



Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, January 5, 2015

10:00 A.M. Session

TURNER V. GA RIVER NETWORK ET AL. (S14G1780)
GRADY CO. BOARD OF COMMISSIONERS V. GA RIVER NETWORK ET AL. (S14G1781)

In this high-profile environmental case, the State government is appealing a Georgia Court of Appeals ruling that affects whether the 25-foot buffer required by state law between development projects and the banks of waterways also applies to marshes and wetlands. In the 4-to-3 decision, the Appeals Court reversed rulings by **Fulton County** and **Grady County** Superior Courts, which found that under the state's Erosion and Sedimentation Act, the 25-foot buffer does not apply to wetlands and is only required along the banks of state waters edged by "wrested vegetation," where the force of the water flow has torn away the vegetation and there is a clean demarcation between water and vegetation.

FACTS: These related cases arose from efforts by Grady County to construct a 960-acre fishing lake by building a dam that would flood various creeks and wetlands. Georgia's Erosion and Sedimentation Act (Georgia Code § 12-7-6 (b) (15) (A)) states that there must be "a 25 foot buffer along the banks of all state waters, as measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action, except" where one of six exceptions applies. One of the exceptions listed is: "Where the director determines to allow a

variance that is at least as protective of natural resources and the environment.” Grady County applied to the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources for a buffer variance that would allow it to encroach on the 25-foot buffer required by the state law for streams on the site. Although Georgia River Network and American Rivers opposed the variance, in part because the application failed to address the project’s impact on nearby wetlands, EPD Director Judson H. Turner issued the variance. The River Groups then petitioned for an administrative hearing, and an Administrative Law Judge reversed the variance, concluding that it failed to account for buffers required for wetlands on the site. Turner and the County then sought judicial review in different courts – Turner in Fulton County Superior Court and the County in Grady County Superior Court. Both courts reversed the Administrative Law Judge’s ruling, finding that the Erosion and Sedimentation Act requires a 25-foot buffer *only* along the banks of state waters edged by vegetation that was disturbed or moved by normal stream flow or wave action.

The River Groups then appealed to the Court of Appeals, which reversed the trial courts’ rulings on the variance. In a 4-to-3 vote, the Court of Appeals majority concluded that “the Superior Courts erred by determining that the 25-foot buffer requirement of the Erosion and Sedimentation Act does not apply unless the state waters at issue have banks with wrested vegetation.” Rather, the majority said, the statute requires a buffer adjacent to “all state waters,” not only those where vegetation has been wrested by normal stream flow or wave action. The majority acknowledged that the statute does not set out a way of measuring a buffer where there is no wrested vegetation, but found its interpretation was more in line with legislative intent, particularly given the legislature’s decision to provide six exceptions to the requirement and its stated intent to strengthen erosion and sediment control. The dissent argued that the statute’s specification that the buffer be required along the water’s “banks” implies a body of water, such as a river or lake. The dissent argued that given the legislature’s intent to prevent erosion, it is possible the legislature concluded a buffer simply was unnecessary where there is no vegetation along the banks or where there is continuous growth of vegetation into the waters, as in wetlands. Turner and the County now appeal to the State Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in determining that the statute requires a 25-foot buffer on all state waters regardless of whether they are edged by wrested vegetation.

ARGUMENTS: In his appeal (S14G1780), Turner argues that the Court of Appeals majority misinterpreted the statute. “If a state water lacks wrested vegetation, then no buffer exists,” the Attorney General’s Office argues on behalf of Turner and the State. “This is a simple and straightforward application of the statute.” The question before the state Supreme Court, Turner argues, is “whether a statute that provides a single starting point for measuring vegetative buffers around state waters should be interpreted as requiring buffers even when that measuring point is absent. The statute’s text, context, statutory history, and agency interpretive history all point to the same answer: no.” Turner argues that the majority ignored the plain language of the statute and focused instead on rewriting it to accomplish what it concluded the legislature intended, based on a law review article, which Turner argues is an improper source. Turner contends the Court of Appeals has violated the separation of powers doctrine by overstepping its authority to rewrite the statute by implicitly giving the EPD authority to create an additional measurement standard. “In this case, the Court of Appeals effectively deleted the words ‘wrested vegetation’ from the statute by rendering them at best optional, and presumably added language

by implication empowering EPD to create a measurement standard to supplement the exclusive standard prescribed by the statute,” the State argues.

