

## **APPELLATE COURT OPINION SUMMARIES AUGUST 2005**

### **United States Supreme Court**

None. Court was in recess.

### **Supreme Court of Georgia**

None. Court was in recess.

### **Court of Appeals of Georgia (all are reversals or otherwise pertinent)**

Battle v. State, A03A2108, 2005 Ga. App. LEXIS 952 (August 31, 2005).

Originally, the Court of Appeals affirmed the trial court's order denying the defendant's motion to suppress evidence gathered in an insurance fraud investigation. The court held a search warrant was not void even though it did not specify the place or person to be searched and the supporting affidavit was not left at the premises. The Georgia Supreme Court held that the search warrant was facially valid because it incorporated by reference an affidavit, which specified the exact location of the property to be searched and the particular items to be seized. However, the Court then remanded for consideration in light of the United States Supreme Court's decision in *Groh v. Ramirez*. In this case, the Court implied that incorporation by reference was insufficient for satisfying the particularity requirement when the incorporated document was not left at the searched premises. The Court of Appeals, following the implications in *Groh*, held that where a search warrant fails to meet the particularity requirement on its face but instead incorporates a supporting document by reference, failure to leave a copy of that supporting document at the searched premises invalidates the warrant. Judgment reversed.

State v. Cochran, A05A0959, 2005 Ga. App. LEXIS 928 (August 19, 2005).

The state appealed the trial court's grant of the defendant's motion to suppress cocaine seized from his house. The search warrant was based on information from a confidential informant. First, the informant relayed statements by a third party indicating that Cochran sold cocaine. Second, the informant witnessed the third party enter the house with money and exit with crack cocaine. The trial court found the search warrant to be invalid because the informant had not witnessed the actual drug transaction and there were no means to assess the veracity of the third party.

The Court of Appeals reversed. First, the court held that the statements by the third party were unreliable because her veracity could not be verified. However, given the totality of the circumstances (the confidential informant had proven reliable on previous occasions and there was independent corroboration that Cochran owned the residence where the drug transaction occurred), the observations by the confidential informant were sufficient

for the magistrate to find probable cause to issue the search warrant. The court also held the “no-knock” provision of the search warrant was authorized because the evidence indicated the officers had a reasonable fear for their safety (the confidential informant indicated the defendant had firearms and would not “go down without a fight.”).

Hydock v. State, A05A1207, 2005 Ga. App. LEXIS 910 (August 15, 2005).

The defendant, convicted of theft by taking, appealed the denial of his motion for directed verdict claiming the evidence was insufficient to render a verdict of guilty. The standard applied when the sufficiency of the evidence is challenged is whether “the evidence was sufficient for a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt.” A specific element of the crime as indicted was conversion of the funds for the defendant’s own use or cashing of the check. The only evidence presented was that upon receiving the first installment for fence work to be performed by Southern Fence Company, the defendant delivered the check to the owner of the company. That check was then endorsed and cashed by the owner of the company. The Court of Appeals finds the conviction unsupportable as a matter of law because the evidence does not “exclude every other reasonable hypothesis save that of the guilt of the accused.” Judgment reversed.

State v. Robinson, A05A1103, 2005 Ga. App. LEXIS 909 (August 15, 2005).

Robinson was acquitted of aggravated assault but convicted of possession of a firearm during the commission of a crime. The trial court granted Robinson’s motion in arrest of judgment finding that the acquittal invalidated the conviction for possession of a firearm. Agreeing with the state that the inconsistent verdict rule has been abolished in Georgia, the Court of Appeals examined only “whether the evidence viewed in the light most favorable to the conviction is sufficient to support the verdict.” Because the evidence shows that Robinson pulled out a revolver, shot at the victim, and then shot again, striking the victim in the abdomen, the court held the evidence was sufficient for a jury to conclude Robinson was guilty of possession of a firearm during the commission of a crime. Judgment reversed.

Castleberry v. State, A05A1532, 2005 Ga. App. LEXIS 882 (August 9, 2005).

Castleberry appealed the denial of his motion to suppress drug evidence on three grounds. First, the defendant contended that at the time of the search his detention was unreasonable because he was being held for possession on an illegal shotgun that turned out to be legal. The Court of Appeals held that because the officer reasonably believed the sawed-off shotgun was illegal, the officer had reasonable, articulable suspicion of criminal wrongdoing to briefly detain the defendant. Second, while the defendant argued the pat-down search was improper, the court found that because the defendant kept putting his hand in his pockets despite repeated requests to stop, the officer was justified in conducting a *Terry* search. Lastly, the court agreed that the *Terry* pat-down exceeded its scope when the officer reached into the defendant’s pocket after feeling a hard object (later identified as a glass pipe used to smoke narcotics). An officer may intrude beneath

the surface only if the object feels like a weapon or its identity as contraband is immediately apparent. The judgment was reversed because the officer's testimony could not provide specific facts to justify that the "hard object" felt like a weapon or contraband.

Parker v. State, A05A0832, 2005 Ga. App. LEXIS 881 (August 9, 2005).

Parker contended there was insufficient evidence to support the revocation of his probation based on commission of a new felony (burglary). OCGA § 42-8-34.1 (b) requires that the alleged probation violation must be established by a preponderance of the evidence. The court held that the circumstantial evidence presented did not establish, even under the preponderance of the evidence standard, that Parker entered the burglarized residence with intent to commit theft. (The only evidence presented was that Parker was present outside the residence. No one saw him enter the house, leave the house, or remove items from the house.) Therefore, the revocation of probation reflected manifest abuse of discretion by the trial court. Judgment reversed.

Campbell v. State, A05A0866, 2005 Ga. App. LEXIS 870 (August 8, 2005).

Campbell was convicted of theft by taking a motor vehicle, theft by retaining a motor vehicle, and theft by retaining stolen property. The Court of Appeals found the evidence was sufficient to support a finding of guilty beyond a reasonable doubt for all counts. However, citing *Ingram v. State*, the court held that theft by taking and theft by retaining a motor vehicle are mutually exclusive. Although the merger of the two counts for sentencing was offered as a remedy, it was an insufficient remedy so Campbell was entitled to a new trial on those two counts. On a separate issue, the court found that the stolen property consisted of "everyday items" to which the jury was qualified to assign value in deciding to impose a felony sentence for the charge of theft by retaining stolen property.