

SUPREME COURT OF GEORGIA

Austin v. State

300 Ga. 889 (2017) · Decided April 17, 2017

SUMMARY

The Georgia Supreme Court affirmed Eric Robius Austin’s convictions arising from the shooting death of his girlfriend, rejecting his challenges to the sufficiency of the evidence and the trial court’s refusal to give a sudden-emergency instruction. The court vacated the sentence to the extent the firearm-possession conviction was merged into the malice-murder conviction and remanded for resentencing on that count.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Presiding Justice Melton; All the Justices
JURISDICTION	Georgia
DECIDED	April 17, 2017
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Austin appealed his convictions and sentences following a jury trial, challenging the sufficiency of the evidence and the trial court's refusal to give a requested sudden-emergency jury instruction. The Supreme Court of Georgia also addressed the trial court's merger of the firearm-possession count into the malice-murder count for sentencing.
STANDARD OF REVIEW	The evidence is viewed in the light most favorable to the verdict, and the conviction is upheld if a rational trier of fact could find the defendant guilty beyond a reasonable doubt. A trial court does not err by refusing a requested jury instruction that is not adjusted to the evidence presented at trial.
PRECEDENTIAL VALUE	Published Georgia Supreme Court opinion; precedential.
PARTIES	Eric Robius Austin v. State

TOPICS

- jury instructions
- sentencing
- criminal procedure
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support Austin's convictions.
2. Whether the trial court erred by refusing to give Austin's requested criminal-law sudden-emergency instruction concerning his possession of a firearm as a convicted felon.
3. Whether the trial court improperly merged the possession-of-a-firearm-by-a-convicted-felon count into the malice-murder count for sentencing.

HOLDINGS

1. The evidence was sufficient to enable a rational trier of fact to find Austin guilty beyond a reasonable doubt of the charged offenses.
2. The trial court did not err by refusing to give the requested sudden-emergency instruction because the instruction was not adjusted to the evidence.
3. The trial court erred by merging the possession-of-a-firearm-by-a-convicted-felon count into the malice-murder count; the sentence on that count must be vacated and the case remanded for resentencing.

KEY QUOTATIONS

"Where, upon a sudden emergency, one suddenly acquires actual possession of a pistol for the purpose of defending himself, if you find that to have been the purpose, [Austin] would not be in violation of any law prohibiting a felon from being in possession of a firearm." (300 Ga. at 891)

"Austin provided no evidence of any sudden emergency that caused him to suddenly possess a firearm to defend himself; rather, the evidence he presented showed, at most, that he already possessed a firearm that he chose to use before being placed in any situation that required him to actually defend himself." (300 Ga. at 892)

FACTUAL BACKGROUND

Austin, a convicted felon, was at the apartment he shared with his girlfriend, Sade Danmola, when the two argued after she returned home from work. A neighbor heard Danmola plead for her life, after which Austin shot her in the abdomen with a .380 pistol. Austin called 911 but fled before officers arrived, leaving the couple's infant son in the apartment; Danmola later died at the hospital. Austin testified that he mistakenly shot Danmola while believing she was a burglar, but he also testified that he already possessed the firearm before seeing the bedroom doorknob turn.

PROCEDURAL HISTORY

Austin was indicted on murder, aggravated assault, and firearm-possession charges and was convicted on all counts after a February 28–March 2, 2012 jury trial. He received a life sentence for malice murder and a consecutive five-year sentence for possession of a firearm during the commission of a felony; other counts were vacated by operation of law or merged for sentencing. The trial court denied his amended motion for new trial,

and Austin timely appealed. The Supreme Court affirmed the convictions and legal rulings, vacated the firearm-possession sentencing merger, and remanded for resentencing on that count.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Vacate the portion of the sentence that merged the possession-of-a-firearm-by-a-convicted-felon count into the malice-murder count and remand to the trial court for resentencing on the firearm-possession count.

