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CRIMINAL LAW

By Denny C. Galis*

The first thing that strikes one who is beginning to write a survey is the sheer number of criminal cases that have traveled through the appellate system. The most immediate and difficult job in preparing such an article is deciding which cases shall be included and which cases shall be excluded. It then becomes apparent that the next choice is either to discuss a few cases thoroughly or discuss more cases briefly. Going on the premise that the criminal law practitioner might use an article of this type as a beginning point of more extensive research, the writer has tried to refer to as many cases as reasonably possible in the space allowed. The decision as to which cases to include, the rather loose division into categories, and the format have been, more or less, arbitrary decisions by the writer and he assumes full responsibility for those decisions.

I. Search And Seizure

Yawn v. State¹

The only evidence that the defendant possessed marijuana was the testimony of the state's witness. While the police officer took the defendant to the police station for the purpose of administering a blood alcohol test, the vehicle was searched by another police officer who later informed the testifying officer that he had discovered marijuana therein. The appellate court held that that statement was hearsay since the witness was not present but was in the station with the defendant while the car was allegedly being searched. Accordingly, it was error to deny the motion to suppress.

Overstreet v. State² and Brown v. State³

In the Overstreet case, it was held that an affidavit totally devoid of any information that drugs of any kind are located on the premises searched is an invalid affidavit and cannot sustain the search. Therefore, in the Brown case, the warrant was further insufficient to support a search of Brown's person when Brown was not mentioned in the affidavit, was not shown to be an occupant of Overstreet's apartment but a mere visitor, and the warrant did not specifically authorize the search of any other person on said premises who might reasonably be involved in the commission of the aforesaid violation.


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The defendant filed a motion to suppress contending that the search warrant was issued on stale and insufficient information. Going on the theory that the staleness objection is without merit where the affidavit states that the activity is occurring, the court held there cannot be "staleness" where it is stated that the activity will occur in the immediate future. The defendant's motion was properly overruled.

State v. Perry

where the hearsay of an informer is relied upon the affidavit must meet two tests: (1) the reasons for the informer's reliability must be furnished and (2) it must either state how the informer obtained the information or the tip must describe the criminal activity in such detail that the magistrate may know it is more than a casual rumor circulating in the underworld or an accusation based merely on the individual's general reputation.

The trial court's sustaining of the defendant's motion to suppress was upheld.

Hiatt v. State

At the beginning of the trial on a charge of possession of marijuana, the defendant orally moved to suppress the evidence. The appellate court held that an oral motion to suppress did not meet the requirements of Ga. Code Ann. §27-313(b) (Rev. 1972) and for this reason a denial was authorized.

State v. Swift

In March, 1973, a rock festival was held on Jekyll Island. A road block was set up by city and county law enforcement personnel to check for driver's licenses, car inspection stickers, registrations, fugitives, and runaways. At times, members of the Georgia State Patrol were present. The defendant was stopped and an officer testified that he walked around the car and saw green vegetation on the floor mat that looked like marijuana. He then searched the car and found a bag of marijuana in the glove compartment. The court of appeals had held that the road block was illegal and a subterfuge and suppressed the marijuana. The supreme court in this case reversed, holding that police officers may set up highway roadblocks for the purposes stated and, if they incidently observe another crime, par-
particularly where the evidence is in plain view, they may search and arrest without a warrant.

**Zimmerman v. State**

Atlanta police officers obtained a search warrant authorizing the search of described premises for certain illegal firearms and explosives. One of the police officers, while searching in a warehouse or storage area, discovered three Olivetti typewriters covered with yellow plastic bags. The typewriters were seized and taken to the front of the storage room for an identification check. It turned out that these typewriters were stolen from the Atlanta Board of Education. The defendant was then arrested. There were no illegal weapons or explosives found. The appellate court excluded these typewriters on the basis that there was no probable cause for their seizure, *i.e.*, there was nothing to indicate to the officer that they were stolen.

**Bellamy v. State**

In this instance, an affidavit in support of a search warrant set out that there was probable cause to believe that a defendant, Owen, had drugs in his possession and control and described the premises as a street address and curtilage. The officer searched a vehicle and a U-Haul truck in the driveway of the described property. The complaint of the defendant, Bellamy, was that the court erred in holding that there was probable cause to search the U-Haul truck because it was not specifically named in the affidavit and therefore, it could not be held to be within the curtilage. The appellate court held that the search of the U-Haul truck was proper in that it was in the curtilage, whether it was named or not.

**State v. Toomey**

The defendant had apparently tied into a private phone line of a local industry and was using the line to discuss drug parties and the usage of drugs. An investigator called in by the industry listened to various phone conversations and, as a result of what he heard, went before a justice of the peace and acquired a search warrant. The search revealed drugs on the defendant’s premises. The defendant filed a motion to suppress the evidence resulting from the intercepted phone conversation. The appellate court upheld the trial judge who had sustained the motion to suppress on the grounds that the investigator did not follow the requirements of Ga. Code Ann. §§26-3001, -3004 (Rev. 1972). These statutes make it unlawful to intercept phone conversations without making written application under oath to the district attorney or attorney general, showing probable

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cause, and obtaining the necessary warrant from the judge of a superior court.

