THE SENTINEL

February 26 '98

DISCOVERY UPDATE

by
Virginia Meigs

Some recent Federal Court decisions on discovery are: In United States v. Parks, 100 F.3d 1300 (7th Cir. 1996), where the government intended on playing only 4 hours of tape at trial and disclose only 4 hours of transcripts, they were also ordered to disclose all 65 hours of tape made in case without transcribing the remaining 61 hours. In United States v. Davis, 93 F.3d 1286 (6th Cir. 1996), the defendant gave notice of intent to call an expert to testify only to his mental state, not his insanity, under Rule 12.2(b), the government is not entitled to have defendant examined by a government expert. In United States v. Smith, 77 F.3d 511 (D.C. Cir. 1996), the government's failure to disclose its witnesses psychiatric history and plea agreement was material under Brady and Kyles; remanded for new trial. In United States v. Galvis-Valseramma,841 F.Supp. 600 (D.N.J. 1994), the government's failure to disclose portion of case agent's report containing statements of defendant helpful to defense material; government may not avoid Brady by failing to take steps necessary to acquire the requested information. In United States v.Lanou, 71 F.3d 966 (1st Cir. 1996), tape recordings of defendant's conversation in jail after arrest are discoverable under Rule 16(a)(1)(A). In United States vs. Williams-Davis, 90F.2d 490 (10th Cir. 1996), rejected defense argument that Jenchs Act applies in persons whose statements are introduced as co-conspiring statements. However, in United States vs. Walker, 922 F.Supp. 732 (N.D.N.Y. 1996), requires disclosure of co-conspirator statements for all persons the government does not intend to call at trial.

KILLING KARLA FAYE

by
John A. Lentine

On Tuesday, February 3rd, I sat transfixed to my television about 5:00 p.m. until 11:00 p.m. watching the sideshow that had become the most televised execution countdown in the last ten years. At about 6:45 p.m. Karla Faye Tucker Brown was executed by lethal injection by the State of Texas based on death sentence for the pick ax murders of two people fourteen years ago. She was the first female executed in about fourteen years and the first female to be executed in Texas since after the Civil War.

Karla Faye's execution has, at least temporarily, thrust the question of the death penalty back into the public's face. For the last month or so Karla Faye's plight was a top news story. Images of a pretty, articulate and deeply religious woman on death row were constantly juxtaposed with the drug addicted, crazied prostitute that fourteen years earlier took part in the brutal killing of two people. An incredible debate began as to whether the "new" Kala actually deserved to die. The "new" Karla Faye was, by all accounts, a deeply religious, repentant and changed person. The ideal rehabilitation apparently was realized in her to such a degree that prosecutors, police investigators and even some victim's family members were against her execution. Yet in the end, all was for naught when the Courts, parole board and Governor allowed the execution to take place.

As I listened to the inevitable arguments for and against the death penalty that raged on last night, I began to wonder what made Karla Faye so different then the men who have been strapped into chairs or on gurneys who have over the years of incarceration become rehabilitated to the extent that they no longer even remotely resembled the person who committed the crime. At first glance its easy to say it was because she was a woman and it harder

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for society to allow the killing of pretty, young, articulate white woman. Unfortunately that's to an easy out. This country has executed numerous women so what's with all this fuss. Why now? What gives?

Perhaps its the bitter realization that some people can change to the extent that they become "new" and better people. Perhaps incarceration can exorcize them of the demon they once were an replace it with one who we can now see as human. It was Karla Faye's humanity that shocked us all. When you looked at her you did not see the animal she once might have been, but another *person* who was about to be killed. The dehumanization of the death penalty allows it to be carried out dispassionately, coolly and with alarming efficiency. Its only real function now is to satisfy a need for retribution. However, I have to wonder how that thirst for retribution is quenched in this case? Would it be enough if she remained In prison until she died? The result would be the same.

The harder pill to swallow is the fact that killing Karla Faye illustrates that our society has not transcended unto a higher plane of morality or integrity. Instead we are still mired in vengeance, wrath and revenge the core of motivational components at the heart of the death penalty. Blood for blood, an eye for an eye, death for death remains the only constant despite the guise for the need of societal protection and preservation.

In the end is our *humanity*, *our* society, improved one iota by the killing of Karla Faye? Will her legacy force us to resolve the fact that the lofty aspirations of some abstract societal need for the death penalty is merely a facade created to rationalize our individualistic desire for the ultimate in retribution for those who have injured us or a loved one? Retribution cannot be the end that justifies the means, if so, our society has not advanced a centimeter from the dark ages.

