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Constitutional Law

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CONSTITUTIONAL LAW

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The constitutional law cases during the past term reflect the great interest in protecting the rights of the criminal defendant. A majority of the cases deal with motions to suppress evidence in vindication of the fourth amendment. This survey will deal with the criminal issues first and then cover certain additional matters which came to the attention of the courts. Some reflect significant changes in the law; others are commented upon because they are apparently quite important to practitioners at present.

I. RIGHTS OF THE CRIMINAL DEFENDANT

A. Right To Counsel

The supreme court reaffirmed its position in *Mercer v. Hopper*[1] that there is no right to counsel at a probation revocation in Georgia. The court relied upon *Reece v. Pettijohn*.[2] Justice Hall concurred[3] specially, stating that the rule should not be absolute but should be considered on a case by case basis, citing *Gagnon v. Scarpelli*.[4] Justice Ingram, relying upon his interpretation of the facts, dissented[5] on the basis of the same case.

The question of whether a pre-trial identification, made where the defendant was displayed without an attorney, tainted an in-court identification, was dealt with in *Yancey v. State*.[6] The court made an independent assessment of facts and, even though no attorney was present during the show-up, due process was not offended under the test from *Neil v. Biggers*.[7]

State v. Houston[8] is significant in that it extends the sixth amendment right to counsel to the preliminary hearing. The court followed the reasoning of *Coleman v. Alabama*[9] in deciding that the preliminary hearing, where allowed, was a critical stage in the prosecution.

In *Cunningham v. State*,[10] the court ruled that counsel's ineptitude in handling an appeal denied the defendant due process and equal protection of the laws. This is a very interesting proposition which Justice Undercofler did not elaborate upon. The defendant was not an indigent, but counsel's failure in procedural matters had vitiated her appeal.

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1. 233 Ga. 620, 212 S.E.2d 799 (1975).
2. 229 Ga. 619, 193 S.E.2d 841 (1972).
3. 233 Ga. at 620, 212 S.E.2d at 800.
4. 411 U.S. 778 (1973).
5. 233 Ga. at 620, 212 S.E.2d at 800.
6. 232 Ga. 167, 205 S.E.2d 282 (1974).
7. 409 U.S. 188 (1972).
8. 134 Ga.App. 36, 213 S.E.2d 139 (1975).
9. 399 U.S. 1 (1970).
10. 232 Ga. 416, 207 S.E.2d 48 (1974).

B. Right To A Speedy Trial

In *Hall v. State*,[11] the court reaffirmed the test for violation of the sixth amendment guarantee to a speedy trial. As stated earlier in *Barker v. Wingo*,[12] the elements are: "(a) Length of delay, (b) the reason for the delay, (c) the defendant's assertion of his right, and (d) prejudice to the defendant." This was interpreted as a balancing test and as applied to this case resulted in sustaining the defendant's plea in bar. The court emphasized in *Sanders v. State*,[13] that the burden is upon the defendant to establish the violation. Justice Ingram dissented in an adverse ruling against the defendant in *Treadwell v. State*,[14] on the grounds that no reason had been shown for the prosecution's delay, a factor which defeats balancing against prejudice to the defendant.

C. Right To A Fair Hearing

In *Roberts v. Greenway*,[15] the petitioner claimed that he had entered pleas of guilty without an understanding of the possible consequences evolving from the entry of the pleas. The case provoked court comment on the standards dictated by *Boykin v. Alabama*.[16] When a defendant raises the question of the validity of his plea of guilty, the burden is on the state to show that the plea was intelligently and voluntarily entered. It may do this by

> (1) showing on the record of the guilty plea hearing that the defendant was cognizant of all of the rights he was waiving and the possible consequences of his plea; or (2) file a silent record by use of extrinsic evidence that affirmatively shows that the guilty plea was knowing and voluntary.[17]

The court required an affirmative showing of compliance, but overruled the trial court's contention that the defendant could invoke the attorney-client privilege to prevent admission of evidence of what the trial attorney told the defendant. This is established also in *Bailey v. Baker*[18] which also rejects the contention that only the trial judge may advise defendant of the consequences of his plea.

