



April 20, 2022

FYI: POLANCO v. STATE

The Georgia Supreme Court suggests that murder is not a serious violent felony for which a mandatory minimum is specified in OCGA § 17-10-6.1 and therefore, a trial court cannot deviate from the mandatory minimum in OCGA § 16-5-1.

In *Polanco v. State*, S22A0174 (4/19/22), the record showed that appellant pleaded guilty to felony murder and other related offenses. On the felony murder count, the trial court sentenced appellant to "[l]ife with [the] first 25 [y]ears to be served in confinement not eligible for parole, balance probated[.]"

In September 2021, the trial court granted appellant's motion for an out-of-time appeal. While appellant's case was pending before the Court, the Court decided *Cook v. State*, S21A1270 (3/15/22) in which it held that trial courts are without jurisdiction to decide motions for out-of-time appeals because "there was and is no legal authority for motions for out-of-time appeal in trial courts." Accordingly, the Court remanded the case back to the trial court for the entry of an order dismissing appellant's motion.

However, Justice Ellington, with whom Chief Justice Nahmias joined, concurred to suggest that the trial court imposed a sentence for appellant's felony murder conviction that is not allowed by Georgia law. Specifically, Justice Ellington noted that under OCGA § 16-5-1 (e) (1), "[a] person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life." Thus, for a conviction of felony murder, death and imprisonment for life, with or without the possibility of parole, are the only sentences prescribed by law. And while OCGA § 17-10-1 (a) (1) (A), grants the power and authority to a judge, in fixing determinate criminal sentences generally, to suspend or probate all or part of a sentence, the Code section expressly excludes cases in which imprisonment for life, with or without the possibility of parole, may be imposed.

Justice Ellington further noted that at sentencing, the trial court appeared to rely on OCGA § 17-10-6.1 when it expressed its intention "to deviate from the mandatory minimum" sentence for felony murder, and it imposed a split sentence including a term of imprisonment of 25 years followed by probation for life. However, Justice Ellington opined, a "split" sentence for felony murder is invalid because murder is not one of those serious violent felonies for which a mandatory minimum is specified in O.C.G.A. 17-10-6.1 and thus, a trial court cannot deviate from the mandatory minimum in O.C.G.A. 16-5-1.

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Moreover, a person who is convicted of felony murder and sentenced to life in prison pursuant to OCGA § 16-5-1 (e) (1) is not eligible for parole until he has served 30 years in prison. See OCGA § 17-10-6.1 (c) (1). Consequently, the trial court had no statutory authority to enter a sentence making appellant eligible for parole after serving only 25 years in prison.

Finally, Justice Ellington observed, a void sentence may be challenged at any time and where a void sentence has been entered, it is as if no sentence has been entered at all, and the defendant stands in the same position as if he had pled guilty and not yet been sentenced. Thus, because appellant has not been properly sentenced for felony murder, he maintains his right under OCGA § 17-7-93 (b) to withdraw his guilty plea upon vacatur of the void sentence and that he can pursue vacatur of the void sentence by filing a motion in the trial court to vacate his murder sentence.

It is worth noting that the parties did not brief the split sentence issue and the views of Justice Ellington are not necessarily the views of the Court. Nevertheless, Justice Ellington's concurrence should give prosecutors pause before recommending or agreeing to a split sentence on a murder conviction.

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