CRIMINAL LAW

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This is an era in which society has become acutely aware of its many ills. In no area is this more evident than in the field of criminal jurisprudence. The increasing number of decisions illustrates the fact. Expanding interest in and knowledge of constitutional law are the visible media producing this result. Indeed, a survey of one year of criminal law is now little more than a narration of the treatment given by state courts to principles previously announced by the federal courts.

It has long been predictable that state courts would not be in sympathy with the constitutional doctrines spelled out by the federal courts. This has proved particularly true in the areas of right to counsel and searches and seizures, and it is precisely here that a degree of caution ought to be exercised. Since the federal courts are firmly established as the final arbiters of constitutional law, the state courts do no one a service by continuing to build up a body of decisional law directly contrary to established federal constitutional doctrines. When such state creations are set aside, as they inevitably will be, sheer chaos is the continuing result. It is solely for the purpose of emphasizing this fact of life, and not merely for the sake of criticism that a number of our state appellate decisions will be analyzed in this article.

The first area of law for discussion is the right of a defendant to a commitment hearing. The first case which should be considered in this connection is *Williams v. State*[1] which, while not dealing at all with the subject of commitment hearings, nevertheless stands for a proposition which makes commitment hearings absolutely necessary for the proper administration of justice. This case is no novelty but is merely the most recent one in a long line of Georgia decisions holding that a defendant in a criminal trial has no right to have any pre-trial discovery of the prosecution's case. It was held in this case, as it has always been held in Georgia, that the state is not required to make evidence available to the defendant or his counsel before trial. With this rule in mind it can be readily appreciated that the only legitimate discovery device available to a person charged with crime is his right to a commitment hearing wherein he can learn what evidence exists against him. In this day of scientific criminology which includes the daily use of crime laboratories, it is often impossible to properly defend a case without some advance knowledge of what the state is going to offer. One decision handed down by the Supreme Court of Georgia during the

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1. 222 Ga. 208, 149 S.E.2d 449 (1966).

period of this survey recognized this necessity in holding as follows: "A commitment hearing is a valuable right which the law gives to one accused of crime. (citations). A lawyer recognizes this fact, for this affords him an opportunity to make the state show its hand by putting up the evidence it has against the accused which enables him to know what he has to defend against, as well as to protect his client against commitment without sufficient evidence."[2] This decision is right, but the Georgia Court of Appeals has seen fit to hold[3] that a commitment hearing is not inherently a critical stage of a criminal proceeding in Georgia. There is one device for the circumvention of a commitment hearing which even the supreme court continues to tolerate,[4]and that is the return of a bill of indictment by a grand jury. This is nothing new because both Georgia appellate courts have always held that the return of an indictment dispenses with the necessity for a commitment hearing. This rule is half right in that one of the purposes of a commitment hearing is to determine whether or not probable cause exists for submission of the case to the grand jury, but it is also half wrong because it permits the only discovery tool available to a defendant to be taken away from him by use of an ex parte proceeding before a grand jury which he cannot attend and where no rules of evidence prevail. The fact of the matter is that a commitment hearing is a critical stage of every criminal proceeding and the defendant is entitled to have one unless he effects a knowing and intelligent waiver of the same.

The subject of searches and seizures has, as one would expect, produced a host of decisions. In the first of these cases[5] the court of appeals has recognized that the contents of a search warrant cannot be merely conclusory, but must contain actual facts sufficient to authorize a finding of probable cause for the issuance of the warrant. In another case[6] the court of appeals held that the warrant itself did not have to contain facts authorizing its issuance, but that it was sufficient if oral evidence was presented to the issuing magistrate. Such a rule gives rise to serious difficulties when the legality of the warrant is subsequently brought into question because it is often difficult or impossible to show what was presented to the magistrates, but this decision was rendered prior to the effective date of our present search warrant statute.[7] Presumably the courts would no longer adhere to such a rule because the statute expressly provides that a search warrant is to be issued only upon a written complaint stating sufficient facts to show probable cause for believing that a crime is being or has been committed, and particularly describing the place or person to be searched