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11. 131 Ga.App. 786, 206 S.E.2d 644 (1974).
12. 407 U.S. 514, 530 (1972).
13. 132 Ga.App. 580, 208 S.E.2d 597 (1974).
14. 233 Ga. 468, 211 S.E.2d 760 (1975).
15. 233 Ga. 473, 211 S.E.2d 764 (1975).
16. 395 U.S. 238 (1969).
17. 233 Ga. at 475, 211 S.E.2d at 766 (citations omitted).
18. 232 Ga. 84, 205 S.E.2d 278 (1974).

D. Motion To Suppress Illegally Seized Evidence

Warrantless Arrest and Seizure

In *Hiatt v. State*,[19] Judge Eberhardt reaffirmed the necessity of a *written* motion to suppress illegally seized evidence under Ga. Code Ann. §27-313(b) (Rev. 1972). When the motion is oral, a denial is authorized.

Under a warrantless search and seizure, the burden of proving that the search and seizure was lawful is upon the state.[20] In *Merritt v. State*,[21] where officers set up a roadblock to apprehend armed robbers, an indiscriminate stopping and searching of an automobile not under suspicion rendered the evidence seized inadmissible.

In *Menegham v. State*,[22] the court of appeals noted that

> "[a]n automobile in which contraband goods are concealed and transported may be searched without a warrant, provided the police have probable cause for believing that the automobile which they search contains the contraband. [Citation omitted.] The reasonableness of the search must be judged in relation to the circumstances then existing and is in the first instance a question for the trial judge to determine. [Citation omitted.]"

State v. Swift[23] posed difficult questions for both the court of appeals and the supreme court, until the supreme court ultimately sustained an arrest and seizure which occurred at a roadblock at Jekyll Island. The court of appeals was disturbed that the purpose of the roadblock was manifestly illegal, while the supreme court reaffirmed the general view that where an officer is authorized to make "stops" for law violations, he may seize what is in plain view. Both cases[24] should be read for the varied appraisal of the "legality" of the stops.

Georgia has recognized that less stringent requirements apply to a warrantless search of an automobile than to a permanent dwelling.[25]

After an automobile has been impounded pursuant to a lawful arrest, evidence seized during an inventory is legal.[26]

Where an officer is executing a warrant of a suspect, he may search the area within the immediate presence of the persons arrested and seize any stolen property as tangible evidence of the commission of a crime.[27]

In *Godwin v. State*,[28] the court held that *Miranda* warnings are not

19. 132 Ga.App. 289, 208 S.E.2d 163 (1974).
20. GA. CODE ANN. §27-313(b)(Rev. 1972).
21. 133 Ga.App. 956, 213 S.E.2d 84 (1975).
22. 132 Ga.App. 380, 382, 208 S.E.2d 150, 152 (1974).
23. 232 Ga. 535, 207 S.E.2d 459 (1974).
24. 131 Ga.App. 231, 206 S.E.2d 51, *rev'd*, 232 Ga. 535, 207 S.E.2d 459 (1974).
25. Cunningham v. State, 133 Ga.App. 305, 211 S.E.2d 198 (1974).
26. Pierce v. State, 134 Ga.App. 14, 213 S.E.2d 162 (1975).
27. Boyd v. State, 133 Ga.App. 136, 210 S.E.2d 251 (1974).
28. 133 Ga.App. 397, 211 S.E.2d 7 (1974).

required prior to the search of a person reasonably suspected of shoplifting.

Officers may seize evidence on public property even though the seizure is accompanied by an illegal arrest. In *State v. Roberts*,[29] hitchhikers were stopped without reasonable cause, but evidence (drugs) which they had thrown away could be seized. The property was abandoned. The defendant could not show that there was a search of his person or protected property.

The question of the search pursuant to consent is discussed in *Ferguson v. Caldwell*.[30] Here a second search was validated. There seems to be no absolute rule on how long consent continues, but it should not be used to justify searches for other crimes.

