Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 19, 2019
Issue 29-19

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Interlocutory Appeals; Appellate Court Jurisdiction

Duke v. State, S19M0969 (6/10/19)

Appellant was indicted for malice murder and other related charges. His pro bono private counsel filed pretrial motions seeking public funding for expert witnesses and investigators to aid his defense. Notwithstanding the trial court's finding that appellant is indigent and that the assistance of experts is necessary to mount a proper defense, his motions were denied, and the trial court did not grant appellant's request for a certificate of immediate review pursuant to OCGA § 5-6-34 (b). In the absence of a certificate from the trial court, Appellant filed both a motion asking the Court to stay the proceedings below and an application asking the Court to exercise discretion to allow an interlocutory appeal pursuant to the analysis set forth in *Waldrip v. Head*, 272 Ga. 572, 574-577 (1) (2000). This Court granted appellant's request for supersedeas and stay, but held appellant's application to appeal in abeyance pending consideration of whether *Waldrip* should be overruled.

The Court stated that Georgia law is well settled that the right to appeal is not constitutional, but instead depends on statutory authority. Here, the Court noted that the order is not a final order which would be directly appealable under OCGA § 5-6-34 (a). Also, because the trial court did not grant a certificate of immediate review, the Court was without jurisdiction to hear the appeal pursuant to OCGA § 5-6-34 (b).

Nevertheless, under the collateral order doctrine, an order that does not resolve the entire case in the trial court may be appealed immediately if it (1) resolves an issue that is substantially separate from the basic issues to be decided at trial, (2) would result in the loss of an important right if review had to await final judgment, and (3) completely and conclusively decides the issue on appeal such that nothing in the underlying action can affect it. But, the Court noted, appellant has acknowledged that his opportunity for appellate review of the order will not be lost if his appeal must await final judgment. Indeed, in his application before the Court, appellant argued that, should he be found guilty, the jury's verdict would likely be set aside on appeal given the importance of expert assistance to the presentation of his defense. Thus, the Court found,

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appellant will not be left without a remedy in the absence of immediate review of the trial court's order by the Court. Accordingly, the trial court's order was not a collateral order.

Thus, the only avenue left for appellant to assert that the Court has jurisdiction is through the holding in *Waldrip*. The Court found that *Waldrip* created a judicial exception to the statutory requirements for bringing an interlocutory appeal. Specifically, the *Waldrip* Court announced that the Court has "the power to consider appeals of interlocutory orders when we disagree with the trial court concerning the need for immediate appellate review of an interlocutory order." But, the Court found, by announcing the Court's discretion to override the requirements of OCGA § 5-6-34 (b), *Waldrip* injected the Court into a role that the General Assembly entrusted *exclusively* to the trial court; namely, deciding whether, in the first instance, an issue merits interlocutory consideration. In so doing, the Court found, the *Waldrip* Court enlarged its own power at the expense of the power the General Assembly vested in trial courts to determine when an interlocutory appeal should be permitted. This constituted a blatant judicial usurpation of the legislative function, and cannot be considered to be the legitimate exercise of inherent judicial authority.

Accordingly, the Court held, *Waldrip* was wrongly decided and must be overruled to the extent it permits the Court to disregard the requirement set forth in OCGA § 5-6-34 (b) that a litigant must obtain a certificate of immediate review from the trial court before pursuing an interlocutory appeal from an order not subject to immediate appeal under OCGA § 5-6-34 (a). More broadly, the Court also disapproved any reading of *Waldrip* and any other decision of the Court to the extent such reading suggests that appellate courts are free to disregard a statutory requirement for appeal in the absence of an articulated and colorable claim that the application of such statute will deprive a litigant of a right under federal law or the Georgia Constitution.

Consequently, because the trial court did not issue a certificate of immediate review in this case, the Court determined it was without jurisdiction to consider appellant's application for interlocutory appeal and it was therefore dismissed.

