Supreme Court of Georgia
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SUMMARIES OF OPINIONS

Published Monday, February 22, 2016

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THE STATE V. KELLEY (S15G1197)

In a 6-to-1 ruling, the Supreme Court of Georgia has ruled in favor of the **Fulton County** District Attorney and reversed a decision by the Georgia Court of Appeals that allowed a trial judge to impose a lighter sentence than the prosecutor had recommended as part of a plea agreement.

Under today's majority opinion, written by **Justice Carol Hunstein**, the high court has ruled that trial judges lack the authority to accept a defendant's guilty plea to a less serious crime than the one for which he was indicted, unless the State consents. Furthermore, if the trial judge intends to reject the State's recommended sentence for the reduced charge and impose a lighter sentence, the State has the authority to withdraw from the negotiated plea agreement and demand the case go to trial.

"We conclude that the trial court does not have the authority to accept a guilty plea to an uncharged, lesser included offense without the consent of the State, and that, where the State makes a timely and specific objection, it has the legal authority to withdraw its consent from a negotiated plea and demand a trial when it learns that the trial court does not intend to follow the sentencing recommendation," the majority opinion says.

According to the facts of the case, Terry Kelley and three others were indicted in Fulton County in 2012 and charged with felony murder, burglary and other crimes for their part in an armed robbery attempt that resulted in the death of a fifth participant of the crimes. In October 2012, Kelley and State prosecutors told the trial court that rather than go to trial, they had negotiated a plea agreement in which the State agreed to reduce Kelley's felony murder charge

to the "lesser-included" charge of voluntary manslaughter and to recommend to the court a prison sentence of 20 years. All the other charges would be "nolle prossed," or dismissed, in exchange for Kelley's guilty plea to voluntary manslaughter and his truthful testimony against his co-defendants. (A "lesser included" offense is a reduced charge that shares some, but not all, of the elements of a greater criminal offense. One cannot commit the greater crime without committing its lesser included offense, e.g. manslaughter is a lesser-included offense of murder.) The trial judge accepted Kelley's plea to the reduced charge as having been "knowingly, freely and intelligently" entered. However, the judge determined the sentence recommended by the State was too high, stating after hearing from witnesses that "there's a substantial factual basis for mitigation in this particular case," including the facts of the case, Kelley's admission of his involvement and remorse, his lack of any criminal history and his willingness to provide truthful testimony about his co-defendants. Instead, the judge sentenced Kelly to 10 years, with the first five to be spent in prison followed by five on probation. The State immediately objected and asked to withdraw Kelley's plea and proceed to trial. The judge orally refused and upheld the sentence. The State then filed a written "Motion to Set Aside an Illegal Judgment," alleging that the trial court lacked the authority to impose a sentence different from the negotiated and recommended sentence. In doing so, the State claimed the trial court was improperly participating in the plea negotiation process by accepting a "non-negotiated" plea to an offense that was not included in the formal indictment. And in a non-negotiated plea, the defendant may only plea to charges in the indictment, and the trial court has no authority to reduce the charges.

In November 2012, the trial court granted the State's motion, agreeing with the State that it had no authority to sentence Kelley to an unindicted lesser offense. In May 2013, the trial court resentenced Kelley to 20 years as originally recommended by the State. When Kelley appealed, however, the Georgia Court of Appeals reversed the ruling. The appellate court ruled that while "the crime with which to charge a defendant is within the exclusive purview of the State," "the sentence to be imposed with regard to a charge is within the exclusive province of the trial court unless that discretion has been removed by statute." The Court of Appeals noted that while a defendant has the right to withdraw a negotiated plea if the trial court decides to impose a longer sentence than that recommended by the State, "there is no comparable authority allowing for the *State* to withdraw its offer if the court indicates it intends to sentence the defendant to less time than recommended." It further ruled that the trial court's rejection of the State's recommended sentence did not give the State the right to withdraw from the plea agreement.

In today's majority opinion, the Supreme Court disagrees, and it has reversed the Court of Appeals opinion. The State is given broad discretion in making decisions about whom to prosecute, what charges to bring, and which sentences to seek, the opinion states. "The authority and discretion to plea bargain rest with the State, and it is within the State's purview to place conditions on any such plea. In contrast, the trial court is prohibited from participating in plea negotiations….The trial court also lacks the authority to dismiss a criminal charge over the State's objection where there is no legal basis for that dismissal; any such decision impermissibly interferes with the State's right to prosecute. Though we have never expressly held as much, we believe it follows from these principles that a trial court may not compel the State to accept a plea to an offense other than that which is charged in the charging instrument."

Given that the State has the authority to decide how to charge a defendant and whether to enter into a plea agreement, and given that a trial court may not accept a guilty plea to a reduced

charge without the State's consent, "it follows that, where the State has agreed to a reduced charge in exchange for a specific sentence, the State has the authority to withdraw from that negotiated plea and demand a trial if the trial court rejects that sentence in favor of one to which the State does not consent."