In its appeal (S14G1781), the County repeats the arguments made by the Court of Appeals dissent opinion and by Turner. The County argues this issue is vitally important to the citizens of Grady County as the County is already committed to the project financially, has already begun construction, and will suffer injury if forced to delay. Furthermore, the Court of Appeals decision upends the EPD’s understanding of the buffer variance statute and thus calls into question any project operating under such a variance.

In support of both Turner and the County, 10 different groups, including the Georgia Chamber of Commerce, have banded together and filed a single amicus brief, claiming that expanding the buffer requirement to include wetlands, as the Court of Appeals majority suggests, would cause significant disruption to the economy. “Wetlands are ubiquitous in Georgia,” they write in their brief. “If land-disturbing activities are prohibited within 25 feet of these features, projects of all kinds throughout the State will be substantially delayed, if not prohibited entirely. At the same time, expanding the buffer requirement would provide negligible environmental benefit, they argue, “because activities in wetlands are already subject to strict regulation under a different statute, the federal Clean Water Act.”

The River Groups argue the Court of Appeals majority decision is the correct one. “The statute is unambiguous,” they write in briefs. “The legislature ‘established a 25-foot buffer along the banks of all state waters.’” The language of the statute is “plain and it is not illogical....All means all, every single one.” It could have said, “all state waters *that are bordered by wretched vegetation*,” “but it did not write the statute that way,” their attorneys argue. The legislative history of the buffer provision bears this analysis out. “As if to demonstrate more emphatically its intent to protect Georgia’s water quality, the General Assembly, in 2000, changed the language it used to describe the scope of the buffer from ‘*any* state waters’ to ‘*all* state waters.’ The provision continues to read ‘*all* state waters’ today.” The Rivers Groups’ attorneys argue the state Supreme Court should observe “that it is the Director and his amici who would rewrite the statute to limit the generality of the establishment clause.” The Director’s argument that it is impossible to set the boundary of a buffer where there is no wretched vegetation fails. In such a case, the buffer “simply begins at a reasonable point on the banks, which was the rule applicable in all cases from 1989 until 1994, as the Director admits.” Turner’s interpretation of the statute also “would result in an absurd regime of fits-and-starts buffer regulation,” the River Groups argue. “Many Georgia streams and rivers, and even some lakes, lack a continuous line of wretched vegetation due to stretches of rock, mud, or sand....Under the Director’s crabbed interpretation of the buffer provision, his regulators would find themselves assigning buffers along rivers, for instance, in an on-again-off-again fashion.” Along the Chattooga River, “with its severe rocky shorelines, the regulator might find no wretched vegetation at all.” As to arguments made in the amicus brief, the River Groups respond that including marshlands in the buffer requirement, as the EPD did until recently, would not collapse Georgia’s economy, particularly given all the exceptions to the buffer requirement under the law. And it would not cause any conflict with the Clean Water Act, as that federal legislation governs activities *within* waters while the state law governs activities “upland” – or *beside* waters.

Attorneys for Appellants (State and County): Samuel Olens, Attorney General, Nels Peterson, Solicitor General, Isaac Byrd, Dep. A.G., John Hennelly Sr. Asst. A.G., James Coots, Sr. Asst. A.G., Edward Tolley, Devin Smith, Kevin Cauley

Attorneys for Appellees (Rivers): Charles Cork, III, William Sapp, Nathaniel Hunt

THE STATE V. JONES (S14G1061)

The State of Georgia is appealing a decision by the Georgia Court of Appeals, which has reversed a man's DUI conviction in **Cherokee County**, ruling that evidence of a prior conviction for driving drunk was inadmissible under Georgia's new Evidence Code.