**Pritchett v. State**\(^{12}\)

Police officers of Spalding County and Griffin, Georgia, received information over a period of several months that defendant, Pritchett, was selling marijuana. A raid was planned but before it was executed, information was received from a confidential informer that Pritchett and his girl friend were at that moment selling drugs in a Griffin parking lot. Pritchett was not found in the parking lot but was seen driving down the street in an automobile. He was stopped and searched, and marijuana was found on the person of his girl friend who was riding with him in the front seat. A motion to suppress was filed and denied, and the defendants were convicted. The evidence revealed that Pritchett was not at the place the informant said he would be but was simply stopped while riding down the street in an automobile. One of the reasons given by the appellate court for sustaining the trial court's ruling upholding the search was that while Pritchett was not caught in the process of selling illegal drugs, a search of his co-defendant, Black, revealed marijuana.

The appellate court, in holding that probable cause did exist, did not explain what constituted probable cause but merely stated that when the defendants were located they were performing an illegal act, to-wit: possession of marijuana. This is contrary to the general theory that the fruits of a search do not validate an otherwise invalid search. Frankly, it is the writer's position that the court has stretched beyond permissible limits in sustaining this search. Certainly the fact that marijuana was ultimately found should be of no help in sustaining that search.

**Culpepper v. State**\(^{13}\)

In this case, some of the evidence given by the defendant in support of his motion to suppress was later presented to the jury over the objections of his counsel. The appellate court held that it was intolerable that one constitutional right should have to be surrendered in order to assert another. The defendant's objections to the testimony of the officers at the trial should have been sustained.

Also, the defendant was convicted by a jury which was never sworn to try the particular case at bar as required by Ga. Code Ann. §59-709 (Rev. 1965). The appellate court held that this is a matter which cannot, in any manner or under any circumstances, be waived. Therefore, this was also reversible error.


In this instance, certain objects were picked up by police officers in a cabin where the defendant was arrested. These items were picked up by officers who returned to the cabin following the defendant's arrest and incarceration. It was conceded that there was no search warrant obtained. The state contended that because the appellant testified that he did not own the cabin from which the evidence was procured, he had no standing to suppress the evidence. However, he further testified that he had the right to use the cabin, that it belonged to a relative, and that he was authorized to use it at his discretion. This, the court held, gave him standing and the motion should have been sustained. However, in a strange decision, the court further reviewed the evidence and held that the objects admitted improperly were harmless error and that there was sufficient evidence without those objects to sustain the conviction.

II. Sentencing

Hopper v. Thompson

In this case, the court reaffirmed the rule that even in the absence of objection on behalf of the defendant, the admission of prior invalid convictions at the sentencing voids the sentence. The convictions held void in this case were found to be so on the basis that there was no evidence to support a finding that the defendant had waived the right to counsel on these charges and that the waiver of such right cannot be presumed from a silent record under Gideon v. Wainright.

Wiley v. State

The appellant entered a plea of guilty and was sentenced under the first offender statute to serve three years on probation. Subsequently, after a hearing, appellant's sentence was revoked and he was sentenced to serve ten years in the penitentiary. It was from this judgment that he appealed. It was held by the court of appeals that even though Ga. Code Ann. §27-2727 (Rev. 1974) allows the court to put the defendant on probation before an adjudication of guilt, in the event that probation is revoked the judge may not increase the sentence.

The supreme court then overruled that decision in State v. Wiley by holding that the result of the first offender treatment is to interrupt the disposition of a defendant's case to see whether or not he can successfully
complete probation. If he cannot, the disposition resumes and he can be sentenced to any term allowed by law without regard to the length of the prior probated sentence.

*Collett v. State*\(^\text{20}\)

The court of appeals in this instance apparently brought our trial courts, perhaps screaming and kicking, into the Twentieth Century by holding that a condition imposed on the suspension of a sentence which amounted to banishment from certain counties in the state was void as against public policy. The supreme court in *State v. Collett*\(^\text{21}\) immediately returned us to the Nineteenth Century by saying that, while one cannot be banished from the state, he can be banished from certain areas within the state.

*Parrott v. State*\(^\text{22}\)

Defendant was convicted of a theft and sentenced for a felony. The only evidence of the value of the stolen property was contained in a transcript of the pre-sentence hearing which, as filed in the court of appeals, quoted the investigating police officer's testimony that the item was worth anywhere from ten cents to three dollars. It was contended that this was an erroneous transcription and that the actual testimony was one hundred to three hundred dollars. The state attempted unsuccessfully to locate the tapes of the hearing which were used by the reporter, now deceased, to make up the transcript. The appellate court held that under Ga. Code Ann. §6-805(a) (Rev. 1975) and §27-2401 (Rev. 1972), it is the duty of the state in all felony cases to have the transcript of evidence and proceedings reported and prepared and, after a guilty verdict, to file the transcript. The failure of the state to file a complete and accurate transcript, even where caused, as here, by its inability to file it (and not by the appellant's fault) effectively denies the appellant his right to appeal. Accordingly, the portion of the judgment sentencing the defendant to felony punishment was reversed and the case was remanded to the trial court for the purpose of conducting another pre-sentence hearing to determine the value of the stolen property so that defendant could be resentenced according to the value proved.