2. Manor v. State, 221 Ga. 866, 148 S.E.2d 305 (1966).
3. Moore v. State, 113 Ga. App. 738, 149 S.E.2d 492 (1966).
4. Whisman v. State, 221 Ga. 460, 153 S.E.2d 548 (1967); Cannon v. State, 223, Ga. 35, 153, S.E.2d 445 (1967).
5. Veasey v. State, 113 Ga. App. 187, 147 S.E.2d 515 (1966)
6. Marshall v. State, 113 Ga. App. 143, 147 S.E.2d 666 (1966).
7. GA. CODE ANN. ch. 27-3 (1957 Rev.).

and the things to be seized. In a subsequent case[8] the court of appeals held that the contents of a lost search warrant were provable by parol. It is at least questionable whether this will continue to be good law in the future in view of the requirements of the statute[9] of the returns which must be made to the court after execution of a search warrant. In surprising contrast to many of these decisions is the case of *Peters v. State*[10] wherein it was held that a search incident to the execution of an arrest warrant which had been issued without a showing of probable cause was not a good search. This is a sound step in the development of our law of searches and seizures, because if there were any less stringent requirements for obtaining an arrest warrant than exist for issuance of search warrants, then the whole concept of search warrants would be abolished; police would in all or most cases elect to make their searches incidental to the execution of arrest warrants. There is one other decision dealing with the subject of search warrants which should be noted. This case, *Hall v. State,*[11] held that it was proper for a police officer to gain entrance to a house under a disguise as an insurance agent before displaying his search warrant. Although this case was decided several months after the effective date of the present Georgia search warrant statute, it is inferable that the facts of the case arose before its effective date and that such decision will no longer be adhered to in view of the express requirements[12] of the statute prescribing that an officer must make his presence known prior to the actual execution of the search warrant.

In two additional search and seizure cases the court of appeals has made rulings squarely in accord with previous decisions of the federal courts. In one[13] it has been held that a defendant has no standing to complain of evidence found against him in a search of the premises of another other than himself. In the other case[14] it was held that a person has no standing to suppress evidence taken from an automobile which he disclaims. Along similar lines the Supreme Court of Georgia has handed down a decision[15] which is somewhat difficult to interpret. From what is stated in the opinion it appears that the officers were making a lawful search of the apartment of a woman when they discovered a man hiding in a closet and found physical evidence to connect that man with a robbery which was not the subject matter of the search. The supreme court allowed the admission of this evidence against the man on the theory that the evidence was revealed as a mere incident of the lawful arrest of the woman. Unfortunately, the

8. Rider v. State, 114 Ga App. 347, 151 S.E.2d 238 (1966).
9. GA. CODE ANN. §27-310 (1957 Rev.).
10. 114 Ga. App. 595, 152 S.E.2d 647 (1966).
11. 113 Ga. App. 587, 149 S.E.2d 175 (1966).
12. GA. CODE ANN. §27-306 (1957 Rev.).
13. Kennemore v. State, 222 Ga. 252, 149 S.E.2d 471 (1966).
14. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966).
15. Cash v. State, 222 Ga. 55, 148 S.E.2d 420 (1966).

opinion does not disclose whether this man was a resident of this household or was a guest or an interloper. If he did not reside in the apartment, it could certainly be concluded that he had no standing to object, but if he was a resident of that place, then it is difficult to conclude that evidence obtained as an incident to the arrest of the woman would be admissible against him. If that is what the supreme court intended to hold we are very likely to see a great number of sham searches in which police managed to legalize the search of one person with the underlying intent actually being to procure evidence against another. This illustrates the real nature of the prohibitions against unreasonable searches and seizures, namely, that any substantial exceptions to the rule eventually become the rule rather than the exception, thus having the practical effect of repealing the prohibition. The case of *Tanner v. State*[16] is one with potentially far-reaching consequences. In this case the officers stopped the defendant's automobile for the ostensible purpose of checking his driver's license, and, while in the process of doing so, spotted some burglary tools. It was held that these articles were the fruit of a lawful search. No contention was made that the officers lacked authority to stop the defendant to check his license, but the court saw fit to give an opinion on this point anyway by holding that it would have been a crime under the law of Georgia for this defendant to have refused to exhibit his driver's license when requested to do so. This appears to give complete judicial sanction to the police tactic of blocking the highways to check the licenses of all travelers thereon, although it is a known fact that the primary purpose of such activity is to make exploratory searches for crimes including, but not limited to, driving under the influence of intoxicants.

