

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 15, 2012

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THIS WEEK:

- **Search & Seizure**
- **Identification**
- **Interview Techniques; Character**
- **Prostitution; Hearsay**
- **Severance; Character Evidence**
- **Statutory Rape; Evidence of Age of Victim**

Search & Seizure

Conrad v. State, A12A0070 (6/8/2012)

Appellants, Conrad and Presnal, were convicted of VGCSA. Appellants challenged the trial court's denial of their motion to suppress drug evidence found in each of their bedrooms during the execution of a search warrant. Appellants contended that the warrant and the search failed to comply with the particularity requirement of the Fourth Amendment, which requires that the warrant particularly describe the place to be searched. The evidence showed that an officer in the narcotics unit launched an investigation, including conducting several 'trash pulls' at appellants' residence, which had a street address of "53 West James Circle." The magistrate issued a search warrant for "the residence located at 53 West James Circle." The dwelling had an outward appearance of a single-family ranch-style house. There was a single mailbox out front, which displayed "53," without any subunit delineation; a single driveway that led to the house; and a single set of adjacent double doors at the sole front entrance. The property was owned by Presnal's mother, who lived there, as did both appellants. The inside of the dwelling was divided by a wall, except that a common area across the front

of the house allowed access between the two sides without going outside. The residential structure had been Presnal's childhood home, and he confirmed that the two sides of the house had previously carried an address with subunit designations, "A" and "B"; and that there had once been two water meters for the residential structure. But his mother had since made changes, and the property no longer carried subunit designations; by (at least) the date of the search, the property had only one water meter, one mailbox, and even one common garbage can that was used by all the residents.

Appellants argued that their residence was a duplex, thus comprised of subunits, and the warrant was insufficient because it did not grant permission to search any particular subunit, only describing the place to be searched as "the residence located at 53 West James Circle." The Court disagreed. Under the particularity requirement of the Fourth Amendment, the general rule is that a search warrant for an apartment house or hotel or other multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately. The Court held that the warrant met two of the three exceptions to the Fourth Amendment particularity requirement: the affidavit accompanying the search warrant application enabled the magistrate to come to a practical, common-sense conclusion that there was a fair probability that evidence of drug crimes could be found in either the mother-in-law's suite or the main part of the residential structure and that appellants had access to the entire residential premises, creating probable cause to search each unit and to believe that the targets of the investigation had access to the entire structure. Importantly, the affidavit

contained the investigating officer's research into the property's tax status, specifically, the property owner's statement to the local Tax Assessors Office that all areas of the residence are accessible from anywhere else in the residence. Therefore, the Court held that the warrant was sufficient to support the search of the residence.

Identification

Tucker v. State, A12A0575 (6/6/2012)

Appellant was convicted of burglary and interference with government property. Appellant argued that the trial court erred in failing to suppress evidence of a pre-trial identification of him as one of the two men involved in the burglary. The Court found no error and affirmed. The evidence showed that when the victims left their house, the back door of the house and the windows surrounding it were closed and locked. Later that day the victims' neighbor observed two young men walking up the victims' driveway, noting that one of the men had dreadlocks and the other man was taller, with short hair. The neighbor saw both men walk to the side door, open it and go in. The neighbor dialed 911 while he went outside to watch the men and remained on the phone as he watched both men exit the house, walk up the driveway and then up the street. The neighbor followed approximately 35 to 40 yards behind the men and at one point the men left the street and cut through some yards toward a street called Woodward Circle. The neighbor stated that the men were wearing jackets with hoods, one of which was white with either blue or black on it. The men had their hoods up when the neighbor first saw them, but they took the hoods off as they walked up the victims' driveway. The police arrived approximately 15 minutes after the neighbor called. Approximately 10 minutes after police arrived, the officers drove the neighbor to Woodward Circle and asked him if he could identify two men who were standing there. One of the men had dreadlocks and the other was taller, with shorter hair; neither was wearing a jacket at the time. The neighbor, who stayed seated in the patrol car, identified them as the two men he had seen go into the victims' house. At trial, the neighbor-witness identified appellant as the man he saw that day with dreadlocks.

