

**APPELLATE COURT OPINION SUMMARIES
OPINIONS FROM FEBRUARY, 2005.**

United States Supreme Court:

* Smith v. Massachusetts, No. 03-8661, 125 S. Ct. 1129, 60 L. Ed. 2d 914, 2005 U.S. LEXIS 1398 (February 7, 2005).

Smith was tried in a Massachusetts court for armed assault, assault and battery, and unlawful possession of a firearm. At the close of the State's evidence, Smith moved for an acquittal on the firearms charges, and the trial court granted the motion. However, the court later "reversed" her own decision, permitted the jury to consider the firearms charge, and it returned a guilty verdict on all three counts. Smith appealed, claiming that this subjected him to double jeopardy. The Supreme Court granted cert to consider the issue and reversed the Massachusetts courts. It held that the judge's first ruling was a "final judgment of acquittal" and as such the double jeopardy clause prohibited any further prosecution. Because Smith reasonably relied upon his acquittal of the weapons charge, and because Massachusetts law did not contain any special provisions allowing trial courts to "reverse" or reconsider such judgments of acquittal and allow the State to reopen its case before sending it to the jury, the trial court erred. Though few states have done so, state courts and lawmakers can craft rules allowing reconsideration or re-opening of the State's case once a directed verdict is granted, but the defense must have notice that such rulings are "nonfinal."

Georgia Supreme Court:

Lewis v. State, S04A2006, 2005 Ga. LEXIS 123 (February 7, 2005).

This is the "Little B" case in which a thirteen-year-old defendant was tried as an adult for murder in the shooting death of an Atlanta man. Lewis's challenge to constitutionality of the SB440 rule allowing juveniles between 13 and 17 to be tried as adults for certain crimes was not raised in the trial court, and was therefore waived. The trial court did not err by not considering *sua sponte* the defendant's competency; there was nothing in the record that should have triggered an inquiry into Lewis's competency, and while **the Court recommended that superior courts hold competency hearings in SB 440 cases "as a cautionary matter,"** such hearings have not been prescribed by the general assembly and Lewis was not legally incompetent because of his youth. Though the trial court erred in allowing hearsay testimony, by allowing the State to comment on matters not in evidence, and by giving a charge (later disapproved of by the Georgia Supreme Court) that the jury may infer intent in the defendant's use of a deadly weapon, the Supreme Court held that the evidence of guilt was so overwhelming (six eyewitnesses testified about the defendant's guilt) that these errors were harmless. Lewis's trial counsel was not ineffective for failing to challenge appellant's competence to stand trial, failing to adequately question prospective jurors, failing to raise objections to improper questioning by the State, or failing to seek a mistrial during closing arguments. Lewis's trial attorney explained reasonable trial strategy behind his actions, and Lewis could not overcome the "strong presumption that trial counsel's representation fell within the range of effective professional representation."

Ware v. State, S04A2076, 2005 Ga. LEXIS 122 (February 7, 2005).

Ware appealed his convictions for malice murder and concealing a death of another. He claimed that the trial court erred in denying his motion to suppress evidence gathered in a search of his home, but as the record contained neither an order denying this motion nor a transcript of that hearing, the court rejected this claim. The evidence was sufficient to authorize a guilty verdict (witness testified that Ware asked for help with “a body,” noticed stains on Ware’s clothing, on his bed, and in his apartment).

Woods v. State, S05A0448, 2005 Ga. LEXIS 119 (February 7, 2005).

Woods was convicted of criminal attempt to possess marijuana with intent to distribute and shortly thereafter (before sentencing) raised a constitutional challenge to declare OCGA 16-13-33 (a sentencing provision of the Controlled Substances Act which requires that one convicted of conspiracy or attempt is subject to the maximum punishment of the offense that was the object of the attempt or conspiracy). Woods claimed that he should instead be sentenced under OCGA 16-4-6 (b) (general criminal attempt), which sets a maximum sentence of only one-half the maximum sentence for the crime attempted. The trial court rejected the challenge and sentenced Woods under 16-13-33 to ten years to serve.