Karla Faye was not a hero. She was a murderer and deserved to be punished for her crime. However, Karla Faye was not at the time of her death the monster that committed the crime. In the end she was a human being who's humanity in the face of death brought fear and shame, thereby forcing us all to question the continued need for the ultimate punishment.

DRUG COURT REPORT
by
THOMAS J. SPINA

The District's Attorney's Deferred Prosecution Program and Judge Cahill's Treatment Court have been discontinued. Judge Hughes requires that all drug defendants to enroll in TASC upon their first appearance in his court, however, he has no Drug Court at this time. Defendants charged with drug offense can still apply for Judge Johnson's Drug Court. Judge Johnson will give "clean time" credit to those defendants that have been involved at TASC since their arrest. This will essentially reduce the actual time spent in Drug Court.

UAB-TASC Director Foster Cook announced that the Jefferson County Drug Court would be awarded a $200,000.00 continuation grant for 1998. This funding will provide treatment beds for indigent offenders, staff and equipment to continue and expand the Drug Court effort.

Mag Matters
HB 458
SB 387

PRESIDENT'S COLUMN

by

Ken Gomany-
President GBCDLA

Our organization has been asked to participate in decision making, provide input and to be present at the committee meetings on the Advisory and Policy Oversight Committee for Breaking The Cycle. The following is taken from the text of a memorandum recently published by TASC:

The University of Alabama at Birmingham (UAB) Treatment Alternatives to Street Crime (TASC), the Jefferson County Judicial system, the Jefferson County Sheriff's Department, the Criminal Bar Association, area treatment providers, the Jefferson County District Attorney's Office and the Jefferson County Commission mutually agree to develop and implement a seamless system of drug testing, sanctions and treatment for drug addicted offenders.

Anyone who has ever paid dues and has not been given a certificate of membership please contact our secretary, Wendy Williams at 322-0888.

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NEWS FROM THE COURTHOUSE

Presiding Judge Mike McCormick met with GBCDLA President Richard S. Jaffe on August 3, 1998, to discuss whether to attempt to implement a uniform discovery rule for all criminal cases. Any suggestions concerning this topic should be sent to **THE SENTINEL**.

As always, any issues, questions and/or suggestions any GBCDLA member wishes to be brought to the attention of the judges, please contact any of the GBCDLA officers and/or board members or write **THE SENTINEL** at P.O. Box 370282, Birmingham AL 35203.

GBCDLA MEMBERSHIP DUES FOR 1998-1999 ARE DUE. PLEASE FORWARD DUES TO GBCDLA, P.O. BOX 370282, BIRMINGHAM, AL 35203.

DUES:

$25.00

PRESIDENT'S COLUMN

This year marks the 6th year of the existence of the Greater Birmingham Criminal Defense Lawyers' Association. I remember well when this organization began in the conference room of my former law office on 14th Avenue South. There, about ten criminal defense lawyers convened in mutual frustration because we, as individuals with common goals and problems, had neither unity nor voice. Not only did we need to be heard, but we needed to make an impact to protect and promote the interests of presumptively innocent citizens accused of criminal offenses. Just as importantly, we needed to add our voice to balance a system which, when left unchecked, will trample upon individual liberties and the simple constitutional guarantee of fundamental fairness.

Since our beginning, we have made a difference insofar as the judges and prosecutors consider and anticipate our organization when significant decisions are made that affect the criminal justice system. No longer are prosecutors present at judges' meetings unless we are invited. Our members are asked to be on committees whose influence affects various aspects of the system. We have represented our members when they have been in conflict with courts and prosecutors. We conduct quarterly meetings to consider legal and political issues. We conduct yearly seminars and we have pledged to be more consistent with our newsletter.

On the other hand, we could do much, much better and be considerably more effective. While any organization is only as energetic as its leadership, we need your input, your ideas, your

suggestions, and we need to know your problems, your conflicts, and your concerns. Please write, fax, or call me or any member of the Board of Directors or any officer. We want to address your needs; we want to grow; and we want to be heard loudly and clearly on those common matters that affect criminal defense.

Never in the 22 years that I have practiced, have I been more appalled at the manner in which both our clients and ourselves are treated and perceived by practically everyone. The anger and frustration over crime is imputed to and blamed upon those of us who represent those accused. There is real and present danger that the system is way out of balance, and when that happens, the ability of the individual to seek fairness and justice is at risk. Our organization must step up to the plate and insist with all of our skills and talents as advocates and insure that the scales stay balanced, that we are treated with dignity and respect and, most of all, that our clients receive justice, which is nothing more than fairness. Please contribute to the newsletter, volunteer for committees, attend meetings, voice your ideas and concerns, and let your voice be heard so that our voice can be heard.