Appellant asserted that the show-up procedure was impermissibly suggestive, and that

the trial court erred in denying his motion to suppress. The Court explained that it must first determine whether the showup was impermissibly suggestive, and, if it was, the Court would then consider the totality of the circumstances to determine whether a very substantial likelihood existed of irreparable misidentification. With regard to part one of the test, the Court stated that on-the-scene showup identifications, like the one in the present case, are often necessary due to the practicabilities inherent in such situations. Thus, as long as this type of showup is reasonably and fairly conducted at or near the time of the offense, it is not impermissibly suggestive and the Court need not reach the second part of the test.

The Court stated that even if it were to assume, without deciding, that the circumstances surrounding appellant's identification rendered the showup impermissibly suggestive, the evidence is inadmissible only if under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. The Court found no such substantial likelihood in this case. The crime occurred in the daylight and the neighbor observed the men from the time they first approached the house and followed them up the street until they turned. The description provided by the neighbor was fairly detailed with regard to the hairstyles and relative height of the two men, which matched appellant and his passenger. The showup occurred within one-half hour of the neighbor first placing a call to police, and the neighbor identified the two men readily even though they were not wearing the hooded jackets at the time. Under these circumstances, the Court held that the trial court was not clearly erroneous in finding the neighbor's identification sufficiently reliable to be admitted at trial.

Interview Techniques; Character

Brown v. State, A12A0713 (6/7/2012)

Appellant was convicted of cruelty to children in the first degree. The evidence showed that appellant and her 22-month-old child were staying with appellant's boyfriend. At some point during the stay, appellant's boyfriend told the child to be quiet because he had a headache and wanted to go to sleep. When the child did not comply, appellant's boyfriend grabbed the child by his right

arm, carried him over his shoulder into the kitchen, and began striking the child with a belt. Appellant could hear her boyfriend yelling at her child and striking him as the child cried, but did not intervene. A few hours later, appellant woke up to the sound of her child crying as if he was hurt. The child indicated that his arm hurt, and appellant noticed that he had welts on his body. Instead of seeking medical attention for the child, appellant dropped the child off at a friend's home and then returned to her boyfriend's residence. A day and a half later, appellant took the child to a local hospital, where he was examined by an emergency-room physician. The physician believed that the child may have suffered soft tissue damage to his right shoulder. Based on the fact that the child's injuries were consistent with him having suffered physical abuse, the physician contacted the police and the local Department of Family and Children Services ("DFCS"). The police officer who was called to the hospital testified regarding his investigation of the matter and regarding his interview of appellant, in which she admitted to being aware that her boyfriend had beaten her child with a belt. The unredacted, digitally recorded video of that interview was entered into evidence and played for the jury.

Appellant contended that the trial court erred in denying her motion in limine to redact portions of the digital video recording of her interview by police, arguing that the coarse and inflammatory language directed toward her by the interrogating officer should have been redacted because it was irrelevant and prejudicial. The Court disagreed. During the latter part of the recording of appellant's interview by the investigating police officer, the officer, who was obviously unsatisfied with appellant's responses, began raising his voice and using profanity. The officer specifically questioned appellant's abilities as a mother and, at one point, stated that he would likely find the child's body in a dumpster one day if the child was ever reunited with appellant. The Court held that the officer's comments during the interrogation did not amount to sworn testimony or opinion testimony and did not require exclusion because the probative value outweighed the prejudicial effect. Such comments should only be excluded if the probative value of the comments is outweighed by their tendency to unduly arouse the jury's emotions of prejudice, hostility or sympathy.

Here, the Court noted, the officer's inflammatory language had probative value because it led to appellant admitting that she heard her boyfriend striking the child and heard the child crying but did not intervene. Conversely, the prejudicial effect was minimal because the officer arrested appellant at the end of the interrogation, which indicated that he believed appellant had not properly cared for the child. Accordingly, the trial court did not abuse its discretion in admitting the unredacted recording of appellant's interview.