Following the above, two decisions have come from the Georgia Court of Appeals which require some scrutiny. The first of these is *Richardson v. State*.[17] In this case a person was observed by the officers trudging along a lonely road at approximately 3:00 o'clock a.m. with a sack on his back. We might observe parenthetically that this was some kind of a sea-bag, and not the proverbial brown paper sack which has often been recognized as the universal symbol of crime and rascality. The officers decided to check him out, although they were unaware at the time that any crime had been committed or that this person had anything to do with a crime. When he saw the officers coming toward him he engaged in a bit of flight, but was promptly caught at which time it was discovered that his sack contained evidence of a crime. The court of appeals managed to uphold this search by rationalizing that, although presence on a lonely road at night does not give probable cause for a search, these factors combined with flight from the officers does generate probable cause. Rounding out

16. 114 Ga. App. 35, 150 S.E.2d 189 (1966).
17. 113 Ga. App. 163, 147 S.E.2d 653 (1966).

this school of thought is the remarkable case of *Croker v. State.*[18] According to the opinion in this case the defendant, a stranger in town, had been *placed in custody for investigation.* As a part of this *investigation* they stripped him of his automobile keys and set out to look for his car which bore a Fulton County license tag and which had a trailer attached to it. They found this vehicle lawfully parked along a public street in a residential neighborhood. They inserted the defendant's key into the trunk, opened it, and found a suitcase which contained burglary tools. The court of appeals managed to uphold this search by ruling that the automobile had been abandoned and could, therefore, be searched without a warrant and without probable cause. Four of the judges were unable to endorse any such conclusion, and their views were expressed in a thorough and lucid dissenting opinion. Decisions such as this do not merely circumvent or evade the fourth amendment of the Constitution of the United States; they repeal it.

During the past year the court of appeals has also created a substantial body of law on the subject of a consent by the defendant to a search without a warrant. In the first of these cases[19] the officers, while engaged in a routine check of driver's licenses on the highway, stopped the defendant, recognized him as a bootlegger, and told him that they were going to search the trunk of his car. He remarked, "there the car is," and the officers searched and found liquor. It was held that he had consented to the search. In *Young v. State*[20] it was held that when the defendant obeyed an order of the police to open his automobile trunk he consented to what was otherwise conceded to be an illegal search. Lastly, in *Westmoreland v. State*[21] police officers stated to the defendant that they wanted to make an exploratory search for anything they might find in his automobile and were told by the defendant to go ahead, that he had broken no law. Here, again, they found contraband, and their search was upheld on the basis of a consent by the defendant. The problem with these decisions is not that they are necessarily illogical or unreasonable, but rather it derives from the fact that they directly refute a long line of federal decisions[22] on the subject. The whole basis of the federal cases is that a citizen should not be required to engage in physical violence with or discourtesy to a police officer in order to protect his constitutional rights, and that where he does any act in obedience to a police order he waives nothing by his compliance.

