Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 11, 2012

State Prosecution Support Staff

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

Miranda; Right to Counsel

Dunlap v. State, S12A0032 (5/7/2012)

Appellant was convicted of felony murder. Appellant alleged the trial court erred when it failed to suppress his in-custody statements to the authorities because he contended he invoked his right to counsel. The facts showed that prior to any interrogation, appellant asked, "My lawyer don't have to be present right here or nothing? ..." In response, the officer said it was "up to" appellant. The officer then read appellant his *Miranda* rights and provided a form listing those rights, including an admonition that appellant could have an attorney present during questioning. Appellant signed the *Miranda* form twice, first in acknowledgment that he received and understood his rights and second to waive those rights and make a statement to police outside the presence of counsel. After signing the waiver, appellant gave his statement and never refused to answer questions and never requested counsel. At the Jackson-Denno hearing, appellant's counsel conceded that appellant's question about the presence of counsel was equivocal. The trial court denied the motion to suppress. The Court found that the trial court's decision was not erroneous as appellant's question about counsel was equivocal and did not trigger any duty on the part of police to stop the interrogation.

Confrontation Right

Disharoon v. State, S11G1880; S11G1881 (5/7/2012)

Appellant and his girlfriend, Brandi McIntyre, were convicted on several charges involving sex with a minor. The victim's DNA was found on items at the couple's home. At trial, Connie Pickens was qualified as an expert to testify about the results of the DNA testing. Counsel for both appellant and McIntyre cross-examined Pickens concerning the procedures and testing used. Although Pickens initially testified that she personally performed the DNA analysis process, Pickens admitted that she was not present when another technician placed the 96 test samples and controls into the scientific instrument used to complete a step of the testing procedure. Pickens testified that she read the results from the instrument and concluded that the control samples worked as expected. Disharoon and McIntyre objected to the testimony as inadmissible hearsay and a violation of the Confrontation Clause under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (the State's use of a forensic laboratory report violated the Confrontation Clause where there was no live witness available for cross-examination who was competent to testify as to the truth of the statements made in the report). The Court of Appeals found no error and the Georgia Supreme Court granted

certiorari to determine whether, in light of *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), the Court of Appeals erred in holding that no violation of the Confrontation Clause occurred where an expert was allowed to testify about the results of DNA testing when that testifying expert was not the one who performed every step of the test.

In *Bullcoming*, the defendant was arrested on charges of driving while intoxicated. The primary evidence against the defendant was a forensic laboratory report certifying that the defendant's blood-alcohol concentration was well above the legal limit. At trial, the analyst who performed the forensic testing and who signed the certification was not called as a witness. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but who had not participated in, observed, or reviewed the test on the defendant's blood sample. The United States Supreme Court held that such "surrogate testimony . . . could not convey what [the analyst who performed the testing and signed the certification] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."

Our Supreme Court found that even in light of the holding in *Bullcoming*, however, the Court of Appeals did not err in determining that it was not a violation of the Confrontation Clause to allow Pickens to testify about the DNA testing results in these cases. As noted above, the holding in *Bullcoming* was based on the fact that the State's witness, while generally familiar with the laboratory's testing procedures, had not specifically participated in, observed, or reviewed the test on the defendant's blood sample. Here, however, the level of participation in the DNA testing by the testifying witness was significantly greater than that of the testifying witness in *Bullcoming*. The testifying witness, Pickens, completed every step of the test with the exception of only being present while another technician merely placed the ninety-six test samples and controls into the scientific instrument that was used to complete a single step of the testing. The United States Supreme Court has signaled that *Bullcoming* would not apply under such circumstances, as the holding in *Bullcoming* might not be so broad as to make it applicable to "a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." Here, Pickens was the supervisor, she drafted the report, and had a substantial personal connection to the scientific test at issue (having actually performed the vast majority of the testing herself).

Search & Seizure

Jones v. State, S11G1054 (5/7/2012)

Appellant was convicted of driving under the influence, and the Court of Appeals affirmed. The Court granted the writ of certiorari to determine whether the Court of Appeals erred in upholding the trial court's denial of appellant's motion to suppress and his request for a subpoena. Because the Court held that the arresting officer's detention of appellant was a seizure and there was no evidence that the officer had reasonable suspicion to make the traffic stop, the Court reversed.