Appellant also maintained that the trial court erred in denying her motion in limine to exclude evidence that she continued her relationship with her boyfriend even after the boyfriend's abuse of appellant's child, arguing that such evidence impermissibly placed her character into evidence. The Court found this argument unavailing, holding that evidence which is relevant to an issue in a case is not rendered inadmissible by the fact that it incidentally puts the defendant's character in issue. Here, the DFCS caseworker who investigated the matter testified that appellant chose to continue living with the boyfriend —the very person who had abused her child—even though doing so defied the safety plan that the caseworker established and, therefore, hurt appellant's chances of being reunited with her child. The caseworker's testimony was relevant to show the State's theory as to appellant's state of mind close in time to the incident of abuse: that appellant valued her relationship with her boyfriend more than she valued the safety and well-being of her own child. Accordingly, the trial court did not abuse its discretion in denying appellant's motion in limine to exclude such evidence.

Prostitution; Hearsay

Smoot v. State, A12A0627 (6/5/2012)

Appellant was convicted of keeping a place of prostitution. Appellant contended that there was insufficient evidence to support her conviction, and that the trial court erred in overruling her objections to the admission of certain evidence. The evidence showed that after receiving complaints from the community about suspicious activity, two police officers conducted surveillance of a residence where appellant and several other women lived. During the surveillance of the residence, officers observed a car pull into the

driveway. An unidentified male got out of the car, entered the residence, remained inside for a short period of time and then left in his car. A traffic stop was initiated and based on what the driver told the officers, the officers and a police lieutenant conducted an independent investigation of certain websites by personally viewing their content. They reviewed advertisements posted on Backpage.com and Craigslist.org, in addition to a separate website with the URL address of www.ifsheiwontiwill.com (the "Ifsheiwontiwill website"). The officers and lieutenant later testified that the Ifsheiwontiwill website included photographs of appellant, and the advertisements posted on Backpage.com and Craigslist.org listed contact phone numbers linked to appellant. Based upon the content of the web pages and their interview of the male driver, the officers applied for and obtained a search warrant for the residence. Upon entry, police found several occupants in the residence, including appellant.

At trial, the court allowed the State to introduce into evidence, over objection, the affidavit that the officer submitted in applying for the search warrant. Among other things, the affidavit stated that the police had received complaints from "Concerned Clayton Community DEMANDING Change" that "OPEN PROSTITUTION" was occurring at appellant's residence, and further stated that the neighborhood group had provided police with "over 25 vehicle descriptions" of cars that had been seen coming and going from the residence for purposes of prostitution. The trial court ruled that the affidavit was admissible because it constituted original evidence that was introduced not to prove the truth of the matters asserted in it, but to explain to the jury why the officers were investigating the residence. The trial court also allowed the affidavit to go out with the jury during its deliberations.

Appellant maintained that the trial court erred in ruling that the search warrant affidavit, which contained hearsay statements from the neighborhood group purportedly linking her residence to prostitution, was admissible as original evidence to explain to the jury why the officers were investigating her residence. Appellant also contended that the trial court erred in ruling that the State could introduce the document that the neighborhood group submitted to the police as original evidence to explain to the jury why the officers were investigating appellant's residence, given

that the document claimed prostitution was occurring at appellant's residence and listed numerous vehicles that the group had seen coming and going from there over several days. Appellant further maintained that the error in admitting the affidavit was harmful and should result in the reversal of her conviction for keeping a place of prostitution. The Court agreed. Here, there was no necessity justifying the introduction of the search warrant affidavit containing hearsay from the neighborhood group nor was there any necessity justifying the introduction of the document that the neighborhood group submitted to the police because the police are expected to investigate crimes, and no explanation of that fact is needed. Accordingly, the Court held that the trial court committed reversible error in allowing the State to introduce into evidence the search warrant affidavit and the document submitted to the police by the neighborhood group, the introduction of which effectively allowed appellant to be tried based on rumor, gossip, and speculation.

