

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 16, 2010

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THIS WEEK:

- **Criminal Contempt**
- **Sentencing; Prisoner Transfers**
- **Voir Dire; Severance**
- **Statute of Limitations; Plea in Bar**
- **Collateral Estoppel; Probation Revocation**
- **Kidnapping; Jury Charges**
- **Search & Seizure**
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Criminal Contempt

Cabiness v. Lambros, A09A2352

This case is related to the RICO forfeiture action described in *Cisco v. State*, 285 Ga. 656 (2009). Appellant is a lawyer who was representing certain corporate entities who were not among the defendants involved in the RICO action. As part of those forfeiture proceedings, the trial court issued a receivership order placing the RICO defendants' assets under the control of the receiver and prohibited *all persons* from creating liens against the property in the receivership. To protect their interest in improvements made at the properties, one of appellant's clients, pro se, filed a notice of lien against the properties. Appellant then forwarded copies of the lien notice to

the Receiver. Based upon this conduct, the trial court held appellant in contempt of the receivership order, and ordered appellant to pay a \$500 fine as well as costs and attorney fees under OCGA § 9-15-14.

The Court held that the distinction between criminal and civil contempt is that criminal contempt imposes unconditional punishment for prior acts of contumacy, whereas civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order. Here, appellant was held in criminal contempt for past conduct. Before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the duties thereby imposed upon him, and the command must therefore be express rather than implied. In this case, the receivership order did not apply directly to appellant, and the record showed that he, personally, neither filed the notice of lien nor took action to have it filed, but that his client filed it pro se on the advice of another attorney. Consequently, appellant did not violate the receivership order; the act of forwarding to the receiver copies of the notice of lien his client filed did not violate the trial court's injunction in this case. "Moreover, neither the trial court nor the receiver has cited any authority, and we are aware of none, authorizing an attorney to dismiss on his own initiative and authority a notice of lien filed by his client." The trial court therefore erred in holding appellant in contempt.

Sentencing; Prisoner Transfers

Hillis v. State, A10A0285

Appellant appealed from the denial of his motion to modify his sentence. The record

showed that appellant was given three years in a probation detention facility. That facility conducted a medical evaluation of appellant and allegedly determined that his medical issues could be more appropriately addressed by his transfer to Ware State Prison. Appellant sought to be returned to the detention facility or to be given home confinement.

The Court held that OCGA § 42-8-35.4 authorizes the trial court to sentence a defendant such as appellant to a program of confinement in a probation detention center and expressly permits the Department to exercise its discretion and transfer a probationer “to other facilities in order to provide needed physical and mental health care or for other reasons essential to the care and supervision of [that] probationer or as necessary for the effective administration and management of its facilities.” The Department is not required to transfer a probationer to a *probation detention center* nor is it prohibited from transferring a probationer to a *prison*. “Had the legislature intended to limit the Department’s transfer authority to other probation detention centers it could have done so.” Instead, it used the broader term facilities. The decision to transfer a probationer to another facility is made by the Department and does not involve the trial court. In so holding, the Court rejected appellant’s contention that this case is controlled by *Edge v. State*, 194 Ga. App. 466 (1990). *Edge* concerned the trial court’s authority to resentence a probationer to prison time after that probationer has begun serving his probated sentence whereas here, the issue is the Department’s authority to transfer a probationer to another Department facility after that individual has begun serving his sentence. While the former action is unlawful, the latter is expressly authorized by statute. Consequently, because appellant’s sole complaint concerned the Department’s decision to transfer him under OCGA § 42-8-35.4 (c), his claim was cognizable only in a mandamus action against the Commissioner of the Department of Corrections or in a petition for habeas corpus.

Voir Dire; Severance

Ham v. State, A09A1967, A09A1968

Ham and Lester were each convicted of armed robbery, kidnapping, burglary, aggravated assault and possession of a firearm during the commission of a felony. The evidence

showed that the two men committed a home invasion. The kidnapping convictions were reversed under *Garza* because the movement of the victim from the living room to the bedroom was of minimal duration; it occurred as part of the armed robbery and in furtherance of that offense; and the movement itself did not present a significant danger to the victim independent of the danger he already faced.