While participating in a Georgia State Patrol roadblock, just after midnight, a trooper observed a sport utility vehicle make an abrupt right turn into the parking lot of a small strip shopping center where all the businesses were closed. Deciding to investigate, the trooper turned around his car and activated his lights as he drove to the parking lot. Before reaching it, he saw a truck that was driven by appellant turn into it. The trooper blocked the lot's exit as appellant was turning around and pulling up behind the SUV. The trooper approached the SUV's driver, who said she thought there had been a traffic accident and she was turning around to avoid it. He decided to let her go, but asked her to wait until he had spoken to the driver behind her. He then walked back to appellant's truck to see why appellant had turned into the parking lot. Smelling a strong odor of alcohol and marijuana through the truck's open window, the trooper told appellant that he was allowing the SUV to leave, but that appellant should remain. After moving his car and releasing the first driver, the trooper returned to appellant and asked him to perform several field sobriety tests. During the tests, the trooper observed signs of impairment, and appellant tested positive for alcohol on a portable alco-sensor machine. As a result, the trooper arrested appellant for DUI.

The Supreme Court concluded that the evidence did not support the trial court's ruling that the initial encounter between the trooper and appellant was a first tier encounter. The Court pointed out that as appellant was turning his truck around in the parking lot, the trooper positioned his patrol car in the exit to prevent any vehicle from leaving and left on his car's flashing lights. He testified, and the trial court found, that appellant could not leave without the patrol car being moved. The trooper had decided to release the SUV driver, the initial target of the traffic stop, but told her to "hold on" while he checked the second driver. He then "stepped back to [appellant] to see what had persuaded him to turn into the parking lot." The Court found that the trooper intended to detain appellant at least momentarily to discover his reasons for avoiding the highway roadblock and a reasonable person would not have felt free to leave under these circumstances without the trooper's permission. Therefore, the Court held that a seizure occurred when the trooper walked back to question appellant while blocking his exit from the parking lot with the patrol car. Moreover, the Court noted that the trooper did not testify to any particular, objective facts that led him to reasonably suspect appellant was committing a crime. There was no evidence that appellant had violated a traffic law or made a sharp, unsafe, or furtive driving maneuver. Without evidence of a specific driving violation or maneuver to support the officer's belief that appellant was trying to avoid the roadblock, the Court concluded that the trooper lacked reasonable suspicion to stop appellant and therefore the traffic stop violated the Fourth Amendment. Hence, the evidence obtained as a result of the stop should have been suppressed.

Register v. State, A12A0750 (5/3/2012)

Following the trial court's denial of her motion to suppress, the Court granted appellant's application for interlocutory review. Appellant argued that there was no reasonable suspicion to authorize a stop of the vehicle in which she was a passenger and that the evidence in her possession seized during the stop was tainted and must therefore be suppressed. The Court agreed and therefore reversed.

The evidence established that the police chief received a phone call from an anonymous caller who stated that they had observed what they believed was a drug transaction "at the

Friendly Gus located on 441 North." The caller stated that he observed a white male exchange "some type of pill" for money. The caller advised that the white male was traveling in a white Chevrolet van and provided the tag number of the vehicle, and also stated that a white female was a passenger in the van. As the police chief approached, he observed the van and verified that the tag number on the van was the same tag number given to him by the caller. He then notified the 911 call center that he was following the van and asked for verification of the tag number. He also asked for a "marked unit" to assist him. The van made several turns leading the police chief to believe that the driver "appeared to be evading [him]," although he acknowledged that the driver did not commit any traffic violations. He stopped the van, and approached the driver whom he knew as Travis Register. The chief testified that he was familiar with Travis because of his "extensive history of narcotic transactions and dealing with narcotics." He also recognized the passenger [appellant] and was familiar with her for this same reason. The police chief asked Travis if he could search the van and Travis consented. The second officer asked appellant to step out of the van and come toward his vehicle. This officer testified that he was also familiar with both Travis and appellant. The officer stated that he talked to appellant and told her what the allegations were and noted that the appellant was very cooperative. She retrieved a gold case out of her bra on the left side . . . which contained Xanax™ and Oxycodone. The trial court concluded that the details reported by the concerned citizen "including the detailed description of the vehicle, the tag number, the description of the occupants, the likely continuing criminal activity that drugs are in the possession of the occupants of the vehicle, and the continuing observations of the concerned citizen and communication with police," gave police "articulable suspicion to stop the vehicle [and] . . . articulable suspicion to investigate possession of narcotics."