Appellant also argued that the trial court erred in admitting printouts from Craigslist.org because (a) the State failed to lay a proper foundation for their admission and (b) the content of the printouts constituted inadmissible hearsay. These printouts were introduced through the police lieutenant, but there was no testimony from her that the printouts fairly and accurately represented the contents of the website she personally viewed as part of her investigation. Accordingly, the State failed to elicit testimony sufficiently authenticating the printouts from Craigslist.org, and the trial court abused its discretion in admitting those printouts into evidence.

Appellant asserted that there was insufficient evidence to convict her of keeping a place of prostitution because the State failed to prove beyond a reasonable doubt, with competent evidence, that her residence was being used for the purpose of prostitution. The Court agreed. Given that the State's case against appellant for keeping a house of prostitution was entirely circumstantial, and in light of the highly inculpatory hearsay statements contained in the search warrant affidavit, the Court cannot say that admission of the affidavit was harmless. Consequently, appellant's conviction for keeping a house of prostitution was reversed. Moreover, the remaining competent evidence was insufficient to support appellant's conviction,

and thus double jeopardy principles preclude her from being retried for that offense.

Severance; Character Evidence

Jackson v. State, A12A0679 (6/7/2012)

Appellant was convicted of aggravated assault on a law enforcement officer. The record showed that in the same indictment, a grand jury charged appellant with the commission, in 2007, of three counts of aggravated battery and one count of aggravated assault during a fight at a restaurant; and with the commission, in 2008, of one count of aggravated assault on a law enforcement officer attempting to arrest him for the crimes allegedly committed in 2007. Appellant was convicted of the 2008 aggravated assault on a law enforcement officer, but was acquitted of the remaining counts from 2007. Appellant challenged the denial of his amended motion for a new trial, alleging that the trial court erred in denying his motion to sever the counts and in not granting a mistrial. The Court found no error and affirmed.

The evidence showed that in 2007, an officer, while working extra duty at a restaurant, heard someone yelling that there was a fight in the parking lot and immediately after heard a gunshot. The officer found the victim lying wounded on the ground. The victim identified appellant as the shooter. A warrant was issued for appellant's arrest in connection with the shooting, and appellant was the subject of a "BOLO" alert. In 2008, but only about two months after the shooting, another officer responded to a call that appellant had been seen at an area apartment complex. That officer testified that appellant attempted to flee in a vehicle driven by another person. When a traffic stop was initiated, appellant pointed a gun at the officer. Appellant was arrested and a 9 millimeter handgun was found during a search of the vehicle.

Appellant contended that the trial court erred in denying his motion to sever the 2008 count of aggravated assault against the officer from the 2007 counts regarding the alleged crimes against the shooting victim. The Court stated that a defendant has a right to severance where the offenses are joined solely on the ground that they are of the same or similar character because of the great risk of prejudice from a joint disposition of unrelated charges. However, where the joinder is based

upon the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, severance lies within the sound discretion of the trial judge since the facts in each case are likely to be unique. A trial court does not abuse its discretion in denying a severance of counts where evidence of one charge would be admissible in the trial of another. The Court concluded that in this case, the offenses were a connected series of acts. Evidence of appellant's flight from the officer in 2008 would be admissible to show consciousness of guilt at a separate trial on the 2007 aggravated assault and aggravated battery incident. Evidence of the 2007 charges would be admissible in a separate trial on the 2008 charge to show the lawfulness of the traffic stop from which appellant attempted to flee. Additionally, since the 2008 aggravated assault charge was a result of appellant's pointing a gun at the officer as he attempted to flee and evade arrest for the charges related to the 2007 incidents, the trial court did not err in its refusal to sever because although the charges related to different crimes that occurred in different locations, one was a circumstance of the arrest for the other. Severance is a matter for the trial court's discretion, and severance should generally be granted if it is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense, considering whether in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Here, there was no evidence that the jury confused the aggravated battery and aggravated assault charges from the 2007 incident with the aggravated assault on the officer in 2008, as it found appellant not guilty of the former, but convicted him of the latter. Accordingly, the Court found no error.