Georgia law requires that a defendant raise a constitutional challenge at the first opportunity (which is usually before a guilty verdict is rendered), and the court held that this challenge was timely because it involved a sentencing statute. “It would be unreasonable to require a criminal defendant to challenge a sentencing statute prior to verdict because a potential acquittal would obviate the need for such action.” However, the court did not consider the merits of this claim since he cited no authority for the proposition that the code section was unconstitutional. Furthermore, Woods’ sentencing did not violate the rule of lenity, because where a specific rule applies, the general rule is inapplicable. The legislature intended (and has the authority), in cases such as these, to supplant the general rules with the sentencing provisions of the Controlled Substances Act. The court also held that the evidence was sufficient to authorize Woods’ conviction (he and two associates attempted to buy thirty pounds of marijuana in a sting operation).

*Ingram v. State, S05A0435, 2005 Ga. LEXIS 118 (February 7, 2005).

Ingram was convicted of malice murder, aggravated assault, and concealing the death of another in the death of a fellow inmate at Valdosta State Prison. The evidence was sufficient to authorize a conviction (he concealed the victim under the covers of his bed, as though asleep, he tried to sell the victim’s necklace after his death, he and his co-defendants confessed to taking turns strangling the victim). However, the Georgia Supreme Court agreed that Ingram’s conviction for aggravated assault conviction merges into his conviction for malice murder; “the assault was not a separate and complete criminal act but rather was part of a continuous criminal act, committed at the same time and place and inspired by the same criminal intent.”

Wallace v. State, S05A0161, 2005 Ga. LEXIS 116 (February 7, 2005).

Wallace was found guilty of malice murder, felony murder predicated on the underlying felony of aggravated assault, aggravated assault, and possession of a firearm during the commission of a felony in the death of his former girlfriend's boyfriend (the felony murder conviction was vacated and the aggravated assault conviction merged into the conviction for malice murder). The Georgia Supreme Court affirmed the convictions. The evidence was sufficient to authorize guilty verdicts on these charges (the defendant confessed to his guilt, and two eyewitnesses testified that they saw Wallace shoot the victim). The Court did not consider whether it was error to admit hearsay testimony at trial since it was not objected to at trial. The court did not err by allowing a witness to testify that she had overheard a conversation in which the defendant replied "Yeah, yeah" to another's statement, "All you kept saying was 'you going to kill that boy Danielle.'" This was considered an "adoptive admission" and is admissible as substantive evidence.

*Ramirez v. State, S04A1973, 2005 Ga. LEXIS 114 (February 7, 2005).

Though the named appellant in the case was Ramirez, who was found guilty of malice murder and sentenced to life in prison (the State sought the death penalty), the substance of the appeal stemmed from an order finding Ramirez's attorney, Tom West, in contempt of court. The Supreme Court of Georgia reversed the contempt order. During the course of the trial, West telephoned a radio station about a matter relating to the case; the trial court held a hearing on the issue the same day, found that West had violated a restrictive order, and fined him \$500. The Court held that, since West's conduct did not occur in open court, it would have constituted—if any—*indirect* contempt, and as such, West was entitled to reasonable notice of the charges, to counsel of his own choosing, and to the opportunity to call witnesses. As these were denied him, the trial court erred.

Davis v. State, S04A1970, 2005 Ga. LEXIS 112 (February 7, 2005).

Davis was found guilty of malice murder, aggravated assault, possession of a firearm in the commission of a crime, and possession of a sawed-off shotgun (his convictions for felony murder were vacated as a matter of law and one count of aggravated assault merged into a malice murder count). Although the Supreme Court, considering the appeal, agreed with Davis that an instruction given to the jury was erroneous ("if a person uses a deadly weapon in the manner in which the weapon is ordinarily used and thereby causes the death of a human being, the jury may infer the intent to kill"), it held that in light of overwhelming evidence of malice, Davis was not prejudiced as a result of the charge and affirmed Davis's convictions. The trial court did not abuse its discretion by failing to sever the offenses because they occurred over the course of two days since the State presented evidence that the crimes were related to ongoing drug sale activity. The multiple possession counts were based on acts against multiple victims and were therefore proper.