CASES CITED

- Jackson v. Virginia, 443 U.S. 307 (1979)
- Dean v. State, 273 Ga. 806, 807 (1) (2001)
- Cauley v. State, 260 Ga. 324, 326 (2)(c) (1990)
- Young v. State, 327 Ga. App. 852, 856 (4)(a) (2014)
- Whitaker v. State, 269 Ga. 462 (6) (1998)
- Chester v. State, 284 Ga. 162, 162 (1) (2008)
- Williams v. State, 287 Ga. 192, 194 (2010)
- Harper v. State, 286 Ga. 216, 218 (1) (2009)
- Hulett v. State, 296 Ga. 49, 55 (2)(b) (2014)
- Malcolm v. State, 263 Ga. 369 (4) (1993)
- MARTA v. Mehretab, 224 Ga. App. 263, 264 (1) (1997)
- Meeks v. State, 216 Ga. App. 630, 631 (1) (1995)

OPINION

MELTON, J.

MELTON, Presiding Justice. Following a jury trial, Eric Robius Austin was found guilty of malice murder, felony murder, possession of a firearm by a convicted felon, and various other offenses in connection with the shooting death of his girlfriend, Sade Danmola.¹ On appeal, Austin contends that the evidence presented at trial was insufficient to support the verdict and that the trial court erred by failing to instruct the jury on “sudden emergency” in connection with the possession of a firearm by *890a convicted felon charge.

For the reasons that follow, we affirm in part, vacate in part, and remand for resentencing on the count of possession of a firearm by a convicted felon. 1. Viewed in the light most favorable to the jury’s verdict, the record shows that Austin, a convicted felon, lived in an apartment with Danmola and the couple’s two-month-old son.

However, Austin divided his time between staying at the apartment that he shared with Danmola and staying at the home of Sacagawea Bolton, another woman with whom he had also fathered a child. On the morning of March 27, 2011, Austin was sleeping at Bolton's house when he received a call from Danmola. He then went to the apartment that he shared with Danmola to look after the couple's infant son while Danmola went to work for a scheduled 9:00 a.m. shift at McDonald's.

Danmola arrived at work, but her 9:00 a.m. shift was rescheduled, so she returned home. When she walked into the apartment, she got into an argument with Austin. During the argument, a neighbor overheard Danmola plead, "Please don't kill me. I don't want to die here." Austin then shot Danmola in the abdomen with a .380 pistol. Austin called 911, saying that his girlfriend had been shot, but he then fled the scene before officers arrived, leaving his infant son on the floor in the back bedroom.

Although there were no signs of forced entry, officers had difficulty entering the apartment because someone had placed a "burglar bar" against the front door of the apartment. When officers were able to enter the apartment, they found Danmola, drifting in and out of consciousness, lying in a fetal position on the living room floor. Danmola was taken to the hospital, where she died shortly thereafter.

The evidence was sufficient to enable a rational trier of fact to find Austin guilty of the crimes of which he was convicted beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979).

The jury was free to reject Austin's testimony that he had mistakenly shot Danmola, believing that she was a burglar as she entered the apartment bedroom. See, e.g., *Dean v. State*, 273 Ga. 806, 807 (1) (546 SE2d 499) (2001) ("This Court does not reweigh evidence or resolve conflicts in testimony; instead, evidence is reviewed in a light most favorable to the verdict, with deference to the jury's assessment of the weight and credibility of the evidence.").

2. Austin claims that the trial court erred by failing to give his requested jury instruction on "sudden emergency," contending that at least some evidence showed that he only came into possession of a handgun in order to defend himself from a sudden attack. See *Cauley v. State*, 260 Ga. 324, 326 (2) (c) (393 SE2d 246) (1990). Specifically, *891 Austin requested that the trial court charge the jury: Where, upon a sudden emergency, one suddenly acquires actual possession of a pistol for the purpose of defending himself, if you find that to have been the purpose, [Austin] would not be in violation of any law prohibiting a felon from being in possession of a firearm.

The charge requested tracks the language that this Court approved in *Cauley*, supra, and is an appropriate charge to be given regarding a defendant's use of force to defend himself where that defendant otherwise would be prohibited from asserting self-defense due to having been engaged in the felony of possessing a firearm at the time that he was defending himself.² *Id.* at 326 (2) (c).

Indeed, the charge provides “a legal theory upon which the jury could acquit, [if] it [chooses] to do so, notwithstanding [the defendant’s] felonious status occasioned by his possession of the firearm.” *Id.* However, this does not mean that the trial court erred by failing to give the requested charge here. “[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.” (Citation and punctuation omitted.)