FACTS: Close to midnight on Jan. 21, 2011, Michael W. Jones was stopped by a police officer on Highway 92 for driving above the speed limit. The officer noticed that Jones' eyes were bloodshot and watery and the officer detected a strong smell of alcohol, which he later concluded was from Jones' breath. He asked Jones twice if he'd been drinking and both times Jones said no. Jones showed signs of impairment on three field sobriety tests and told the officer he could not say the alphabet without singing it. The third time the officer asked if he'd been drinking, Jones admitted that earlier that day, he had consumed two beers at The Twisted Tavern. The officer concluded Jones was "less safe to drive due to alcohol impairment" and arrested him for Driving Under the Influence (DUI). Jones consented to chemical testing of his breath, which showed he had a blood alcohol level of 0.147 and 0.139. In Georgia, the legal limit is 0.08. In February 2011, Jones was formally charged in state court with "DUI per se," "DUI less safe," and speeding. The State filed a motion asking to introduce at trial evidence of Jones' 2005 conviction, also for "DUI less safe." The State said the purpose was to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State argued the "similar transaction evidence" was necessary to show it was no accident that Jones had driven after becoming impaired, that he had denied drinking based on knowledge gained from his previous arrest, and that the previous arrest showed Jones' intent to drive under circumstances he knew to be both illegal and dangerous. Following a hearing, the trial court ruled in the State's favor, finding that Jones' prior DUI conviction was relevant to "the fact that he's aware of what [drinking alcohol] did to him the first time and this is what it did to him the second time." As a result, at trial the jury heard evidence that in 2005, Jones was stopped by an officer for driving erratically. The officer from that incident testified he smelled alcohol coming from Jones, observed his eyes were bloodshot and glassy and his speech was slurred. Jones admitted he had drunk "a few" beers, later stating he'd drunk about four "adult beverages." He showed signs of impairment on the field sobriety tests, and the officer arrested him for DUI after concluding Jones was "less safe to drive." Jones' blood alcohol level measured 0.195. At trial, Jones' defense attorney told jurors the State had introduced the similar transaction evidence to anger them and plant in their minds the suggestion that because Jones had committed one DUI, he must have committed another. The State said in response that the officers who testified about the prior DUI were not there to paint Jones as a bad man but to show that in the second instance, he intended to conceal his impairment because he now understood the consequences.

In January 2013, the jury found Jones guilty of all charges. Jones appealed, and the Court of Appeals reversed the DUI convictions, finding the trial court erred in allowing in evidence of the prior conviction because it was "not relevant to, or probative of, the commission of the crime charged." The appellate court noted that before the new Evidence Code was enacted, allowable

purposes for admitting similar transaction evidence included course of conduct and bent of mind. But the new Evidence Code (Georgia Code § 24-4-404 (b)) did not mention bent of mind or course of conduct as permitted purposes. Even under the prior statute, the ultimate issue was not the similarity in the crime but “relevance to the issues in the trial of the case,” the appellate court stated, concluding that the trial court erred in permitting the similar transaction evidence to prove intent or knowledge because the crime of DUI Less Safe does not require proof of specific intent to commit the crime. Furthermore, the Court of Appeals found, evidence of a prior crime is “highly and inherently prejudicial, raising as it does, an inference that an accused who acted in a certain manner on one occasion is likely to have acted in the same or in a similar manner on another occasion and thereby putting the accused’s character at issue.” The State now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred. This appears to be the first case to address whether under the new Evidence Code, evidence of a prior DUI conviction is admissible in a DUI trial to show intent and knowledge of the accused.

ARGUMENTS: The State argues the Court of Appeals opinion is wrong. Georgia’s new Evidence Code tracks the Federal Evidence Code and states that “the term ‘relevant evidence’ means evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The use of the word “any” suggests “a rule of admissibility favoring inclusion,” the State argues in briefs. While the code also states that “[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,” the trial court engaged in a balancing test before deciding its value was not outweighed by unfair damage to Jones’ case, while the Court of Appeals never reached that point, having determined the evidence of the prior case was not relevant. The Court of Appeals erred in its definition of relevant evidence, concluding that since neither intent nor knowledge are elements of the crime of DUI, evidence of a DUI defendant’s state of mind, and particularly his knowledge and intent, is not relevant. The Court of Appeals also construed the new Evidence Code too narrowly as the code’s language suggests that the General Assembly’s intent was one of “broad inclusion,” the State argues. Finally, the value of introducing Jones’ prior conviction was not outweighed by any substantial danger of unfair prejudice, the State contends. “The terms ‘substantially’ and ‘unfair’ in the Code Section serve to reinforce the legislative intention favoring the inclusion of all relevant evidence,” the State argues. Prosecuting attorneys and the Cobb County District Attorney’s Office have filed amicus briefs on behalf of the State, arguing that DUI prosecutions are in substantial danger if the Court of Appeals’ opinion is allowed to stand.