VOLUNTEERS NEEDED FOR COMMITTEES

Volunteers are needed for the following committees:

Newsletter

Social

CLE

Organizational Planning

Please write Richard S. Jaffe if you are interested in joining one or more of these committees.

GBCDLA 1998-99 OFFICERS CHOSEN AT APRIL, 1998 MEETING

The general membership meeting of the GBCDLA was held at the Redmont Inn in Birmingham on April 11, 1998. The membership was updated on matters occurring at the last several judges' meetings as well as recent court decisions that will affect criminal defense lawyers. Nominations were opened to select the new officers for the 1998-99 term. The offices that were open for nomination were that of President Elect, Executive Vice-President, Treasurer and Secretary. Therefore, the new officers who will comprise the Board of Directors for the GBCDLA for 1998-1999 starting in June are as follows:

PRESIDENT – RICHARD S. JAFFE

PRESIDENT (ELECT) – JOHN ROBBINS

VICE PRESIDENT – RICHARD IZZI

TREASURER – VIRGINIA MEIGS

SECRETARY –BARRY ALVIS

The following Board Members were appointed by the Board:

KEN GOMANY – PAST PRESIDENT

TOMMY NAIL – PAST PRESIDENT

EMORY ANTHONY

JOHN LENTINE

TOMMY SPINA

INDIGENT DEFENSE BILL POCKET VETOED BY GOVERNOR

By Richard Izzi

In case any of our membership has yet to learn about it, this year's version of the indigent defense bill (H.B. 458) suffered a pocket veto at the hands of Governor James. The bill, which was sponsored by Rep. Demetrius Newton, would have raised the present hourly rates of $20.00 for in-court time and $40.00 for non-court time, respectively, to a flat hourly rate of $55.00. Docket fees would also have been increased by $28.00. The Governor's signature was necessary because the bill passed on the final day of this year's regular session of the legislature.

The Governor, in refusing to sign this legislation, reportedly expressed concern about the potential for abuse of the May decision, which allows for appointed counsel to be compensated for overhead expenses. Interestingly enough, no reference was made by the administration to the longstanding efforts of our state to do indigent representation on the cheap, which made that litigation so necessary in the first place. Nor did the administration wage an effort at anytime during the session to amend or offer a substitute for Rep. Newton's bill, in order to impose a reasonable cap or ceiling on compensation related to overhead expenses. Instead, the Governor chose to wait until the 59th minute of the 11th hour to raise this fatal objection.

While our organization does not share the Governor's distrust about the ability and competence of the judiciary when it comes to such matters, it practically goes without saying that any resistance on the part of the criminal defense bar to the imposition of a reasonable cap on the rate of recoverable overhead expenses would have been unthinkable. To even suggest such a reaction to an amendment or substitute that would have been offered for that purpose would be thoroughly disingenuous.

In any event, the GBCDLA would like to express its gratitude to both the House and Senate for their bipartisan support of Rep. Newton's bill, which drew not the first dissenting vote in either chamber, and go on record as to our amazement about this shamefully irresponsible behavior on the part of the Governor.

UNITED STATES V. SINGLETON – CAN TESTIMONY BE PURCHASED?

By Derek Drennan

On July 1, 1998, a three-judge panel in a Tenth Circuit Court of Appeals issued a courageous and potentially historic decision. Circuit Judge Kelly's opinion in United States v. Singleton (C.A. 10, No. 97-3178) (July 1, 1998) may lead to a change in the way Federal prosecutors do business. Based upon Title 18, § 201(c)(2) which provides, in part, that "whoever . . . directly or indirectly gives, offers, or promises anything of value to any purpose for or because of the testimony given by such person . . . shall be fined or imprisoned for not more than two (2) years," the Tenth Circuit reversed a conviction because the Government's use of testimony was in violation of the statute.

Singleton was charged with multiple counts of money laundering and a conspiracy to distribute cocaine. The Government's case revolved around the testimony of Douglas, a co-conspirator who made a deal with the Government for his cooperation, which included the condition that he testify "truthfully" against the Defendant. The Government made numerous promises to Douglas including, but not limited to, a Section 5K1.1 Motion for Downward Departure, a promise not to prosecute for other drug violations, and a promise to write a letter to the Mississippi Parole Board regarding Douglas' cooperation.

Singleton objected to the admission of Douglas' testimony pursuant to Title 18, §201(c)(2) in the District Court. Singleton's

objections and Motion to Suppress were overruled. Subsequent to her conviction, Singleton appealed to the Tenth Circuit Court of Appeals for review.