Res Judicata; Out-of-time Appeals

Cooper v. State, S19A0605 (6/10/19)

In 2001, appellant pled to murder and armed robbery. He did not take a direct appeal. In 2007, he filed a motion in which he sought in the alternative to vacate his conviction or to secure leave to pursue an out-of-time appeal. The trial court denied his motion and appellant did not then appeal. In 2018, appellant filed a second motion for an out-of-time appeal, which the trial court again denied. This time, appellant appealed.

The Court stated that res judicata precludes re-litigation of claims where the cause of action and the parties or their privies are identical and the claim was previously adjudicated on the merits by a court of competent jurisdiction. Here, the Court found, all of the grounds asserted as the basis for the second motion appear to have been raised in connection with the first motion, and to the extent the second motion asserted anything new, it asserted nothing that appellant could not have raised at the time of his first motion. In either event, the denial of the first motion—which appellant could have appealed, but did not—meant that his entitlement to an out-of-time appeal is res judicata. Accordingly, the Court concluded, the denial of the second motion was not error.

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Sufficiency of the Evidence; Possession of a Firearm by a Convicted Felon

McKie v. State, S18G1007 (6/10/19)

Appellant was tried for felony murder and other offenses, including possession of a firearm by a convicted felon. He was convicted of only the possession charge. The evidence showed that at the conclusion of the State's case, State's Exhibit 35 was admitted without objection. The exhibit consisted of two pages: the cover sheet of the accusation and the charge, accusing appellant of committing forgery in the first degree. At the bottom of the first page, the printed portion of the form stated that the defendant "waives copy of indictment, list of witnesses, formal arraignment and pleads__Guilty." An "X" is written in the space provided, and the signature blocks contained signatures of appellant, his counsel, and the assistant district attorney. No judgment of conviction or sentence appeared in the exhibit. During closing argument, defense counsel stated, "Count 7, possession of a firearm by a convicted felon. Yes, he's a convicted felon, we admit that all day. It's true. But, again, due to the circumstances of this case, we ask you to find him not guilty."

The Court noted that in a sharply divided opinion, with all three judges writing separately, the Court of Appeals affirmed appellant's conviction. *McKie v. State*, 345 Ga. App. 84 (2018). The Court granted certiorari to consider whether, under the new Evidence Code, the evidence was legally sufficient to support appellant's conviction for possession of a firearm by a convicted felon.

Initially, the Court found, defense counsel's statements in closing argument were not evidence, as Georgia law has long held. Indeed, the trial court so instructed the jury in accordance with the Suggested Pattern Jury Instructions. Therefore, the Court stated, it did not need to consider the assertion by amicus curiae that counsel's statements in closing argument should be treated as admissions by analogy to federal law.

Nevertheless, the Court found, the circumstantial evidence of appellant's felony conviction was sufficient in light of the trial court's instructions combined with the absence of any other reasonable hypothesis known to the jury. Here, the jury was presented with an accusation showing appellant's guilty plea to a charge of forgery in the first degree, which, the jury was instructed, is a felony. This document amounted to circumstantial evidence of appellant's prior conviction. And while the circumstantial nature of that evidence required the exclusion of other reasonable hypotheses, no alternative hypothesis was put forward in the evidence, in argument, or in the jury instructions. At trial, appellant testified but gave no testimony regarding any irregularity in his prior forgery conviction; in fact, he never mentioned it, and the State did not cross-examine him on that point.

Defense counsel's closing argument, while not evidence, was an opportunity to offer the jury an alternative hypothesis, or in the words of the trial court's charge, a "reasonable theory" other than conviction of a felony to explain the circumstantial evidence. But, the Court stated, not only did trial counsel offer no alternative hypothesis, he conceded repeatedly in closing argument that appellant was a convicted felon. While counsel's argument was not evidence, it was a point at which the jury would expect to hear a reasonable alternative theory, if one existed. It heard none; only affirmation of the fact of conviction.

Finally, the trial court instructed the jury that the evidence they would receive for deliberations included what the court described as a document "purporting to be a copy of a prior conviction of this defendant," and went on to instruct the

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jury that that evidence could be considered only as to two counts of the indictment they were considering, including possession of a firearm by a convicted felon, and for no other purpose. Thus, the Court concluded, in considering all of these circumstances from the point of view of ordinarily prudent jurors, the evidence of appellant's prior felony conviction was sufficient to support his conviction for possession of a firearm by a convicted felon.