Jones’ attorney argues the Court of Appeals opinion is correct. Under Georgia’s new Evidence Code, to be admissible, “evidence of a prior conviction must be ‘relevant to an issue other than the defendant’s character.’” Jones’ prior DUI conviction was inadmissible under the new code “because it did not bear on any fact of consequence and was irrelevant to any issue other than his character,” the attorney argues. The state offered the prior conviction at trial to show Jones’ knowledge and intent at the time of the subsequent offense. “The problem is that knowledge and intent are not elements of the crime of driving under the influence because it is a strict liability offense, and the State was only required to show that the defendant drove while intoxicated, not that he intended to do so.” “Whether a driver believes himself to be a safe driver or unsafe driver has no bearing on his guilt,” and a charge of committing a strict liability offense

“ordinarily renders the defendant’s state of mind irrelevant.” Also, court rulings from other states “reinforces that there is no basis for the State’s proposed interpretation” of the new code. In other states, “the admission of prior DUI convictions is widely prohibited and regarded as inherently prejudicial,” the attorney argues. And no “previous Georgia case has upheld the admission of a DUI similar transaction under the knowledge and intent exceptions; instead, each case relies on the now disfavored bent of mind exception.”

Attorney for Appellant (State): Barry Hixson, Chief Assistant Solicitor General

Attorney for Appellee (Jones): Jeffrey Filipovits

BOSTICK V. CMM PROPERTIES, INC. ET AL. (S14G1223)

A man is appealing a Georgia Court of Appeals ruling against him that upheld a **Monroe County** court decision involving a lease for a grocery store.

FACTS: The appeal in this case stems from a complicated scenario and involves contract law. In January 1992, Diversified Capital Management, Inc. leased premises designated as a grocery store in Forsyth, GA (Monroe County) to James Bennett Bostick. In August 1992, Diversified assigned its rights as the leasing company to Ingram Timber Enterprises, L.P. In October 2000, Bostick, with the approval of Ingram, subleased the property to CMM Properties, Inc. The sublease – which was to run from Oct. 2, 2000 to Dec. 31, 2012 – was the balance of the master lease and was subject to all its terms. In April 2005, CMM stopped operating the grocery store on the premises and stopped paying monthly rental payments. In June 2005, Ingram sued CMM and three individual guarantors of the sublease in Monroe County. Ingram did not sue Bostick, however. Ingram claimed CMM had defaulted on making payments and abandoned the property in violation of the terms of the master lease and sublease. In the lawsuit, Ingram sought possession of the property and various damages, including all rent that would be due through the last day of the lease period, which was Dec. 31, 2012, and which would total more than \$695,000 plus taxes, insurance and maintenance expenses. CMM agreed on returning the property and relinquished possession of the premises to Ingram on July 22, 2005. But there was no agreement on the damages. CMM argued that Ingram was attempting to collect all amounts due under the lease as if it hadn’t been terminated. Ingram claimed these were the “liquidated damages” agreed to in the lease. (“Liquidated damages” are an amount stipulated in a contract as a reasonable estimate of the actual damages a party can recover if the other party breaches the contract.) Ingram’s first lawsuit was transferred to Turner County based on improper venue, and that court granted “summary judgment” to CMM. (A court grants summary judgment when it determines a jury trial is unnecessary because there is no dispute over the facts and the law falls squarely on the side of one of the parties.) Here, the judge found that the damages sought by Ingram under the provisions in the lease were a “void and unenforceable penalty.” Specifically, the court ruled that because the particular provisions of the master lease did not take into account the future rental value of the premises and the likelihood of reletting them for the remaining term of the lease, they were a void and unenforceable penalty. Ingram did not appeal the trial court’s ruling.

In January 2010, Ingram filed a second lawsuit in Monroe County against Bostick, contending it was entitled to collect rent plus late fees, taxes, insurance and maintenance costs from Bostick by virtue of default under the master lease. Bostick then filed a “third-party complaint” against CMM, claiming that if he were ultimately found liable to Ingram, then CMM was liable to him. The CMM parties again asked the trial court for summary judgment, this time