The Tenth Circuit held, inter alia: (1) that because the statute in question did not specifically exclude the Government from its application, the statute applied to the Government; (2) that the phrase "anything of value" included anything which the "recipient objectively attaches value"; (3) that the policy of §201(c)(2) is to protect the truthfulness of in-court testimony and that such Government conduct violates or inhibits the policy's objective; (4) that the Government's belief that the witness' testimony is truthful and the Government's assertions that such deals are justified as a necessary tool in law enforcement, are irrelevant and/or unpersuasive; and (5) that the appropriate remedy is suppression of the "bought" witness' testimony.

After reviewing the Government's case without Douglas' testimony, the Court was not convinced that the failure of the District Court to suppress Douglas' testimony was harmless. The Court reversed and remanded the case for new trial.

Subsequent to this decision, the Tenth Circuit, sua sponte, decided to hear the issue en banc and vacated the panel's decision. The briefs of the parties were due on August 10, 1998. The Court has scheduled the en banc hearing in November.

RECENT DECISIONS

ALABAMA COURT OF CRIMINAL APPEALS

July 24, 1998

No opinions released.

July 16, 1998

Ex parte Hutto

Appeal from Walker Circuit Court. Opinion by Presiding Judge Long. Arrest warrants for sexual abuse in the first degree and kidnapping in the first degree were served on petitioner, Hutto, on April 23, 1998. Hutto was not brought before a judge or magistrate until May 5, 1998, 12 days after his arrest. Citing Rule 4.3(b)(3), Hutto moved to have bail set at the minimum amount recommended in Rule 7.2, Ala.R.Crim.P., because he was not brought before a judge or magistrate within 72 hours of his arrest. The district court denied the motion and set bail at $50,000 for each of the two counts. Hutto then filed a petition for a writ of habeas corpus in the Walker County Circuit Court. Judge Brotherton granted the motion and set the bonds at $1,000 and $3,000 for the two charges and in the same order reset each bond at $50,000. Hutto then filed petition for writ of mandamus with this court. The State argued that any failure to set the minimum recommended bail in accordance with Rule 4.3(b)(3) was rendered moot because Judge Brotherton granted habeas corpus relief and because Hutto had since been indicted for the offenses for which the arrest warrants were issued. The Court of Criminal Appeals granted Hutto's petition and ordered that his bond be set at the minimum recommended on the bail schedule set out in Rule 7.2, Ala.R.Crim.P. McMillan, Cobb, Brown, and Baschab, JJ., concur.

July 9, 1998

No opinions released.

July 2, 1998

Ex parte Land

Appeal from Jefferson Circuit Court. Opinion by Presiding Judge Long. Petitioner Land, was convicted of two counts of capital murder. After filing a rule 32 Petition, Land filed a lengthy discovery motion requesting access to the complete files of the Jefferson County District Attorney's office related to the case, and the complete files of all other agencies involved in the case, including the Jefferson County Sheriff's Department, the Birmingham Police Department, the Jefferson County Coroner's office, the Alabama Bureau of Investigation, the Alabama Department of Forensic Sciences, and the Alabama Department of Youth Services. The Judge allowed Land to inspect the files in the District Attorney's office, but did not allow discovery of any of the other files. Land filed a petition for writ of mandamus requesting that the circuit judge grant his discovery motion. Land correctly states that a trial judge may order "broader discovery" when a defendant is facing the death penalty. However, the current proceeding is a post-conviction proceeding collaterally attacking his conviction and sentence. Few Alabama cases concern a post-conviction proceeding. There is nothing in Rule 32 or any other Rule of Criminal Procedure that allows the "unlimited" discovery the petitioner seeks in this post-conviction proceeding. Discovery in a post-conviction proceeding should be allowed only when "good cause" has been shown. The extent of discovery is within the discretion of the trial court. Greater defernce is due a trial court when the judge who is entertaining the discovery motion in a collateral proceeding presided over the trial. PETITION DENIED. McMillan, Cobb, Brown, and Baschab, JJ., concur.

June 26, 1998

No opinions released.

