

WEEKLY OPINION SUMMARIES
OPINIONS FROM THE WEEK OF JANUARY 10-14, 2005.

United States Supreme Court:

*United States v. Booker, No. 04-104, 2005 U.S. LEXIS 628 (January 12, 2005). (Together with United States v. Fanfan, No. 04-105).

In Booker and Fanfan, the US Supreme Court considered two drug cases on certiorari from two federal circuit courts of appeal. Booker was convicted of possession with intent to distribute cocaine, and under the federal sentencing guidelines, the trial judge increased his sentence by eight years. In a sentencing hearing after the jury's verdict, the judge found by the preponderance of the evidence that Booker had 560 grams of crack (rather than the 92 grams of cocaine for which he was found guilty by the jury). In Fanfan's case, there were similar factors by which the judge could have enhanced his sentence by up to ten years, but the judge declined to do so, concerned that Blakely and Apprendi forbade sentencing with facts not found by a jury.

In considering the case, the Supreme Court determined that Blakely and Apprendi apply to the federal sentencing guidelines. Any fact (other than a prior conviction) that may increase a defendant's sentence must be found by a jury or admitted by the defendant. From now on, and for cases now under direct review (this case is not retroactive), the federal sentencing guidelines must be considered in determining defendants' sentences, but will not tie judges to a predetermined result. To the extent that Title 18 U.S.C. A. § 3553(b) and § 3742(e) —or any similar state scheme, as in Washington State's system, at issue in Blakely—are mandatory and binding on sentencing judges, they violate the Sixth Amendment right to a jury trial.

Supreme Court of Georgia:

* Tompkins v. State, S04G1113, 2005 Ga. LEXIS 35 (January 10, 2005).

In a case up on cert from the Court of Appeals, the Georgia Supreme Court found that Tompkins had not waived the state's duty to prove venue by agreeing to a bench trial where the parties each presented their evidence by proffer. Even in such a case, the state is bound to establish venue beyond a reasonable doubt, and the defendant's failure to raise the issue during the trial did not relieve the state of its burden. The case was remanded for re-trial.

Robinson v. State, S04A1718, 2005 Ga. LEXIS 34 (January 10, 2005).

Robinson was convicted of murder and armed robbery and appealed, claiming that the evidence was insufficient to support a guilty verdict, that his custodial statements should not have been admitted, that the trial court erred by failing to give certain jury instructions, and that his trial counsel was ineffective. The Supreme Court affirmed, finding the evidence sufficient to support the conviction (Robinson was seen on a surveillance videotape with the victim shortly before the victim disappeared, Robinson admitted to witnessing the victim's death but insisted he was not the shooter and later admitted to breaking down and disposing of the murder weapon). The Supreme Court found that Robinson's pre-arrest statements were properly admitted because the

record showed that he understood he was not under arrest, that he was free to leave, and nevertheless made incriminating statements to the police. His post-arrest statements were made after he was informed of his Miranda rights, and the trial court did not err by admitting them. A member of the jury pool who served as a police officer need not have been dismissed for cause because he did not have full arrest powers. The trial court did not err by failing to give a “mere association” instruction because it gave a “mere presence” instruction, which was similar, and the “mere association” charge was not requested by Robinson’s counsel. Robinson’s claim of ineffective assistance of counsel was without merit, because, though he admitted to being over-worked, still tested the State’s evidence and committed no unreasonable errors that had prejudiced Robinson’s case.

Billings v. State, S04A1716, 2005 Ga. LEXIS 33 (January 10, 2005).

A Houston County jury convicted Leonard Billings of felony murder, armed robbery, burglary, and possession of a firearm during the commission of a crime, and he appealed from the denial of his motion for new trial. The Georgia Supreme Court found the evidence supporting his conviction sufficient (bullets recovered from the victim and the crime scene matched a gun owned by the victim and sold by Billings after the victim’s death). The trial court did not violate his Fifth Amendment rights by not forcing his co-defendant to testify; since his co-defendant intended to take the Fifth Amendment, the trial court was authorized not to force him to testify at all. The trial court did not err by allowing a videotape of the appellant’s statements to law enforcement even though portions of the videotape had been edited out, because an officer who took Billings’ statements testified about the tape’s contents. That officer’s comment that Billings’ statements were not believable was not an improper comment on his failure to testify, and was harmless error anyway. It was not error to introduce a ski mask supposedly worn by the defendant or a picture of the victim before his death. Language in the jury charge intended to help avoid inconsistent verdicts was legally accurate and not error. Other errors were waived by counsel’s failure to object at trial.