arguing that the doctrine of “res judicata” precluded the lawsuit. (Res judicata bars the same parties, or related parties, from litigating a second lawsuit on the same claim that has already been adjudicated. The three essential elements to claiming a res judicata defense are an earlier decision on the issue, a final judgment on the merits, and the involvement of the same parties, or parties in “privity” with the original parties, i.e. parties with a mutual interest.) Before the trial court ruled on that motion, Ingram and Bostick entered into a consent judgment, which provided that Ingram was entitled to a judgment of at least \$1 million, but that Ingram would not attempt to collect the judgment. Instead, the judgment would be satisfied by Bostick pursuing the case against CMM. Ingram and Bostick agreed that Ingram would then get two-thirds and Bostick one-third of whatever amount, if any, was collected from the CMM parties. The trial court granted summary judgment to CMM, finding that the previous Turner County court case barred the second suit under res judicata, among other grounds. On appeal, the Court of Appeals upheld the judgment. It ruled that although Bostick had not been a party to Ingram’s first lawsuit, he was “in privity” with CMM as they were so connected by the sublease and master lease that they had the same interest in defending themselves against liability of any alleged default. Therefore, Bostick was bound by the prior court ruling that was in CMM’s favor. Bostick now appeals to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals correctly applied the doctrine of res judicata to the facts of this case.

ARGUMENTS: Bostick’s attorney argues that the Court of Appeals’ ruling is wrong because under the statute, the party against whom the doctrine of res judicata is raised must have had a full and fair opportunity to litigate the issues in the first action. “Bostick was not involved in the first suit,” the attorney argues in briefs. While he may be prohibited from recovering under the provisions of the master lease, he is not prohibited from invoking the provisions of the master list to recover his independent claims for additional and direct rent under the sublease with CMM. Also, CMM should not be considered “in privity” with – or having a mutual interest with – Bostick. Bostick as the sub-landlord should not be held by the courts to be a “privity” with the sub-tenant, CMM, as landlords and tenants cannot be privies. “Parties are in privity for res judicata purposes only if they ‘mutual or successive relationships to the same rights or property,’” the attorney argues. “The landlord and the tenant have mutual rights in the same piece of property, but the relationship between landlord and tenant should not make this ‘mutuality’ a basis for res judicata.” There is a natural antagonism between landlord and tenant, and they “just can’t represent the other,” the attorney argues. Bostick argued that it isn’t fair or right to hold him in privity with either his landlord Ingram or his tenant, the CMM parties. “On some issues he is aligned with his landlord and on some issues he is aligned with his tenant, but he is definitely in conflict with both parties,” the attorney argues. “When the party in the middle has rights, duties and responsibilities going to either side, the court should not find him in privity with either side for purposes of res judicata because the man in the middle’s position is incongruent.” In conclusion, the attorney argues the Supreme Court “should not hold that res judicata bars any claims of the third-party plaintiff Bostick against the third-party defendants CMM parties.”

CMM’s attorney argues the Court of Appeals ruled correctly. “The prior order finding that the liquidated damages provisions are a void and unenforceable penalty is a final and conclusive judgment which cannot be re-litigated,” he argues in briefs. “An examination of both suits and [Ingram’s] own testimony demonstrates that he sought recovery of the exact same

damages in both suits.” The Turner Superior Court found the provisions of the lease were a void and unenforceable penalty and while Ingram had the opportunity to appeal, “he voluntarily chose **NOT** to appeal the ruling.” Rather, Ingram and Bostick then colluded to bring a third-party action in their home county and entered into a “friendly and illusory consent judgment in an effort to collect from [CMM] claims which were extinguished in the Turner County action.” The same law firm represented both Ingram and Bostick at various points. “Essentially, Appellant [Bostick] and Plaintiff [Ingram] conspired to enter into this friendly illusory judgment with Appellant having no personal exposure and with Appellant receiving one-third of any net recovery.” Bostick could have himself asserted the defense of res judicata in response to Ingram’s lawsuit. Instead, Bostick is seeking to collect for Ingram, and then split the recovery with Ingram when Ingram is barred from seeking recovery directly. Bostick’s contention that there was no privity between him and CMM and that their interests are not aligned is “misguided,” the attorney argues. “They clearly have joint interests in arguing that the remedy provisions are void and unenforceable.” Simply, “this action involves two separate groups: (1) plaintiff [Ingram] who is attempting to collect money under the remedy provisions of the lease; and (2) the defending parties which consists of the Appellant [Bostick] lessee and the Appellee [CMM] sublessees as obligated parties,” the attorney argues. “Accordingly, the res judicata defense was properly invoked and sustained.” Bostick’s arguments are based on the false premise that he ever asserted a claim for direct rent, as the record is clear that the only claims he asserted were third-party claims for indemnity. Bostick is now trying to reshape the entire case. He could have filed suit in Turner County Superior Court asserting his direct claims as sublessor against CMM. “He did not do so.” However, the “existence of these potential claims, which have never been asserted, does not eliminate or destroy the identical interests and privity that exists between these parties as obligors under the lease,” the attorney argues. For these reasons, “the trial court’s rulings should be affirmed.”

