Mercer Law Review

Volume 28
Number 1 *Annual Survey of Georgia Law*

Article 23

12-1976

Assault Leading to Homicide May Be Used To Invoke Felony-Murder Rule

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NOTES

Assault Leading to Homicide May Be Used To Invoke Felony-Murder Rule

In *Baker v. State*,[1] the Georgia Supreme Court held that "the Georgia legislature intended felony murder to encompass all felonies as 'felony' is defined in Code §26-401(e)."[2] The court refused to adopt the "merger" doctrine[3] that has been applied by some states to the felony-murder rule.[4] The defendant was convicted of felony murder[5] for the shooting death of Roger Clark and sentenced to life imprisonment.[6] Clark and one other person entered the defendant's bedroom before 5:30 one morning to collect a debt allegedly owed to Clark by the defendant. The defendant fired one shot over the heads of the intruders and then fired the fatal shot that struck Clark in the heart. The defendant testified at trial that he simply fired the shot to frighten away an unknown intruder and meant no harm to anyone.[7] The underlying felony supporting the defendant's felony murder conviction was the aggravated assault[8] committed on Clark. On appeal to the Georgia Supreme Court, the defendant contended that this was an improper application of the felony-murder rule, but his contention was rejected and his conviction was affirmed.[9]

The felony-murder rule existed in the early common law of England[10] and exists today in virtually all the states of this country.[11] The trend has

1. 236 Ga. 754, 225 S.E.2d 269 (1976).

2. 236 Ga. at 758, 225 S.E.2d at 272.

3. 236 Ga. at 757, 225 S.E.2d at 271. The merger doctrine requires that a felonious assault which is an essential and integral element of the homicide may not be used as the underlying felony for a felony-murder conviction.

4. *See, e.g.*, People v. Wilson, 1 Cal. 3d 431, 462 P.2d 22 (1969); State v. Clark, 204 Kan. 38, 460 P.2d 586 (1969); State v. Branch, 244 Or. 97, 415 P.2d 766 (1966).

5. GA. CODE ANN. §26-1101(b) (1972).

6. The indictment also alleged malice murder.

7. The defendant had given two earlier statements. The first one agreed with his trial testimony. The second one stated that he knew the person in the room was Clark.

8. GA. CODE ANN. §26-1302 (1972).

9. Only three of the seven justices concurred in the opinion, written by Justice Hall. Justice Hill concurred specially in a separate opinion, Justices Jordan and Ingram concurred in the judgment only, and Justice Gunter dissented on grounds unrelated to this note.

10. Note, *The Doctrine of Merger in Felony-Murder and Misdemeanor-Manslaughter*, 35 ST. JOHN'S L. REV. 109, 110 (1960) [hereinafter cited as ST. JOHN'S]; Tucker, *Felony Murder in Georgia: A Lethal Anachronism?*, 9 GA. ST. BAR J. 462 (1973) [hereinafter cited as Tucker].

11. See the state-by-state breakdown in Tucker, *supra* note 10, at 463ff. Tucker's article presents an excellent in-depth analysis of the felony murder rule in the United States, especially in Georgia, with emphasis on the problems presented by the rule.

been towards a restriction of the rule, both legislatively and judicially.[12] The rule stated in its simplest form is that "[h]omicide committed while perpetrating or attempting a felony is murder."[13]

> The purpose of the felony murder rule is to relieve the state of the burden of proving premeditation or malice whenever the victim's death is caused by the killer while the killer is committing another felony. Since a malignant purpose is established by proof of the defendant's other felony, malice is redundant with reference to the killing.[14]

In Georgia, the murder statute[15] sets out the traditional definition of malice murder and defines express and implied malice. This is immediately followed by the statutory definition of the felony-murder rule: "A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

One problem, among others,[16] that has developed with the felony-murder rule is that of determining which underlying felonies may be used to invoke its application. In broad terms, this was the problem faced in *Baker*. More specifically, the problem was whether the felony-murder rule should be applied where the underlying felony is itself an essential element of the homicide.[17] Many state legislatures have avoided this problem by stating which felonies may be used to invoke the felony-murder rule and by limiting the rule to those felonies only.[18] However, some states, including Georgia, have not limited the felony-murder rule in that way, and it has become necessary in some of those states to resolve the problem judicially.[19]

The first state to face the problem whether a felony that is an essential element of the homicide could be used to invoke the felony-murder rule was New York, which developed the "merger" doctrine at an early stage in answer to this issue.[20] This doctrine, simply stated, is that where a homicide results from a felonious assault, the assault is considered merged into the homicide and the entire transaction is analyzed on the basis of the presence or absence of malice. The limitation on the application of the doctrine is that the assault must be an essential and integral element of the homicide.[21] The basic premise is that such a holding is necessary if the