Ham contended that the trial court erred in not removing a juror for cause. During individual questioning, the juror expressed his belief that defendants had too many rights, stated that he would be upset if defense counsel attacked the credibility of prosecution witnesses if their accounts were consistent, and stated that he honestly believed that a person charged with a crime must be guilty of something. He did state that he would listen to the trial court’s definition of “reasonable doubt” at trial, but nevertheless expressed his belief that the grand jury’s indictment indicated that there was enough evidence to go to trial and that he had already formed an opinion that because the defendants were indicted something must have happened. When presented with a football analogy where the State must prove guilt beyond a reasonable doubt to get into the end zone, he acknowledged he had already formed an opinion that because of the grand jury indictment, the prosecution was starting at about mid-field instead of the one-yard line. The Court held that the juror was clearly biased against the defendants and gave no indication that he intended to be impartial during the trial. It therefore reversed Ham’s convictions.

Lester contended that the trial court erred in denying his motion to sever his trial from that of his co-defendant, Ham. In considering whether to grant a motion to sever, the trial court should consider three factors: 1) Will the number of defendants create confusion of the evidence and law applicable to each individual defendant? 2) Is there a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court? 3) Are the defenses of the defendants antagonistic to each other or to each other’s rights? Lester contended that the trial court erred on the second factor based on testimony during trial. Lester contended that a *Bruton* violation occurred when counsel for Ham asked an investigator whether there was any other evidence linking his client to the

crimes and the investigator replied that there was a statement made by his co-defendant. The Court held that no *Bruton* violation occurred because the investigator’s testimony about the existence of a co-defendant’s statement as evidence did not, standing alone, directly incriminate Lester and, in any event, referred to evidence in Ham’s case, not Lester’s case. The trial court therefore did not err in denying the motion to sever.

Statute of Limitations; Plea in Bar

State v. Bair, A09A1959

Bair was indicted for 31 counts of theft by taking. She filed a plea in bar alleging that the statute of limitations had run. The trial court agreed and the State appealed. The record showed that Bair was originally indicted on June 14, 2005 with one count of theft by taking. This indictment alleged that “...between the 1st day of August, 1999, and the 1st day of February, 2002, [Bair] DID UNLAWFULLY TAKE U.S. CURRENCY OF A VALUE IN EXCESS OF \$500.00, THE PROPERTY OF MASS MUTUAL INSURANCE COMPANY WITH THE INTENTION OF DEPRIVING SAID OWNER OF SAID PROPERTY...” The trial court granted Bair’s demurrers finding that 1) the statute of limitations had run; and 2) the indictment failed to allege the manner in which the theft by taking had occurred. Thereafter, and within six month, the State re-indicted Bair on 31 counts of theft by taking alleging specific dates and alleging that the statute of limitations was tolled. The trial court again dismissed the indictment.

The Court affirmed. It held that the general rule is that the State must commence prosecutions for theft by taking within four years of the commission of the crimes. The four-year limitation period does not include any period in which the crimes were unknown by the State, but the knowledge of someone injured by the crime may be imputed to the State for purposes of determining if the exception to the statute applies. When the State seeks to rely on an exception to the statute, it must allege the exception in the indictment.

The State argued that because the first indictment was not fatally defective, its re-indictment of Bair was saved by OCGA § 17-3-3. The Court disagreed. First, it held that

the first indictment, which alleged only one count of theft by taking, was in fact fatally defective because it showed on its face that it was time barred and did not allege a tolling provision. Second, based on the allegations of the second indictment, it was clear that the first indictment did not inform Bair of all the charges she must defend against at trial and was not specific enough to protect her from multiple prosecutions. Moreover, the first indictment did not inform Bair of the manner in which she was alleged to have committed the crimes. “The State cannot allege a single defective charge of theft by taking that may have been barred by the statute of limitation, and upon its dismissal, inflate that single, defective one count indictment to one alleging 31-counts.” Therefore, the trial court did not err by granting Bair’s plea in bar to the first indictment based on the statute of limitation and the second indictment would impermissibly broaden and substantially amend the first indictment.

Collateral Estoppel; Probation Revocation

Thackston v. State, A09A2060

Appellant appealed from the revocation of his probation. He argued that the revocation court should have granted his plea in bar under the doctrine of collateral estoppel. The record showed that appellant was on probation for a drug offense when he was stopped in another jurisdiction and found to be in possession of narcotics. The State moved to revoke his probation. When appellant was arrested on the probation revocation warrant in the other jurisdiction, he was again found in possession of narcotics. While the revocation hearing was pending, appellant was successful in moving to suppress the narcotics found from the two searches in the other jurisdiction. The State did not appeal from that order of suppression but instead, nolle pros’d the charges related to both searches. The probation court then denied appellant’s plea in bar, re-litigated the same motion to suppress which appellant had previously won in the other jurisdiction, denied the motion and revoked his probation.