Attorney for Appellant (Bostick): Jonathan Alderman

Attorney for Appellee (CMM): John Spurlin

2:00 P.M. Session

TEPANCA V. THE STATE (S15A0045)

A man is appealing his conviction and life prison sentence for the murder of a man in **Hall County**.

FACTS: In April 2008, Hugo M. Tepanca had been living in Gainesville with the mother of his two children, Melissa Gonzalez-Clamborn. For about six months, he had also been seeing another woman, Alicia Hernandez, who lived in a duplex on Dean Street. On April 20, Tepanca, Gonzalez-Clamborn and their two children went to visit some friends, who happened to live next door to Tepanca’s girlfriend, Hernandez. According to both the State and the defense, Hernandez was trying to end the relationship. When Tepanca arrived at his friends’ home, he saw Jose Sanchez-Vargas sitting in his truck in Hernandez’s driveway and the two were talking. Tepanca approached and asked Sanchez-Vargas what he was doing with Hernandez. According to the State, Sanchez-Vargas had an arrangement with Hernandez and others to drive them to work for a fee. He had arranged to pick up his advance fare from Hernandez for the next week’s

transportation. Sanchez-Vargas replied that it was none of his business. Tepanca then pulled out a gun and fired into the ground near the truck. According to the defense, Tepanca believed his girlfriend was having an affair with Sanchez-Vargas. According to the State, Tepanca “never thought that Ms. Hernandez was seeing someone else.” Rather, Sanchez-Vargas was at Hernandez’s house because for a fee, he regularly drove Hernandez, as well as others, to work and he had arranged to come by to pick up his money. The State claimed Tepanca was well aware of this transportation arrangement. After the confrontation, both men drove off in the same direction, meeting up at a traffic light a short distance away. The two eventually stopped on Merck Street, where Sanchez-Vargas got out of his truck and walked toward Tepanca, allegedly gesturing with his hand. Tepanca then shot Sanchez-Vargas six times, killing him. A neighbor called 911, and shortly after, Tepanca was apprehended in a nearby commercial area. A nine-millimeter pistol was found in his truck, and bullets later removed from Sanchez-Vargas’ body matched Tepanca’s gun. No weapon or ammunition was found in the victim’s vehicle.

Tepanca was advised of his *Miranda* rights in both English and Spanish, and he gave an extensive statement, during which he admitted the shooting. In April 2010, the jury found Tepanca guilty of malice murder, felony murder based on aggravated assault, aggravated assault, and possession of a firearm during commission of a felony. He was sentenced to life plus five years in prison. Tepanca now appeals to the state Supreme Court.

ARGUMENTS: Tepanca’s attorney argues the trial court made eight errors, including by “merging” Tepanca’s malice murder and aggravated assault convictions into his felony murder conviction for the purpose of sentencing. (If a person is convicted of multiple crimes involving the same incident, courts “merge” them into the most serious offense – or treat them as a single crime for sentencing.) Here, Tepanca’s attorney argues, “the trial court got it exactly backward.” “When the jury returns guilty verdicts on both felony murder and malice murder charges in connection with the death of one person, it is the felony murder conviction, not the malice murder conviction, that is simply surplusage, and stands vacated by operation of law,” the attorney argues. The trial court also erred by simultaneously accepting an acquittal on voluntary manslaughter, which under the law is a less serious homicide than murder, while accepting a guilty verdict on the more serious offense of murder. These verdicts are “mutually exclusive” because they are logically irreconcilable, Tepanca’s attorney argues. Voluntary manslaughter differs from murder only in that it results from “serious provocation.” “By returning a guilty verdict to malice murder, the jury said that it found that the State proved that Mr. Tepanca acted without provocation,” the attorney argues. “But by returning a ‘not guilty’ verdict to the charge of voluntary manslaughter – a charge that differed only on the issue of provocation – the jury necessarily indicated that the State had failed to prove the lack of provocation beyond a reasonable doubt.” “Upon receipt of the mutually exclusive verdicts, the trial court should have sent the jury back to deliberate and return only one verdict on Count 1, not two verdicts.” “But it did not do that.” As a result, the state Supreme Court cannot know whether or not the jury found provocation existed. Therefore, the judgment against Tepanca must be thrown out. The trial court also erred by refusing to instruct jurors that adultery is a legally recognized basis of provocation for manslaughter, “regardless as to whether the defendant and his partner are married,” the attorney argues, citing the Georgia Supreme Court’s 2007 decision in *Culmer v. State*. “In this case, the evidence is overwhelming that Mr. Tepanca’s perception of a romantic relationship between Ms. Hernandez and Mr. Vargas actually triggered a sudden and passionate reaction: Mr.

