

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 7, 2010

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## THIS WEEK:

- **Right to Jury Trial**
- **Possession of Cocaine; Sufficiency of the Evidence**
- **Prosecutorial Misconduct; Double Jeopardy**
- **Search & Seizure; Gant**
- **Jury Charges; Accident**
- **Restitution; Fair Market Value**
- **Prior Consistent Statements**

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### *Right to Jury Trial*

*Guise v. State, A10A0676*

Appellant was convicted of simple battery as a lesser included offense of family violence battery. He argued that the trial court erred in denying him a trial by jury. The record showed that in February, five months prior to trial, appellant was shown two forms, one of which pertained to his right to counsel and the other, to his right to trial by jury. He signed the first form, indicating his intent to hire an attorney, but he did not sign the form that waived his right to a jury trial. Appellant's retained counsel filed a demand for a trial by jury in March. Nevertheless, a bench trial proceeded on July 16.

The Court held that because the right to a jury trial is a fundamental constitutional right, the burden is on the State to show that the defendant made a knowing, intelligent and voluntary waiver of that right. The State argued that when defense counsel proceeded to a bench trial without objection in appellant's presence, the demand for a jury was effectively

withdrawn. However, the Court found, such a waiver cannot suffice because, when counsel waives a jury trial in the presence of the defendant, the most that can be said is that the defendant voluntarily waived a jury. It still must be shown that waiver was knowingly and intelligently made. To ensure that a defendant has waived his right to a jury trial voluntarily, knowingly and intelligently, the trial court should conduct a colloquy with the defendant himself. But here, a review of the trial transcript reflected no discussion about appellant's waiver of the right to a jury trial. Because no such colloquy was conducted, the Court reversed appellant's conviction and remanded for a new trial.

### *Possession of Cocaine; Sufficiency of the Evidence*

*In the Interest of J.S., A10A0654*

Appellant, a juvenile, was adjudicated a delinquent for possession of cocaine. He contended that the evidence was insufficient to support his conviction. The Court agreed and reversed. The evidence showed that an officer saw a vehicle parked at the end of a store parking lot some distance from the store. One person was sitting in the driver's seat and the other in the back. Another vehicle driven by appellant pulled in next to that car. Appellant got out and into the front passenger seat of the first vehicle. The officer observed nothing in appellant's hands as he went from one vehicle to the other. The officer pulled behind the first car, and appellant "glanced back at [him] and appeared to be hiding something in the console, moving around the console area with his hands." The officer approached the driver of the first vehicle, consent was given to search, and cocaine was found in the center console.

The officer did not observe appellant in physical possession of the cocaine. Appellant had been in the car for two or three minutes when the officer approached; he denied possessing or knowing about the cocaine; and no drugs or drug paraphernalia were found on him. Appellant testified that he was at the store to collect on a debt from a third party. He noticed the driver, was surprised to see him, and got in the car to talk.

The Court held that the only evidence beyond spatial proximity that connected appellant to the cocaine in the console was appellant's act of moving his hand near the console in a manner that appeared to be hiding something. While this circumstantial evidence could support the hypothesis that he had constructive possession of the cocaine contained in the console, it did not exclude every other reasonable hypothesis as to why appellant, who was sitting in the front passenger seat of the car, moved his hand near the car's center console. When the circumstantial evidence supports more than one theory, one consistent with guilt and another with innocence, it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt. Moreover, even when the circumstantial evidence creates a strong suspicion of guilt, mere suspicion is insufficient to support a conviction. Thus, the Court found, the evidence that appellant moved his hand in the area of the closed center console next to where he was sitting did not satisfy the State's burden of excluding every reasonable hypothesis other than that he intended to exercise dominion or control over contraband found within the console. Therefore, the evidence was insufficient to show that he had constructive possession of the cocaine.

### **Prosecutorial Misconduct; Double Jeopardy**

*Brown v. State, A10A0196*

Appellant was indicted for aggravated assault (with a gun), criminal attempt to commit armed robbery, carrying a concealed weapon, and possession of a firearm during the commission of a felony. The trial court granted a motion for mistrial which was based on the prosecutor's questioning of a State witness that resulted in appellant's character being improperly injected into evidence. Appellant then filed a plea in bar which the trial court denied.

