



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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ELKINS V. THE STATE (S19A0331)

The Supreme Court of Georgia has upheld the murder conviction of a young man who was 17 years old when he shot a 13-month old baby between the eyes after the baby's mother refused to give him her purse.

In this highly publicized case, the high court finds that the evidence against **De'Marquise Elkins** "was sufficient to authorize a rational jury to find Appellant guilty beyond a reasonable doubt of the crimes for which he was convicted," **Justice Michael P. Boggs** writes for a unanimous court.

However, the Supreme Court is sending the case back to the trial court with instructions that it hold an evidentiary hearing on one of Elkins's claims that he received "ineffective assistance of counsel" from one of his attorneys.

According to the facts of the case, the day of the crime – March 21, 2013 – Elkins was about three months shy of his 18th birthday, at which time he would legally become an adult. On that day, Elkins and a 15-year-old boy were walking down Ellis Street in Brunswick, **Glynn County**, when they encountered Sherry West, who was pushing her 13-month-old son, Antonio Santiago, in a stroller. Elkins approached West and demanded her purse. When she said she had no money, Elkins pulled out a gun he had tucked into his waist and asked West if she wanted him to shoot her baby. West begged him not to but still did not turn over her purse. Elkins then hit her in the face with his gun and started counting down from five. He stopped at three, demanded her purse again, and she again refused. Elkins walked around the stroller, fired a shot

into the ground, shot West in the leg, and resumed his countdown. He then pointed his gun at the baby and shot him between the eyes, killing him instantly. West began screaming, and as Elkins and the 15-year-old ran away, West tried in vain to save her baby by performing CPR on him until police arrived.

At the hospital, after West was told her baby was dead, she told a detective that her assailants were two black males and that the older one was wearing a red sweatshirt and had thick, curly hair and thick eyebrows – a description that matched Elkins. The next morning, Elkins went to a relative's apartment where he hid the gun under a love seat. When taken into custody later that morning, Elkins had two .22 caliber bullets in his pocket, the same caliber as the bullet that killed the baby. He said to the arresting officers, "Y'all ain't got s**t on me. Y'all ain't got no gun. Y'all ain't got fingerprints. All y'all have is a f**king acquittal." But when one of the officers smiled at him, Elkins responded, "Oh, you got the gun?"

Later that morning, Elkins's mother and sister went to the apartment where Elkins had been, retrieved the gun, got a ride to a saltwater fishing pond behind a flooring store off Highway 17, and threw the gun into the pond. Law enforcement retrieved the gun a few days later.

Elkins was indicted for malice murder, felony murder, first degree child cruelty and other crimes for killing the baby and shooting and trying to rob his mother. Due to significant pre-trial publicity, the trial was moved from Glynn County to Cobb County. Following the August 2013 trial, the jury found Elkins guilty of all charges. Elkins was ineligible for the death penalty because he was not yet 18 when he committed the murder. Instead he was sentenced to life without parole plus a total of 105 years. Part of that sentence – 30 years – was for a crime Elkins committed 10 days before the murder when Elkins shot and injured a pastor who was working with one of his parishioners on his church's fence. At gunpoint, Elkins had demanded their cell phones and wallets, and when the parishioner said he did not have any, Elkins shot the pastor in the arm.

Elkins's mother was sentenced to 10 years in prison for tampering with evidence by helping dispose of the gun Elkins had used to shoot the baby. Elkins's sister entered a guilty plea to the same charge and his aunt pleaded guilty to making a false statement. The 15-year-old pleaded guilty to the attempted armed robbery of West and testified for the State at trial.

In his appeal to the Georgia Supreme Court, Elkins argued a number of things, including that under the U.S. Supreme Court's 2012 decision in *Miller v. Alabama*, its 2016 decision in *Montgomery v. Louisiana*, and the Georgia Supreme Court's 2016 decision in *Veal v. State*, as a juvenile at the time of the crime, it was unconstitutional to sentence Elkins to life without parole. He also argued that the trial court violated his constitutional rights by preventing him from showing that someone else committed the crimes; that he was deprived of a fair trial and the presumption of innocence when the jury heard that he had a criminal record as a juvenile; and that he was denied effective assistance of counsel.

In today's opinion, the state Supreme Court finds that, "The trial court did not violate Appellant's constitutional rights by preventing him from showing that someone else committed the crimes, he was not deprived of a fair trial or the presumption of innocence by a fleeting reference at trial to a 'criminal juvenile report,' and his claims of ineffective assistance related to his trial counsel are waived." (Ineffective assistance claims not raised at trial or at the earliest possible opportunity are considered waived and cannot be raised for the first time on appeal.)

However, one of Elkins's claims of ineffective assistance of counsel was not waived, the Court has ruled. Before the trial court entered an order on Elkins's motion requesting a new trial, the Georgia Supreme Court issued its ruling in *Veal*. That opinion explained that the U.S. Supreme Court "has now made it clear that life-without-parole sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers," and that such a sentence had to be supported by a "distinct determination on the record that [the defendant] is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom a life-without-parole sentence is proportional under the Eighth Amendment." Three days after the *Veal* decision, Elkins's attorney filed an amendment to Elkins's new trial motion and asked the trial court to resentence Elkins to life in prison with the possibility of parole. But Elkins claims the attorney was ineffective for failing to present evidence at the hearing on the amended motion that was nearly six months later that would have shown he could not be constitutionally sentenced to life without parole. Following a brief hearing, the trial court denied the amended motion.

"The State concedes, and we agree, that Appellant raised this claim of ineffective assistance of motion-for-new-trial counsel at the earliest practicable moment" after a new attorney took over his case, today's opinion says. "When there has been no evidentiary hearing in the trial court on a preserved claim of ineffective assistance of counsel, this Court generally must remand the case to the trial court for an evidentiary hearing on the issue."

"Judgment affirmed in part and vacated in part, and case remanded with direction," the opinion concludes.

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