June 19, 1998

Blevins v. State

Appeal from Lawrence Circuit Court. Opinion by Presiding Judge Long. Appellant, Michael Blevins, was convicted of the felony offense of driving while under the influence of alcohol (D.U.I.) and driving while his license was revoked. He was sentenced to 8 years' imprisonment and was fined $4,000 for the D.U.I. conviction. He was sentenced to 100 days' imprisonment in the county jail and was fined $25 for the conviction of driving while his license was revoked. Although the issue of the trial court's jurisdiction was not raised below or on appeal, the Court of Criminal Appeals took notice that the trial court lacked jurisdiction to try Blevins' case. The indictment failed to specifically charge that the defendant had three prior D.U.I. convictions within the past five years. Because the prior convictions are a material element of felony D.U.I. under §32-5A-191(h), they must be set out in the charging instrument, and proven to the jury at trial. The circuit court lacked jurisdiction to try Blevins' case because the indictment charged him only with committing two misdemeanor traffic offenses -- driving while under the influence of alcohol and driving while his license was revoked. It did not charge him with committing the Class C felony now set out in §32-5A-191(h). Reversed and remanded.

Baxter v. State

(CR95-1556r; Appeal from Montgomery Circuit Court, # CC95-1090) Per McMILLAN, J. -- During opening statements, the prosecutor told the jury that he expected "Mr. Baxter" to testify. Immediately after making this statement, the prosecutor told the jury that he did not mean to say "Baxter," but instead meant to say "Boswell," the name of the State's confidential informant. Baxter's lawyer made a timely motion for mistrial, which the trial court denied. Nor did the trial court give any curative instruction. The prosecutor stated further, though outside the presence of the jury, that the comment was unintentional, and defense counsel agreed. Baxter did not testify at trial. Baxter argues that the trial court reversibly erred in both denying the motion for mistrial and failing to give any curative instruction.. First, it appeared that the Court would adhere to its former pronouncement to the effect that: at a minimum, under such

circumstances, the trial judges should sustain the objection and immediately instruct the jury as to the impropriety of the remark made Or, as in Whitt v. State, 370 So. 2d 736, 739 (Ala. 1979), where the Supreme Court stated, "[w]ith appropriate instructions, we hold that the error of the prosecutor's remarks will be sufficiently vitiated so that such error is harmless beyond a reasonable doubt." But here the Court retreats somewhat from the strict language of those prior decisions, stating that, "Although direct comments on a defendant's failure to testify can amount to reversible error, whether they do must be determined on a case-by-case basis, and under certain circumstances, the comment may be curable or may [itself] be harmless." Turning then to a discussion of authority from other jurisdictions the Court explores a number of different approaches to the problem of inadvertent comments on silence, ranging from automatic reversal in all situations where it occurs to a "totality of the circumstances" analysis, focusing instead on any actual prejudice to the defendant resulting from the comment. Ultimately, the Court seems to adopt the latter, and finding in this case, specifically that "the prosecutor's remark was a singular incident and was clearly inadvertent. Although the trial court failed to give curative instructions, the prosecutor immediately retracted his remark and corrected his statement. Moreover, there was overwhelming evidence of the appellant's guilt." REMANDED with instructions

Mangione v. State

Per BROWN, J. --. Mangione and others were charged in a two count indictment of the capital offense of murder committed during a kidnapping in the first degree as well as the capital offense of murder committed during a robbery in the first degree. The jury found Mangione guilty of capital murder, as charged in Count I, and guilty of murder as a lesser-included offense of the capital murder charge in Count II. Mangione contends that the conviction returned as to Count II of the indictment was a violation of the Double Jeopardy Clause, inasmuch as both counts I and II involve the same victim and the same actions. With this, the Court agrees. Where, as here, the jury returns guilty verdicts for both a capital offense alleged in one count of the indictment and the lesser included offense of intentional murder of a capital offence alleged in another count of the indictment, and the same murder was an element of the capital offense and the intentional murder conviction, the trial court should enter a judgment on only one of the offenses. Accordingly, this cause was REMANDED to the trial court with instructions to vacate the conviction for intentional murder, as a lesser-included offense of capital murder, as charged in Count II. Mangione also cites as error the trial court's denial of his motion for mistrial after it was made known to the court that the victim's mother had approached a juror and shown the juror a portrait of the victim. The trial court questioned the victim's mother, at which time she acknowledged having shown the picture to someone in the hallway, but that she did not know that the woman was a juror. That juror, once identified, was also questioned by the court about the incident. The juror informed the court that she had been approached by the woman, but that when the woman told her that she had something she wanted to show her and then began to produce a photograph from an envelope, the juror entered the courtroom without even speaking to the woman. The juror also stated that the incident, occurring on the third day of trial, would not affect her verdict. There was no further contact between the juror and the victim's mother, and the juror was instructed not to tell any other jurors about the incident. An unauthorized contact between the jurors and a witness or others does not necessarily require the granting of a mistrial. It is within the discretion of the trial court to determine whether an improper contact between a juror and a witness or other person was prejudicial to the accused. The Court also cited a Louisiana case in which the facts were very similar. In that case, the Louisiana court upheld the trial court's denial of a motion for a new trial, finding that the defendant had failed to demonstrate that he was prejudiced by the improper contact. That is what the Court, here, determined as well.. Mangione also cited as error the trial court's refusal to give an instruction on the charge of hindering prosecution as a lesser-included offense of the capital charge, since there had been testimony that Mangione had concealed the appendage of the victim from authorities and had also threatened potential