Where a mistrial is granted at the request of a criminal defendant, retrial is not prohibited on the basis of double jeopardy unless it is established that the State intended to goad the defendant into moving for a mistrial in order for the State to avoid a reversal due to prosecutorial or judicial error, or otherwise to obtain a more favorable chance of a guilty verdict on retrial. The fact that the prosecutor blundered at trial and the blunder precipitated a successful motion for a mistrial does not bar a retrial. Unless the prosecutor was intentionally trying to abort the trial, his misconduct will not bar a retrial. It doesn't matter that he knows his actions were improper, provided that his aim was to get a conviction. The only relevant intent is the intent to terminate the trial, not the intent to prevail at trial by impermissible means.

Appellant first claimed that the prosecutor attempted to goad him into moving for a mistrial because she asked about appellant being featured on "America's Most Wanted". The State argued that the question was not designed to place appellant's character in issue, but rather to show flight which would evince appellant's guilt. The Court agreed and found the trial court correctly rejected appellant's argument that the direct examination illustrated to some degree the prosecutor's intent to goad the defense into moving for a mistrial.

Appellant also argued that the question that caused the mistrial was another attempt to goad him into requesting the mistrial. During the direct examination of an officer, the prosecutor asked in reference to materials sent to the television show "What picture [of Brown] did you use?" The prosecutor expected an answer that it was the same picture from which the victim identified appellant in a photographic lineup. Instead, the officer replied that it was a photo that he got from the Columbus Police Department. The trial court criticized the prosecutor's question as "very poorly framed" and the officer's answer as displaying a "lack of sophistication in regards to testifying about the particular pictures and/or the lineup." Nevertheless, the trial court accepted the prosecutor's explanation, thereby rejecting appellant's argument. The Court therefore concluded that the record contained evidentiary support for the trial court's determination that the prosecutor's direct examination of the officer did not show that the prosecutor was intentionally trying to abort the trial.

### **Search & Seizure; Gant**

*Grimes v. State, A10A0156*

Appellant was convicted of possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer stopped at a local convenience store. The clerk told the officer that appellant had been outside "fiddling" on a car for the last couple of hours. The officer went to investigate. He asked appellant for identification. Appellant showed him a traffic ticket. The officer subsequently learned that appellant's license was suspended. A sheriff's deputy arrived on the scene. He stated to the officer that he saw appellant drive up in the vehicle appellant was working on. The officer arrested appellant and placed him in his patrol car. The officer then searched the vehicle and found the methamphetamine in a fanny pack on the front seat.

Appellant first contended that the arresting officer lacked reasonable suspicion to stop and then detain him in the parking lot as required under *Terry v. Ohio*. The Court disagreed. It found that the officer's approach was nothing more than a first tier encounter with appellant. The Court found no evidence that the arresting officer, or the sheriff's deputy who arrived immediately before appellant was arrested, physically touched appellant, displayed a weapon, activated the lights or siren on his respective patrol car, or used language or a tone of voice reflecting that compliance from appellant was compelled prior to his arrest.

Appellant also argued that the methamphetamine should have been suppressed because the officer's search of his vehicle was not a proper search incident to arrest under the recent case of *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 SC 1710, 173 LE2d 485 (2009). In *Gant*, the Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment warrant requirement applies only to situations (1) where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or (2) where "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Nevertheless, even if the requirements imposed by *Gant* for a valid search incident to arrest are not satisfied, a warrantless search of a vehicle still may be valid under another Fourth Amendment exception, such as the exception for inventory searches. The Court

found that this case involved a search of an automobile following an arrest, and, therefore, fell within the scope of *Gant*, unless the search was a proper inventory search. Since *Gant* was decided after the trial court denied appellant's motion to suppress, after the trial on the merits, and after appellant filed his notice of appeal, the trial court's denial of the motion to suppress must be remanded for rehearing by the trial court in light of *Gant*.