12. Tucker, *supra* note 10, at 462.
13. R. PERKINS, CRIMINAL LAW 35 (1957).
14. State v. Branch, 244 Or. 97, 415 P.2d 766, 767 (1966).
15. GA. CODE ANN. §25-1101 (1972).
16. See Tucker, *supra* note 10, at 466.
17. The supreme court in *Baker* called this the "merger problem." 236 Ga. at 755, 255 S.E.2d at 271. Although *Baker* also discusses what it called the "nondangerous felony problem," *id.*, 225 S.E.2d at 270, the facts of the case presented only the problem of merger.
18. *See* Tucker, *supra* note 10, at 463, n. 12; ST. JOHN'S, *supra* note 10, at 114.
19. *See* Annot., 40 A.L.R.3d 1341 (1971) for an exhaustive annotation on this problem.
20. ST. JOHN'S, *supra* note 10, at 117.
21. *Id.* at 118.

distinction between murder and manslaughter is to be maintained intact;[22] without this holding, all homicides that are preceded by some type of felonious assault, as most of them are, would automatically, by operation of law, be converted into murder, regardless of the elements of passion, deliberation and premeditation.[23] As Chief Judge Cardozo said in *People v. Moran*:[24]

> Homicide is murder in the first degree when perpetrated with a deliberate and premediatated design to kill, or, without such design, while engaged in the commission of a felony. To make the quality of the intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide. [cite omitted] Such a holding would mean that every homicide, not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential. [cite omitted] The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape.[25]

For these reasons, the New York courts have long held that "the precedent felony must constitute an independent crime not included within the resulting homicide."[26]

This problem has arisen in numerous other states where felony-murder statutes have left open an interpretation on this point. Those states have almost unanimously adopted the rationale of the merger doctrine and have held that the felony-murder rule does not apply where the felony is an offense included within the homicide.[27] In *State v. Essman*,[28] the Arizona Supreme Court held that "[t]he felony murder doctrine does not apply where the felony is an offense included in the charge of homicide. The acts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder."[29] In *People v. Ireland*,[30] the California Supreme Court adopted the rationale of the merger doctrine and noted that, otherwise, the operation of the felony-murder rule could be extended

> "beyond any rational function that it is designed to serve." [cite omitted] To allow such use of the felony-murder rule would effectively preclude the

22. PERKINS, *supra* note 13, at 36; Tucker, *supra* note 10, at 469.
23. People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927); Corcoran, *Felony-Murder in New York*, 6 FORDHAM L. REV. 43, 48 (1937).
24. 246 N.Y. 100, 158 N.E. 35 (1927).
25. *Id.* at ___, 158 N.E. at 36.
26. People v. Wagner, 245 N.Y. 143, ___, 156 N.E. 644, 646 (1927).
27. *See* Annot., 40 A.L.R.3d 1341 (1971) for lists of the states and cases so holding.
28. 98 Ariz. 228, 403 P.2d 540 (1969).
29. *Id.* at ___, 403 P.2d at 545.
30. 70 Cal.2d 522, 75 Cal. Rptr. 188, 450 P.2d 580 (1969).

> jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law.[31]

Although the felony-murder rule has existed virtually throughout Georgia's history in a form subject to interpretation of appropriate underlying felonies,[32] the precise issue presented by the merger doctrine had never been directly addressed by the Georgia appellate courts before the *Baker* decision.[33] To be sure, there are Georgia appellate opinions affirming felony-murder convictions where the precedent felony was a felonious assault[34] and where such jury instructions have been approved.[35] These opinions could be said to have implicitly resolved the issue.[36] However, neither in these decisions nor in any others in Georgia does it appear that the problem presented by the merger doctrine has ever been raised by litigants or directly discussed by the courts. An issue of such significance cannot be said to have been resolved by decisions in which it was neither raised nor addressed.

Rejecting the application of the merger doctrine to the felony-murder statute in Georgia, the court in *Baker* relied heavily on its construction of the Georgia homicide statutes.[37] After acknowledging the existence of the merger problem and a few of the authorities which discuss it,[38] the court held that the narrow definition of manslaughter in the Georgia statutes, coupled with an absence of a "reckless" or "negligent" homicide statute in Georgia,[39] precludes application of the merger doctrine and requires the conclusion that the Georgia legislature intended the felony-murder statute to encompass all felonies as defined in Georgia law.[40] The court stated that an unlawful homicide that is not malice murder or felony murder must come under one of the manslaughter statutes if it is to be punished. The court found a problem with this situation in that a death caused by a felony can fall under the manslaughter statutes only if the homicide is committed in passion, in which case it is voluntary manslaughter. In addi-

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31. *Id.* at ___, 75 Cal. Rptr. at 198, 450 P.2d at 590.

32. Tucker, *supra* note 10, at 474-475.

33. The court in *Baker* does not characterize the case as one of first impression in Georgia but does note that it raises "some real problems in the felony murder concept," 236 Ga. at 755, 225 S.E.2d at 270, and does not cite a single Georgia case that has discussed this problem.

34. *See* Leutner v. State, 235 Ga. 77, 218 S.E.2d 820 (1975), Cain v. State, 232 Ga. 804, 209 S.E.2d 158 (1974).

35. *See* Teal v. State, 122 Ga. App. 532, 177 S.E.2d 840 (1970).

36. Tucker, *supra* note 10, at 479.

37. GA. CODE ANN. §§26-1101, 26-1102, 26-1103 (1972).

38. However, the court did not discuss or even cite a single other opinion which has faced this issue.

39. *But cf.*, GA. CODE ANN. §68A-903 (Supp. 1976) on homicide by vehicle.