The Court held that under common law, collateral estoppel applies where an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment. That determination is

then conclusive in a subsequent action between the same parties. Applying this definition, the Court concluded that the State was precluded from relitigating the motion to suppress in the probation revocation case. First, the same issues concerning the legality of the searches were actually and fully litigated in the prior criminal case, and the question of whether those searches were conducted in a legal manner was essential to resolution of the motion to suppress. Second, both the criminal case and the probation revocation case involved the same parties: Appellant and the State. Finally, the trial court’s grant of the motion to suppress in the criminal case was sufficiently firm to be accorded conclusive effect. In so holding on this latter issue, the Court noted that the State could have appealed the order of suppression but instead decided to nolle pros the charges.

Finally, the Court noted that its decision conflicts with its prior decisions in *Harvill v. State*, 190 Ga. App. 353, 354 (1) (1989), and *Aikens v. State*, 143 Ga. App. 891, 892 (2) (1977). The Court held that “[b]ecause *Harvill* and *Aikens* failed to recognize th[e] important distinction between litigation over a motion to suppress and litigation over the sufficiency of the evidence, they wrongly concluded that the issues adjudicated on a motion to suppress could be relitigated by the state.” The Court therefore overruled *Harvill* and *Aikens*.

Kidnapping; Jury Charges

Hammond v. State, A09A1701

Appellant was convicted of one count each of sexual battery, aggravated sodomy, kidnapping with bodily injury, false imprisonment, and two counts of aggravated assault, and two counts of burglary. The evidence showed that appellant broke into his ex-wife’s home, threatened to kill her with a knife, had sex with her, committed oral sodomy, moved her to various rooms in her house, and held her captive until she finally escaped. He argued that the trial court erred in failing to give his requested charge on asportation. The record showed that appellant requested and the trial court agreed to give the following charge: “[T]he movement necessary to constitute asportation must be more than a mere positional change. It must be a movement that is not merely incidental to the other criminal act, but movement designed to carry out better the criminal activity.” When giving the charge to the jury, however, the

trial court gave the pattern charge on kidnapping. The Court held that there was not error. When appellant was tried in 2006, *Garza* had not been decided. Before *Garza*, asportation could be proven by showing “movement of the victim, however slight.” Therefore, appellant’s requested charge was not legal, apt and *precisely* adjusted to some principle involved in the case and authorized by the evidence.

Appellant also alleged that under *Garza*, there was insufficient evidence of asportation to support his conviction for kidnapping with bodily injury. The Court disagreed. Here, the evidence showed that appellant moved the victim from the bedroom to the bathroom twice. Although the movement each time was of minimal duration, the movements were not inherent parts of the sexual battery, aggravated sodomy, false imprisonment, aggravated assaults, or burglaries. The movements occurred after those crimes had been completed. Appellant moved the victim to keep her under his control and prevent her escape, and further enhanced his control over her. Therefore, the evidence of asportation was sufficient.

Search & Seizure

Davis v. State, A10A0605

Appellant was convicted of possession of marijuana with intent to distribute. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped by a trooper for a window tint violation. The officer decided to issue appellant a warning. Eight minutes after stopping appellant, the trooper gave him the written warning, his driver’s license, and insurance card and told him that he was free to go. Without pausing, the trooper asked appellant if he had any drugs or other illegal contraband in his car; appellant answered that he did not. The trooper asked appellant if he could search the car. Appellant said yes and the officer had him fill out a voluntary consent form and told appellant he had the right to refuse to consent.

The Court held that in order to pass constitutional muster, the duration of a traffic stop cannot be unreasonably prolonged beyond the time required to fulfill the purpose of the stop. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver’s license, insurance, and registration, to complete any paperwork connected with the

citation or a written warning, and to run a computer check for any outstanding arrest warrants for the driver or the passengers. Where an officer requests consent to search contemporaneously or nearly so, with the moment the purpose of a traffic stop is fulfilled, a trial court is authorized to conclude that the request did not unreasonably prolong the detention. Here, it was undisputed that the trooper asked appellant for his consent to search his car immediately after giving him his documents and warning ticket. The Court therefore deferred to the trial court's determination that the trooper's request to search did not unreasonably prolong appellant's detention.