Remittiturs; Law of the Case

Strozier v. State, S19A0790, S19A0907 (6/10/19)

A jury found appellants guilty of a variety of crimes, including felony murder. On appeal, the Court held that "the trial court properly convicted [the] appellants of felony murder predicated upon unlawful participation in criminal gang activity through the commission of a simple battery [Count 4]" and that the jury's verdicts as to voluntary manslaughter (Count 1) and the other felony murder counts (Counts 2-3, 5-7) were vacated by operation of law. *Anthony v. State*, 303 Ga. 399, 403 (2) (a) (2018). After explaining in detail how the convictions on Counts 1-3 and 5-13 had been either merged, vacated, or reversed, the Court affirmed appellants' convictions as to the Count 4 felony murder *only*. The Court did not remand to the trial court for resentencing. When the cases returned to the trial court, all the court was required to do was to file the remittiturs.

However, upon the return of the remittiturs, the trial court, at the urging of the prosecutor, entered an "Amended Sentence Pursuant to Supreme Court Decision" for each defendant and they appealed.

The Court stated that Georgia's statutory law of the case rule provides that holdings of the Supreme Court in a case shall be binding in all subsequent proceedings in that case in the lower court. OCGA § 9-11-60 (h). It is well established that this rule applies to holdings in criminal cases. In *Anthony*, the Court affirmed the appellants' sentences as to Count 4 only. Because the trial court was precluded from revising that holding, the amended sentencing orders are nullities that did not supersede the sentencing orders already reviewed by this Court. Therefore, as the appellants contended, and the State conceded, the trial court's resentencing orders violated the law of the case rule. Furthermore, the appellants' sentences as to Count 4 remained in effect.

Jury Charges; Prior Bad Acts

Clark v. State, S19A0367 (6/10/19)

Appellant was convicted of felony murder predicated on possession of a firearm by a convicted felon and aggravated assault in connection with the shooting death of his brother-in-law, Sonny Barlow. The evidence, briefly stated, showed that the victim was married to appellant's sister and that the two of them lived with the mother of appellant and his sister. In 2015, appellant came to the house for a visit with his mother. Although he was a convicted felon, appellant always carried a pistol with him when he visited. Appellant's mother did not feel up for a visit. The sister and the victim asked appellant to leave. He refused. An argument ensued. At some point, the argument ceased after appellant went outside and looked to be leaving. But, appellant then turned around, pulled his pistol and shot the victim.

Appellant contended that the trial court erred in refusing to give his requested instruction on sudden emergency. Specifically, quoting *Cauley v. State*, 260 Ga. 324, 326 (2) (c) (1990), appellant requested that the trial court instruct the

jury, "Where upon a sudden emergency, one suddenly acquires actual possession of a pistol for the purpose of self defense, if you find that to have been the purpose, then he would not be in violation of any law prohibiting a felon from being in possession of a firearm." The Court disagreed.

The Court noted that its review was limited to plain error since there was no objection at trial. A charge on sudden emergency may be appropriate when a defendant, who is on trial for felony murder predicated on possession of a firearm by a convicted felon, otherwise could not successfully assert self-defense because he was engaged in the felony of possessing a firearm at the time that he was defending himself. However, a trial court does not err by failing to give a jury charge where the requested charge is not adjusted to the evidence presented at trial. Thus, a sudden emergency charge is not required where the defendant did not suddenly acquire actual possession of the gun that he used to shoot the victim while trying to defend himself, but instead already possessed the firearm that he chose to use before being placed in any situation that required him to actually defend himself. And here, on the day of the incident, intending to go to visit his mother, appellant put the pistol in his car. And, when he saw the victim's vehicle in the driveway, he chose to tuck the pistol under his shirt and carry it inside the home. Therefore, the evidence showed that appellant already possessed the pistol before he was confronted with any situation that would require him to defend himself. Therefore, the Court concluded, the trial court's refusal to give appellant's requested instructions on sudden emergency was not a clear or obvious error.