witnesses. To this, the Court simply noted that the charge of hindering prosecution is inapplicable to a person charged as a principal and that as a matter of law, the offense of hindering prosecution is not a lesser included offense of the offense upon which the underlying prosecution could be based.. AFFIRMED in part, REVERSED in part, and REMANDED with instructions.

Benefield v. State

Appeal from Jefferson Circuit Court. Opinion by Judge McMillan. The appellant, Rudolph Benefield, filed a Rule 32 petition in which he argues that he was denied his constitutional right to a speedy trial. He argues that the delay of three years and six months between the time the trial court restored his case to the trial docket on September 5, 1991 and the time that his case was tried on March 20, 1995, was excessive. In support of his argument, he states that, even if the time period from September 21, 1991, to July 30, 1992, when apparent plea negotiations were in process, is excluded there was still a delay of some two years and eight months before a trial was had. In Barker v. Wingo, 407 U.S. 514 (1977), the United States Supreme Court enunciated a four-pronged balancing test to be applied when a defendant alleges a speedy trial violation. Those factors are as follows: (1) the length of the delay; (2) the accused's assertion of his right; (3) the reason for the delay and (4) the prejudice to the accused. The Court of Criminal Appeals held that the appellant had not been denied his right to a speedy trial, after considering all of the Barker factors and other relevant evidence. The appellant also argued that the trial court erred in sentencing him as a habitual offender to life imprisonment without parole because, he argued, the State failed to properly prove that he had three prior felony convictions. This Court has held that the identity of names raises a prima facie presumption of the sameness of the person. Additionally, this Court has held that the various spellings of a defendant's name do not negate a finding of identity. The record further indicates that the State, out of an abundance of caution, produced fingerprint evidence that showed that the prints on the prior convictions matched the prints of the appellant. Moreover, when the State properly proves a defendant's prior convictions for enhancement purposes, and the defendant makes objection to that proof, the defendant bears the burden of going forward with evidence in support of his claim. Here, the appellant failed to carry that burden. Because the appellant failed to overcome the presumption that he was the same person mentioned in the prior convictions to enhance his sentence.

Hall v. State

Appeal from Barbour Circuit Court. Opinion by Presiding Judge Frank Long. Appellant Charles T. Hall was convicted of murder in violation of § 13A-6-2, Alabama Code 1975, and robbery in the first degree, in violation of § 13-A-8-41. He was sentenced as an habitual offender to life without parole for each conviction. On appeal he contended that the Trial Court erred when it allowed his former wife to testify to what he asserted were confidential communications that occurred during the time they were married. Hall was charged with the shooting death of a man named Ferrell. Two days before his body was discovered, Ferrell's car was found abandoned. It's interior was stained with blood and bullet fragments. Hall gave two Mirandized statements to detectives, after signing written waivers. In his second statement Hall admitted being present when Farrell was killed but maintained that Eddie Wesley committed the murder. Hall further told police that Wesley gave him $5,500 and told him to leave town. Hall said that he gave his wife three or four hundred dollars of the money, kept $1,500 and buried the rest. He stated that he then caught a bus for Texas and that before he left, he told his wife where he had buried the rest of the money Wesley had given to him. At trial the State presented testimony from Hall's former wife, Deborah Mylius, who was married at the time of Ferrell's murder. Mylius testified, over objection as to the marital privilege, that while spending a weekend together at a recreation area near Lake Martin, where they were expected to be joined later by Eddie Wesley and Donna Singleton, Hall said to her, "I guess you know I am the one who killed Roger [Ferule]." According to Mylius, Hall stated that he told her that because he was afraid that Singleton or

Wesley would say something to her over the course of the weekend. The Alabama Court of Criminal Appeals unanimously reversed Hall's conviction, holding that the Alabama Rules of Evidence, Rule 504(a) provides protection under Alabama's husband-wife privilege for confidential communications, which are not waived, and meant to be private, when made while married. The Alabama Court of Criminal Appeals upheld that the Trial Court erred in finding that Hall did not intend for those communications to his then wife to be confidential. The Alabama Court of Criminal Appeals ruled that Mylius could testify to her observations about seeing large sums of money in Hall's possession during this time period, because in his second statement Hall disclosed this information about the money Wesley had give him, and he testified to this information at trial. Thus, Hall voluntarily disclosed a "significant part" of the information concerning Mylius' observation of the money which therefor amounted to a waiver. However, due to the error resulting from Mylius' testimony about the privileged communications was not harmless error, and, therefore, Hall's conviction was reversed and remanded for a new trial.

