

**APPELLATE COURT OPINION SUMMARIES
OPINIONS FROM JANUARY 17-31 , 2005.**

United States Supreme Court:

Bell v. Cone, No. 04-394, 2005 U.S. LEXIS 1369 (January 24, 2005).

The United States Court of Appeals for the Sixth Circuit granted a writ of habeas corpus to respondent Gary Bradford Cone after concluding that the “especially heinous, atrocious, or cruel” aggravating circumstance found by the jury at the sentencing phase of his trial was unconstitutionally vague. The US Supreme Court granted certiorari to consider the issue and reversed.

Cone was convicted in the beating death of an elderly couple, and the jury returned four aggravating circumstances, found that they outweighed mitigation in the case, and sentenced him to death. On appeal to the Tennessee Supreme Court and in subsequent habeas actions, he challenged the statutory aggravator “especially heinous, atrocious, or cruel,” and though the Sixth Circuit had granted him relief on that claim, the US Supreme Court held that this aggravator, as defined in the jury instructions and later reviewed by the state supreme court, was sufficiently clear to withstand a challenge under the Eighth Amendment. Unlike in Godfrey v. Georgia, 446 US 420 (1980), on which the Sixth Circuit relied, the Tennessee Supreme Court explicitly held that the evidence supported a narrowed construction of the statutory aggravator. (While the Court struck down the language in Godfrey, it did make clear that even if instructions given to a capital jury were vague, if a state supreme court narrowed the construction of the aggravator when reviewing the case, the aggravator could stand.) The Court also ruled that the narrowing construction that the Tennessee Supreme Court applied was not itself unconstitutionally vague, since that court applied the same construction the US Supreme Court approved in Proffitt v. Florida, 428 US 242 (1976). The Court, furthermore, made its point that federal courts of appeal were not to presume that state courts did not know and follow the law.

Illinois v. Caballes, No. 03-923, 2005 U.S. LEXIS 769 (January 24, 2005).

The U.S. Supreme Court granted certiorari on the question of whether the Fourth Amendment required reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop (Caballes was stopped for speeding by an Illinois state trooper). While one officer wrote Caballes a warning ticket, a second officer walked around the car with a drug dog and searched his car after the dog gave an alert. The officers found marijuana in the trunk; the entire stop lasted around ten minutes. Caballes’ motion to suppress the drugs found in the car was denied and he was sentenced to a lengthy prison term, but the Illinois Supreme Court found that the search was illegal. The US Supreme Court held that the use of a drug dog – so long as it was the “consequence” and not the “cause” of the stop—during a legitimate traffic stop was permissible; it did not implicate privacy interests (the dog sniffed around the outside of the car), did not impermissibly extend the search, and did not violate Caballes’ Fourth Amendment rights.

Georgia Supreme Court:

Rakestrau v. State, S04A1625, 2005 Ga. LEXIS 38 (January 24, 2005).

Rakestrau was convicted of malice murder, felony murder, and aggravated assault (the aggravated assault merged and the felony murder was vacated), and the Georgia Supreme Court affirmed. The Court found that Rakestrau's trial counsel had not been ineffective; though he did not call a witness Rakestrau contended could have offered exculpatory evidence, Rakestrau did not call the witness at his Motion for New Trial hearing and trial counsel explained this decision as trial strategy (preserving the right to opening and closing argument). Though a prosecution witness was not sequestered during the trial, the defense was able to effectively cross-examine the witness on this point and the jury knew the witness had been present during the trial. The prosecution offered acceptable race-neutral reasons for striking black female members of the jury pool, and no Batson violation occurred.

Griffin v. Keller, S04A1914, 2005 Ga. LEXIS 39 (January 24, 2005).

