

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 19, 2011

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## THIS WEEK:

- **Search & Seizure**
- **Statements**
- **Restitution**
- **Similar Transactions; Voir Dire**

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### **Search & Seizure**

*Morrow v. State, A11A0905 (7/29/2011)*

Appellant was convicted of manufacturing marijuana and trafficking in marijuana. The evidence showed that based on a tip, appellant's home was searched by law enforcement officers pursuant to appellant's Fourth Amendment waiver. He contended that the trial court erred in denying his motion to suppress because 1) the Fourth Amendment waiver in his special condition of probation did not waive his rights under the Georgia Constitution; and 2) the search was improperly conducted by a law enforcement officer rather than his probation officer.

Appellant's Fourth Amendment waiver stated that he "[s]hall submit to a search of his/her person, houses, papers, and/or effects as these terms of the Fourth Amendment to the United States Constitution are defined by the Courts, any time of day or night, with or without a search warrant, whenever requested to do so by a probation officer, and he/she specifically consents to the use of anything seized as evidence in any judicial proceedings or trial." The Court stated that the question was not whether the Georgia's Constitution provides protection against unlawful searches

and seizures, but whether the right was validly waived by appellant when he waived his rights pursuant to the special condition of probation. The Court acknowledged that it has recognized greater protection under the Georgia Constitution than under the federal Constitution in a number of areas, but appellant failed to cite "case law demonstrating that the Fourth Amendment of the Georgia Constitution affords greater protection than provided by the federal constitution under the circumstances presented in the case at bar." Therefore, appellant was aware of the rights he was waiving when he bargained for his plea. Additionally, as the trial court noted, a careful reading of the special conditions of probation indicates that the sentencing court's reference to the Fourth Amendment under the federal constitution was merely illustrative of the category of rights being given up by appellant.

Appellant also argued that the trial court erred in denying his motion to suppress because the search of his person and his home was conducted by a law enforcement officer, not by a probation officer, as required by the special condition of probation. However, the Court found, the record revealed that at all relevant times, the Narcotics Unit investigators were authorized by the probation officer to conduct the search. The investigators contacted the probation officer to verify that appellant was a probationer, worked with the probation officer to locate appellant, and obtained permission from the probation officer prior to making contact with him. Further, the probation officer was present during the search of appellant's basement, which revealed the marijuana growing system. Thus, the search of appellant's person and home was authorized by the probation officer and this issue was without merit.

## Statements

*Frazier v. State, A11A0196 (7/12/2011)*

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a crime. He contended that his statements to law enforcement were involuntary because of his intoxication during the interrogation. The issue arose on retrial after appellant succeeded in overturning his first conviction because his statements were obtained in violation of *Miranda*. The trial court on remand found that the statements, being voluntary, could be used for impeachment purposes if appellant testified. Appellant did not testify at his second trial and he was again convicted. Appellant argued that he was denied his constitutional right to testify because of the trial court's ruling on the voluntariness issue.

Although a statement obtained in violation of *Miranda* may not be used in the prosecution's case-in-chief, it may be used to impeach the defendant's credibility if its trustworthiness meets legal standards. This test means that a court must find that the statement is voluntary under traditional due process analysis. The burden is on the prosecution to show the voluntariness of a custodial statement by a preponderance of the evidence and voluntariness is determined based upon the totality of the circumstances. The mere fact that a defendant was intoxicated at the time of the statement does not render it inadmissible. Here, appellant maintained that the videotape reflected the "effects of the copious amount of alcohol" he consumed, that he was "drunk," and that he "exhibited poor physical and mental coordination." But, the Court noted, neither the videotape nor a transcript of it was included in the appellate record. Since the trial court viewed the videotape, its findings must be accepted by the Court since the Court was unable to determine whether those findings were clearly erroneous.

## Restitution

*Coile v. State, A11A0968 (8/4/2011)*

Appellant was convicted of felony theft and ordered to pay restitution. He contended that the trial court erred in setting the amount at \$1,000.00 because he did not cause the damage to the property. The evidence showed that copper wiring and aluminum siding were

stripped from a building and stolen. Appellant claimed that he saw the wiring and siding sitting on the property and he did steal it, but he did not damage the property by stripping it from the building and therefore there was insufficient evidence that he caused the \$1000.00 damaged the property.