Appellant also contended the trial court erred in allowing his sister to testify about a prior bad act, specifically, a 2012 incident in which appellant pushed her against a door and hit her three times. Because the incident did not occur between appellant and the victim, appellant argued that the testimony was irrelevant and prejudicial. The Court again disagreed.

The Court agreed with the Attorney General that Rule 404 (b) did not apply because the evidence was "intrinsic." Evidence is intrinsic when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense. Evidence that explains the context of the crime is admissible if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

And here, the Court found, the testimony regarding appellant's hitting and pushing his sister at her home in 2012 was necessary to complete the story of the crime for the jury. It provided context for the charged offenses to explain why his sister and the victim were persistent with their requests that appellant leave; why the victim did not want appellant at his residence; why the victim did not feel comfortable leaving appellant alone in the room with his wife; and why he followed appellant outside of the home to ensure that he left. Furthermore, the Court found, the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not err in admitting the evidence.

Felony Murder; Constitutionality

Davis v. State, S19A0164, S19A0416 (6/10/19)

Appellants Davis and Beamon were convicted of felony murder and related crimes. Beamon argued that OCGA § 16-5-1 (c), Georgia's felony murder statute, is unconstitutionally vague, both facially and as applied to her case. The Court disagreed.

In support of her contention that the felony murder statute is facially unconstitutional, Beamon argued that the Court's decision in *Ford v. State*, 262 Ga. 602 (1992) deprives persons of fair notice of the conduct proscribed by the statute and creates a potential for arbitrary enforcement. The Court stated that a facial challenge is the most difficult challenge to mount successfully because it requires one to establish that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep. OCGA § 16-5-1 (c) provides that "[a] person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice." The *Ford* Court held that "a felony," as used in the statute, means any felony that is dangerous per se, or which by the attendant circumstances, creates a foreseeable risk of death. Beamon argued that, because certain felonies cannot serve as predicate offenses for a felony murder charge, the statute is vague and fails to give fair notice.

But, the Court stated, the language of the felony murder statute, read naturally, places all persons on notice that they commit the offense of murder by committing a felony that causes the death of another. The language of the statute could thus suggest to the reader that any felony can potentially serve as the predicate offense. But no defendant is prejudiced by the fact that, based on the holding in *Ford*, the felony murder statute does not apply to a given offense. Thus, no defendant could reasonably argue that the statutory text fails to provide a warning that a given felony could not serve as a predicate offense.
Ford instead provides a defendant with an avenue to argue that a specific felony offense cannot serve as a predicate to felony murder because such offense is "neither inherently dangerous nor life-threatening." Put differently, because the provisions of the statute require the State to prove that commission of the felony at issue caused the victim's death, persons of ordinary intelligence would understand that, at a minimum, any crime which involves conduct which is inherently dangerous or life-threatening could serve as a predicate offense. Thus, because the felony murder statute broadly places all persons on notice that felonious conduct leading to a death may result in a murder charge, persons of average intelligence are on adequate notice that such felonious conduct involving inherently dangerous or life-threatening conduct is covered by the felony murder statute. Consequently, because many applications are valid, Beamon failed to demonstrate that the statute is facially unconstitutional.

Nevertheless, Beamon argued, the felony murder statute is unconstitutional as applied to her case. The Court stated that an as-applied challenge addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. Beamon's argument on this point was limited to an evaluation of the subjective fairness of her sentence, particularly in comparison to the sentence her co-indictee, who pled guilty and testified against her, received. In sum, she claimed that because both she and the co-indictee engaged in virtually the same conduct - "riding in the back seat of the truck with others who intended to rob [the victims] and who then ultimately assaulted and murdered the victim" - it was unfair that the co-indictee received a sentence of probation while Beamon was sentenced to life imprisonment. But, the Court stated, fairness and considerations of prosecutorial discretion in charging co-conspirators who testify on behalf of the State are not considerations in determining whether a statute is unconstitutional as applied. Consequently, the Court held, because Beamon articulated no cogent argument as to how the felony murder statute is unconstitutional as applied, her argument failed.