Tepanca experienced such an emotional reaction that he pulled out a gun and shot it into the ground.” Tepanca’s attorney also argues the jury should have been instructed on the law of “mutual combat.” When both parties agree to fight, a jury charge on mutual combat is generally proper. And a homicide that occurs through mutual combat can be manslaughter, as opposed to the more serious murder.

The State argues the trial court did not err by merging malice murder into felony murder as the evidence supported both and the penalty for each was the same. “While the preferred practice when verdicts of guilty are returned on both malice and felony murder is to merge the felony murder into the malice murder, the subsequent imposition of a life sentence...renders any perceived error harmless,” the District Attorney, representing the State, writes in briefs. Furthermore, Tepanca’s attorney did not object at the time of sentencing to the judge’s merging the counts into the conviction for felony murder, and therefore this argument is considered waived, as the attorney failed to bring it up at the earliest possible time. The trial court also did not err in accepting verdicts of guilty on murder and not guilty on voluntary manslaughter. “Verdicts are only mutually exclusive when a conviction on one logically excludes a conviction on another,” the State argues. “Moreover, the not guilty verdict on voluntary manslaughter would support the conclusion that the jury affirmatively *rejected* [Tepanca’s] contention that he acted solely as the result of a sudden, violent and irresistible passion resulting from serious provocation by the victim.” Among other arguments, the trial court did not err in refusing to instruct the jury on adultery “as there was no evidence of adultery,” the State argues. Georgia statutory law says: “A *married* person commits the offense of adultery when he has sexual intercourse with a person other than his spouse....” Tepanca wasn’t married either to the woman with whom he lived or to the woman he was seeing behind the first woman’s back. “Further, the evidence at trial was that no untoward relationship existed between the victim, Mr. Sanchez-Vargas, who was married, and Ms. Hernandez,” the State contends. “All evidence was, in fact, to the contrary.” As to the judge’s refusal to charge the jury on mutual combat, again “there was no evidence of mutual combat,” the State argues. “No witness testified about anything even vaguely resembling mutual combat.”

Attorney for Appellant (Tepanca): Howard W. Anderson, III

Attorneys for Appellee (State): Lee Darragh, District Attorney, William Akins, Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder Asst. A.G.

DYAL V. THE STATE (S15A0139)

A man convicted of shooting and killing his son is appealing his murder conviction and sentence to life in prison.

FACTS: According to state prosecutors, in 2007, Jonathan Dyal was living with his parents, Vickie and Lewis Dyal in Alapaha, GA, which is located in south Georgia in rural **Berrien County**. After work on Dec. 17th, 34-year-old Jonathan Dyal, a construction worker, came home and was drinking outside as he stood by his truck and listened to the radio. His father, 56-year-old Lewis Dyal, an electrician, was also drinking outside near his truck. Jonathan eventually went inside to get something to eat and help his mother set up a new satellite dish. The two were sitting at the kitchen table eating dinner when Lewis came in and said he was going to take a shower and go to bed. Vicky Dyal later testified that it had been a quiet, peaceful

evening, which was a change from the drinking and arguing that was common in their marriage. But after Lewis had been in the bedroom for a while, he returned with a loaded .44 caliber revolver in his hand and pointed it at both his wife and son. As Jonathan stood next to his mother, with his hand on her shoulder, Lewis fired twice at his son, striking him in the face and instantly killing him. As Jonathan lay bleeding on the kitchen floor, Vicky rushed to him, but her husband stopped her, saying “you stupid b---, he’s dead.” When Vicky again reached for her son, Lewis threatened that she would be next if she didn’t leave Jonathan alone. She then ran out the back door to the nearest neighbor’s house. Meanwhile, Lewis called 911 and said he had shot his son. Berrien County sheriff deputies arrived at the home where they noted that Lewis smelled of alcohol and was slurring his speech. He told officers he had shot Jonathan because “he was going to beat my tail.” Lewis told the officers that he and his son had been arguing over pickles and he had gone to his bedroom, retrieved his firearm, come back to the kitchen, aimed the gun at his son and shot twice. During the investigation, law enforcement officials uncovered another incident involving father and son from Dec. 7, 2000. At that time, Vicky and Jonathan also had been eating in the kitchen when Lewis went to bed drunk, returned with a gun and shot at the television. He threatened to kill his wife and son if they told anyone what he had done. Jonathan tried to wrestle the gun away from his father and the two fought, leaving Lewis injured and requiring facial surgery. Vicky corroborated her son’s characterization of events.