Nettles v. State

(CR96-2409; Appeal from Mobile Circuit Court, # CC93-3219.8 and CC94-645.8) Per COBB, J. -- During Nettles' second trial for the robbery of a fast food establishment and the kidnapping of its assistant manager, his lawyer asked for a hearing outside the presence of the jury in order to determine the admissibility of a confession Nettles gave following his arrest. The trial judge denied the request, stating that he would explore the matter when the jury was "on break." The trial continued, and testimony from a police officer concerning the confession was presented to the jury. Ultimately, the confession itself was also admitted into evidence. After the jury was released for its lunch break, the trial court made the statement (on the record) to Nettles' lawyer giving the reason the court had refused his request for a hearing on the admissibility of the confession. The reason given was that the confession had been, after a hearing outside the presence of the jury, deemed admissible by the trial judge presiding over Nettles' first trial. And that, "[t]he Court does not believe that a second hearing is necessary for that purpose, the evidence having been presented to a judge and ruled on by him . . * * * . . which ruling . . the Court finds is a matter decided." The Court then determined that the procedure followed at the hearing during the first trial was satisfactory. Thus, the question was whether that prior determination of admissibility was sufficient to allow the trial court in the second trial to decline to hear testimony outside the presence of the jury and then decline to determine the voluntariness of the confession before admitting it into evidence. The Court then held that, under the circumstances, the trial court at the second trial could not consider the admissibility of the confession "a matter decided." According to the Court, the remand after appeal of the first trial was in no way intended to limit the relitigation of the case. Thus, "trial counsel had to object to the admission of the confession at the second trial to preserve the issue for review, and the trial court was required to consider the admissibility of the confession when it was offered. See People v. Mattson," 789 P.2d 983, 999, cert. denied 489 U.S. 1017 (1990). Nevertheless, the Court held that Nettles was not entitled to a new trial. Rather, the Court held that Nettles was entitled to a post-trial evidentiary hearing to determine whether the confession was voluntary. REMANDED WITH DIRECTIONS.

Headley v. State

(CR97-2469; Appeal from Elmore Circuit Court, CV97-253.7) Per McMILLAN, J. -- Headley, a prisoner of the Department of Corrections, was found guilty of possession of marijuana. He appeals the Elmore Circuit Court's denial of his writ of habeas corpus, in which he alleges that the confiscation of the green plant material was not based upon Corrections' officers' own experience in identifying marijuana. The case was remanded to the circuit court, where testimony was taken and a determination made that the officer's identification was based upon his military training and other law enforcement experience. On return from remand, the Court agreed that the evidence presented at that evidentiary hearing satisfied the "some

evidence" standard and AFFIRMED the dismissal of the writ.

Houston v. State

Owen v. State

(CR97-0374; Appeal from Montgomery Circuit Court, CC97-1385 and -1386) Per McMILLAN, J. -- Owen appeals the circuit court's denial of his motion to suppress the marijuana and cocaine found in his automobile incident to a routine traffic stop, arguing that the discovery of the drugs was the result of an illegal search and seizure. At the suppression hearing, State Trooper Farrell testified that after some initial hesitation, Owen consented to a Deputy's walking his drug dog around Owen's car. The dog indicated first by scratching on the driver's side door, and once let into the car indicated immediately toward the trunk. A subsequent roadside search of the vehicle resulted in the recovery of a Minute-rice box full of what Owen then admitted to be cocaine. Owen was placed under arrest and his vehicle was impounded. Further searching of the vehicle resulted in the recovery of more cocaine, as well as a quantity of marijuana. Owen argues that the evidence of drugs found in his vehicle should have been suppressed because Trooper Farrell did not have reasonable suspicion to have the K-9 unit search the car. According to Owen, the scope of the stop should have been limited to what was necessary to issue the warning citation for the traffic violation. Owen relied heavily upon State v. Washington, 623 So. 2d 392 (Ala.Crim.App. 1993). Washington also involved a traffic stop by a State Trooper, wherein the trooper attempted to establish his reasonable suspicion of criminal activity on four factors: (1) Washington had a temporary driver's license, (2) the car he was driving was a rental car rented to someone else, (3) the car had a temporary license plate, and (4) Washington was extremely nervous. There, the Court had held that the trooper did not have "specific, particularized, and articulable" grounds for suspecting any criminal activity. The Court in Washington had held that the first three factors were irrelevant as to whether Washington was transporting drugs, and that nervousness exhibited by the detainee cannot alone form the basis for reasonable suspicion. It was the "mere nervousness exhibited by the detainee" language in Washington which Owen relied upon so heavily. However the present case, according to the Court, is distinguishable from Washington. The basis for the distinguishing this case from Washington stems from Trooper Farrell's ability to articulate specific grounds, other than mere nervousness, for reasonably suspecting Owen of other criminal activity. The Court cites Owens' other activity: the "jumping" immediately from his vehicle, the attempts to obstruct Trooper Farrell's view of the inside of the vehicle, his evasiveness when asked about his car, and his initial denial of ever being arrested. And although the court acknowledged that any one of these factors, standing alone, would not have justified searching the car, "we must look at the totality of the circumstances when determining whether reasonable suspicion exists." In sum, the Court found that Owens was not only nervous, but also evasive, adding that they had "previously held that evasive words and behavior can form the basis for reasonable suspicion to conduct a search." Denial of the motion to suppress was AFFIRMED.