*Hill v. Hopper*\(^\text{23}\)

The appellate court held that Rule 11 of the Federal Rules of Criminal Procedure which requires that the length of possible sentence be explained before a guilty plea is taken, is not a rule of constitutional magnitude.


\(^{23}\) 233 Ga. 633, 212 S.E.2d 810 (1975).
Consequently it is not error under Georgia procedure to fail to give that information to the defendant in an otherwise voluntarily-given guilty plea.

*Calhoun v. Couch*²⁴

Appellant pleaded guilty to two counts of burglary. He was probated on the condition precedent that he pay a fine of two hundred fifty dollars and restitution to each of two victims. Appellant began serving his sentences in the custody of the appellee, Warden Couch. Subsequently, restitution was made but the fines were not paid. Petitioner sought release on habeas corpus on the basis that *Williams v. Illinois*,²⁵ *Morris v. Schoonfield*,²⁶ and *Tate v. Short*²⁷ require the conclusion that he had been denied equal protection of the law. The appellate court held that those cases did not apply in this instance because they involved situations where an individual was held in jail to pay a debt, and by paying the debt would have escaped a prison sentence altogether. In this instance, the petitioner received a prison sentence in any event. Payment of the fine was simply made a condition of whether he would serve that sentence in confinement or out of confinement. Frankly, the writer does not see the distinction because the end result is the same. If one can afford a fine and/or restitution, one is on the street. If one cannot, one goes to prison.

*Ballard v. State*²⁸

In this instance, the defendant entered a plea of guilty based on a plea bargaining agreement between the district attorney’s office and defendant’s attorney. The court announced that it would sentence the defendant to a more severe penalty. When defense counsel then attempted to withdraw the plea, the judge announced that he had signed the judgment before sentence was pronounced specifically to prohibit the defendant from withdrawing the plea. The appellate court held that the judgment must not only be in writing and signed, but it must also be filed with the clerk of the court. Consequently, the motion to withdraw was made within the proper time and the defendant had the absolute right of withdrawal. The decision further states that even after the pronouncement of a sentence, the defendant has the legal right to move for a withdrawal of a guilty plea and that upon such motion, the trial judge must exercise his legal discretion in deciding whether or not to grant the same. In this instance, the trial judge not only had not pronounced sentence, but had also failed to exercise any discretion.

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Defendant, Elrod, filed a writ of habeas corpus in which he asserted that he had pleaded guilty to an accusation for motor theft which did not charge him with a second offense. However, he was sentenced as a multiple offender. Relying on previous decisions which hold that one cannot be indicted for only one offense carrying a maximum punishment and then have maximum punishment increased under the recidivist statute at the election of the district attorney, the court held that this applies to an accusation as well. Even though an accusation can be amended, this one was not.

In this case, the trial court attempted to amend the original sentence which, being for a term of years unauthorized by law, was void. The defendant, who had originally pleaded guilty, attempted by written motion to withdraw such plea prior to the resentencing procedure. The trial judge refused to allow him to do so saying that he was entering up the order nunc pro tunc as of the date of the original sentence. This the trial court could not do for two reasons. First, the sentence being void, there was nothing to amend by, and second, the term having passed, the trial judge had no authority to modify the sentence in any event. The defendant was entitled to a new hearing on the sentence. Where the sentence is void, a valid sentence may be imposed by the court, but until such valid sentence is imposed, the defendant stands as though convicted but not sentenced.

In these cases, the district attorney, in the presence of the jury, made a statement to the court in which he explained the appellate procedure whereby the supreme court automatically considers any case involving a death sentence. Although no objections to this statement were made in the trial court, the appellants asserted on appeal that the above statement was prejudicial in that it would influence the jury to act without exercising reasonable caution and deliberation and to shift the responsibility for an erroneous sentence.

The supreme court ruled on this even though no objection was raised in the trial court. It was held that such statements constitute prejudicial error in cases in which the accused is exposed to a death penalty. Where one of the jury’s functions is to impose punishment for a crime, a reference by the prosecutor to the defendants’ right to appeal is more likely to be con-

sidered reversible error if a death penalty is subsequently imposed. This is because, in weighing the imponderables, it cannot be concluded that the jury was not influenced by such statements to impose a more severe punishment than their unbiased judgment would have given.

The two sentences of death for murder and the two sentences of death for armed robbery were set aside and a new trial was ordered on the issue of punishment for these offenses.