Patterson v. State[31] dealt with the interesting question of whether an officer could arrest for the commission of a felony which he witnessed by spying on the defendant with binoculars. The court sustained the arrest and the seizure of the growing marijuana. The officer was not trespassing at the time he observed the defendant harvesting the marijuana.

The problem of who is aggrieved by an unreasonable search and seizure was faced in *Nealey v. State*.[32] The defendant testified that he had authorization from the owner to use the cabin which was subjected to a warrantless search to his disadvantage. The court found that he was an "aggrieved person" and that the motion to suppress should have been granted.[33]

Search and Seizure With a Warrant

The propriety of the search warrant received much attention last term. Although the following cases may not present significant developments, they are discussed because of their present importance to the practitioner.

The warrant must be issued by a neutral and detached magistrate. A justice of the peace, who was a part-time police radio dispatcher, was not so qualified according to *Baggett v. State*.[34]

A search warrant must be executed by an officer legally qualified to do so. In *Baxter v. State*,[35] the court reviewed with great care the authority of a GBI agent to do so, finally satisfying itself that such authority existed. The case also reaffirmed the methodology of execution: a knock, an identification, a reasonable lapse for a response before using physical force to enter the premises.[36] The officer need not be uniformed.[37]

The affidavit supporting the issuance of the warrant came under close

29. 133 Ga.App. 206, 210 S.E.2d 387 (1974).
30. 233 Ga. 887, 213 S.E.2d 855 (1975).
31. 133 Ga.App. 742, 212 S.E.2d 858 (1975).
32. 233 Ga. 326, 211 S.E.2d 286 (1974).
33. The court, however, found the admission of the evidence harmless to defendant's case, and so affirmed the conviction. *Id.* at 328, 211 S.E.2d at 288.
34. 132 Ga.App. 266, 208 S.E.2d 23 (1974).
35. 134 Ga.App. 286, 214 S.E.2d 578 (1975).
36. *Id.* at 294, 214 S.E.2d at 583.
37. *Id.* at 293, 214 S.E.2d at 583.

scrutiny in *Bailey v. State*.[38] Information which may be "stale" will not support an affidavit. There must be some evidence to show a temporal relevance. Where the affidavit relies upon tips, it should show when the informant witnessed the suspicious activity.[39]

An unintentional inaccuracy in the information supporting the warrant, in the totality, will not undermine the warrant.[40]

Where an officer has a warrant to search for specific items, the seizure of evidence of other crimes must be supported by probable cause for the suspicion that the "other" crime has been committed.[41]

Where a warrant authorizes a search of certain premises and "curtilage," does this authorize a search of an automobile parked in a driveway on the premises? In the circumstances of *Bellamy v. State*,[42] the court said yes. Accordingly, in *McGee v. State*,[43] the court said that a hog pen behind a house was within the curtilage of the building and could not be searched without a warrant. (Incidentally, the hog pen was a welcome relief from the sweet aroma of marijuana which permeates so many of these cases.) A search warrant does not authorize the search of *other persons* incidentally on the premises. Such a search must be justified on independent probable cause.[44]

There were many cases dealing with the adequacy of the affidavits required to support the issuance of warrants. It would not be profitable to review all of these. Presumably each case stands on the court's appraisal of the reasonableness of the probability shown. There must be a basis for justifying the magistrate's issuance. This is a practical and not an academic test. The court is dealing with the basis for supporting a "*probability*." Particularly if the probable cause relies upon an informer, there must be support for the reliability of the informer.[45]

E. Self-incrimination

Turning to a civil case for a moment, in *Busby v. Citizens Bank of Hapeville*,[46] the court reversed a contempt order by holding that only a witness can determine the incriminatory nature of questions concerning financial matters. There is nothing for the court to decide and, therefore, the witness need not offer the basis for the incrimination. Where the questions show as a matter of law that they may be incriminating, only the witness can weigh the effect. Judge Evans concurred specially[47] stating