* Woodard v. State, S04A1706, 2005 Ga. LEXIS 31 (January 10, 2005).

The evidence was sufficient to uphold Woodard’s convictions for murder, aggravated assault and possession of a firearm in the commission of a crime (the victim identified Woodard by his nickname and other victims testified that Woodard fired shots at them). Since Woodard was sentenced as a recidivist to life without the possibility of parole, his sentence was void because OCGA 17-10-7 (c) expressly prohibits this; Woodard’s sentence was vacated. The trial court properly admitted the murder victim’s identification of Woodard as the man who shot him as a “dying declaration.” The trial court’s failure to give the pattern charge on identification was error, but the court found it harmless because it was not likely that this error contributed to the guilty verdict. The trial court was not required to give an additional charge on venue where proper venue was alleged at trial and in the indictment.

Fuller v. State, S04A1624, 2005 Ga. LEXIS 29 (January 10, 2005).

Fuller was convicted by a jury of felony murder and possession of a firearm during the commission of a felony, and she appealed. On appeal, most of her claims related to ineffective

assistance of counsel. The Supreme Court of Georgia found none of her attorneys' supposed errors unreasonable (pursuit of inconsistent theories of self-defense and lawful act-unlawful manner involuntary manslaughter; pursuit of a self-defense theory; failure to request charge on voluntary manslaughter; failure to introduce witness' drug convictions). The evidence, which included testimony of an eyewitness that Fuller attacked the unarmed, non-aggressive victim when he would not pay her \$30, was sufficient to uphold the conviction. The trial court did not err by allowing the State to inquire into why a witness did not originally offer full information about Fuller's guilt, even though this testimony indirectly mentioned her involvement in drug sales in the neighborhood.

Maddox v. State, S04A1682, 2005 Ga. LEXIS 28 (January 10, 2005).

Maddox pleaded guilty to malice murder and was then tried and convicted by a jury of burglary, aggravated assault, armed robbery, and possession of a firearm during the commission of a crime. His Motion for New Trial was denied, and his later motion for an Out-of-Time appeal was granted. The Supreme Court affirmed his convictions. It held that his claim of ineffective assistance of counsel was barred since it had not been explored in the trial court below; even though his first Motion for New Trial was denied before he filed for an Out-of-Time appeal, Maddox should have filed a second Motion for New Trial alleging ineffective assistance. The record of his guilty plea reflected that it was knowing and voluntary, and there was no "manifest injustice" to be corrected when he filed a motion to withdraw his guilty plea two weeks after he was sentenced. There was a sufficient factual basis for accepting his guilty plea, and sufficient evidence to authorize a jury to find Maddox guilty of the remaining counts (a surviving victim testified that she and another elderly woman were robbed at gunpoint and then shot to prevent their identification of the men, and Maddox's gun matched the ballistics on the murder weapons). A change of venue was not required by law because the pre-trial publicity did not deny Maddox a fair trial; only one potential juror had to be excused because he had a "fixed opinion" of Maddox's guilt.

Andrews v. State, S04G1070, 2005 Ga. LEXIS 27 (January 10, 2005).

Andrews filed a habeas petition claiming ineffective assistance of trial counsel. Though the habeas court did not rule on the ineffectiveness claim, it granted an Out-of-Time appeal and Andrews filed a notice of appeal in the trial court (without filing a second Motion for New Trial raising the issue of ineffective assistance). The Court of Appeals held that the claim was procedurally barred because it had not been raised in the trial court, and the Supreme Court affirmed. When a habeas petitioner is granted an Out-of-Time appeal, he must file a Motion for New Trial claiming ineffective assistance if he wants to preserve the issue for review in the appellate courts (See Ponder v. State, 260 Ga. 840, 400 SE2d 922 (1991)).

Campbell v. State, S04A1784, 2005 Ga. LEXIS 21 (January 10, 2005).