Just as there has been a great increase in the number of cases involving

18. 114 Ga. App. 43, 150 S.E.2d 294 (1966).
19. Crider v. State, 114 Ga. App. 523, 151 S.E.2d 792 (1966).
20. 113 Ga. App. 497, 148 S.E.2d 461 (1966).
21. 114 Ga. App. 389, 151 S.E.2d 548 (1966).
22. Johnson v. United States, 333 U.S. 10 (1947); United States v. Di Re, 332 U.S. 581 (1947); Amos v. United States, 255 U.S. 313 (1921); *see also* Raniele v. United States, 34 F.2d 877 (1929); Karwicki v. United States, 55 F.2d (1932); Ray v. United States, 84 F.2d 654 (1938) and United States v. Roberts 194 F. Supp. 478 (1959).

searches and seizures, so have habeas corpus proceedings substantially increased. In *Givens v. Dutton*[23] and *Buxton v. Brown*[24] the Supreme Court of Georgia dealt with situations in which appointed counsel conducted defenses on the trial court level but failed or refused to appeal convictions. Here is an issue of real importance both because of the frequency with which it arises and because of the very difficult position in which it places members of the bar. It arises when defense counsel manages to obtain a verdict sparing the life of an indigent defendant in a case in which counsel knows that a sentence of death was very probable. The defendant, grossly ignorant of his own personal danger in such prosecutions, demands an appeal. The supreme court has said in these cases that the judgment of counsel in refusing to make such an appeal should be upheld. These decisions are a service to the bar and an aid to the administration of justice, particularly in those cases where the defendant is either insane or seriously demented yet nevertheless adamantly insists on repudiating the sound judgment of his counsel. Perhaps it would be a good practice in such situations for defense counsel to file a motion for new trial, then offer a written motion for its dismissal setting up the peculiar facts giving rise to the conclusion that it should not be pursued, and have the trial court enter an order dismissing the motion for new trial on the basis of the facts set out in the subsequent motion. This would then make the situation a matter of record sanctioned by a judicial finding, thus relieving counsel of the embarrassment of subsequently being charged with dereliction of duty. There have been other habeas corpus decisions[25] which produced some rather harsh and severe results in cases involving attacks on the legality of sentences, but they will not be discussed in detail here because it is thought that the subsequent passage of a new Habeas Corpus Act[26] will require different results in the future. Both decisions were prior to the effective date of the Act. This is a very good law, the gravamen of which is a provision that constitutional rights will no longer be deemed waived by a defendant unless it is shown that there was a voluntary, knowing and intelligent relinquishment or abandonment of such rights. Presumably, this act will place a considerable burden on the state to show by a proper accord that the defendant attacking his sentence in fact received all of its constitutional rights. This will be a considerable change from the past rule which placed the entire burden on the defendant to show an illegality.

The year under survey did not produce any remarkable decisions on the subject of self-incrimination although a number of decisions dealt with it in one way or another. The courts have reaffirmed the long standing

23. 222 Ga. 756, 152 S.E.2d 369 (1966).
24. 222 Ga. 564, 150 S.E.2d 638 (1966).
25. Broome v. Matthews, 223 Ga. 92, 153 S.E.2d 721 (1967); Nichols v. Heffner, 222 Ga. 706, 152 S.E.2d 393 (1966).
26. Ga. Laws 1967, p. 835.

rule that for an utterance of a person to amount to a confession of guilt it must contain an admission of every element of the crime, and where a defendant admitted his presence at the commission of the crime, and his knowledge that it was being committed, but denied participation therein, this was not a confession of guilt.[27] On the other hand, where a defendant made a simple statement to a police officer that he was guilty as charged, but that he was going to do his very best to "beat the case," this was a full confession of guilt.[28] The case of *Tompkins v. State*[29] may create some confusion by its ruling that a confession of guilt may aid in the establishment of the corpus delicti since it has heretofore been the rule that the corpus delicti had to be proved aliunde the confession. *Smith v. State*[30] is also an interesting confession case. In this case quite a number of police officers in addition to the principal investigating officer had interrogated the defendant prior to his confession of guilt. In his attack on the voluntariness of the confession the defendant claimed that several of these police officers, other than the principal investigator, had physically abused him. The only witness testifying in support of the confession was the principal investigator. The supreme court held that the defendant had made out a prima facie case of coercion which the state failed to rebut because of its failure to call the other police officers as witnesses on the question of whether they had in fact abused the defendant .Another case[31] dealt with a certain right of the defendant in connection with the making of his unsworn statement, the ruling being that it was reversible error for the court to instruct the defendant that he had a right to make a statement and that he could not be cross examined if he objected to it. The court held that there was no burden on the defendant to object to his being cross-examined, and that this prejudiced his case in the eyes of the jury.