This is an appeal from the denial of a mandamus in a rather complicated procedural case. Griffin was originally sentenced to twenty and ten years for aggravated assault and false imprisonment. Since the sentences were concurrent rather than consecutive, in an appeal from the original trial court, the Supreme Court held that the Sentence Review Panel did not have the statutory authority to reduce Griffin's ten year sentence for false imprisonment charge to five years. Thereafter, the District Attorney filed a petition for mandamus to compel the Department of Corrections to enforce the original ten year sentence, which was granted and Griffin filed a motion to set aside the judgment since he was not joined as a party. That motion was denied and Griffin appealed, claiming a violation of due process, but the Supreme Court dismissed the appeal. It was a discretionary appeal, rather than an appeal of right, and any error in failing to join Griffin as a party was negated by the Sentence Review Panel's lack of jurisdiction to reduce the sentence in the first place.

Jones v. State, S04A2098, 2005 Ga. LEXIS 40 (January 24, 2005).

Jones' life sentence for murder was affirmed by the Supreme Court but had been remanded for a hearing on the effectiveness of his trial counsel. The lower court found no ineffectiveness, and the Supreme Court affirmed, holding that Jones had failed to show unreasonable attorney error and resulting prejudice in counsel's failure to move for a directed verdict (not error since the evidence was found to be sufficient to authorize a conviction) and failure to cross-examine the medical examiner about the entry and exit of fatal bullets, which was legitimate trial strategy.

Gravitt v. State, S05A0253, 2005 Ga. LEXIS 42 (January 24, 2005).

Gravitt was convicted and sentenced for malice murder (aggravated assault and felony murder convictions merged and were vacated) and other comparatively minor charges. He appealed the denial of his motion for new trial and the Georgia Supreme Court affirmed. Gravitt claimed that he killed the victim because an unidentified drug dealer, who suspected Gravitt and the victim of stealing from him, threatened harm to him and his family unless Gravitt could prove himself innocent of the theft by killing the victim. Gravitt shot the victim during a hunting trip, the death

was verified by the unknown drug dealer, and Gravitt confessed to the murder ten years later. On appeal, he claimed that the trial court should have instructed the jury on justification, but the Georgia Supreme Court held that a justification defense would only have been required if the victim had posed a threat to Gravitt (this was never alleged). A coercion instruction about defense of third parties was not appropriate since the harm threatened to Gravitt's family was not imminent, and, though recommended by a treatise as standing on the same basis in law as self-defense, is not currently recognized by Georgia law.

Slaughter v. State, S05A0203, 2005 Ga. LEXIS 46 (January 24, 2005).

Slaughter was convicted of malice murder in the death of his cousin and the Georgia Supreme Court affirmed, holding that the evidence was sufficient to authorize a guilty verdict. Though Slaughter claimed that the State failed to disprove his defenses of self-defense and mistake of fact beyond a reasonable doubt, the court held that a jury is to weigh the evidence and was authorized to believe testimony that Slaughter planned the murder of his cousin and shot him in the back.

Brite v. State, S05A0031, 2005 Ga. LEXIS 48 (January 24, 2005).

After Brite was convicted of malice murder in the death of Vasquez Harden and the aggravated assault of Jamal Jackson. He appealed from the denial of his motion for new trial and the Georgia Supreme Court affirmed his conviction and sentence. The evidence was sufficient to authorize a guilty verdict (witnesses testified that Brite went to Harden's house, asked him to come outside, then shot him in the eye, then fired at Jackson as he ran away). Brite claimed error in the trial court's admission of evidence that Brite committed an unindicted murder, but since the trial court admitted the testimony to show Brite's course of conduct and bent of mind, and that act was not too remote in time, this claim was rejected. Brite also contended that the trial court should not have admitted hearsay testimony of a police officer about statements made by a witness. Since the State established that the witness was deceased and therefore unavailable, and there were particularized guarantees of trustworthiness (the statement was made as part of an official investigation, was never rescinded, and no hope of benefit was given in exchange for the statement), the Court rejected this claim as well. Brite raised no error under Crawford v. Washington, so the Court did not address the problem of the introduction of testimonial hearsay.

Court of Appeals of Georgia:

Clanton v. State, A04A1972, 2005 Ga. App. LEXIS 71 (January 27, 2005).