Kelley's argument that any sentence associated with a plea agreement is only a recommendation and the trial court has the final authority to impose any legal sentence once the plea is accepted "is untenable," the majority opinion says, as it would "render the State powerless to enforce its bargain." It also would "chill the State's willingness to enter into such pleas, much to the detriment of criminal defendants and 'the orderly administration of criminal justice.'"

"We also hold that, where a trial court intends to reject a sentence recommended as part of a plea agreement to a lesser charge, the trial court must, on the record and before sentencing, inform the State of its intention and allow the State to exercise its authority to withdraw its consent to the plea and demand a trial," the majority opinion says.

In a dissent, **Justice Robert Benham** writes that he agrees with the Court of Appeals that while a defendant may withdraw from a plea agreement if a judge decides to impose a longer sentence, there is no comparable authority allowing the State to withdraw if the judge decides to impose a lighter sentence. The legislature has determined by statute that a trial judge has the authority to set the sentence, "not only where a guilty verdict has been returned but also where the defendant has entered a guilty plea," the dissent says. But there is no statute or rule that gives the prosecutor the right to withdraw from a plea agreement if the judge, after considering mitigating factors as this judge did, imposes a sentence that is more favorable to the defendant.

"Until today, a defendant in Georgia has entered into plea negotiations with the understanding that the judge has the final say as to sentencing," the dissent says. "If the purpose of the majority's ruling is to 'even the playing field' for the prosecutor in plea negotiations, this purpose is incongruous with our system of criminal law. The law has never recognized a level playing field between the accused and the State; the accused is innocent until proven guilty and the State bears the burden of proving guilt….Until today, the law in Georgia has been that a defendant, but not the prosecutor, may withdraw a guilty plea upon learning the trial judge has determined that the sentence should be something other than that which was agreed upon. Such a rule is consistent with the State's burden of proof."

"I am persuaded that the majority opinion, by creating new law, violates the separation of powers between the executive and judicial branches of government by stripping the judicial branch of the statutorily conferred authority to exercise sentencing discretion with respect to sentencing a defendant for an offense to which the State has agreed to accept a plea instead of the offense charged," the dissent says.

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Marc Mallon, Sr. Asst. D.A.

Attorneys for Appellee (Kelley): Curtis Hubbard, Jr., Todd Barbee

KELLAM V. THE STATE (S15A1913)

The Georgia Supreme Court has upheld the life without parole prison sentence given to a man in **Laurens County** for the 2005 child abuse murder of a 17-month-old baby girl.

According to the facts of the case, Jaworski Dune Kellam, described as a "friend" of the child's mother, was babysitting A'Trevia Davis while her mother was at work. The mother said her child appeared healthy and well the morning of Aug. 17, 2005, when she left A'Trevia at home in Kellam's care, as she had done the day before. Kellam, 26, later told the mother and others he had been playing with the baby, bouncing her up and down and throwing her on the bed, then left her in the room so she could nap. He said that when he returned, she would not wake up and her eyes were rolled back in her head. At around 10 that morning, Kellam knocked on a neighbor's door saying the baby was not breathing. The neighbor returned with Kellam to the home and said he found the child "slightly breathing." Trained in administering CPR to children, the neighbor attempted to revive the baby but to no avail. The neighbor, Kellam and a cousin of the baby's mother then rushed her to Fairview Park Hospital in Dublin, GA. Meanwhile, a supervisor of A'Trevia's mother told her that someone had just frantically called and said she should immediately go to the hospital. When Kellam and the neighbor arrived with the baby, hospital attendants found the little girl listless, not breathing, and without a pulse. Resuscitation efforts failed and A'Trevia was pronounced dead. When nurses asked him if A'Trevia had fallen off the bed, Kellam said no.

The nurses noted injuries to the baby's wrist and neck and that the child's abdomen had started to swell. They also observed fresh abrasions that had likely occurred within the hour. As a result, they called the sheriff's department to investigate. At trial, the Georgia Bureau of Investigation (GBI) medical examiner who performed the autopsy testified she had found recent injuries to the baby's face and neck and bruising around her abdomen. The internal examination revealed bleeding within the abdomen, severe injuries to the child's liver, and hemorrhaging around her kidneys and stomach. The medical examiner testified the baby had lost about 20 percent of her blood, and concluded that the severity of the injuries to her abdomen were caused by a "tremendous" amount of blunt force, consistent with having been punched by a clinched fist, severely kicked, or having been in a car wreck. The medical examiner said the injuries were inconsistent with vigorous or misapplied CPR or with Kellam's story that he had tossed A'Trevia into the air and back onto the bed.

Following a two-day trial, where Kellam did not testify, the jury convicted him of murder and cruelty to children. Under the state's "three strikes, you're out" law, he was sentenced as a repeat offender to life without the possibility of parole.

In today's unanimous opinion, **Justice Robert Benham** writes for the Court that the evidence at trial "was legally sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that while the victim was in appellant's care he fatally injured her in the manner alleged in the indictment and was guilty of the crimes of which he was convicted."

Kellam's attorney argued that the trial judge was wrong to deny his request to instruct the jury on his defense that what had happened to the baby was an accident.