Appellant also argued that the trial court erred in denying his motion for a mistrial after a witness testified about appellant's felony and probation warrants, alleging that the testimony impermissibly put his character into evidence. The record showed that defense counsel moved in limine to exclude evidence of federal charges against appellant, and that the State represented to the court that she had instructed officers not to mention the federal issues in their testimony. However, when the witness was asked on direct examination what

the warrants for appellant were for, he made a brief reference to "felony or probation warrants. I think federal probation warrants." The trial court denied the motion for mistrial and strongly cautioned all the officers who would testify not to discuss federal or probation warrants. The trial judge then gave curative instructions to the jury, outlining the only issues they were to consider and asking them to "wipe" the officer's testimony from their minds. When the trial judge asked jurors to raise their hands if they were unable to wipe the officer's testimony from their minds, none did so. The Court stated that where, as here, no details were given about the warrant or charge, the comment was fleeting and incomplete, the witness was immediately redirected before his testimony continued, and curative instructions were given, refusal to grant a mistrial was not an abuse of discretion.

Statutory Rape; Evidence of Age of Victim

Baker v. State, A12A0632 (6/6/2012)

Appellant was convicted of statutory rape and was acquitted on counts of interstate interference with child custody (OCGA § 16-5-45) and battery. Appellant asserted that the trial court erred in excluding evidence suggesting the victim had lied or been deceptive about her age. He also contended the trial court erred with regard to a jury charge and a transcript of a 911 call. The evidence showed the victim was a 14-year-old Florida resident who frequently ran away from home without permission. The victim met appellant on the internet and asked him to come to Florida to pick her up, which he did. They returned to appellant's home in Georgia and engaged in sexual intercourse multiple times. The victim got homesick and called her father, who picked her up from a bus station in Atlanta. A few months later, the girl again asked appellant to come get her, which he did, and the couple returned to his residence in Georgia and again had sexual intercourse. Appellant admitted to officers that he had sexual intercourse with the girl on both visits. The Court affirmed appellant's conviction for statutory rape, holding that his admission to having sexual intercourse with the 14-year-old victim supported it.

The trial court granted the State's motion in limine to prohibit any evidence relating to appellant's knowledge of the age of the victim,

or evidence that the victim misled appellant about her age, as well as any impeachment based on evidence that the victim misled anyone about her age. Appellant admitted the trial court's ruling was correct as to Count 1- statutory rape, but he argued the trial court erred because the evidence was relevant to Count 2- interstate interference with child custody - and was therefore admissible. Despite being acquitted on Count 2, appellant argued the issue was not moot and that the evidence was harmful because the State attempted to suggest that he knew the victim was under the age of consent, arguably in violation of the ruling on the motion in limine, and that this information could have prejudiced him in the mind of the jury with regard to the charge of statutory rape. Thus, he argued, the State was able to imply that he knew the victim was under age, but he was prohibited from showing that she misled him in that regard.

The Court concluded that appellant did not show that any possible error was harmful. The primary information appellant contended was erroneously admitted consisted of statements made by the prosecutor during her opening statement and closing argument, and the jury was instructed that openings and closings are not evidence. The remainder of the information appellant contended was erroneously admitted in favor of the State consisted of the circumstances surrounding appellant's sexual encounter with the girl, such as that she did not have permission to leave Florida with him and that the parents did not know she was with him. It would have been within the trial judge's discretion to admit these facts as a part of a stand-alone trial on statutory rape. The State is entitled to present evidence of the entire *res gestae* of the crime. Appellant was able to significantly attack the victim's credibility anyway: the evidence showed that she changed her story about what happened in several ways, including that she withdrew assertions that their sexual encounters had been forced. Accordingly, the Court found appellant's argument regarding harm to be without merit, and therefore there was no possible reversible error by the trial court in granting the motion in limine.