Morgan v. State, S04A1714, 2005 Ga. LEXIS 111 (February 7, 2005).

Morgan was convicted of malice murder and appealed; the Georgia Supreme Court rejected his claims of error and affirmed his case. The evidence was sufficient to authorize his conviction (witnesses testified that Morgan tried to recover car tire rims from the victim and shot the victim in the abdomen when he couldn't recover the rims). Though the trial court gave a disapproved-of

charge to the jury that it could infer malice and intent from the use of a deadly weapon, the Supreme Court held that this charge was harmless in light of overwhelming evidence of Morgan's guilt. Morgan's trial counsel was not ineffective for failing to object to this disapproved-of charge, since no prejudice resulted from it. Counsel was not ineffective for failing to request a charge on voluntary manslaughter since there was no evidence that Morgan acted "solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person."

Hunt v. State, S04A1528, 2005 Ga. LEXIS 110 (February 7, 2005).

A jury convicted Hunt of malice murder in the shooting death of David Miller. The Georgia Supreme Court rejected his claims on appeal and affirmed his conviction. The evidence was sufficient to authorize a conviction (the victim's sister, who had known Hunt for years, testified that she watched him shoot her brother). Hunt claimed that the trial court erred in allowing two in-court identifications; however, Hunt did not cite to authority that this was error, and such challenges should be made in trial through cross-examination. A prosecutor's statement vouching for the truthfulness of some witnesses was not preserved for review since it was not objected to at trial. Hunt's trial counsel was not ineffective because the two errors claimed (he failed to object to certain statements of the prosecutor and he failed to object to the testimony of witnesses who claimed that they saw Hunt with other co-defendants) were either not unreasonable error or did not affect the outcome of the defendant's case.

Wimberly v. State, S04A1870, 2005 Ga. LEXIS 109 (February 7, 2005).

Wimberly was indicted in 2001 in connection with two murders and the State announced its intention to seek the death penalty. The State elected to try his co-indictee first, and Wimberly claimed that the resulting delay violated his right to a speedy trial. To this end, filed a speedy trial motion and a plea in bar to prosecution, both of which were rejected by the trial court and ultimately by the Supreme Court as well. Since Wimberly did not show that a 38-month delay was "presumptively prejudicial," the Court held that the trial court had not violated his right a speedy trial without applying the additional balancing factors of the Barker v. Wingo test.

Sampson v. State, S04A1844, 2005 Ga. LEXIS 107 (February 7, 2005).

Sampson was tried jointly with his brother on charges of malice murder, felony murder, aggravated assault, making a false statement to law enforcement officers, and giving a false name to law enforcement officers arising out of the shooting death of the victim during an attempted robbery. He was convicted of all charges except malice murder, and he appealed from the denial of his motion for new trial. The evidence was sufficient to authorize a conviction (the victims testified that Sampson and his brother robbed them at gunpoint, fatally shot one of the victims, and Sampson shot himself in the foot; fellow jail inmates of Sampson's brother testified that he confided to them that had been involved in a fatal robbery). Sampson's Bruton claim is not applicable in this case because his brother's statement to the jail inmates (and their subsequent testimony) did not directly implicate Sampson. Sampson's counsel was not ineffective; her failure to object to certain officers' testimony was not unreasonable since the issue had been decided against Sampson in pre-trial hearings. Other claims of error were waived by failure to object at trial.

Styles v. State, S05A0466, 2005 Ga. LEXIS 145 (February 21, 2005).

Appellant Gregory Styles was tried together with his brother (see above case, Sampson v. State) convicted of felony murder, aggravated assault, and giving a false statement. He was sentenced to life imprisonment on the felony murder count, a concurrent ten year sentence for aggravated assault (different victims), and a concurrent three year sentence on the false statement conviction. The evidence was sufficient to authorize his convictions (see above). The trial court did not err in denying his motion for a severance; there was no likelihood of confusion and the defenses they put forward were not antagonistic in that both denied any involvement in the crimes. Severance would not have limited the introduction of the evidence Styles contended was unduly prejudicial to him, and the evidence against Sampson was not overwhelming in comparison to evidence of Styles' guilt. The court's recharge on several definitions of crimes charged was not error. Styles' trial counsel was not ineffective for failing to interview alleged alibi witnesses; trial counsel attempted to interview these witnesses and procure their testimony, and their failure to assist or testify was not due to unreasonable attorney error.