**Nix v. State**

The court held that the questions raised by the appellant’s habeas corpus petition in which he alleged that his felony conviction was void were not moot even though he had completed the service of his sentence, since he was suffering collateral consequences from the sentence.

**Duncan v. Ricketts**

The appellant had his parole revoked without a hearing due to his failure to appear in the City Court of Atlanta for alleged traffic violations. The state, at the habeas corpus hearing, contended that the forfeiture of a cash bond was the same as a finding of guilt under Ga. Code Ann. §24-310(a) (Rev. 1971). However, the appellate court held that under Ga. Code Ann. §24-312a(b) (Rev. 1971), any traffic violation under the jurisdiction of the Traffic violation Bureau is characterized as a “traffic violation” and shall not be considered as a misdemeanor. Consequently, the admission of guilt to a traffic offense under the jurisdiction of a traffic violation bureau, such as was involved here, is not one of the specified exceptions to the statutory requirement that there be a hearing before a parole is revoked. Therefore, a failure to hold such a hearing was a denial of due process.

**Bailey v. Baker**

Petitioner, Bailey, entered a guilty plea to the charge of aggravated assault with the intent to murder and was sentenced to ten years on probation and to make restitution of three thousand dollars. Approximately three years later, her probation was revoked and she was imprisoned to serve the remainder of her sentence. She filed habeas corpus on the theory that the trial court did not advise her of her rights as required by *Boykin v. Alabama* whereby the defendant must be instructed on the record concerning what the plea connoted and its consequences. In the habeas corpus hearing, the attorney who had previously represented the defendant, attempted to testify that he gave her the necessary instructions.

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regarding the consequences of a guilty plea. The petitioner attempted to invoke the attorney-client privilege saying that the trial court was the only legal source of instruction with regard to the consequences of a guilty plea. The appellate court, saying that this was a case of first impression in Georgia, held that the trial court was not necessarily the only source of said information and the petitioner could not on the one hand contend that she was ignorant of certain facts and on the other hand prevent the attorney from testifying as to his instruction concerning those facts.

*Gregg v. State*\(^\text{37}\)

Gregg was tried on four counts, two of which consisted of murder. The other two consisted of armed robbery. He was convicted on all four counts and the death penalty was given on each. However, in the jury's verdict it was stated that the aggravating circumstances in recommending death for the two counts of robbery were the murders, and the murders were then found to be the aggravating circumstances in the armed robberies. The supreme court set aside the two sentences of death for the offenses of armed robbery because the two different crimes cannot each be used as aggravating circumstances in the other. That is, if the armed robbery is used as an aggravating circumstance for the murder, then the murder cannot be used as an aggravating circumstance for the robbery.

*Scott v. State*\(^\text{38}\)

This appeal questioned whether the evidence in the case was sufficient to authorize a revocation of the probationary sentence under Ga. Code Ann. §27-2713 (Rev. 1972). The court reviewed the case law dealing with a probationer's rights when faced with a revocation and concluded that the trial court does not even have to support the revocation finding by a preponderance of evidence. The judge is the trier of fact, and while he cannot act from whim or caprice, he has a very wide discretion.

III. WITNESSES

*Nix v. State*\(^\text{39}\)

Under the statute requiring corroboration of an accomplice's testimony in any case of a felony, Ga. Code Ann. §38-121 (Rev. 1974), the corroborating circumstances must connect the defendant with the crime independently of the accomplice's testimony. It is not sufficient that the accomplice be corroborated with respect to time, place, and circumstances if there is nothing to connect the defendant therewith.

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ERRATA

Moody v. State

In this instance, a witness was held in contempt for failure to appear as directed by subpoena and for appearing in a courtroom while under the influence of alcohol. Her appearance, however, in the courtroom in that condition was not voluntary, but resulted from her having been arrested and conveyed there by the sheriff's office. This was the determining factor in holding that she could not be held in contempt merely for appearing there in a drunken condition. It was further held that she was entitled to notice and a hearing before being held in contempt on the ground of failure to respond to a subpoena.

Murphy v. State

Defendant was indicted for an aggravated assault. His sole defense was to be insanity at the time of the act caused by epilepsy. His main witness was a doctor who had supposedly treated him for epilepsy and who had been subpoenaed but failed to respond to the subpoena. A motion was made to the court to force the witness' attendance at the trial. At a hearing, the defendant met all the requirements of Ga. Code Ann. §81-1410 (Rev. 1956) in making a formal showing for a continuance, except that he could not show that he could produce the witness at the next term of court and could not state what the doctor’s testimony would show. The defendant was unable to show these matters because the doctor refused to communicate with the defendant’s attorney or to obey the subpoena. Apparently, the doctor-witness was totally uncooperative and uncommunicative. It was held that under the circumstances of this case, it was reversible error for the trial court to overrule the defendant’s motion and the trial court should have exercised its authority to bring the witness to court.