On appeal from his conviction for child molestation, Clanton challenged evidentiary rulings during his trial. Clanton also claimed that testimony that the six-year-old child victim had previously observed her mother having sexual intercourse, which prompted the allegation, was improperly excluded, but the Court of Appeals affirmed citing no reversible error (the testimony was part of child's sexual history and was also irrelevant in that the child may not have noticed it). Other claims not objected to during trial were waived.

* Ponce v. State, A04A1856, 2005 Ga. App. LEXIS 59 (January 26, 2005).

Ponce was convicted of trafficking cocaine and challenged the denial of his motion to suppress the 400 grams of cocaine hidden in the watermelons in his tractor-trailer. He claimed the trial court erred in finding the officers in a road safety check point were justified in stopping Ponce (because his behavior indicated he intended to bypass the inspection) and were entitled to hold him long enough to get his consent to a search.

The Court of Appeals ruled that the search violated Ponce's Fourth Amendment rights. "In sum, warrantless searches of commercial vehicles may be constitutionally authorized by a state statutory or regulatory scheme that meets the criteria of Burger, including the requirement that the scheme 'in terms of certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant.' The Georgia statutes [OCGA 46-7-2; 40-8-7 (d); and 40-16-2 (b) (3)] cited by the state, however, do not meet this requirement." Since the statutes did not justify the stop, Ponce could only have been stopped if the officer had a reasonable, articulable suspicion that he was involved in criminal activity. The Court of Appeals ruled that there was none (Ponce merely looked at the officer and quickly looked away) and the cocaine found during that stop should have been suppressed and reversed the judgment.

Pitts v. State, A04A1621, 2005 Ga. App. LEXIS 50 (January 24, 2005).

Pitts appealed his conviction for false imprisonment, interference with a 911 call, and simple battery following an incident at his estranged wife's house where he tried to stop her from calling 911 and pinned her to the bed. The Court of Appeals affirmed. There was sufficient evidence to authorize the convictions (one of the deputies saw Pitts holding the victim down on the bed and the 911 calls supported the convictions). Though Pitts contends the family court did not have jurisdiction over his felony case, the Court of Appeals denied this claim because the juvenile court judge was acting on the superior court's order requesting assistance. His claim that he was denied effective assistance of counsel was without merit (counsel's strategic decision not to file motion to prevent introduction of 911 tape was reasonable, attorney tried to reach state's witnesses, and the trial result would not have been different if counsel had done all Pitts wanted). The Confrontation Clause (wife refused to testify at trial) was not violated by the admission of the 911 tapes of wife's statement because they were not testimony but were admissible as an excited utterance. Even though Pitt's wife's statements given to the deputies were testimonial and infringed upon Pitts' right to confront the witness, the Court determined that admitting them was harmless error because there was other evidence to support the conviction.

* King v. State, A04A1917, 2005 Ga. App. LEXIS 54 (January 25, 2005).

King appealed his conviction of robbery by sudden snatching, arguing that there was a lack of evidence to establish venue in the county and that the trial court erred in not instructing the jury on the lesser offense of theft by taking. The Court of Appeals ruled that the trial court did not err by refusing to charge on the lesser offense because the victim was next to the shopping cart that her purse was in when it was snatched and was never out of the King's presence. Venue was not proven beyond a reasonable doubt (there was testimony that the alley that King was arrested was in Ben Hill County but none that the store was also in that county). Establishing venue of a nearby site is not enough to establish venue of the site of the crime. The fact that the responding

deputies were employed by Ben Hill county was insufficient to establish venue because they intercepted a call meant for the local police department. Judgment reversed.

Perdue v. State, A04A1663, 2005 Ga. App. LEXIS 58 (January 26, 2005).

