that appellant matched the physical description of the suspect involved in the armed robberies, and the officers spent at least 15 minutes attempting to verify the information given by appellant, the Court concluded that the stop was not unreasonably prolonged.

### **Sufficiency of the Evidence; VGCSA**

*Cooper v. State, A13A1467 (11/4/2013)*

Appellant was convicted of four counts of selling cocaine, five counts of distributing cocaine within 1,000 feet of a public housing project, three counts of using a communication facility in committing or facilitating the commission of a felony, possession of cocaine with intent to distribute, and possession of a counterfeit controlled substance. The evidence showed that an officer made four controlled buys of cocaine from appellant, who resided in a low-income housing project. The police then executed a search warrant and found additional suspected cocaine, and a single pill of suspected MDMA. A GBI forensic scientist testified that the drugs appellant sold to the informant and found in the apartment tested positive for cocaine, except for the pill, which tested positive for piperazine.

Appellant argued that the evidence was insufficient to convict him of possession of a counterfeit controlled substance. The Court agreed. O.C.G.A. § 16-13-30(i)(1) provides that it is unlawful for any person to possess a counterfeit substance. The definition of a counterfeit substance, according to O.C.G.A. § 16-13-21(6)(B), (C), is "[a] controlled substance or [a] noncontrolled substance,

which is held out to be controlled substance or marijuana, whether in a container or not which does not bear a label which accurately or truthfully identifies the substance contained therein,” or “[a]ny substance, whether in a container or not, which bears a label falsely identifying the contents as a controlled substance.” The State presented testimony of an officer who opined that the pill found in appellant’s apartment appeared to be suspected MDMA. The State’s forensic chemist testified the pill contained piperazine. However, the State failed to adduce any evidence established that the pill bore markings that misidentified or misrepresented it as being MDMA. The Court found that because the record contained no evidence from which the fact finder could conclude that the pill was a counterfeit controlled substance as defined in the statute, the conviction was not supported by sufficient evidence.

Appellant also contended that the evidence adduced was insufficient to establish he sold drugs within 1,000 feet of a public housing project. The Court again agreed. The State failed to offer any evidence which established that the apartment complex in questioning was owned or operated by a public housing authority. Since this was an essential element of the offense, appellant’s conviction on five counts of distributing cocaine within 1,000 feet of a public housing project was reversed.