Peeterse v. State

Appeal from Houston Circuit Court. Opinion by Judge Baschab. Appellant, Peeterse, was convicted of criminal trespass in the Houston County District Court. His 12 month sentence was suspended. Later, the district court revoked the appellant's suspended sentence. Rule 27.6 Ala. R. Crim. P., requires the sentencing court to conduct a hearing to determine whether probation should be revoked, unless the probationer has waived his right to a hearing under Rule 27.5(b). The record does not show that the district court held a revocation hearing, nor does it reflect that the appellant waived his right to a revocation hearing. This case was remanded to the circuit court with directions that the circuit court direct the district court to make specific findings as to whether it held a probation revocation hearing or whether the appellant waived his right to a hearing.

Alvis v. State

Per McMILLAN, J. -- Alvis appeals his convictions for rape and sodomy, based on his claim that his pleas of guilty were defective because, he says, the trial court failed to establish a factual basis for those pleas. During the sentencing hearing, Alvis entered his pleas, followed by the following exchange between he and the trial court:

> "COURT: Are you guilty as charged?
> "ALVIS: Yes, your honor.
> "COURT: What did you do?
> "ALVIS: Raped and sodomized.
> "COURT: All right. You did basically what?
> "ALVIS: Raped and sodomized.
> "COURT: All right. But I'm talking about the actual thing. You did what [the victim] testified to in your first trial, is that correct?
> "ALVIS: Yes, sir."

According to Alvis, this exchange was not sufficient to establish a factual basis for the plea because the trial judge, in effect, improperly took judicial notice of testimony from another proceeding. However, the Court disagrees. According to the Court, the mere failure to include in the plea colloquy the detailed facts of the crimes admitted to by the appellant does not render the plea invalid. The rule requiring a factual basis focuses upon the satisfaction of the trial court rather than upon any requirement that certain events be described in the record. In Alabama, then, the factual basis for a guilty plea may be established through methods other than having the defendant, the district attorney, the trial judge, or someone else recite during the plea hearing the facts of the crimes admitted to..

Goodwin v. State

Appeal from Jefferson Circuit Court. Opinion by Judge McMillan. A writ of mandamus is the proper vehicle by which a petitioner may compel the trial court to proceed on a Rule 32 petition in which the trial court has denied the petitioner's request to proceed in forma pauperis.

Colbert v. State

(CR97-0994; Appeal from Lee Circuit Court, CC93-466.7) Per BASCHAB, J. -- Colbert, on probation after receiving a suspended sentence in 1993 for attempted possession of a controlled substance, was reported by his probation officer as having violated probation by committing a new offense-unlawful possession of a controlled substance. After a hearing, the trial court revoked Colbert's probation and this appeal follows. Colbert presented three issues on appeal, the first being that the trial court erred when it based its decision to revoke on inadmissible hearsay. This issue was held to be "not properly before the Court" as it had not been preserved at the hearing. The second argument was that the substances allegedly discovered in Colbert's home were illegal to possess only under Federal law, and all that was proved at the hearing was that federal charges may have been pending. The Court found this to be without merit as well. The third and final issue was whether the trial court's order of revocation was deficient in that it did not state specifically the evidence relied upon and the reasons for revoking Colbert's probation. This the Court agreed with, citing Stallworth v. State, 690 So. 2d 551 (Ala.Cr.App. 1997) and Rule 27.6(f), Ala. R. Crim. P., and REMANDED back to the trial court.