The next case to be discussed, namely, *Bacon v. State*[32] is one of first import in Georgia. In this case the defendant was indicted for murder and filed a special plea of insanity which was placed on trial before a jury specially empaneled for that purpose. The prosecution, over the objections of defense counsel, called the defendant as a witness for the purpose of cross-examination. The supreme court permitted this procedure on the basis that the special plea of insanity was a civil proceeding in which rules of procedure applicable to civil proceedings applied. The only restriction imposed by the court was a provisio that no question could be propounded to the defendant which touched on his guilt or innocence. The last case to be dealt with on the subject of the privilege against self-

27. Haggard v. State, 113 Ga. 185, 147 S.E.2d 469 (1966).
28. Jones v. State, 113 Ga. App. 836, 149 S.E.2d 740 (1966).
29. 222 Ga. 420, 151 S.E.2d 153 (1966).
30. Smith v. State, 222 Ga. 438, 150 S.E.2d 676 (1966).
31. Wright v. State, 113 Ga. App. 436, 148 S.E.2d 333 (1966).
32. 222 Ga. 151, 149 S.E.2d 111 (1966).

incrimination is *Chastain v. State*.[33] In this case the court of appeals held that a witness who actually had a right to invoke the privilege had to do so against specific questions put to him rather than invoke it by simply declining to testify at all. While this decision is undoubtedly correct, it does pose one danger in that it places a witness in the position of continually having to spar with a prosecuting attorney who continues to propound questions in spite of the assertion of the privilege.

The appellate courts have handed down a number of decisions ruling on various instructions given by trial judges to juries. One of these was *Andrews v. State*[34] in which the defendant elected to be sworn as a witness and thus be subjected to cross-examination. During the course of this cross-examination the solicitor general asked the defendant whether he had ever been previously arrested. The trial court sustained an objection to the question before it could be answered. It was held that this corrective measure was a sufficient basis on which to refuse a mistrial. This is wrong. It is wrong because it is injurious to a person on trial regardless of the sustaining of an objection, and it is an aggravated wrong because of its perpetration by an officer of the court who knew better than to do it in the first instance. This is somewhat similar to the ruling made in *Moore v. State*.[35] In that case the judge concluded his charge to the jury with a specific instruction for the jury to reach a "speedy verdict." This was held to have been cured by a subsequent withdrawal of the remark. The same type of holding was made in another case[36] where a woman screamed out that the defense attorney was a liar during his concluding argument to the jury. One case, however, was reversed on grounds less harmful to the defendant than were involved in the situations hereinabove discussed. Reference is made to *Faust v. State*[37] in which a reversal was ordered because a judge charged the jury that they could consider "the position" that a state witness occupied and for the further reason that the court erred in stating to the jury that one of the appellate courts might reverse him for something he had said or done during the course of the trial.

There were two cases[38] in the period under survey wherein a trial judge allowed evidence of the commission of previous burglaries by the defendant for the purpose of showing his "bent of mind" in connection with the case on trial. Both convictions were promptly reversed. Both opinions did an excellent job in explaining that this was exactly the thing which the rule sought to proscribe in the first place. On the other hand, *Anderson*

33. 113 Ga. App. 601, 149 S.E.2d 195 (1966).
34. 222 Ga. 689, 152 S.E.2d 388 (1966).
35. 222 Ga. 748, 152 S.E.2d 570 (1966).
36. Holland v. State, 113 Ga. App. 843, 149 S.E.2d 919 (1966).
37. 222 Ga. 27, 148 S.E.2d 430 (1966).
38. Kitchens v. State, 221 Ga. 834, 147 S.E.2d 509 (1966); Shinall v. State, 113 Ga. App. 127, 147 S.E.2d 510 (1966).
39. 222 Ga. 561, 150 S.E.2d 638 (1966).

v. State[39] is a good example of a case where previous crimes are admissible. It was a rape prosecution, and evidence of previous rapes by the defendant was held admissible on the basis that they showed a modus operandi in the case on trial.