Smith v. State, S05A0223, 2005 Ga. LEXIS 143 (February 21, 2005).

A jury in Bartow County convicted Smith of malice murder, false imprisonment, armed robbery, and other crimes related to the shooting death of Ed Shockley. Smith appealed from the denial of his motion for new trial and the Supreme Court of Georgia affirmed his convictions. The evidence was sufficient to authorize his convictions (Smith confessed and his confessions were corroborated by evidence and testimony offered by surviving victims). Though Smith claimed that the State improperly commented on his failure to testify, the Court held that, taken in context, the prosecutor was making an inference based on other facts relating to Smith's lack of remorse and this was unrelated to Smith's decision not to testify. Smith's claim that the grand jury lacked sufficient evidence to indict him was moot since the jury considering his guilt or innocence convicted him of the crimes for which he was indicted. The State gave him proper notice of its intention to seek the death penalty, and this claim waived by Smith's failure to object at trial. Smith contended that the trial court erred in admitting a videotape of his arrest because the State did not establish a chain of custody, but there is no such requirement for videotapes. Finally, Smith claimed that his custodial statements to police in Florida were improperly admitted because he waived his *Miranda* rights only for the Florida issues, rather than for the issues relevant to his Georgia crimes. However, a valid waiver of the Fifth Amendment privilege does not require that the criminal suspect know and understand every consequence of that waiver.

Cochran v. State, S05A0392, 2005 Ga. LEXIS 141 (February 21, 2005).

Cochran's malice murder conviction was overturned by the Georgia Supreme Court and he was re-sentenced to life by the trial court for the remaining felony murder conviction. He claimed that the trial court erred in failing to hold a sentencing hearing on remand; however, under Williams v. State, 271 Ga. 686 (1999), "a sentence imposed by a trial court in a non-death penalty case is not rendered void by the court's failure to conduct a pre-sentence hearing under OCGA 17-10-2." The Georgia Supreme Court found no error and affirmed the sentence.

Flanders v. State, S04A1873, 2005 Ga. LEXIS 139 (February 21, 2005).

Flanders was convicted and sentenced for malice murder and possession of a firearm during the commission of a felony in the shooting death of Jessica Tower. On appeal, Flanders claimed that the trial court gave an improper charge on malice murder allowing the jury to infer intent to kill from the use of a deadly weapon. The Georgia Supreme Court held that the charge was erroneous, but that this amounted to harmless error since there was sufficient evidence to support a conviction of malice murder (Flanders admitted to taking money from Tower and to shooting her when she asked for her money back). The trial court did not err by denying Flanders' Batson challenge; the prosecution gave race-neutral reasons for excusing black potential jurors (one's son had been prosecuted for DUI, another was a social worker, and another could not serve because he cared for a disabled aunt). The court also rejected Flanders' claims that he was given hope of benefit when he confessed; Flanders did not testify at trial so there is no basis in the record for his claim. Furthermore, he was not under arrest at the time he made the incriminating statements (although he was given a Miranda warning), so there was no constitutional violation. Flanders' statements were sufficiently corroborated.

Moore v. State, S04A2037, 2005 Ga. LEXIS 138 (February 21, 2005).

Moore was found guilty of malice murder, felony murder, aggravated assault and possession of a firearm during the commission of a crime, but due to the merger and surplusage of several offenses, he was convicted only of the malice murder and the possession charge. The Supreme Court of Georgia affirmed his convictions. The evidence was sufficient to authorize Moore's conviction in the death of his girlfriend (Moore had the victim's blood on his boots and continued to use her credit card after her death). Moore's trial counsel's failure to object to the "silent method" of jury selection waived the claim for purposes of appellate review. In Moore's motion for new trial hearing, Moore's appellate counsel raised some issues relating to trial counsel's ineffectiveness. Those not raised at that point were waived. Others lacked merit because Moore suffered no prejudice.