38. 131 Ga.App. 276, 205 S.E.2d 532 (1974).
39. Hurd v. State, 131 Ga.App. 354, 206 S.E.2d 112 (1974).
40. Williams v. State, 232 Ga. 213, 205 S.E.2d 859 (1974).
41. Zimmerman v. State, 131 Ga.App. 793, 207 S.E.2d 220 (1974).
42. 134 Ga.App. 340, 214 S.E.2d 383 (1975).
43. 133 Ga.App. 184, 210 S.E.2d 355 (1974).
44. Wallace v. State, 131 Ga.App. 204, 205 S.E.2d 523 (1974).
45. *See* Moreland v. State, 132 Ga.App. 420, 208 S.E.2d 193 (1974).
46. 131 Ga.App. 738, 206 S.E.2d 640 (1974).
47. *Id.* at 741, 206 S.E.2d at 642.

that *Prince & Paul v. Don Mitchell's WLAQ, Inc.*[48] should be overruled outright. This case had indicated that the court should be satisfied with the possibility of incrimination without relying upon the witnesses' say so. The court in the principal case did not go so far.

F. Right To A Fair Tribunal

In *Mize v. State*,[49] the court reversed a trial court's refusal to allow defense counsel on voir dire to ask:

> If there is a conflict in the evidence in what the witnesses who are white testify, and the witnesses who are black testify, will this in any way affect your ability to serve in this case fairly, affect your ability to have an open mind, to be completely impartial?[50]

The court held that where, as here, all witnesses for the state were white, and all defense witnesses were black, it is proper on voir dire to ask questions dealing with racial prejudice of the jurors in order to test their impartiality.

The court sustained Ga. Code Ann. §59-112(d) (Supp. 1974) which permits women to be excluded from jury service merely by notifying the jury commissioner of the county in which they reside in writing to that effect, in *Maddox v. State*.[51] The court distinguished *Taylor v. Louisiana*[52] which struck down an automatic statutory exclusion. The court saw an escape in the Georgia statute which would prevent a totally male jury.[53] There was no evidence in the case that the jury list did not represent a cross-section.

In *Gould v. State*,[54] the court reversed the overruling of a challenge to the array of the grand and petit juries. Ga. Code Ann. §59-106 (Rev. 1965) requires a fairly representative cross section of the citizens of the county. Where evidence showed, over a ten year period, under-representation on race, sex and color, the challenge was sustained. The pattern was set out in tabular form for Coweta County.[55] The court specifically denied any proportional representation on jury lists.

There is, of course, no Georgia statute or rule of practice which allows discovery in criminal cases. But due process imposes on the prosecution, on the defendant's pretrial motion, an affirmative duty to disclose evidence favorable to him in advance of trial. In *Hicks v. State*,[56] the judge made an in camera inspection to determine whether certain evidence had to be given to the defendant in order to fulfill the due process requirement.

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48. 127 Ga.App. 502, 194 S.E.2d 269 (1972).
49. 131 Ga.App. 538, 206 S.E.2d 530 (1974).
50. *Id.* at 540, 206 S.E.2d at 532.
51. 233 Ga. 874, 213 S.E.2d 654 (1975).
52. ___ U.S. ___, 95 S.Ct. 692 (1975).
53. 233 Ga. at 877, 213 S.E.2d at 657.
54. 131 Ga.App. 811, 207 S.E.2d 519 (1974).
55. *Id.* at 815, 207 S.E.2d at 523.
56. 232 Ga. 393, 207 S.E.2d 30 (1974).

The court found that, where the evidence in question was presented at trial by the prosecution, it is incumbent upon the defendant to show how he has been prejudiced by not having the evidence earlier.

G. *Double Jeopardy*

In *Cameron v. Caldwell*,[57] the court declared that under both the U.S. and Georgia Constitutions, when a jury can not reach a verdict and there is a mistrial, this does not prevent a re-trial on the same charge.