IV. EVIDENCE

Quinn v. State

Defendant was charged with an assault by shooting the prosecuting witness with a pistol. Defendant’s attorney asked the witness whether or not he had a civil action pending against the defendant arising out of the same incident. It was held to be error for the trial judge to refuse to let the witness answer the question. The appellate court held that it was admissible to show interest or possible bias on the part of the witness. The instant decision was distinguished from Faulk v. State where it was held that the same type testimony was rightfully excluded to show motive because the filing of the civil suit happened after the criminal warrant was

43. 47 Ga. App. 804, 171 S.E. 570 (1933).
apparently, the testimony that a civil suit is pending on behalf of the prosecuting witness is admissible to show interest, but not admissible to show motive.

_Cagle v. State_ 44

Defendant was charged with burglary and with theft of a motor vehicle. With counsel present, and shortly after his arrest, the defendant agreed to take a lie detector test. Later that same day, with counsel present, defendant made a statement denying participation in the burglary and in the theft of the vehicle. On the trial of the case, the state, over defendant's objection, admitted the results of the polygraph examination. The appellate court held that this was reversible error. Under Georgia law, the results of a lie detector, favorable or unfavorable to the accused, are not admissible as evidence, even when, as in this case, the evidence was admitted for impeachment purposes.

_Bryant v. State_ and _Smallwood v. State_ 45

In this instance, defendant Bryant was offered immunity if she would state what she knew about the alleged robbery. She admitted certain incriminating facts and then stated that she would not testify because she feared reprisal by co-defendant Smallwood. Defendant Bryant's admissions were offered by law enforcement officers in testimony at the trial. Objection was made on the ground that the information was elicited by the hope of reward, but the trial court admitted it against both defendants. The appellate court held that it could not be admitted against Bryant over her objection because it is always reversible error to allow a confession or incriminatory statement in evidence against the maker thereof when it is not freely and voluntarily made, or when made with the hope of reward, _i.e._, immunity.

_Hess v. State_ 46

This is the famous "Five Dollar Rocking Chair" case. Ms. Hess' conviction was overturned on the basis that the prosecutrix, the owner of the house from which the chair was taken, was allowed to testify at the trial that she went to the house several days after the defendant was arrested and compiled a long list of other items that were taken from the house. The only item which could be connected with the defendant was the chair. None of the other items had been moved from the house by the defendant and none were found in the car on the occasion in question or in possession of the defendant. Testimony concerning any of the listed items was harmful error.

Eades v. State 47

The defendant complained of error in that the crime with which he was charged was committed prior to the enactment of Ga. Code Ann. §38-415 (Rev. 1974) which eliminated the opportunity for an accused to make an unsworn statement. Therefore, he contended that he should have been allowed to make such a statement, even though the trial was after the effective date of such act. The appellate court held that this was not an ex post facto law because the method whereby the defendant gets his story to the jury is procedural only. The trial must be governed by the procedural rules in existence at the time of trial, rather than at the time of offense.

Hancock v. State 48

The appellate court held in this case that if the defendant takes the stand and testifies to a state of facts contrary to his prior statements, those prior statements may be given in evidence solely for the purposes of impeachment, with the proper caution by the trial court, even though those statements were previously made by the defendant without the proper Miranda warnings.

Robinson v. State 49

This case discussed the difference between an incriminatory statement and a confession, and cited the rule that where a defendant has made an incriminating statement and not a confession, it is prejudicial error to charge the law of confession. It then proceeded to attempt to explain the difference between the two and came up with the conclusion that a confession, as distinct from an incriminating admission, is a statement inconsistent with the possibility of the accused's innocence for the crime charged. A statement which includes facts or circumstances which show excuse or justification is not a confession even if it admits the main fact.

Russell v. State 50

The court relied, in a marijuana conviction, on the law that evolved from illegal whiskey cases which states that

even the presumption of law that whiskey found in the house belongs to the head of the house is not sufficient to support a verdict of guilty, where the defendant's occupancy of the premises is maintained by him and his family jointly with others. 51

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51. Id. at 36, 207 S.E.2d at 620.
This gave rise to the “equal opportunity” situation as explained in Brown v. State. This same basic theory was applied in Ridley v. State in an entirely different situation. In this instance, the defendant was a prisoner in the Georgia Diagnostic and Classification Center and was charged with possession of a deadly weapon by a prisoner. It was found secreted in his cell but the evidence revealed that the prisoners had the option to leave their cells unlocked when they were out, and it was not unusual for one inmate to go into another inmate’s cell. The defendant also testified, without dispute, that other prisoners always had access to his cell. The court held that these circumstances did not rule out all other reasonable hypotheses except the hypothesis of guilt of the accused.