On appeal, appellant argued that the trial court erred in finding that the police chief had a reasonable articulable suspicion to authorize a stop of the vehicle in which she was a passenger. The stop of the vehicle was a second-tier encounter requiring officers to have reasonable suspicion of criminal activity. The Court found that the tip here lacked any indicia of reliability as it provided no prediction of future behavior or other inside information that could be corroborated by police and thus was not sufficiently reliable to justify a stop of the vehicle. The Court held that the taint of the illegal stop in this case required the suppression of the contents of the gold case possessed by appellant as there were no intervening circumstances or events to purge the taint of the illegal stop.

Due Process; DUI

Padidham v. State, S11G1808 (5/7/2012)

The Court granted a writ of certiorari to determine when the results of a State-administered Intoxilyzer 5000 breath test must be given to a defendant accused of driving under the influence (DUI) in violation of OCGA § 40-6-391.

Appellant was arrested and charged with driving under the influence after being stopped for a traffic violation by a City of Duluth police officer. At the time of his arrest, appellant was informed of his rights under Georgia's Implied Consent Statutes, OCGA § § 40-5-55 and 40-5-67.1 (b), and was asked whether he would consent to submit to a State-administered breath test. He was further informed, consistent with the mandate of OCGA § 40-5-67.1 (b) (2), that should he submit to the State's test, he had the right to request an independent test by a qualified person of his choosing. Appellant consented to testing by the State but he at no time requested that an independent test be administered. Nor did he ask to be informed of the results of the State's test, which indicated blood alcohol levels of .129 and .126. Appellant first learned of the results of the State's test the next morning when he was provided a copy of the test results in his property bag.

Prior to trial, appellant moved to suppress evidence of the State's breath test results, arguing they were inadmissible because the State had a statutory and constitutional duty to immediately inform him of the results. The trial court agreed appellant should have been given "prompt delivery of the breath test result" and granted the motion to suppress. The Court of Appeals reversed but did not address in its opinion appellant's constitutional arguments.

Appellant argued that the State's practice of not immediately informing DUI defendants of its test results violated his federal and state due process rights because it deprived him of the opportunity to meaningfully decide whether to request independent testing. The Court found that his challenge was thus limited to the procedure used by the State for providing the results of its breath test to DUI defendants and in order to prevail he had to demonstrate the procedure contains a defect so serious that it renders the process fundamentally unfair.

The parties did not dispute that Georgia's DUI statutes provide no specific requirement as to when the results of a State-administered breath test must be provided to defendants other than to state that full information concerning the State's test shall be made available to the defendant or his attorney "[u]pon . . . request." OCGA § 40-6-392 (a) (4). The Court found that it is clear under our statutes that the State must inform a defendant at the time of his arrest for driving under the influence of his right to refuse to submit to testing by the State, as well as his right to have an independent chemical test by a qualified person in the event he chooses to submit to such testing. OCGA § § 40-5-67.1 (b); OCGA § 40-6-392 (a) (4). The Court recognized with regard to this statutory obligation that one cannot make an intelligent choice to submit to a chemical test without the knowledge of the right to have an independent test. The Court stated that these principles, however, which emanate from statutory obligations, do not compel the conclusion that the State had a constitutional duty to immediately inform a defendant of the results of its breath test.

While the Court agreed with appellant that the additional information contained in the State's test results would undoubtedly be useful to a DUI defendant and might affect his decision whether to request an independent test, due process does not require the State to disclose any or all information a defendant might consider helpful. DUI defendants must determine, often under difficult and stressful circumstances, whether to request an independent test. That the choice may be difficult does not render it fundamentally unfair and this fact alone does not support a due process claim. Further, it was undisputed in this case that the police officer delivered to appellant the required implied consent notice in an accurate and timely manner thereby informing appellant of his right to an independent test. Having done so, the State was under no constitutional duty to immediately inform appellant of the results of the State-administered breath test.