In *Marchman v. State*,[58] the defendant had had a previous conviction reversed because "there was a fatal variance between the allegata . . . and the probata. . . ."[59] On a second trial, he asserted double jeopardy. The court construed Ga. Code Ann. §26-507 (Rev. 1972) to permit a distinction between a situation in which (1) there was a fatal variance, or (2) there was a finding that even though there was a fatal variance, there was sufficient evidence to support a conviction. The earlier *Marchman* conviction[60] was construed as a fatal variance only in the formal sense; the court did not hold the evidence inadequate. Under the statute, the defendant could be tried a second time.

H. *Punishment*

In an unusual case the court considered the legality of banishment of the defendant from seven counties in Georgia as a condition for suspension of a sentence by a trial court.[61] The state constitution expressly forbids banishment beyond the limits of the state.[62] This case thus requires construction of the constitutional limitation. Ga. Code Ann. §27-2711(6) (Rev. 1972) permits the court to require the probationer to "remain within a specified location." The court of appeals ruled such banishment should be illegal.[63] The supreme court held it to be a matter for the legislature. Justice Undercofler dissented[64] on public policy grounds that such banishment would permit dumping criminals on other counties.

The Georgia Supreme Court continues to hold that the death penalty does not constitute cruel and unusual punishment.[65] Nor does it find any such holding by the U.S. Supreme Court under the eighth amendment. The court also sustained the Georgia statute against a charge of arbitrariness.

A case which will be mentioned here probably belongs under a discussion

57. 232 Ga. 611, 208 S.E.2d 441 (1974).
58. 132 Ga.App. 677, 209 S.E.2d 88 (1974).
59. *Id.* at 677, 209 S.E.2d at 89.
60. Marchman v. State, 129 Ga.App. 22, 198 S.E.2d 425 (1973).
61. State v. Collett, 232 Ga. 668, 208 S.E.2d 472 (1974).
62. GA. CODE ANN. §2-107 (Rev. 1973).
63. Collett v. State, 131 Ga.App. 411, 206 S.E.2d 70 (1974).
64. 232 Ga. at 671, 208 S.E.2d at 474.
65. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975).

of the "new equal protection." In *Calhoun v. Couch*,[66] the defendant, upon a conviction on two counts of burglary, was given probation subject to the payment of a fine of $250 and restitution to each of his victims. Subsequently the defendant's mother made restitution but the fines were not paid. On habeas, the defendant claimed a violation of the equal protection clause. He relied on *Williams v. Illinois*[67] and *Tate v. Short*.[68] The court distinguished these cases by stating that the instant case was not a "working off" of a fine. It is difficult to see, however, why the indigent is not being deprived of his liberty by reason of his indigency, simpliciter. True there are factual differences, but somehow Justice Ingram does not go much beyond the factual distinctions.

Conditions of probation were before the court again in *M.J.W. v. State*.[69] Here the juvenile was required to contribute "100 hours to Parks and Recreation Department of DeKalb County."[70] In addition to other statutory attack, the defendant argued that the condition imposed involuntary servitude. The court found such work rehabilitative in light of the statute and within the punishment exception to involuntary servitude.

I. Right To Bail

Ga. Code Ann. §27-901 (Rev. 1972) provides that specific offenses are bailable only in the discretion of a superior court judge. In *Reed v. State*,[71] the defendant was convicted of unlawfully selling cocaine and heroin. He contended that whenever a superior court refuses bail for any offense that is non-capital it would violate the constitutional right to bail. The court reaffirmed the judge's discretion, unless it has been manifestly and flagrantly abused.

Parris v. State[72] dealt with the problem of when the Great Writ can issue. Here the petitioner had in fact already served the sentence of which he complained. He complained that his conviction was invalid because he did not have counsel. Having the former conviction set aside was important in that that conviction enhanced his present sentence under a federal conviction. Was the petitioner presently "restrained of his liberty" in terms of Ga. Code Ann. §50-101(c) (Rev. 1974)? Justice Hall held that the Great Writ was available and that because of the collateral consequences it was not moot.