Lott v. State, A10A0558, A10A0559

Appellants were convicted of trafficking in cocaine and one count of possession of marijuana with intent to distribute. They argued that the trial court erred in denying their motion to suppress. Specifically, they contended that the affidavit for the search warrant lacked probable cause because the only link between the residence and illegal drugs was through the hearsay statements made by an informant. The Court held that in determining whether an affidavit provides probable cause for the issuance of a search warrant, 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. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Here, the Court held that because the informant was actually named in the affidavit, he did not fit the model of the anonymous or confidential informant whose motives in coming forward are unknown, or whose basis of knowledge is not shown, or whose story may be stale. Common sense requires that information from such informants be strongly corroborated to be considered reliable. The informant's statements were given with some indicia of reliability. In fact, when the named informant made the declarations against penal interest and based on personal observation, this in itself provided a substantial basis for the magistrate to credit that statement. Furthermore, the

police surveillance team's observation of the informant's meeting with subjects in front of the targeted house provided some corroboration of the informant's statements. Thus, the magistrate was authorized to conclude that informant had purchased drugs at the location and that proof of the crime might reasonably still be found at that location.

Hawkins v. State, A09A1639

Appellant was convicted of possession of methamphetamine. He argued that the trial court erred in denying his motion to suppress. Specifically, he argued that the affidavit in support of the warrant contained stale information and lacked probable cause. First, the Court stated that time is an element of the concept of probable cause. However, the precise date of an occurrence is not essential. Rather, the inquiry is as to whether the factual statements within the affidavit are sufficient to create a reasonable belief that the conditions described in the affidavit might yet prevail at the time of issuance of the search warrant. The affidavit here stated as follows: "the affiant received information from reliable confidential informant. . . pertaining to a methamphetamine lab at [an address], the residence of Lori and Hawk. [The informant] informed the affiant that he/she overheard a telephone conversation pertaining to manufacturing methamphetamine at the above residence. . . . [The informant] stated he/she heard Sharon speaking to an individual about the methamphetamine cook she was to perform later that day. Sharon stated that all of the preparation work for the cook was complete. Sharon said she was going to Horse Town in order to purchase the iodine needed for the cook. Sharon said that she was going to be cooking at Lori and Hawk's residence around 8:00 or 9:00." The affidavit did not contain a date but the warrant was taken on August 19. The Court held that in reviewing the totality of the circumstances, based on the affidavit, the magistrate was authorized to conclude that, at some point on or about August 19th, based on a conversation the informant overheard, methamphetamine was going to be manufactured at appellant's house. Regardless of whether the informant actually heard the information on August 19th, the information provided a substantial basis for believing that, when the magistrate issued the warrant, methamphetamine was being manufactured there.

Appellant also contended that the warrant lacked probable cause because the information given by the informant was not sufficiently corroborated. The Court held that the sufficiency of information obtained from an informant is not to be judged by any rigid test. Generally, probable cause is determined by the totality of the circumstances surrounding (1) the basis of the informant's knowledge and (2) the informant's veracity or reliability. A deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. Here, the basis for the informant's knowledge was that she overheard one of the co-defendants discuss that there was going to be methamphetamine at the address to be searched. Evidence of the informant's reliability included that the informant had been known to the affiant and that the informant had previously provided information leading to the seizure of methamphetamine and marijuana and to several drug-related arrests. The Court found that while the better practice would have been for the officer to include all information relating to the informant's reliability, including payment status and criminal history, nothing indicated that the affidavit contained deliberate falsehoods, that it was made with reckless disregard for the truth, or consciously omitted material information which, if it had been included in the affidavit, would have been indicative of the absence of probable cause. Moreover, even if the affiant had given this additional information to the magistrate, the informant's previous work with police would have provided a substantial basis for deeming her reliable.

Sex Offender Registration

Green v. State, A10A0608

Appellant was convicted of failing to register as a sex offender in 2008. The evidence showed that appellant was convicted of sodomy with a 16 year old in 1997. Appellant argued that his conviction should be reversed. He argued that under *Powell v. State*, 270 Ga. 327 (1998) and *Lawrence v. Texas*, 539 U. S. 558, 123 SC 2472, 156 LE2d 508 (2003), the Due Process Clause of the Fourteenth Amendment to the United States Constitution shields consensual, noncommercial, private sexual conduct between adults from government interference and thus, his sodomy conviction