Child Molestation; Lesser Included Offenses

Castaneda v. State, A12A0754 (4/30/2012)

Appellant was found guilty of aggravated sexual battery and two counts of child molestation. He claimed that the evidence was insufficient to support the guilty verdict for aggravated sexual battery, and that his conviction for the offense of aggravated sexual battery merged with his conviction for molesting the child in connection with that offense. The Court found that the evidence was sufficient to support the conviction for aggravated sexual battery, but agreed that one count of child molestation merged with aggravated sexual battery.

The evidence showed that Castaneda committed the offense of child molestation under count 2 of the indictment by touching the child's vagina with his hand at the same time that he committed the offense of aggravated sexual battery by penetrating her vagina with his finger. Because, looking at the evidence required to prove each crime, child molestation under count 2 was established by proof of the same or less than all the facts required to establish commission of aggravated sexual battery, child molestation under count 2 was a lesser included offense of aggravated sexual battery and merged into aggravated sexual battery as a matter of fact. Accordingly, the Court held that the conviction and sentence for child molestation under count 2 be vacated and the case remanded to the trial court for re-sentencing.

Firearms Offense

Peppers v. State, A12A0501 (5/3/2012)

Appellant was convicted on two counts of possession of a firearm by a convicted felon. Following the denial of his motion for new trial, he asserted only that the evidence was insufficient to sustain his convictions. The Court found the evidence on the second count of possession of a firearm insufficient and therefore reversed on that part and remanded for resentencing.

The evidence showed that police officers responded to a call that someone shot a dog in front of a child. When officers investigated the matter, they made contact with appellant, who was standing on his front porch. An officer asked appellant if he "had any weapons in the house," and appellant responded "yes," and allowed officers to enter his home. Once inside the home, appellant picked up a .22-caliber rifle "on his left-hand side in the corner of the hallway kind of living room area . . . two to three feet within the residence as [officers] first made entry into the house." Appellant handed the rifle to one of the officers.

Officers then asked appellant "if there were any other weapons in the house." One of the officers testified that appellant led them through the house into a back bedroom on the left side of the home where he showed officers "where the shotgun was, at which time [the officer] didn't let him handle that weapon. [The officer] took possession of it." An officer testified that appellant did not indicate "whose bedroom it was[,]" that there was an older woman in the house, and that he did not "recall ever discussing whose weapons they were." Appellant testified that he "didn't have a gun but [his roommate] had one." He explained that to cooperate with police, he retrieved his roommate's guns. Appellant stated that when officers asked about weapons, he asked his roommate if he could show them to police and the roommate responded that it was "all right" to do so. He explained that the weapons were on his roommate's side of the home, and that although he could access her side of the home, he did not do so. Appellant explained further that he shared the living room with his roommate "and that's all."

Appellant's roommate testified that the rifle and shotgun belonged to her and that she kept them in her bedroom "between [her] bookcase and [her] bathroom." She explained that appellant "never touched [her] guns." The roommate stated further that when she heard appellant tell the officers that he did not have any weapons, she retrieved two weapons she owned from her bedroom and put them by the front door, and that appellant asked her if he could hand the guns to the officers. She explained that she and appellant had separate bedrooms but that they split the rent and bills

Based on the evidence the Court found that it must reverse appellant's conviction for possession of a firearm by a convicted felon based upon his alleged possession of the shotgun. While appellant knew the location of the shotgun, there was no evidence presented that he had actual possession of it outside of possibly handing it to officers at their request, nor was there evidence that appellant was in constructive possession of the shotgun. "A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it. Constructive possession is sufficient to prove possession of a firearm by a convicted felon." The evidence showed two possible scenarios: (1) that appellant asked his roommate for permission to take officers to her room to retrieve the shotgun, and led officers to the roommate's bedroom where they retrieved it; or (2) appellant handed the officers the shotgun that his roommate had placed by the door after hearing officers ask if there were guns in the home. The Court held that neither of those circumstances was sufficient to show that appellant actually possessed or exercised sufficient dominion and control over the shotgun to establish constructive possession.

Prior Crimes; Limiting Instructions

Martinez v. State, A12A0395 (5/1/2012,)

Appellant was convicted of one count each of trafficking cocaine and reckless driving. He contended that the trial court erred in denying his motion in limine to redact references to prior drug trafficking from the statement he made to an officer after his arrest because these references impermissibly placed his character in evidence. After being advised of his *Miranda* rights, appellant made a statement to the officer admitting that he was the driver of the Honda Civic containing four kilograms of cocaine, that he had transported narcotics several times before and that he had pre-arranged prices based upon whether he was to transport cocaine or marijuana. The officer stated that appellant made this statement to explain that he only found out that he was transporting cocaine once officers began trying to stop his car and that is why he tried to escape in a reckless manner. The Court found that the portions of the statement challenged by appellant "were an integral part of a criminal confession, and such statements are not rendered impermissible because the language used therein indicates that the accused has committed another and separate offense."