Perdue appealed convictions for battery and obstruction of a police officer. Purdue claimed that the trial court erred in admitting hearsay when officers were allowed to testify, over Perdue's objections, about what the victim told them. As to one officer, Perdue objected at the beginning of the testimony, the objection was sustained unless the state could show the statements were made as a part of the *res gestae*, and when it did, Perdue did not object again. The other officer's testimony was admitted over objection under a *res gestae* exception. On appeal, the court ruled there was no harm shown, as the testimony was on charges for which the trial court directed a verdict. Additionally, the Court found that since Perdue was found not guilty of three of five counts, there is no merit to his argument that the hearsay affected the verdict. Other claims not objected to at trial were waived. The Court affirmed the judgment.

High v. State, A04A2053, 2005 Ga. App. LEXIS 55 (January 25, 2005).

High was convicted for armed robbery and appealed the denial of his motion for new trial challenging the admission of similar transaction evidence and of his statements against interest. The Court of Appeals ruled that trial courts have discretion in receiving evidence at the pre-trial Uniform Superior Court Rule 31.3 (B) hearing and that the prosecutor's statement about what the similar transaction evidence (evidence of High committing a string of other robberies) would show was acceptable. High claims that his statements were induced by hope of benefit and so should not have been admitted, but the court rejected this claim (the investigator told High only that cooperating might help him). High also contended that the court erred in instructing the jury that the similar transaction evidence was admissible, but the court found no error because the purposes were "legitimate" and trial counsel did not object to the charges or reserve his objections. Judgment affirmed.

Clark v. State, A04A2110 2005 Ga. App. LEXIS 65 (January 26, 2005).

Clark was found guilty on one charge of a multi-count indictment, entered guilty pleas on two other counts the next day. He filed a *pro se* motion for new trial and to withdraw his guilty pleas five years later. Clark cannot move for a new trial from a guilty plea. The appeal from the motion to withdraw the guilty plea was dismissed because the trial court lacked jurisdiction to allow withdrawal of the plea since the term of court had expired, and the Court of Appeals had no jurisdiction to rule on denial of the unauthorized motion. The Court holds that the motion for new trial based on the conviction by jury verdict was actually an extraordinary motion for new trial, because it was untimely and there was no leave to file and out-of-time appeal. Having no jurisdiction to entertain Clarke's untimely direct appeal, the appeal from his conviction was dismissed.

Ayoluwa v. State, A04A2181, 2005 Ga. App. LEXIS 61 (January 26, 2005).

Ayoluwa appealed from the denial of his motion for new trial, which claimed that the ID lineup

process was highly suggestive and that the evidence was not sufficient to convict. The Court of Appeals ruled that even though one witness was only 50 percent sure of Ayoluwa's identity, another witness viewed pictures in a lineup that had previously been viewed by other witnesses who chose Ayoluwa and initialed the lineup form, and a police officer admitted to making mistakes on the lineup form, there was sufficient evidence to convict (a witness took the license plate number of robbers' car, Ayoluwa was arrested after fleeing the car, and another witness was certain of Ayoluwa's identity). The Court of Appeals found that the trial court did not err in allowing the state to reopen evidence after a directed verdict was granted on claims where the witnesses did not testify. Discretion lies with the trial court to reopen a case and allow additional evidence even if testimony not rebutting evidence offered by defendant. The judgment was affirmed.

Wiley v. State, A04A2295, 2005 Ga. App. LEXIS 56 (January 25, 2005).

Wiley was convicted of child molestation for acts committed against his nine year old daughter. Challenging the sufficiency of the evidence and the admission of his use of internet pornography, Wiley appeals the denial of his motion for new trial. The Court of Appeals ruled that there was sufficient evidence for a rational trier of fact to have found that Wiley committed the offense of child molestation where the daughter reported that he put his hands in her underwear and there was testimony that he viewed internet pornography regularly and in his daughter's presence. Wiley's claim that he only touched her for medical reasons seven times over the last year only served to create a conflict for the jury to decide on. Wiley's argument that his use of internet pornography in his daughter's presence could not be linked to his fondling his daughter and cannot be used just to show him as being lustful under Simpson v. State, 271 Ga. 772 (523 SE2d 320) (1999) is invalid because it is not clear under *Simpson* that testimony regarding the materials would be prohibited or just the materials themselves, and more importantly, Wiley failed to object at trial and so the argument is waived. The Court affirmed the judgment.