## **Jury Charges; Accident**

*Arnold v. State, A10A0088*

Appellant was convicted of two counts of aggravated assault and one count of aggravated battery. The evidence showed that appellant and the two victims, boyfriend and girlfriend, were in appellant's camper. Appellant earlier in the day asked the boyfriend if he was willing to die for the girlfriend. Appellant first told the girlfriend that he had put something in her drink and had 10 minutes to live. He then started counting down. Then he picked up a shotgun and pointed it at the girlfriend. The boyfriend pushed the weapon away twice. On the third time, the weapon went off, injuring both victims.

Appellant contended that the trial court erred in not sua sponte giving a charge on accident because it was his sole defense. Under OCGA §16-2-2: "A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence." Accordingly, the Court said, unless there was evidence to support a finding that appellant acted without any "criminal scheme or undertaking, intention, or criminal negligence," there was no error in the trial court not giving, sua sponte, a charge on the defense of accident. Here, the evidence showed that appellant, having consumed alcohol and with the intent to show the girlfriend that her boyfriend would die for her, counted down the minutes until he picked up a shotgun and intentionally stood within a few feet of the two of them. Although appellant contended that, absent evidence that he pointed the gun at the victims or threatened them, the jury could find that the gun accidentally discharged, even if appellant did not intentionally fire the shotgun, his admitted acts constituted criminal negligence rendering the defense of accident inapplicable.

## **Restitution; Fair Market Value**

*Browning v. State, A10A0027*

Appellant entered a negotiated guilty plea to theft by receiving stolen property (a vehicle). Following a hearing, she was ordered to pay restitution in the amount of \$4,330.17, at the rate of \$100 a month. She argued that the restitution order was unsupported by competent evidence. OCGA § 17-14-7 (b) provides that "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the state." Pursuant to OCGA § 17-14-9, the amount of restitution ordered may be equal to or less than, but not more than, the victim's damages. And as used in this context "'(d)amages' means all special damages which a victim could recover against an offender in a civil action . . . based on the same act . . . for which the offender is sentenced." OCGA § 17-14-2 (2). A determination of the amount of damages must be based upon fair market value, which must be determined exactly.

Here, a State Farm employee testified that the insurance company was seeking to recover \$4530.17 in restitution. The employee testified that this figure was derived by taking the total pay out to the insured of \$8340.17, which included \$7066.50 for the stolen vehicle, \$200.00 for items inside the car when it was stolen, and \$573.67 for a rental car, and then deducting from that amount the net amount the insurance company received when the car was recovered and sold at auction. The witness further testified that the amount paid to the insured was based on the National Automobile Dealers Association ("NADA") retail value of the car, plus tax and tag.

Appellant argued that the State failed to prove fair market value and the Court agreed. The witness did not participate in the valuation of the vehicle and no evidence was presented concerning the condition of the vehicle at the time it was stolen. Moreover, no evidence was presented that the condition of the vehicle was considered in determining the value of the vehicle, which appeared to be based totally on the vehicle identification number. Although as the trial court noted, the insurance company was forced to value the vehicle before it was recovered, this did not prevent the State from introducing evidence, such as testimony from the victim or others with such knowledge,

concerning the condition of the vehicle at the time of the theft. Further, no explanation was offered concerning the discrepancy between the NADA value and the amount received for the vehicle at auction. Thus, the Court found, the State failed to carry its burden of properly establishing the value of the vehicle, and that the restitution award must be reversed and remanded for a proper determination.

## **Prior Consistent Statements**

*Davis v. State, A10A0868*

Appellant was convicted of statutory rape and child molestation. The victim was his 13 year old stepdaughter. The evidence showed that he impregnated the victim and admitted this to the victim's mother. Appellant contended the trial court erred in allowing an investigator to testify, after the mother testified that appellant admitted to her that he molested the victim, that the mother had told him (the investigator) the same thing. The Court stated that a witness's prior consistent statement is admissible at trial

only where (1) the veracity of a witness's trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination. A witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. To be admissible to refute the allegation of recent fabrication, improper influence, or improper motive, the prior statement must predate the alleged fabrication, influence, or motive. Here, the mother testified at trial and was cross-examined. In addition, appellant placed her veracity in issue during cross-examination by attempting to show that she had an improper motive for testifying against him, a motive that developed after she made the prior consistent statement to the investigator. Consequently, the trial court did not err in subsequently allowing the investigator to testify regarding her prior consistent statement.