Stephens v. State, S04A1894, 2005 Ga. LEXIS 136 (February 21, 2005).

Stephens appealed his convictions of felony murder, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony (he was acquitted of malice murder in a bifurcated trial). The evidence was sufficient to authorize his convictions (several eyewitnesses testified that Stephens shot the victim in the abdomen at close range). The Court also held that the trial court did not err in finding the status offense of possession of a firearm by a convicted felon was sufficiently dangerous and connected to the murder to serve as the underlying felony for the felony murder conviction. The not guilty verdict on the malice murder count and the guilty verdict on the felony murder count could not be attacked as inconsistent verdicts, as that is no longer a cognizable avenue for appealing a conviction in Georgia.

Williams v. State, S04A1737, S05A0110, 2005 Ga. LEXIS 135 (February 21, 2005).

Williams was indicted in 1997 for burglary, but was indicted in 1998 for murder and arson when Williams implicated himself in the deaths of the burglary victims. The State gave notice of its

intention to seek the death penalty, and the case sat relatively inactive for several years. In this, his second appeal to the Georgia Supreme Court on speedy trial matters, Williams claimed that trial court erred in not dismissing his burglary and felony murder charges. The Court held that the respective five and six year delays were presumptively prejudicial. However, weighing the State's delay in bringing appellant to trial against the withdrawal of Williams' speedy trial demand, his failure to press for a trial, and his failure to establish any specific prejudice as a result of the delays, the Georgia Supreme Court held that the trial court did not err in denying appellant's motion to dismiss the indictment rejected Williams' appeal of the denial of his speedy trial motions.

Court of Appeals of Georgia:

***The following cases are all either reversals or cases of note.**

State v. Harper, A04A2293, 2005 Ga. App. LEXIS 165 (February 23, 2005).

The State appeals following the transfer of Harper's case from superior court to juvenile court. Harper, 15 at the time, was charged with armed robbery, and the State contends that the juvenile court erred in finding that the district attorney had reduced the charge to robbery. The Court of Appeals found that Harper did not accept the State's plea offer, which meant that the state was not obligated to reduce the charge. The Court of Appeals agreed that the superior court did not have the authority to transfer the case to juvenile court because exclusive jurisdiction over armed robbery with a firearm (Harper admitted that the gun used in the armed robbery was his) resides with the superior court. The constitutional argument that OCGA §15-11-28 violates due process and equal protection was not ruled on at the trial court level and as such was not properly before the Court of Appeals.

In the Interest of M. D. L., A04A2353, 2005 Ga. App. LEXIS 169 (February 22, 2005).

The juvenile M.D.L. appealed from the trial court's ruling adjudicating him delinquent for two aggravated assaults, first-degree criminal damage, and possession of a firearm during the commission of aggravated assault and criminal damage to property. The Court of Appeals ruled that the criminal damage conviction must be reversed because there can be no criminal damage to property where there is no reckless endangerment to human life (there was no evidence that the car fired upon would have been occupied at 4:00 a.m.). As such, the possession of a firearm during the commission of first-degree criminal damage must also be reversed. The trial court failed to make findings on the last of five elements to be examined when a juvenile can be sentenced to restrictive custody under the designated felony act (needs and best interest of juvenile, record and background, nature and circumstances of offense, need for community protection, and physical condition and age of juvenile). The case was remanded with instructions that the court be specific as to those findings.

The other convictions were affirmed. The evidence was sufficient to uphold adjudications of delinquency of aggravated assault on both victims and the possession of a firearm in the commission of the assaults (victim Renfroe testified that M.D.L., with his co-defendants, threatened him with their guns and victim Poole testified that M.D.L. and his co-defendants fired their guns into the house in which they believed she was staying).

State v. Allen, A04A2128, 2005 Ga. App. LEXIS 151 (February 21, 2005).

The trial court granted Allen's motion to suppress a breath test result and the State appealed. The Court of Appeal reversed the judgment, citing that the officer was not required to give the implied consent warnings to Allen again when she was asked the second time if she wanted to take the test (where Allen was apprised of her rights in a timely manner). Failure to give the warnings again was not cause for suppression of breath test where the procedure used to get consent is reasonable and fair.