"Since accident was not reasonably raised by the evidence, the trial court did not err by failing to give a charge on that defense," today's opinion says. Furthermore, "if a defendant does not admit to committing any act which constitutes the offense charged, he is not entitled to a charge on the defense of accident." Here Kellam "presented no evidence that he admitted the act described in each count of the indictment – the infliction of blunt force trauma injuries to the victim's abdomen with a solid object. Instead, the evidence showed he admitted only to playing with the victim by bouncing her on the bed."

Kellam's attorney also argued on appeal that the trial court failed to instruct jurors that they could consider him guilty instead of the less serious charge of involuntary manslaughter.

"Again, we conclude a charge on this defense was not authorized as a matter of law," the opinion says. "Judgment affirmed. All the Justices concur."

Attorney for Appellant (Kellam): Wendell Adams

Attorneys for Appellee (State): Louie Fraser, District Attorney, Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

TDGA, LLC V. GEORGIA DEPARTMENT OF REVENUE, ET AL. (S15A1638)

The Georgia Supreme Court has unanimously ruled that conventional quiet title lawsuits that are brought against state government to determine who owns a piece of property are barred by sovereign immunity, the legal doctrine that protects state government from being sued.

At the same time, however, the high court has ruled that as long as the legal action is brought against the property itself ("in rem"), as opposed to against the State, the lawsuit is not prevented by sovereign immunity.

The case stems from a **Forsyth County** judge's dismissal of a lawsuit brought by a private company that buys properties under foreclosure, in which the company was seeking a ruling that two state agencies no longer have any interest in a property it had purchased.

In today's opinion, **Justice Harold Melton** writes for the Court that, "we find that sovereign immunity does bar a conventional quiet title action against the State, but sovereign immunity is not applicable to an in rem quiet title action against all the world."

The lawsuit is of particular interest to the legal community. According to the facts of the case, TDGA, a limited liability company, purchased property in a tax sale at 6030 Bethelview Blvd. off Atlanta Highway in Cumming, GA. Both the Georgia Department of Revenue and the Georgia Department of Labor had liens on the property, based on the former owner's failure to pay debts. After purchasing the property, TDGA went through the required process of "redemption," which gives the former owner a set period of time to get his property back by paying the buyer the cost paid at auction, as well as any penalties and interest. If the former owner does not pay all the costs by the end of the time period, the current owner may "foreclose on the right to redeem," and the former owner has no further rights to the property. Following its foreclosure of the right to redeem, TDGA filed a court action to get the property released from any interest by the state agencies so TDGA could show it was the rightful owner of the property and would be free to sell it in the future. Specifically TDGA filed a conventional "petition to quiet title," the legal action taken to clear up any disputes over who owns a piece of property. TDGA filed the action against the state departments of Revenue and Labor and any parties with any interest in the property. In response, the departments filed a motion to dismiss the lawsuit, and the trial court granted it, agreeing with the state departments that they were protected from the company's claims by sovereign immunity, the legal doctrine that prevents the State government and its agencies from being sued. The trial court ruled that under the high court's 2014 decision in *Georgia Department of Natural Resources v. Center for Sustainable Coast*, the state legislature had not specifically waived sovereign immunity for such claims as TDGA's, which was asking for a declaration by the court that TDGA was the rightful owner of the property. The trial court determined that while TDGA had properly foreclosed the right of redemption of all parties, including those of the state departments, under the *Sustainable Coast*

decision, the lawsuit was barred by sovereign immunity. TDGA then appealed to the Georgia Supreme Court.

In today's opinion, the high court has ruled against TDGA and upheld the lower court's ruling. The opinion points out that Georgia's Constitution specifically states that the "sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."

"Therefore, in the greatest general sense, the State and its agencies are immune from suit unless the legislature specifically states otherwise," the opinion says. "Neither the statutory provisions regarding foreclosure of the right of redemption nor conventional quiet title actions contain an explicit waiver of sovereign immunity. For this reason, the State and its agencies are immune from suit under Georgia Code section 23-3-40."

"This does not mean, however, that there is no mechanism for quieting title against all potential claimants, including the State," the opinion says. "Georgia Code section 23-3-60 provides such a mechanism." Under this statute, instead of suing the State or a person or entity, the legal action is brought against the underlying property itself with the purpose of removing any cloud on the title of that property. Such a lawsuit is called an "action in rem" and the named defendant is the property itself. "So, by its very nature, an in rem quiet title action is not subject to sovereign immunity because it does not involve a claim against the State, though the State may certainly make a claim to the property in question during the pendency of the quiet title action."

Attorneys for Appellant (TDGA): John Ayoub, Carolina Bryant
Attorneys for Appellee (State): Samuel Olens, Attorney General, W. Wright Banks, Jr., Dep. A.G., Julie Jacobs, Sr. Asst. A.G., Brittany Bolton, Asst. A.G.

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IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Michael Gomillion (Muscogee Co.)	**GOMILLION V. THE STATE (S15A1617)**
* Herbert Soward Lowe (Clayton Co.)	**LOWE V. THE STATE (S15A1691)**
* John Lombard Smith (Richmond Co.)	**SMITH V. THE STATE (S15A1408)**