Appellant also argued that the trial court erred by not giving a limiting instruction to the jury on the references to the prior acts of drug trafficking. The Court found this to be harmless error. The Court stated that even

disregarding appellant's statement regarding his prior acts of drug trafficking, the evidence of his guilt was overwhelming. In addition, the Court noted that the lower court gave the pattern jury instruction on credibility, including language that the jury may consider a witness's credibility.

Speedy Trial; Barker v. Wingo

Watkins v. State, A12A0246 (4/27/2012)

Appellant challenged the denial of his motion to dismiss the criminal charges against him, contending that the four-year delay between his arrest and the ruling on his motion violated his right to a speedy trial under the Sixth Amendment of the United States Constitution. Because the trial court's order was insufficient in allowing the Court to determine whether it abused its discretion in denying the motion, the Court vacated the judgment and remanded for entry of an order including proper findings in accordance with *Barker v. Wingo*, 407 U.S. 514 (1972).

Appellant was arrested on August 17, 2007, and indicted on August 28, 2007 for attempted armed robbery, aggravated assault with the intent to rob, and possession of a firearm during the commission of a crime. On March 23, 2010, the State re-indicted appellant to add charges for aggravated assault with a deadly weapon and two counts of firearm possession by a felon. On July 30, 2010, appellant moved to dismiss the indictment, asserting that the State had violated his constitutional right to a speedy trial, and the trial court denied the motion on August 9, 2011, almost four years after his arrest and a year after he filed his motion to dismiss.

When considering a motion to dismiss on this ground, the court conducts a two-tier analysis. Under the first tier, the court considers whether the delay is long enough to be presumptively prejudicial, and if so, then it considers under the second tier whether the delay constituted a speedy trial violation. In determining whether the delay violated the defendant's speedy trial right, the court considers (1) whether the delay is uncommonly long; (2) the reasons and responsibilities for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant. *Doggett v. United States*, 505 U.S. 647(1992).

The four factors must be considered together, balancing the conduct of the prosecution and the defendant on a case-by-case basis. Here, the trial court failed to make the findings required for the Court to determine whether it properly exercised its discretion. The length of delay is calculated from the date of arrest or other formal accusation to the date on which a defendant's speedy trial motion was granted or denied. The State conceded that the nearly four-year delay was presumptively prejudicial, thus triggering the need for additional analysis. It also conceded that the length of delay was uncommonly long, and should weigh heavily against the State. In considering the reasons for the delay, the trial court noted only that appellant twice failed to appear for scheduled court dates, which resulted in the issuance of two bench warrants and appellant's subsequent arrests, which accounted for approximately six months of delay. Other than this six-month period, however, the trial court's order did not address the causes of the remaining three-and-a-half years of delay or determine how much of the delay should be weighed against either appellant or the State.

Appellant argued that he was prejudiced by the delay because the crime scene became unavailable, he could not locate a witness, and his ability to work was restricted. Again, the trial court made no findings regarding prejudice resulting from delay caused by the State, finding only that appellant's unavailability to assist his counsel when he was incarcerated pursuant to bench warrants "equally contributed to any prejudice" he suffered. Finally, the trial court failed to make even a bare conclusion about how these factors balanced against each other. Considering the trial court's failure to balance the *Barker* factors at all, as well as its failure to address important factual issues such as the reason for most of the lengthy delay, the Court vacated the trial court's judgment and remanded the case to the trial court for proceedings consistent with its opinion.

Restitution

Overby v. State, A12A0087 (5/2/2012)

Appellant pleaded guilty to one count of arson and was sentenced to 20 years on probation. Additionally, the trial court ordered that appellant's probation would be suspended after five years if restitution was paid and, after conducting a hearing on same, ordered that restitution be paid to the victim in the amount of $63,125 in monthly increments of $270. Appellant challenged the trial court's order of restitution, contending that the amount was not supported by fact or law. The Court agreed with the appellant and therefore vacated the court's award and remanded for a new restitution hearing.