Kirsche v. State, A04A1949, 2005 Ga. App. LEXIS 150 (February 21, 2005).

Kirsche appealed his conviction for manufacturing and possessing marijuana. Kirsche claims that the trial court erred in its denial of his motion to suppress, since the officers were in his back yard illegally. The Court of Appeals agreed ruling that the officers, who were investigating a domestic violence complaint at night, were precluded by the Fourth Amendment to enter Kirsche's home or yard without consent or absent exigent circumstances. The court reversed the conviction.

Costley v. State, A05A0734, 2005 Ga. App. LEXIS 136 (February 17, 2005).

Costley appealed from his trial court conviction for first-degree homicide by vehicle following denial of his motion to suppress state-administered chemical test results. Costley was found guilty of causing the death of the victim by operating the vehicle under the influence of methamphetamine and amphetamine in violation of OCGA 40-6-391 (DUI statute), causing death by driving with reckless disregard for persons or property, and the lesser-included offense of second degree homicide. The lesser two offenses were merged into the conviction for count one. The Court of Appeals ruled that based on Cooper v State, 277 Ga. 282 (2003) (finding provisions of the implied consent statute (OCGA § 40-5-55) unconstitutional where a driver is required to submit to chemical tests just because he is involved in an accident involving serious injuries or death without any probable cause of a violation of OCGA § 40-6-391), which was decided while Costley's appeal was still pending, the conviction on count one should be reversed. The trial court should have suppressed the chemical tests, and without the tests, there was no probable cause to arrest Costley for violation of OCGA 40-6-391 and no basis for a conviction on count one.

Curry v. State, A04A1632, A04A1633, 2005 Ga. App. LEXIS 133 (February 17, 2005).

Curry appeals his conviction by the trial court for violating the Controlled Substances Act, trafficking in cocaine, and possessing and using drug related objects. Curry challenges the denial of his motion to suppress and in forfeiting his property. The Court of Appeals ruled that the warrantless search of Curry's home was unsupported by suspicion that Curry was calling someone to destroy contraband located at his home, and by investigator's accurate belief that there would be more contraband at Curry's home. The State did not show that the warrantless search was necessary in preventing the destruction of items. The Court ruled that the trial court erred in denying the motion to suppress and reversed the forfeiture of property taken from Curry's home during the illegal search and the convictions for possession and use of drug related items, trafficking in cocaine and violation of the controlled substances act. The Court affirmed the forfeiture of Curry's car, which had drugs, a weapon, and drug-related items in it when Curry was stopped.

Kemp v. State, A04A1613, 2005 Ga. App. LEXIS 123 (February 16, 2005).

Following her conviction for felony theft by shoplifting, the defendant appealed. Kemp cited insufficient evidence and that the trial court erred in not charging the jury on the lesser-included offense of misdemeanor theft by shoplifting. The Court of Appeals ruled that, though the jury might have believed that Kemp was guilty of felony theft by shoplifting, the State failed to prove which of the items not scanned by Kemp's friend the cashier were taken by Kemp. The trial court erred in not charging on misdemeanor theft by shoplifting where there was evidence that the jury could have found that Kemp was guilty of that offense. The judgment was reversed.

Kirk v. State, A04A1996, 2005 Ga. App. LEXIS 122 (February 15, 2005)

Kirk appealed the denial of his motions for a directed verdict and for the later denial of his motion for new trial after being convicted for armed robbery, aggravated assault, and escape. The Court of Appeals found that there was sufficient evidence to support the convictions for armed robbery and aggravated assault and that there was no error in denying the directed verdict. It ruled that the aggravated assault conviction should have merged with the armed robbery conviction since they were based on the same act, and so the aggravated assault conviction was vacated. The Court ruled that there was no error in the trial court's failure to charge that the force used to commit the robbery must be simultaneous with the taking, and that the trial court did not err in overruling Kirk's objection to a portion of the state's closing argument which may have been improper but which probably did not affect the outcome of the trial.