Pepper v. State

The first error committed by the trial court was in failing to charge the law of alibi where the appellant’s sole defense was alibi. The appellate court held that the trial court should have so charged, even without request. The trial court committed further error in charging the jury that a single witness is sufficient to establish a fact except in a felony case where the only witness is an accomplice. The judge charged the jury that whether the state’s witness was an accomplice was a question for the jury to determine and the test for determining whether a witness is an accomplice is whether or not the witness could be indicted for the offense. If so, he is deemed to be an accomplice. However, it was held error that the trial court did not go further in giving the jury a standard by which they could determine whether said witness could be indicted for the offense and could thus be considered an accomplice whose testimony required corroboration.

Wattley v. State

During the pre-sentence hearing after conviction, a character witness was offered by the defendant to prove his good character. On cross-examination, the state was allowed to ask the witness whether or not he had heard that the defendant had been charged with various crimes. The trial court ruled that this was permissible in that a person’s reputation is what his friends and neighbors say about him, irrespective of the truth of those sayings, as opposed to his character which is what he really is. The appellate court proceeded to express its strong disapproval of this type of evidence, even going so far as to quote the ethical rules as approved by the supreme court for the State Bar of Georgia, to-wit: “A lawyer shall not . . . state or allude to any matter . . . that will not be supported by admissible evidence.” The court then said that this ethical consideration has not

52. 94 Ga. App. 542, 95 S.E.2d 302 (1956).
56. Id. at 321, 206 S.E.2d at 518
been given legislative sanction or been written into a decision, and therefore, it cannot have the effect of overturning the defendant’s conviction.

*Banks v. State*

In this case, the defendant was convicted of a violation of the Public Nuisance Act of Clayton County, Georgia, in that she had unlawfully dumped a bag of garbage on Postum Road. The sole evidence against her was the fact that the bag of garbage included a letter bearing her name. She testified that she had never disposed of her own garbage, that it was handled by her son, and that she had never dumped garbage on Postum Road and did not know of anyone who may have dumped any garbage along Postum Road. The court held that this circumstantial evidence did not exclude every other reasonable hypothesis save that of the guilt of the accused and that the defendant should have been exonerated.

*Jones v. State*

The appellant in this case was convicted on two counts of rape, one count of aggravated sodomy, and three counts of armed robbery. His basic complaint was that the trial judge excluded the testimony of a psychiatrist who was to testify concerning the credibility of eye witnesses. The court gave a long description of the standards under which expert testimony is admissible. It excluded the expert testimony of the psychiatrist concerning the witness’ credibility on the basis that credibility was for the jury to decide and there was insufficient observation of the assailed witness by the expert. The court concluded that generally, the best method of attacking the credibility of an eye witness identification is by cross-examination. The memory of a witness may not be disparaged by other witnesses in order to impeach that testimony. It must be done by cross-examination of the witness whose recollection is under attack.

*Williamson v. State*

This can be called the “Case of the Phantom Pistol.” Defendant, Williamson, was convicted of possession of stolen property based on evidence that he was a passenger in another individual’s automobile and that a stolen .38 caliber pistol was found under the seat where Williamson was sitting. Both Williamson and the driver denied any knowledge of the ownership of the pistol or of how it got there. Apparently, it simply appeared when the law enforcement officers stopped the car. In any event, the appellate court reversed the decision based on the facts that the pistol being stolen and the accused sitting in the automobile seat under which it was

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found were not sufficient to show that he had possession and, therefore, would not authorize a conviction.

Royal v. State

The defendant was convicted of theft of lost or mislaid property. Under Ga. Code Ann. §26-501 (Rev. 1972) every essential element of the crime charged must be established. In this case, it was proven by the evidence that the copper tubing in question was clearly stolen from the owner and that the owner had not lost or misplaced it. Consequently, the defendant was entitled to an acquittal.

Phillips v. State

This is an interesting case in that the opinion states that it constitutes the first appellate court ruling wherein reliance is solely upon the provisions of Ga. Code Ann. §27-1802 (Rev. 1972), which allows a directed verdict of not guilty by the trial court. This case ended up in the court of appeals because the trial ended in a mistrial and defendant had filed a motion for a judgment of not guilty notwithstanding the mistrial. The trial court denied the motion, and this appeal followed. After reviewing the evidence, the court of appeals ruled that the trial court should have sustained the motion for acquittal.

Phillips v. State

The defendant was charged with possession of marijuana but the only marijuana connected to the defendant was an egg carton containing small growing plants. These plants were taken to the sherriff’s office where they were permitted to die and were discarded. The plants were not analyzed by the State Crime Laboratory. The sheriff was allowed to testify that he had observed growing marijuana plants and thought those plants seized were marijuana, but he could not be sure. The appellate court held that this testimony did not eliminate every other reasonable hypothesis save that of the guilt of the defendant and he should not have been convicted.

V. Jury Charge

Tift v. State

This is a marijuana case in which the appellate court held that it is error to fail to charge that possession of marijuana must be "knowledgeable" possession to be unlawful. There must be criminal intent, and this should have been charged without a request.

McNeill v. State

One of the defendant's contentions was that the trial court erred in charging the jury on entrapment by failing to further instruct the jury that the burden of disproving entrapment beyond a reasonable doubt was upon the state. The appellate court agreed with this contention and reversed the conviction.