should be vacated, which would, in turn, require the reversal of his conviction for failure to register. The Court held that new rules of substantive criminal law must be applied retroactively to cases on collateral review and an appellate decision holding that a criminal statute no longer reaches certain conduct is a ruling of substantive law. Thus, the ruling in *Powell* should be applied retroactively on collateral review. But, the Court found, it did not apply in this case as it was not before the Court on collateral review. Instead, this appeal was from a conviction for failure to register as a sex offender, which is a proceeding separate from appellant's original offense. The sex offender statute is a separate and distinct offense for which one can be prosecuted. When appellant was charged with failure to register, he was required to register as a sex offender because he had been convicted of criminal sexual conduct toward a minor, proof of which was introduced at trial, which conviction had not been vacated. Appellant testified that he pled guilty to failure to register in 2005; that he knew he was required to register; and that he did not register in 2008 because he forgot to do so. Based on this evidence, the State satisfied its burden of proof and consequently, appellant's challenge to the sufficiency of the evidence failed.

Kidnapping; Garza

Escoffier v. State, A10A0754

Appellant was convicted of armed robbery, kidnapping, hijacking a motor vehicle, and aggravated assault. Citing *Garza*, he argued that his conviction for kidnapping should be reversed because of insufficient evidence of asportation. The Court agreed. The evidence showed that appellant ordered the victim from the driver's seat to the passenger seat so that he could get in the car and steal it. The Court found that the victim's movement occurred during the commission of the separate offense of hijacking a motor vehicle. The distance moved was short and the duration was brief. Moreover, appellant's moving the victim to the passenger seat did not create a significant danger to her independent of the danger posed by the separate offenses, especially when the movement facilitated the victim's escape through the passenger door. Given these circumstances, the Court concluded that the victim's movement did not constitute

the asportation required to prove the offense of kidnapping, but, rather, was incidental to appellant's crime of hijacking the victim's car.

Jury Charges

McGhee v. State, A10A0473

Appellant was convicted of possession of methamphetamine, possession of drug related objects, and driving with a suspended license. At trial, the State admitted similar transaction evidence. Appellant argued that the trial court erred in failing to give his requested jury instruction that was patterned after OCGA § 24-2-1 and read: "the evidence for you to consider must relate to the questions being tried and bear upon them directly or indirectly and you should exclude all irrelevant matter[s] from your deliberations." The Court held that jury instructions must be read and considered as a whole in determining whether the charge contained error. If any portion of a requested charge is inapt, incorrect, misleading, confusing, not adequately adjusted or tailored, or not reasonably raised by the evidence, denial of the charge request is proper. Here, the requested charge referred to the trial court's duty to exclude irrelevant evidence, but because appellant was unable to cite to any instance during trial in which the trial court failed to exclude irrelevant evidence, the trial court properly refused to give this charge.

Appellant also argued that the requested charge should have been given in light of the trial court's admission of the State's similar transaction evidence. The Court disagreed because the requested charge did not pertain to similar transaction evidence. Moreover, the Court stated, not only did the trial court's instruction cover the principles of law relevant to similar transaction evidence, but unlike appellant's requested instruction, it did so accurately. Accordingly, the trial court did not err in refusing to give the requested charge.

Discovery; Child Molestation

Waters v. State, A09A1980

Appellant was convicted of child molestation. He argued that the trial court erred by not requiring the State to comply with reciprocal discovery. The record showed that appellant opted-in under OCGA § 17-16-1 et. seq. During trial, the victim's mother testified that the victim saw a therapist on a

weekly basis. Appellant requested a continuance complaining that the notes related to the counseling sessions were not included with the discovery. According to appellant, the discovery included a two-page report from the therapist that described only three counseling sessions. The State argued it had no duty to affirmatively seek the therapist's work product, and that it had not seen any of the information contained in the counselor's therapy reports. The trial court denied the motion.

The Court held that the parties to reciprocal discovery have the affirmative duty to attempt to acquire the information required by the statute. They may not rest solely on the fact that it is not within their possession. However, the Court held, contrary to appellant's contentions, the reciprocal discovery act does not provide an independent statutory basis for the discovery of the therapist's files. Pursuant to OCGA § 49-5-40, records concerning reports of child abuse are confidential, and access to such records is prohibited except as provided in OCGA §§ 49-5-41 and 49-5-41.1. OCGA § 49-5-41 (a) (2) grants access to such records to a court, by subpoena, upon its finding that access to such records may be necessary for determination of an issue before such court; provided, however, that the court shall examine such record in camera, unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then before it and the record is otherwise admissible under the rules of evidence. Here, appellant did not request an in camera inspection of the therapist's records. The State was therefore not obligated to produce the file and did not violate his due process rights under Georgia's reciprocal discovery act by not providing the file earlier.