Young v. State, 327 Ga. App. 852, 856 (4) (a) (761 SE2d 801) (2014). See also, e.g., *Whitaker v. State*, 269 Ga. 462 (6) (499 SE2d 888) (1998). Here, based on Austin’s own testimony, he did not suddenly acquire actual possession of the gun that he used to shoot Danmola while trying to defend himself. See *Cauley*, *supra*.

To the contrary, he claimed that he already had a gun that he pointed at the bedroom door of the apartment when he heard footsteps coming toward the door. He then claimed that he fired his gun as soon as he saw the doorknob turning on the bedroom door. Austin provided no evidence of any sudden emergency that caused him to suddenly possess a firearm to defend himself; rather, the evidence he presented showed, at most, that he already possessed a firearm that he chose to use before being placed in any situation that required him to actually defend himself.

The trial court did not err by refusing to give Austin’s requested charge on sudden emergency. Decided April 17, 2017. Edward V. Silverbach, for appellant. Paul L. Howard, Jr., District Attorney, Paige Reese Whitaker, F. McDonald Wakeford, Lyndsey H. Rudder, Assistant District Attorneys; Samuel S. Olens, Attorney General, Patricia B. Attaway Burton, Deputy Attorney General, Paula K. Smith, Senior Assistant Attorney General, Vanessa T. Meyerhoefer, Assistant Attorney General, for appellee.

3. While the trial court did not err with respect to the legal issues raised by Austin in this appeal, it did err by purporting to merge the count of possession of a firearm by a convicted felon into the malice murder count against Austin for sentencing purposes. Indeed, “possession of a firearm by a convicted felon does not merge into a conviction for malice murder.” *Chester v. State*, 284 Ga. 162, 162 (1) (664 SE2d 220) (2008), overruled on other grounds by *Williams v. State*, 287 Ga. 192, 194 (695 SE2d 244) (2010), and *Harper v. State*, 286 Ga. 216, 218 (1) (686 SE2d 786) (2009). “[A]s no merger occurred, [Austin] should have been sentenced on [the possession of a firearm] count.” *Hulett v. State*, 296 Ga. 49, 55 (2) (b) (766 SE2d 1) (2014).

Accordingly, we vacate the portion of the sentence purporting to merge the possession of a firearm by a convicted felon count into the malice murder count and remand this case to the trial court for resentencing on the possession of a firearm count. Judgment affirmed in part and vacated in part, and case remanded for resentencing. All the Justices concur.

On July 1, 2011, Austin was indicted for malice murder, felony murder predicated on aggravated assault, felony murder based on possession of a firearm by a convicted felon, aggravated assault

with a deadly weapon, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Following a February 28-March 2, 2012 jury trial, Austin was found guilty on all counts.

On March 2, 2012, Austin was sentenced to life imprisonment for malice murder and five consecutive years for possession of a firearm during the commission of a felony. The felony murder counts were vacated by operation of law (see *Malcolm v. State*, 263 Ga. 369 (4) (434 SE2d 479) (1993)), and the remaining counts were merged with the malice murder count for sentencing purposes.

Austin filed a motion for new trial on March 15, 2012, which he amended on August 19, 2013. The trial court denied the motion on May 20, 2015. Following the payment of costs, Austin's timely appeal was docketed to the term of this Court beginning in December 2016 and submitted for decision on the briefs. Both the State and Austin's post-trial counsel erroneously assert on appeal that the "sudden emergency" charge requested below relates to "sudden emergency" charges that are given in civil tort cases and that are not appropriate for criminal cases.

MARTA v. Mehretab, 224 Ga. App. 263, 264 (1) (480 SE2d 310) (1997) (In civil tort cases, "[t]he defense of emergency is not available unless the evidence shows that there has been a sudden peril caused by circumstances in which the defendant did not participate and which offered him a choice of conduct without time for thought so that negligence in his choice might be attributable not to lack of care but to lack of time to assess the situation....

The doctrine requires that the person confronted by the emergency have the opportunity to exercise one of several reasonable alternative courses of action. In the absence of such factors, there can be no conduct to which to apply the standard and the doctrine is inapplicable.") (emphasis omitted); *Meeks v. State*, 216 Ga. App. 630, 631 (1) (455 SE2d 350) (1995) ("The charge of sudden emergency [applicable in civil tort cases] is not appropriate in a criminal case.").

However, the criminal jury charge on sudden emergency that was approved by this Court in *Cauley* and that was actually requested below has nothing to do with the sudden emergency charges given in civil tort cases.