There are several decisions involving or touching on substantive law which require mention. One of these is *Roach v. State.*[40] It involves the selection of a jury. One juror admitted that he had formed an opinion adverse to the defendant, but felt that his opinion could be changed by evidence. The trial judge refused to disqualify the juror. The supreme court affirmed with one dissent. Although this same thing has been held many times in the past, it is suggested that this rule has outlived its usefulness. It is a mere relic of ancient times when the country was so sparsely settled that in many cases it was difficult to obtain a jury. That problem no longer exists, and it would be better to disqualify any prospective juror who admits having formed an opinion about the case, no matter what the basis of that opinion may be. The case of *Evans v. State*[41] produced two rather astonishing rulings. First of all, it held that a statement of a co-indictee of the defendant made after his arraignment was admissible in evidence against the defendant inasmuch as the conspiracy between the two men continued through that state because the defendants had not admitted the killing and had continued to deny their guilt. It has, of course, always been held that a statement made by any conspirator during the continuance of the conspiracy was admissible against all other conspirators, and several past cases have gone so far as to say that the conspiracy continued through the time the defendants were placed in jail. Surely that is the uttermost limit to which the thing could be stressed. It transcends the bounds of reason to say that a conspiracy continues on through an arraignment simply because a defendant neither makes a confession nor pleads guilty. The second point in this case was that the supreme court affirmed a charge given by the trial court to the jury to the effect that the corroboration of the testimony of an accomplice could be predicated upon *slight* evidence. It has always been the rule that only slight evidence was required to corroborate such testimony, but we have here a completely new creation when it is held that a judge can so charge a jury. One justice dissented. The next substantive law case deserving attention is *Huff v. State.*[42] Here the majority of the court of appeals was of the opinion that in cases involving the defense of habitation it was not error for the trial court to refuse to charge on this defense in the absence of a written request where it arose solely from the unsworn statement of the defendant. This

40. 221 Ga. 983, 147 S.E.2d 299 (1966).
41. 222 Ga. 392, 150 S.E.2d 240 (1966).
42. 113 Ga. App. 257, 147 S.E.2d 840 (1966).

is contrary to at least five previous decisions[43] of the Georgia appellate courts.

Georgia lawyers have always had a pronounced sense of humor, and every year produces one or more examples of it. *Dye v. State*[44] produced the classic for the period under survey. In that case counsel for the appellant insisted to the bitter end that his client was entitled to a new trial because the court reporter, in transcribing the charge given to the jury, let her propensity for spelling lapse in such a way that she inserted the word "purgery" in lieu of the legalism "perjury". The court, of course, did not embrace this contention, and it is not known whether the ingenuity which prompted it was appreciated. Actually, there was some very sound authority for the ruling of the court in a decision[45] written many, many years ago wherein the supreme court observed: "This is an unsightly literary blemish, but not a grave legal infirmity. In school the composition would not pass, but it may be tolerated in the Courthouse."[46]

43. Norris v. State, 184 Ga. 397, 191 S.E.375 (1937); Porter v. State, 180 Ga. 147 S.E.151 (1934); Downs v. State, 175 Ga. 439, 165 S.E.112 (1932); Frazier v. State, 88 Ga. App. 82, 76 S.E.2d 70 (1953); Towell v. State, 47 Ga. App. 405, 170 S.E.690 (1933).
44. 114 Ga. App. 299, 151 S.E.2d 164 (1966).
45. Dickson v. State, 62 Ga. 583 (1879).
46. *Id.* at 589.