Sufficiency of Evidence; Discovery

Williams v. State, A09A1854

Appellant was convicted of possession of marijuana with intent to distribute and drug trafficking within 1,000 feet of public housing. She argued that the evidence of the latter conviction was insufficient. The Court agreed and reversed. OCGA § 16-13-32.5 (b) makes it unlawful for any person to manufacture, distribute, dispense, or possess with intent to distribute a controlled substance or marijuana or a counterfeit substance in, on, or within

1,000 feet of any real property of any publicly owned or publicly operated housing project. For the purposes of this Code section, the term “housing project” means any facilities under the jurisdiction of a housing authority which constitute single or multifamily dwelling units occupied by low and moderate-income families pursuant to Chapter 13 of Title 8. The Court found that while the indictment pertinently charged that appellant had committed the drug offense within 1,000 feet of a “publicly owned and operated housing project, to wit: the Housing Authority of the City of Dublin, Georgia,” the State failed to produce any evidence establishing the same. The State’s witnesses testified that appellant’s residence was located in a housing project, commonly known as Jones Village, and made reference that there were multiple apartments at the location. Significantly, however, there was no evidence establishing that the housing project was publicly owned or operated. Nor was there testimony that the housing project was occupied by low and moderate-income families. Accordingly, the State failed to establish that appellant’s residence fell within the purview of the statute proscribing this offense.

Appellant also contended that she was entitled to a new trial based upon the State’s failure to produce exculpatory fingerprint evidence during discovery. During the course of trial, the State informed appellant and the trial court that it had been informed of the existence of fingerprint evidence and test results indicating that the fingerprints did not match those belonging to appellant. The record showed that appellant did not seek a mistrial. Rather, she requested and was afforded the opportunity to review the test results. Pursuant to the parties’ stipulation, the fingerprint evidence was then presented to the jury. The Court held that although the fingerprint evidence should have been furnished to appellant as *Brady* material, appellant failed to show that she suffered any cognizable harm from the alleged discovery violation since the evidence was introduced at trial for the jury to consider and weigh.

Hearsay

McKinley v. State, A10A0324

Appellant was convicted of two counts of robbery by intimidation, OCGA § 16-8-40 (a) (2), as a lesser included offense of armed

robbery, OCGA § 16-8-41 (a), and hijacking a motor vehicle, OCGA § 16-5-44.1 (b). At trial, appellant gave alibi testimony that he was at DeKalb Recorder’s Court answering citations when the crimes occurred. In rebuttal, the State, over the hearsay objection of appellant, introduced copies of two of the traffic citations, certified by the clerk of the DeKalb County Recorder’s Court, that were stamped “FTA.” The trial court admitted the citations “pursuant to the provisions of OCGA § 24-5-20,” which is one specific application of the best evidence rule.

The Court held that properly certified copies of public records are generally allowable under the best evidence rule. This rule is deemed necessary to preserve the integrity of and access to official records by not removing the originals for use at trial. The Code section relied upon by the trial court, OCGA § 24-5-20, concerned the exemplification of public records transmitted by facsimile. Premitting whether the trial court correctly determined that State’s exhibits constituted the best evidence of the documents pursuant to OCGA § 24-5-20 (b), however, Code sections that merely pertain to evidentiary authentication of documents do not remove hearsay considerations. Thus, because OCGA § 24-5-20 does not address hearsay concerns, that Code section does not require the admission of hearsay merely because the hearsay has been recorded in a court record certified by facsimile.

Here, the State introduced the citations to prove the truth of the statement of the unidentified person who stamped “FTA” on the citations (presumably the clerk of the DeKalb County Recorder’s Court) that appellant failed to appear for his court date. Also, the State argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents. Therefore, the trial court erred in admitting the exhibits. Moreover, although the State contended on appeal that the exhibits were business records and properly admitted, the Court found that the State failed to lay the proper foundation at trial for the admission of the exhibits as business records.

Finally, the Court held that given the many conflicts and gaps in the evidence, and the prosecutor’s use of exhibits to attack appellant’s alibi, it was highly probable that the erroneous admission of the exhibits contributed to the verdict. Therefore the admission

of the exhibits was not harmless error and appellant’s convictions were reversed.