Owens v. State

The supreme court held in this case that the standards of jury selection applicable in death cases, as set forth in Witherspoon v. Illinois, must be inquired into by the trial court on voir dire, and the failure to record the Witherspoon voir dire, in a case in which the sentence of death is imposed, is reversible error.

Maddox v. State

Defendant Maddox appealed on the ground, among others, that Ga. Code Ann. §59-112(b) (Rev. 1965), which permits women to be excluded from jury service merely by notifying the jury commissioner in writing to that effect, was unconstitutional and denied him a proper jury panel from which to select the trial jury. The supreme court discussed this at some length and found that the statute standing alone does not necessarily result in a jury box that is almost totally male and therefore, is constitutional.

Edwards v. State

In this murder conviction, the jury requested further instructions on murder, voluntary manslaughter, and involuntary manslaughter. The judge refused to give further instructions upon determining that the jury already had a verdict, but had not yet given it in open court. It was held that when a jury requests the court to recharge them on any point, it is the court's duty to do so.

Gould v. State

Although there were several cases during the surveyed period in which the defendant raised the objection that the jury box was not properly compiled, the appellate courts did not hold much sympathy for that contention where it was either totally or partially without substantial evidence to reflect the composition of the jury box vis-a-vis the composition of the

68. 233 Ga. 625, 212 S.E.2d 802 (1975).
available jurors. In the instant case, the defendant's contention was upheld on the basis of substantial statistical material submitted by the defendant. The decision itself contains some of the statistics and charts presented in the court. It seems to the writer that Gould would be a substantial guideline to any practitioner attempting to challenge the composition of the jury box.

Linder v. State

A charge that the defendant

has the right to either testify or to remain silent, as the burden is not on him to establish his innocence, but upon the state to prove guilt, and if he makes no statement or does not testify, this does not infer guilt, and such failure should not be considered for or against him . . . 71

was found to violate Ga. Code Ann. §38-415 (Rev. 1974) which expressly forbids any comment on defendant's taking the stand or his failure to take the stand. Here, the charge constituted reversible error.

VI. RIGHT TO COUNSEL

Smith v. State

Where the state's witness testified on cross-examination that he could not recall whether the defendant requested that a lawyer be present at the interrogation and that he was not denying that the defendant requested a lawyer, it was held reversible error to allow the statements resulting from the interrogation in evidence over objection, because the state could not demonstrate clearly that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel as required by Miranda v. Arizona.

Moore v. Hopper

This was a petition for habeas corpus based on the ineffective assistance of counsel in filing an appeal. The defendant stated that his attorney did not advise him of his right to appeal, that he did not know that he had the right to appeal, and therefore, he did not request his attorney to file an appeal. His attorney testified that he had no communication from appellant in regard to filing an appeal. The court cited Holloway v. Hopper in which the supreme court expressly disapproved earlier hold-

71. Id. at 625, 208 S.E.2d at 632.
75. 233 Ga. 615, 212 S.E.2d 795 (1975).
ings to the effect that the responsibility in determining whether to appeal rests on counsel, and stated that those holdings should not be followed. However, in the instant case, the supreme court held that the evidence was sufficient to sustain appellant's contentions that he was not fully informed of his appellate rights and that his direct appeal was foregone by his court-appointed attorney without his consent. Consequently, he was entitled to file an appeal with the appointment of counsel.76

Mercer v. Hopper77

Per curiam, the court held that a defendant is not entitled to counsel at his probation revocation hearing. In a special concurring decision, Justice Hall found that the individual waived his right to counsel in this particular instance, but dissented from the basic theory that a defendant was not entitled to counsel at a probation hearing. The special concurring opinion stated that this was in direct conflict with the U.S. Supreme Court case of Gagnon v. Scarpelli.78

Grant v. State79

Clifford Grant, Jr. and Willie J. Grant were jointly indicted for the offense of burglary. Upon the call of the case, their court-appointed counsel announced that he was ready to proceed with Clifford, who was a jail prisoner with whom he had conferred, but that he had not conferred with nor seen Willie until the morning of the trial. He requested a severance as to Willie and also requested permission to withdraw as Willie's counsel. The court allowed counsel fifteen minutes to confer with Willie and stated that if it were to grant a motion at all, it would be a continuance or postponement, not a severance. The cases proceeded to trial and both defendants were convicted. Under the provisions of Ga. Code Ann. §27-2101 (Rev. 1972) as to misdemeanors and felonies less than capital, the court has discretion as to severance. However, the appellate court held that under these circumstances, the court should have granted the motion for severance or continued the case. It was shown nowhere in the record that Willie had ever received notice or knowledge that counsel had been appointed for him. Thus, no blame could be properly lodged against him for failure to contact counsel.

Willingham v. State80

The defendant in this instance involved various lawyers from time to time in his case and ended up, against his wishes, with a public defender.