At trial, Lewis Dyal claimed he’d shot his son in self-defense. He said he was afraid of his son when his son drank, so much so that he would often stay in the barn out back when his son was drinking. In March 2009, a jury found Dyal guilty of malice murder, aggravated assault and family violence, and possession of a firearm during the commission of a felony. He was sentenced to life plus five years in prison. Dyal now appeals to the state Supreme Court.

ARGUMENTS: Dyal’s attorney argues the trial court made multiple errors, abused its discretion, and Dyal deserves a new trial. The primary error, the attorney argues, was the court’s refusal to allow in evidence of Jonathan’s “bad acts of violence,” in part because his attorney failed to file the motion asking to do so within the 10 days required by court procedure. “Crucial evidence that explained why Mr. Dyal was so fearful of his son that night was prohibited from being entered into evidence because it was found to be untimely filed by defense counsel,” the attorney argues in briefs. Among the information the jury was deprived of learning about was his son’s history of drinking and becoming violent, including an incident when Jonathan beat his girlfriend while he was drunk and another incident when he shot at a Coffee County deputy. That information was essential to showing Dyal’s state of mind at the moment he shot Jonathan. “The trial court’s rulings made the presentation of Mr. Dyal’s defense nearly impossible,” the attorney argued. “Not only are the victim’s prior bad acts relevant in a case where justification is the defense, but these acts also go to the state of mind of the defendant at the time of the offense.” In addition, “evidence that *was admitted* included Mr. Dyal’s prior bad acts between him and the deceased, that he is an alcoholic, and that he takes out his anger on his family,” the attorney argues. “To give one side the right to call Mr. Dyal’s reputation for violence into question but not the deceased’s is also proof that Mr. Dyal’s substantive due process rights were violated from this ruling.” Dyal’s attorney makes a number of other arguments, including that the trial court erred by admitting a written statement made by Jonathan to law enforcement officers regarding the 2000 incident in violation of Dyal’s 6th Amendment right to confrontation. Dyal also argues his trial attorney was ineffective for failing to file the notice of Jonathan’s prior bad acts within

the 10-day procedural requirement and for failing to object to an erroneous verdict form. And the trial court was wrong to admit into evidence the redacted version of the phone conversation that took place the night of the killing between Dyal and law enforcement. The court should have allowed the entire tape to be played for the jury, as his attorney requested. “The tape is the best evidence of defendant’s state of mind and the trial court’s decision to redact the portions that pertain directly to the defendant’s state of mind issue was an abuse of the trial court’s discretion,” Dyal’s attorney contends.

The District Attorney and Attorney General argue for the State that the trial court properly ruled by denying the motion to admit evidence of the victim’s prior bad acts. The rule is that his attorney was permitted to file the motion “at least 10 days before trial unless the time is shortened or lengthened by the judge.” At no time did Dyal’s attorney – who had represented him through at least two trial terms and had met with him multiple times to discuss his case – indicate that she had only just become aware of the bad acts she asked to present at trial. “Based on these factors, the trial court did not abuse its discretion when it properly ruled on an untimely motion made by trial counsel that the prior bad acts of the victim were inadmissible,” the State argues. The trial court also properly ruled that Jonathan’s written statement was admissible as an exception to the hearsay rule and as evidence of the prior difficulty between father and son. And the trial court properly admitted into evidence the redacted version of Dyal’s phone conversation with law enforcement the night he killed his son because “the redacted portions referenced the exact same prior bad acts of the victim the court had already ruled to be inadmissible.” Finally, the verdict form was proper and Dyal is not entitled to a new trial based on ineffective assistance of counsel, the State contends. His attorney was not ineffective for failing to object to the verdict form or for failing to file her motion within 10 days. “The defendant has not overcome the strong presumption that his counsel’s performance fell beneath reasonable conduct and that there is a reasonable probability that absent his counsel’s deficiency, the result of the trial would have been different,” the State contends.

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