The Court stated that because the amount of restitution to be paid is based upon the victim's civil damages, the sufficiency of evidence to support an order of restitution is measured by the civil standard of preponderance of the evidence. Given the evidence in this case, the trial court did not err in concluding that appellant's claim that someone else had caused the damage to the building before he arrived lacked credibility and in finding, instead, that appellant had stripped the materials from the building while in the process of committing the theft.

## Similar Transactions; Voir Dire

*Bell v. State, A11A0118 (7/5/2011)*

Appellant was convicted of rape. He first contended that the trial court erred in admitting as a similar transaction evidence of a 1996 rape that went to trial and upon which he was acquitted. When prosecuting an independent crime, use of evidence of a prior offense is generally inadmissible. It may be admitted, however, if there is some logical connection between the two from which it can be said that proof of the one tends to establish the other. However, evidence of prior criminal misconduct on the part of a defendant which would otherwise be relevant and admissible to prove identity, motive, bent of mind, or course of conduct is rendered inadmissible under the doctrine of collateral estoppel where the defendant has been tried and acquitted of the alleged prior offense. Although some jurisdictions have adopted a per se rule prohibiting any evidentiary use of independent offenses where an acquittal was obtained, our courts have not. Instead, the application of collateral estoppel requires an examination of what facts were in issue and necessarily resolved in the defendant's favor at the first trial.

In the 1996 trial, appellant admitted performing the act but denied that he acted with the intent to rape, instead claiming consensual sex. Thus, his identity and the fact he performed the acts were not in dispute and not

necessarily resolved in his favor. That he acted with the intent to rape was an issue resolved in his favor. Here, appellant claimed that he did not know the victim, and had not raped her; thus identity was one of the purposes for which the State sought to have the similar transaction evidence admitted. The State presented evidence that in the 1996 case, appellant approached the victim, and after being rebuffed, forced her to go with him to an abandoned building where he then had sex with her, which the State argued was similar to the modus operandi alleged in the present case. Identity was not an issue in the 1996 case, as appellant had claimed the act was consensual. Thus, as identity and commission of the act were not at issue in the first trial, the prior transaction evidence was proper and not foreclosed by collateral estoppel, and the evidence of the prior transaction was admissible.

Appellant also contended that the trial court erred in denying the motion for mistrial that he made after a question from a prospective juror. During voir dire, the juror stated that he had heard of a person named James Bell who was accused of a previous sexual assault in another county, and asked if it was the same person because the victim in that assault was his grandmother. The State responded: "Your grandmother is [name omitted]?" To which the juror responded: "My grandmother is Ardella [name omitted]." When questioned if he knew James Bell, the juror responded that he did not, but wondered if it was the same person. The State then responded: "I can't go into the past. That's what the judge was getting at and that's what I'm getting at. We can't talk about what happened in the past, just talking about today. The juror was then asked whether his relationship with his grandmother would affect his ability to be fair and impartial, he responded that "I would hope so. I guess I could because I don't know James Bell. I can't say that I know him."

The Court found that due process requires a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Here, although the prospective juror at issue said he was not sure if the defendant was the same James Bell accused of raping of his grandmother, rather than leave the questioned unanswered, and move on to another juror,

the State elicited more information from the juror. Specifically, the State asked if the juror's grandmother was "[name omitted]" thereby providing the other prospective jurors with the name of another alleged rape victim in a crime for which Bell was not on trial. Moreover, the trial court did not undertake any measures to ascertain what, if any, impact the remark had on the panel's ability to decide the case. The State elected not to use evidence of that alleged rape as a similar transaction, and thus it is not a circumstance in which the jury would have heard the incriminating evidence during the trial. The Court found that this evidence was inherently prejudicial and deprived appellant of his right to begin his trial with a jury free from even a suspicion of prejudice or fixed opinion. The trial was thus tainted from the beginning, and appellant's conviction was accordingly reversed.