Foster v. State, A04A2256, 2005 Ga. App. LEXIS 63 (January 26, 2005).

Foster appeals the trial court's denial of his motion for new trial for his conviction for statutory rape, child molestation and enticing a child for indecent purposes. His out of time appeal was granted. The Court of Appeals ruled that there was no error in allowing evidence of similar transactions because the State specified its reasons for introducing the evidence; there was sufficient similarity between the acts (where, among other things, the acts were 12 days apart, occurred at night in remote locations, sex was being sought in exchange for a benefit and Foster was driving the same vehicle). Foster waived any error regarding victim's testimony when he failed to object either during the pre-trial hearing or during trial. The trial court did not err in not dismissing a juror for cause since the juror was willing to try to be objective and juror's bias stemmed from feelings about the crime and not the accused. In allowing a detective to read a portion of her report into evidence the Court ruled that there was no error because the reading was to show a prior consistent statement where the victim's credibility was called into question. Judgment affirmed.

Kates v. State, A04A1905, 2005 Ga. App. LEXIS 35 (January 21, 2005).

The Court of Appeals affirmed Kates' convictions for trafficking and obstruction. The evidence (cocaine was found in his car, on his companions, he had \$900 in his pocket at the time of arrest, and he fled the scene before being re-apprehended) was sufficient to authorize a conviction; searches of his car and person were permissible; and though he alleged a "variance" between the indictment and the jury charge, a judge is not required to read the indictment verbatim, and the difference between the two was very slight. The evidence of similar transactions was only admitted to show "bent of mind and course of conduct," and this was an acceptable purpose.

Pryor v. State, A04A2252, 2005 Ga. App. LEXIS 36 (January 21, 2005).

The Court of Appeals reversed a Clayton County trial court's denial of Pryor's "motion to release transcript, tapes, notes and records" of her criminal trial for theft by deception. Pryor was indicted, so although her trial was transcribed, the record was never prepared. However, Pryor wanted, and offered to pay for, these records for use in a civil action against her accuser, and the Court of Appeals held that since she offered to reimburse the county for the costs of preparing the record, she was entitled to all records and transcripts.

*Wilson v. State, A05A0141, 2005 Ga. App. LEXIS 41 (January 21, 2005).

Wilson's conviction for cocaine possession was reversed because of ineffective assistance of trial counsel. Wilson's trial attorney failed to make a chain of custody objection to the introduction of the cocaine. A GBI tech "testified that the substances in state's Exhibit One were turned over to her for analysis and that the bags were sealed. But no showing was made how the bags were transported from the local police department or received by the crime lab," and the Court of Appeals determined from the record that a proper chain of custody was never proven, requiring a reversal, since this was non-strategic error that clearly affected the trial's outcome. The court also opined that Wilson's counsel should have objected to the trial court's refusal to give a jury instruction on Wilson's primary defense, "mere presence," though it found this error was probably harmless.

Menefee v. State, A05A0206, 2005 Ga. App. LEXIS 42 (January 21, 2005).

A trial court dismissed Menefee's motion for new trial without a hearing since he failed to secure a transcript of his trial. Though the trial court granted him a requested continuance to order and pay for his trial transcript, after further delay, the trial court deemed the motion abandoned. The Court of Appeals held, "[a]lthough OCGA § 5-6-48 (c) requires an 'opportunity for hearing' before a trial court orders an appeal dismissed for an unreasonable and inexcusable delay in filing the transcript, technically no such requirement pertain to motions for new trial."

Simmons v. State, A04A1965, 2005 Ga. App. LEXIS 49 (January 21, 2005).