As part of his appeal, the defendant came up with the novel and imaginative proposition that if he was unable to employ his own counsel, then he was immune from prosecution. The appellate court very quickly ruled against him on this point.

VII. Demand For Trial

Sander v. State81

In this instance, the defendant demanded a speedy trial simply by writing a letter through his attorney to the court making that request. The letter was not made a part of any of the court records. However, the appellate court held that while the burden is on the defendant to make a timely demand for trial, under Ga. Code Ann. §27-1901 (Rev. 1972) his failure in doing so does not, of itself, work a waiver of the sixth amendment of the U.S. Constitution. That amendment, being an independent guarantee of this right, and defendant's assertion or failure to assert his statutory right was simply one of the factors to be considered in determining whether the sixth amendment right had been impinged.82

VIII. Extradition

Burton v. Stynchcombe83

The governor of Michigan sought the extradition of Burton for trial in that state for the offenses of fraudulent detention or use by a subcontractor of building contract funds, and fraud by false pretenses. Burton filed a writ of habeas corpus in the Fulton County Superior Court and contended that the extradition proceeding was an endeavor to use the criminal process for collection of civil debts. The appellate court held that the courts of the asylum state cannot, upon a writ of habeas corpus, inquire into the guilt or innocence of the accused, or any of his alleged defenses.

Gillstrap v. Wilder84

Defendant, Gillstrap, now released from a Georgia prison but subject to a Georgia governor's warrant for his extradition to Virginia, sought habeas corpus to avoid extradition on the grounds that Virginia delayed an unreasonable length of time after indicting him before bringing a detainer against him while he was in Georgia custody. He claimed that such delay denied him his constitutional right to a speedy trial. The substance of the decision held that the issue was improperly raised in an extradition pro-

82. See Hall v. State, 131 Ga. App. 786, 206 S.E.2d 644 (1974) for the four relevant factors in determining whether the constitutional requirements for a speedy trial have been carried out.
ceeding and that the defendant should raise that question in the Virginia courts after being sent there to answer the Virginia charges.

IX. INDICTMENT

*Stinnett v. State*

An indictment in the superior court which has jurisdiction over both felonies and misdemeanors, charging possession of marijuana, does not have to state the amount of marijuana. Whether the defendant is guilty of a felony or misdemeanor depends upon the proof at the trial of the amount of marijuana possessed and the prior record of the defendant.

*DeFoor v. State*

The defendant, a county commissioner, was indicted for theft by taking. Several counts charged that the defendant, as county commissioner, did “then and there having lawful possession of the money of the county of Gordon . . .” appropriate said property to their [defendant’s and co-defendant’s] own use in that the said county commissioner “did make, draw, and sign a check” in a specified amount upon funds of the County of Gordon. . . .

The court of appeals held that the indictment should be quashed because the title to the funds was in the bank. The county commissioner was therefore a creditor of the bank as to said funds, and the bank was a debtor as to the funds. The demurrers to those counts of the indictment should have been sustained.

The supreme court overruled this decision on the grounds that at the time the thefts charged were completed, the money had been drawn from the bank and the bank no longer had title.

*Nelms v. State*

In this case, after ample explanation by the defendant’s attorney to the defendant, the defendant’s attorney signed on the back of an accusation the following: “The defendant waives formal arraignment, copy of bill of indictment, list of witnesses sworn before the Grand Jury, and agrees to strike from a panel of jurors and pleads not guilty.” Upon a jury trial, he was convicted and sentenced, and thereafter attacked the sentence by habeas corpus. The court of appeals held that this did not amount to a

87. *Id.* at 767, 206 S.E.2d at 713 (emphasis by the court).
90. *Id.* at 691, 209 S.E.2d at 111.
waiver of actual indictment by a grand jury and the judgment was reversed.

X. APPELLATE PROCEDURE

Echols v. State

The state, relying on Hill v. Willis, contended that since the defendant did not assign error upon the denial of his motion for a new trial, no question was presented for decision in this court. The appellate court noted previous decisions which have held that since the rules of the court were amended March 2, 1972, and specifically by rule 14(e) which provides that "[t]he enumeration of errors shall be deemed to include and present for review all judgments necessary for a determination of errors specified," the rule of Hill v. Willis is superceded.

Cross v. State

The appellant in this case filed a motion to suppress certain tape recordings of his telephone conversation with police officers and the testimony related thereto. He had filed a previous motion to suppress the identical evidence and this ruling was sustained by the court of appeals. The case was returned to the trial court for final disposition. In the instant case by the same defendant, the supreme court held that

[a]n appellant may not avoid a judgment of the court of Appeals which affirms the denial of his [prior] motion . . . by filing another motion to suppress the same evidence when the case is returned to the trial court, attacking the constitutionality of a portion of the law under which the Court of Appeals' decision is rendered where there has been no subsequent change in the law.

93. 134 Ga. at 216-17, 213 S.E.2d at 908 (citations omitted).
95. Id. at 961, 214 S.E.2d at 376.