The record reflected that appellant pleaded guilty to first degree arson of a dwelling appellant was renting from the victim. Appellant apparently set fire to a sofa in the house, causing damage to the structure. At the restitution hearing, the victim testified that her husband purchased the land and built the home himself in 2001, that she charged between $350 and $500 per month in rent (which was her sole source of income), that she sold the home after the fire for approximately $3,000, and that she only wanted restitution for the loss of the home and rental income. At the end of the hearing, the State requested that the court award the victim the lost value of the home and lost rental income. Thereafter, the court issued an order in which it awarded $63,125 in restitution to the victim, also noting that it regarded the opinion of appellant's expert as unreliable due to his former relation to appellant through marriage.

Appellant contended that the trial court used an improper method to calculate damages, looking to the diminution in value of the subject property as opposed to the cost of repairing the house and, accordingly, that the State presented insufficient evidence of damages because there was no evidence of repair costs. The Court agreed and referenced that the victim claimed only that her house was damaged, not that the house and lot were damaged. Further the Court noted that it is well established that the "[c]ost of repairs is the appropriate measure of damages if the injury is to the building alone," which is a rule that dates back to an 1887 opinion by our Supreme Court. The application of this rule contrasts with situations in which injury is alleged to both a building and the property on which it stands. In such cases, "[t]he correct measure of damages for injury to realty is the difference in the value of the property before and after the injury." There is, however, an exception to the general rule, that being that the measurement of damages by repair or restoration costs is limited when restoring a building to its condition at the time of destruction would

be "absurd." Indeed, "[t]he cost of restoration may not be disproportionate to the diminution in the property's value" and instead "must be reasonable and bear some proportion to the injury sustained."

The Court applied this exception — instead of calculating damages according to diminution in value — when buildings were in poor condition prior to destruction or when they have been completely destroyed, such that repairing or restoring the buildings would result in an inflated measure of damages and thus be absurd. And here, as noted, the victim sought restitution only for damage to her home. Thus, the Court held, the proper measure of damages was the cost to repair the home, unless such an undertaking was absurd, in which case diminution in value would be appropriate. But the State failed to present evidence of repair cost — save the victim's vague testimony that she could not afford to repair the home — and there was likewise no indication that repair of the home would be an absurd undertaking. Instead, the State's evidence focused on the testimony of a tax appraiser who opined as to the diminution in the home's value after the fire. Accordingly, the State failed to meet its burden of proof by presenting insufficient evidence as to the amount of restitution, and the trial court's order must be vacated and the case remanded for a new restitution hearing.

Habeas Corpus; Venue

Hughes v. State, S12A0136 (5/7/2012)

Appellant, serving a 13-year federal sentence at the US Penitentiary in Atlanta, had his sentence enhanced by a State drug-related felony conviction and various misdemeanor convictions that had been previously imposed on him in Cobb County. In May 2008, appellant filed in the Superior Court of Cobb County a petition for habeas corpus relief challenging his Cobb County convictions. On August 9, 2010, the Superior Court concluded that venue for appellant's habeas proceeding was not proper in Cobb County, and that Fulton County was the proper venue, because appellant was incarcerated in a federal prison located in Fulton County. The Court granted appellant's petition for a certificate of probable cause to challenge this ruling, and, for the reasons that follow, the Court reversed.

OCGA § 9-14-43 controls the issue of venue in habeas corpus proceedings. The statute was amended in 2004, and the amendment added the following sentence: "If the petitioner is not in custody or is being detained under the authority of the United States, any of the several states other than Georgia, or any foreign state, the petition must be filed in the superior court of the county in which the conviction and sentence which is being challenged was imposed." The current version of the statute made clear, and the State conceded, because appellant was a federal prisoner who was attempting to challenge his prior Cobb County convictions, venue for his habeas action was proper in Cobb County and not Fulton County. The trial court therefore erred by concluding that Fulton County was the proper venue for appellant's habeas action. The Court held that cases that were decided before the 2004 amendment to OCGA § 9-14-43 that reached results that were contrary to the current version of the statute will no longer be followed, as they have been superseded by the statute. See, e.g., *Capote v. Ray*, 276 Ga. 1 (2) (2002); *Scott v. Wright*, 276 Ga. 12 (2) (2002).