Simmons was convicted of possession of cocaine, possession of cocaine with intent to distribute, and two counts of the sale of cocaine and he appealed, raising mostly issues of sufficiency of the evidence. The Court of Appeals held that the evidence was sufficient to authorize a conviction; an undercover officer purchased cocaine from Simmons through one of Simmons' employees, and the officer saw Simmons and the employee exchange the cocaine and money. After

obtaining a search warrant, police found cocaine in Simmons' office to which only he had access; therefore, an equal access charge was not required and the jury was authorized to find that Simmons had knowledge of the presence of cocaine in his office. However, since Simmons' appellate attorney had been appointed after his motion for new trial was denied and he raised an ineffective assistance of counsel claim for the first time before the court, the court remanded the case for a hearing on Simmons Sixth Amendment claim.

In the Interest of D.L.S. , A05A0375, 2005 Ga. App. LEXIS 31 (January 20, 2005).

The Court of Appeals found that the trial court had sufficient evidence to terminate the parental rights of the parents of D.L.S. and three siblings. The lower court found that when the children lived with their parents, they were in extremely poor health, uncared for, dirty, and frequently homeless. After the children were removed from the parents' home (at the request of the father), they showed improvement (except for trauma arising out of parental visits) and the children's parents had failed to meet DFCS goals set for reunification, including finding housing and employment. Thus, under OCGA § 15-11-94, the children were deprived, and (b) the cause of the deprivation was lack of proper parental care or control (subsection 2); the deprivation is likely to continue or not likely to be remedied (subsection 3); and continued deprivation is likely to cause serious physical, mental, emotional, or moral harm to the children (subsection 4), and a termination was in their best interest.

Neal v. State, A04A2051, 2005 Ga. App. LEXIS 24 (January 18, 2005).

Neal appeals his conviction for three counts of child molestation and one count of aggravated child molestation claiming that the trial court should have merged two of the convictions and that there was insufficient evidence. The Court of Appeals upheld the verdict holding that there was sufficient evidence and that any inconsistencies in the children's testimony only created issues for the jury to decide. The Court also ruled that the convictions for child molestation and aggravated child molestation against one child for touching child's anus with his penis and placing his penis in child's anus should not be merged where the child testified to Neal touching his anus with his penis and placing his penis in child's anus on more than one occasion. Since it cannot be said that the convictions were from the same conduct the convictions did not merge.

Daniel v. State, A04A1987, 2005 Ga. App. LEXIS 28 (January 19, 2005).

Daniel was convicted for armed robbery and aggravated battery following a bench trial. His motion for new trial was denied and this appeal followed. The Court of Appeals found that there was sufficient evidence to support the verdicts where victim testified that Daniel and his co-defendant demanded money from him at gunpoint, he threw \$15 at co-defendant; both defendants fought with victim in his home and co-defendant shot victim as he tried to run away from his house. The Court of appeals ruled that the trial court did not abuse its discretion in not allowing the defense to question the victim as to his illegal drug sales. Whether victim was under the influence of drugs was relevant and he could be questioned about that but whether the victim sold drugs was irrelevant since in a criminal proceeding, a victim's character is rarely relevant. The judgment was affirmed.

Jackson v. State, A04A1767, 2005 Ga. App. LEXIS 26 (January 18, 2005).

Jackson appealed his conviction for violation of the Georgia Controlled Substance Act and of concealing a death citing insufficient evidence and error on the part of the trial court for allowing hearsay testimony and by failing to charge the jury on equal access. The Court of Appeals found that testimony of victim's companion, Leone, that Jackson sold cocaine to himself and victim, they all sat down to play cards, Jackson and victim struggled over gun, and victim was shot by Jackson's companion's gun, was sufficient for jury to conclude that Jackson sold cocaine to victim and that it was the same cocaine found next to the victim's body. Leon also testified that he was threatened, with death, by Jackson not to tell the police and the Court found that was enough for the jury to find that Jackson tried to conceal the death and thus hindered discovery of the body. Leon's former statement to police was properly admitted as a prior consistent statement (even though the officer testified before Leone) where the truth of his trial testimony was called into question. The trial court did not need to charge the jury with equal access (based on information that others had delivered cocaine to victim's house) because such a charge would not have been applicable as Jackson was not charged with possessing cocaine nor did the state try to show that he owned the house where the cocaine was found. Judgment affirmed.