The Georgia Supreme Court affirmed Campbell's convictions for malice murder, rape, kidnapping, and aggravated assault. It found the evidence sufficient to authorize guilty verdicts on these counts (A.F., the surviving victim, testified that Campbell had fatally stabbed her new boyfriend, Hunter, and after responding to 911 calls, the police found A.F. in Campbell's

apartment, bleeding, and calling for help). There was no error in the admission of prior difficulties between A.F. and Campbell because the evidence was relevant and the court gave limiting instructions about how the jury was to consider that evidence. A claim related to the language of the jury instruction on felony murder was moot, since the trial court did not enter a guilty verdict on that count, as it merged with the malice murder count.

Brown v. State, S04A1589, 2005 Ga. LEXIS 19 (January 10, 2005).

Brown was convicted of malice murder, felony murder, aggravated assault, arson, and aggravated sexual battery, and he appealed from the denial of his Motion for New Trial. The Supreme Court affirmed, finding the evidence sufficient (Brown's blood was recovered from the burned victim's body, Brown's shoes matched the tread and pattern of bloody footprints in the victim's home). The trial court did not err by allowing evidence of prior difficulties between Brown and the victim, and though under Crawford v. Washington, the trial court should not have admitted hearsay testimony that Brown had attacked the victim a week before her death, the error was harmless (Brown's guilty plea to that assault was before the jury). Hearsay testimony that Brown had been stalking the victim was properly admitted under a necessity exception; the information had especial indicia of reliability and was more probative than other evidence on the issue.

* Grant v. State, S04A1654, S04A1805, 2005 Ga. LEXIS 18 (January 10, 2005).

In an interim appeal from Clayton County, the Supreme Court of Georgia held that the trial court had erred by denying a capital defendant the right to proceed with volunteer co-counsel with whom he had an established, trusting relationship and by appointing local counsel unknown to the defendant. "[W]hen a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant's request to appoint the counsel of his preference." Grant, quoting Davis v. State, 261 Ga. 221, 222 (403 SE2d 800) (1991). The trial court erred by failing to give the proper weight to the existing relationship between Grant and existing co-counsel and the lack of countervailing considerations in favor of midstream substitution. The trial court also erred by holding Grant's lead counsel in contempt and removing him from the case for challenging the order substituting counsel.

Morrison v. State, S04A1529, 2005 Ga. LEXIS 17 (January 10, 2005).

Morrison was convicted of felony murder and aggravated assault and appealed, claiming that the evidence was not sufficient and that his lawyer was ineffective. The Supreme Court affirmed his convictions, holding that the evidence was sufficient to authorize a guilty verdict on those counts. (Eyewitnesses testified about an argument between Morrison and Vernard Glass, that Morrison fired at Glass as he fled, and that the shot hit Eric Harris and caused his death.) Morrison's counsel was not ineffective; it was reasonable for counsel not to object to the admission of Morrison's criminal record because it was not invalid and there was no reasonable basis for the trial court to exclude it.

Court of Appeals of Georgia:

Helton v. State, A04A2088, 2005 Ga. App. LEXIS 21 (January 12, 2005).

The Court of Appeals affirmed Helton's conviction for possession of methamphetamine with intent to distribute. His equal access defense (that someone else had left the baggies of drugs along the highway where he was pulled over by police) had been presented to the jury that convicted him, and the evidence was otherwise sufficient to authorize a guilty verdict.

Combs v. State, A04A2362, 2005 Ga. App. LEXIS 22 (January 12, 2005).

Combs appealed from his conviction for possession of methamphetamine, claiming that there was no probable cause for his arrest. Combs was found by a police officer slumped over and unconscious in the driver's seat of his parked car with needles and vials in his lap. Upon coming to, Combs admitted to injecting himself with the drugs but claimed that they were "similar to steroids" and not illegal. The officer arrested him anyway, and methamphetamine was found incident to an inventory search of the car after Combs' arrest. The Court of Appeals found the arrest valid and the search legal since the officer had a reasonable understanding that drug injections must be administered by a doctor's office and since Combs could not establish that he possessed the drugs legally.

Hill v. State, A04A1817, 2005 Ga. App. LEXIS 20 (January 10, 2005).

David Hill was convicted by a DeKalb county jury of armed robbery and simple battery. On appeal, he argued that the trial court should have admitted evidence of a "reverse similar transaction"—a similar crime committed at the same location while Hill was in Arkansas. The Court of Appeals rejected his claim, though it agreed that submitting the other alleged perpetrator's name was not a litmus test for admitting this evidence; Hill's proffered evidence did not show that the person who committed the second robbery was the same person who committed the first robbery, and was therefore properly excluded.