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Ineffective Assistance of Counsel; Defense of Habitation

Swanson v. State, S19A0360 (6/10/19)

Appellant was convicted of felony murder of the predicate felony of sale of marijuana, in the shooting death of Reed. Very briefly stated, the evidence showed that appellant agreed to sell Reed marijuana. They arranged to meet in a parking lot. Appellant was driving and had four passengers in his vehicle. Reed approached appellant's vehicle. Reed apparently tried to snatch the marijuana away, brandished a firearm and made statements that indicated a robbery of the persons in appellant's vehicle. Appellant shot and killed Reed. Appellant then got out of his car, picked up the fallen bag of marijuana and drove off.

Appellant contended that his trial counsel was ineffective for failing to request a jury charge on use of force in defense of habitation. The Court noted that the evidence was undisputed that appellant was inside his car when he shot at Reed, who was pointing a gun at appellant and (appellant argued) was in the process of committing an armed robbery against appellant and the passengers inside appellant's car. To that end, appellant testified that Reed—the aggressor—brandished a firearm, threatened appellant and the other passengers in the car, and reached into appellant's car to steal marijuana from him. Appellant testified that he feared that Reed, who kept his gun pointed at appellant as Reed stepped back, was "wanting more stuff," prompting appellant—who remained in his car—to shoot. Because the defense-of-habitation statute concerns entry "made or attempted in a violent and tumultuous manner … for the purpose of assaulting or offering personal violence to any person dwelling or being therein" and also entry "made or attempted for the purpose of committing a felony therein"—the situation appellant argued he was in at the time he shot Reed—appellant contended that his counsel was deficient when he failed to request a jury charge on defense of habitation. The Court agreed.

The Court found, given this record, a reasonable attorney would have pursued a justification defense on appellant's behalf. In fact, appellant's trial counsel did pursue such a defense. But, the defense he elected to pursue—self-defense—was legally foreclosed because OCGA § 16-3-21 (b), expressly provides, and the jury was accordingly charged, that "[a] person is not justified in using [such] force … if he … [i]s attempting to commit, committing, or fleeing after the commission or attempted commission of a felony," However, the Court noted, significantly, the statute governing defense of habitation, unlike that governing self-defense, does not contain an express exclusion for people using force while in the commission of a felony.

Moreover, the Court stated, it could identify no reasonable basis for an attorney failing to request a jury instruction on defense of habitation under OCGA § 16-3-23 under these circumstances. Yet trial counsel failed to do so here, and even admitted at the hearing on a motion for new trial that he did not request such a charge because at that time, he "did not know about" the statute defining "habitation" to mean a "motor vehicle"; that he "didn't realize" that "habitation was expanded to the point of dealing with a car"; and that "[i]t did not appear to" him "that use of force and defense of habitation applied." And although decisions of counsel made based on a misunderstanding of the law are not automatically deficient, a defendant can carry his burden of showing deficiency if, under the circumstances, the challenged action cannot be considered a sound trial strategy, which the Court found to be the case here. In other words, a reasonable trial counsel would not have made the same strategic decision if he properly understood the law.

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The Court then turned to whether the deficient performance prejudiced appellant. The Court found that based on the closing argument of the prosecutor focusing heavily on the inapplicability of the pursued self-defense theory, the questions poses by the jury concerning justification, and the testimony at trial, the record, when viewed as a whole, showed that there was a reasonable probability that, but for counsel's deficient performance, the outcome of appellant's trial would have been different. Consequently, appellant was entitled to a new trial.

Rule of Lenity; Changes in the Law

Anderson v. State, A19A0118 (6/11/19)

Appellant was convicted of two counts of exploitation of an elder person, two counts of theft by taking, and eleven counts of financial-transaction-card fraud. Appellant contended that the trial court erred in failing to apply the rule of lenity by imposing a felony sentence as to the two theft-by-taking convictions. The Court agreed.