40. The court cites Tucker, *supra* note 10, at 482, as supportive of its conclusion on legislative intent.

tion, the court stated that Georgia does not have a "reckless homicide" or "negligent homicide" statute. The court thus perceived a void in the Georgia law of homicide wherein could fall certain unlawful homicides caused by felonies unaccompanied by passion yet failing to meet the traditional requirements of malice murder. To fill this void, the court turned to the felony-murder statute and held that anytime a homicide is preceded by an aggravated assault, as defined in Georgia Code §26-1302, it is automatically murder, regardless of malice.

The underpinning of the court's opinion in *Baker* appears to be the void the court perceived in Georgia law—a void it felt was at least partly due to the absence of a "reckless homicide" statute. The weakness with this is that in Georgia the murder statute states that the necessary malice aforethought for a murder conviction "shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."[41] Implied malice has long been interpreted in Georgia to include conduct that evinces a reckless disrsgard for human life showing a wanton and reckless state of mind such as to be the equivalent of a specific intent to kill.[42] This presumption of malice can come about especially where there is a deadly weapon involved in the homicide.[43] Even though the court says there is no "reckless homicide" statute in Georgia, under established case law in this state a reckless killing can certainly be murder on the basis of malice without the need to resort to the felony-murder rule. In *Baker*, the supreme court has ignored logic and authority and has eliminated the requirement of malice in those homicides resulting from a felonious assault; in doing so it drastically changed the Georgia law of homicide.[44] Henceforth, any homicide preceded by a felonious assault will automatically, by operation of law, be converted into murder, regardless of the elements of premeditation, deliberation, and passion. The state need prove only the assault and will no longer need to prove malice aforethought to secure a murder conviction.[45]

The *Baker* decision also has the effect of altering the law of voluntary manslaughter in Georgia.[46] This effect is best illustrated by the plight of a trial judge who must charge a jury in a situation where a defendant, as a result of sudden, violent and irresistible passion, has committed an assault

41. GA. CODE ANN. §25-1101 (1971).

42. Carrigan v. State, 206 Ga. 707, 58 S.E.2d 407 (1950); Myrick v. State, 199 Ga. 244, 34 S.E.2d 36 (1945); Collier v. State, 39 Ga. 31 (1868); Keye v. State, 136 Ga. App. 707, 222 S.E.2d 172 (1975).

43. Favors v. State, 234 Ga. 80, 214 S.E.2d 645 (1975); Wilburn v. State, 230 Ga. 675, 198 S.E.2d 857 (1973); Ogletree v. State, 209 Ga. 413, 73 S.E.2d 201 (1952); Plummer v. State, 200 Ga. 641, 38 S.E.2d 411 (1946).

44. *See* Wallace v. State, 216 Ga. 180, 115 S.E.2d 338 (1960).

45. The court, in its opinion, makes reference to the "bootstrapping" characteristics of this practice. 236 Ga. at 755-56, 225 S.E.2d at 271. *See* People v. Ireland, 70 Cal.2d 522, 450 P.2d 580, 590 (1969).

46. *See* Tucker, *supra* note 10, at 469; R. PERKINS, CRIMINAL LAW 36 (1957).

on someone and caused his death. That act would normally be voluntary manslaughter, and the judge could charge the jury as to the elements of that crime. Under *Baker*, however, the presence of a felonious assault would also render this fact situation appropriate for a felony-murder instruction.[47] So the assault warranting a voluntary-manslaughter instruction and possible conviction is the same assault allowing a felony-murder conviction. The distinction between murder and voluntary manslaughter is eliminated and the lower grade of homicide is gone. As put by one commentator:

> All assaults involve some degree of bodily harm but any law or principle of law which would permit every act of killing to be classified as murder would be barbarous and unreasonable. Homicide is the product of a fatal assault; without the assault there would be no homicide. It is for this reason that it has been almost universally held that the specific crime of assault merges with the homicide.[48]

In *Baker*, the Georgia Supreme Court has taken an illogical position directly contrary to the weight of authority in the country. The court used faulty reasoning in relying on the absence of a "reckless homicide" statute when Georgia has well-developed case law on reckless homicides based on implied malice. Perhaps without really realizing it, the court has altered the law of homicide in Georgia by creating an utterly improper application of the felony-murder rule that will likely result in more litigation in the Georgia appellate courts.[49]

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47. Under Edwards v. State, 233 Ga. 625, 212 S.E.2d 802 (1975), the trial judge would be required to define all the elements of felony murder.

48. ST. JOHN'S, *supra* note 10, at 119.

49. The Georgia Supreme Court will again face the question raised in *Baker* when it reviews the court of appeals decision in State v. Malone, ___ Ga. App. ___ (No. 52323, June 17, 1976). The court of appeals relied on *Baker* and held against Malone. But the supreme court granted certiorari and said it is "particularly concerned" with the question whether *Baker* "preclude[s] a charge on voluntary manslaughter." Case No. 31539, Sept. 23, 1976.