

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 12, 2011

## Legal Services Staff Attorneys

**Stan Gunter**  
Executive Director

**Chuck Olson**  
General Counsel

**Joe Burford**  
Trial Services 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:

- **First Offender Statute**
- **Photographs**

---

---

---

### **First Offender Statute**

*Higdon v. State* A11A0926; A11A0927;  
A11A0928; A11A1027 (7/27/2011)

Appellant was charged with numerous offenses on four separate charging instruments (three accusations and one indictment). The offenses ranged from deposit account fraud to burglary to theft by taking. He entered guilty pleas on the offenses set forth in the four separate charging instruments and the court sentenced him in four separate judgments. He challenged the denial by the court to consider giving him first offender treatment on all the charges. The trial court offered to give him first offender on one charging instrument, but not all. Appellant refused the offer.

OCCA § 42-8-60 provides in part that “[n]o person may avail himself or herself of this article on more than one occasion.” The Court found that the most reasonable interpretation of the legislature’s intention is that “one occasion” of first offender treatment means for one or more offenses set forth in one charging instrument for one trial, or for one or more offenses set forth in multiple charging instruments consolidated or joined for one trial. In other words, “one occasion” of first offender treatment means in a single prosecution of related offenses. There being no evidence that any of the accusations or the indictment at issue were consolidated or joined for prosecution in a single trial, the trial court correctly concluded that each accusation and the indict-

ment represented “one occasion” for purposes of first offender sentencing, and that it could consider giving appellant first offender treatment in one case but not all four.

### **Photographs**

*Washington v. State*, A11A1141 (7/27/2011)

Appellant was convicted of burglary and carrying a concealed weapon. He argued that the trial court erred in admitting a photograph into evidence. As a general rule, before a photograph may be introduced in evidence, it must be authenticated by a showing that it is a fair and truthful representation of what it purports to depict. The quantum of evidence required to sufficiently identify photographs as true and accurate representations of what they purport to depict is a matter to be left within the discretion of the trial court. The photograph depicted items allegedly taken in the burglary. The victim identified a ring and a necklace as his, but stated that the cellphone in the photograph looked like his but was not his. One of the officers who participated in the search testified that the photograph was a fair and accurate description of what he observed. The Court held that because this testimony satisfied the basic foundational requirements, the trial court did not err in admitting the photograph. The fact that the victim testified that the cell phone was not his went to the weight, not the admissibility, of the photograph.