The Court noted that the rule of lenity has been referred to as a sort of junior version of the vagueness doctrine, which requires fair warning as to what conduct is proscribed. The rule of lenity applies where two or more statutes prohibit the same conduct while differing only with respect to their prescribed punishments. And according to this rule, when any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered. Importantly, the essential requirement of the rule of lenity is that both crimes could be proved with the same evidence.

Here, the Court found, Count 2 of the indictment charged appellant with theft by taking by alleging that she, "between the 8th day of March, 2010, and the 5th day of June, 2013, being in lawful possession thereof, did unlawfully appropriate money from [Account *1859], the property of Alberta Wells, with a value greater than $500.00, with the intention of depriving said owner of said property[.]" And Count 4 charged appellant with the same offense as to appellant's account designated "Account *4842." Thus, under the indictment, appellant committed the offenses of theft by taking at some point within this three-year span, and the State was only required to prove the offense occurred within that time span.

But, the Court noted, during this three-year time frame, the applicable sentencing statute changed. Former OCGA § 16-8-12 (a) (1) (2009) provided: "A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except . . . [i]f the property which was the subject of the theft exceeded $500.00 in value, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor[.]" Nevertheless, effective July 1, 2012, OCGA § 16-8-12 was amended and at that point it provided: "A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except . . . If the property which was the subject of the theft was at least $1,500.01 in value but was less than $5,000.00 in value, by imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor[.]"

Thus, the 2012 amendment raised the value of the subject property—from $500 to $1,500.01—that the State was required to prove before a felony sentence could be imposed, but also limited such sentence to five years unless an even higher value (at least $5,000) was alleged and proven. However, given that the trial court imposed a sentence of six years to serve on each of appellant's theft-by-taking convictions, it appeared that the trial court sentenced her under the pre-amendment version of OCGA § 16-8-12. But because the indictment only generally alleged that the offenses occurred at some point

in a three-year span and the jury was only provided a general verdict form, it was impossible to discern if it found appellant guilty on one or both of these counts for conduct occurring before or after the July 1, 2012 amendment of the statute. As a result, the Court held, appellant could not be sentenced to the longer term imposed by the pre-amendment version of OCGA § 16-8-12 (a). Accordingly, the Court vacated this aspect of appellant's sentence and remanded the case to the trial court for resentencing.

Juveniles; Merger

In re I. H., A19A0462 (6/11/19)

Appellant was adjudicated delinquent based upon offenses which, if committed by an adult, would have constituted the crimes of aggravated assault on a peace officer, aggravated assault, two counts of obstruction of an officer, interference with government property, simple battery, disorderly conduct, disrupting a public school, and three counts of simple assault. He contended that the trial court erred by failing to merge certain counts in the delinquency petition. He also argued that the juvenile court erred by relying on *In the Interest of M. J. F.*, 191 Ga. App. 792 (1989), to conclude that the doctrine of merger is inapplicable in juvenile court. The Court disagreed.

The doctrine of merger precludes the imposition of multiple punishments when the same conduct establishes the commission of more than one crime. While a defendant's conduct may constitute more than one crime, Georgia law bars conviction and punishment of more than one crime if one crime is included in the other. However, in the context of juvenile court proceedings, "[a]n order of disposition or adjudication shall not be a conviction of a crime and shall not impose any civil disability ordinarily resulting from a conviction nor operate to disqualify the child in any civil service application or appointment." OCGA § 15-11-606. Thus, once a juvenile court finds that a child has committed a delinquent act, the court does not sentence the child; instead it must determine whether, "[s]uch child is in need of treatment, rehabilitation, or supervision." OCGA § 15-11-600 (a) (1) (A). Therefore, because of the unique nature of juvenile court proceedings and the fact that a disposition or adjudication order is not a conviction of a crime, the doctrine of merger is inapplicable.

Here, the Court found, appellant is a juvenile and he was neither convicted of anything nor did he receive multiple punishments for the same conduct. Instead, appellant was found to be in need of rehabilitation, treatment, and supervision, and he was placed on specialized probation for his acts of delinquency as a whole. Accordingly, because the doctrine of merger does not apply to juvenile adjudications of delinquency, the Court found no merit in appellant's argument.