66. 232 Ga. 467, 207 S.E.2d 455 (1974).
67. 399 U.S. 235 (1970).
68. 401 U.S. 395 (1971).
69. 133 Ga.App. 350, 210 S.E.2d 842 (1974).
70. *Id.* at 351, 210 S.E.2d at 844.
71. 134 Ga.App. 47, 213 S.E.2d 155 (1975).
72. 232 Ga. 687, 208 S.E.2d 493 (1974).

II. General Due Process Matters

A. *Necessity For Hearing Before Revocation Or Suspension Of Driver's License*

The court in *Pope v. Cokinos*,[73] returned to the problem presented to the Georgia Commissioner of Public Safety by *Bell v. Burson*.[74] The U.S. Supreme Court held there that Georgia must give a motorist a meaningful fault or liability hearing before there can be a suspension or revocation. In the instant case, the Commissioner issued new regulations which allowed a de novo hearing in superior court, although the license was suspended. The court rejected this as satisfying the *Bell* requirements.[75] The court urged the legislature to provide new legislation to solve this break in administration of the act.

A different twist to the same problem arose in *Department of Public Safety v. Irby*[76] in which the court sustained a revocation of the motorist's license upon certification from Florida after a hearing there on liability. The court saw this as a problem of reciprocal revocation, and since Florida had granted a prior hearing, *Bell v. Burson*[77] presented no difficulty. Justice Gunter concurred specially[78] on the ground that Georgia had granted notice and hearing on the Florida certification.

Doran v. Home Mart Building Centers, Inc.[79] sustained the attachment proceeding under Ga. Code Ann. §8-109 (Rev. 1973), where the attachment affidavit was made before a judge of the superior court; asserted that the debtor was removing, absconding and concealing himself to avoid paying the debt; and was made from the personal knowledge of the deponent. The court thought that the U.S. Supreme Court had not eliminated *every* summary proceeding and that if the circumstances created the necessity for the seizure, and an affidavit were properly made, there could be a seizure without a hearing. This view emphasized the idea that *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[80] had found the Georgia garnishment procedure unconstitutional because of the inadequacy of the affidavit requirements.

In *Kirton v. Biggers*,[81] the court sustained Ga. Code Ann. §92-6904 (Rev. 1974) by construing it to require notice and hearing before county commissioners could remove a tax assessor "for cause shown." The court gave a liberal construction to the phrase to save the statute, stating that clearly removal could only be accomplished after notice and hearing.

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73. 232 Ga. 425, 207 S.E.2d 63 (1974).
74. 402 U.S. 535 (1971).
75. 232 Ga. at 429, 207 S.E.2d at 66.
76. 232 Ga. 384, 207 S.E.2d 23 (1974).
77. 402 U.S. 535 (1971).
78. 232 Ga. at 387-88, 207 S.E.2d at 26.
79. 233 Ga. 705, 213 S.E.2d 825 (1975).
80. 419 U.S. 601 (1975).
81. 232 Ga. 223, 206 S.E.2d 33 (1974).

Roberts v. Macaulay[82] laid to rest Georgia's possessory warrant proceeding.[83] In view of the current lively interest in whether any pre-judgment seizure of property without prior notice and hearing is constitutional, the statute failed in many respects.

III. First Amendment Problems

A. Prohibiting A Policeman From Publicly Criticizing Superior Officers

In *Aycock v. Police Committee of the Board of Aldermen of the City of Atlanta*,[84] the court upheld the dismissal of an Atlanta policeman for violating restrictions against public criticism of his superior officers. The appellant raised first amendment problems but the court responded by balancing effectiveness and morale against the individual freedom.

B. Obscenity

Georgia's judicial construction of Ga. Code Ann. §26-2101 (Rev. 1972), concerning the distribution of obscene materials was found to comply with *Miller* standards[85] in *Dyke v. State*.[86]

82. 232 Ga. 660, 208 S.E.2d 478 (1974).
83. Ga. Code Ann., §82-101 *et seq.* (Rev. 1970).
84. 133 Ga.App. 883, 212 S.E.2d 456 (1975).
85. *See* Miller v. California, 413 U.S. 15 (1973).
86. 232 Ga. 817, 209 S.E.2d 166 (1974).