[6] 7. The defendant also contends that the evidence is insufficient to support his conviction of murder. The jury was not required to accept the defendant's version of the shooting that the victim jerked the barrel of the gun and pulled it forward himself. We note that this version was not mentioned by the defendant when he answered Berry's accusation, when he spoke to the deceased's brother at the hospital or when he stopped the policeman after leaving the hospital. Nor was the jury required to accept the fact, testified to by the defendant, that he did not know the gun was loaded. Absent defendant's statement at the scene and his testimony at trial, the evidence shows that the defendant shot and killed the deceased. The jury could have found the defendant guilty beyond a reasonable doubt.

8. For the reasons stated in Division 4, above, the defendant is entitled to a new trial.

Judgment reversed.

All the Justices concur except UNDERCOFLER, C. J., and HILL and CLARKE, JJ., who concur specially.

HILL, Justice, concurring specially.

"A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." Code § 26–1101.

There is no evidence in this case of a deliberate intention to kill; i.e., there is no evidence of express malice. Nor is there any evidence of an abandoned and malignant heart; i.e., there is no evidence of implied malice.

I am supported in this conclusion by the trial judge's finding that "there exists no evidence in the record of any intent to kill or any evidence that the defendant intentionally discharged the weapon . . ." except the testimony of Kelly Fite. Fite's testimony that the gun would not fire accidentally be being dropped or hit does not prove intent to kill beyond a reasonable doubt.

I therefore dissent to Division 7 of the majority decision but join the other divisions and concur in the judgment.

I am authorized to state that Chief Justice UNDERCOFLER and Justice CLARKE join in this special concurrence.

246 Ga. 424

CITY OF ATLANTA

v.

FIRST NATIONAL BANK OF ATLANTA et al.

No. 36507.

Supreme Court of Georgia.

Argued Sept. 9, 1980.

Decided Sept. 24, 1980.

The Fulton Superior Court, Tidwell, J., affirmed a special master's finding in condemnation proceeding that public necessity did not require condemnation of additional property. On city's appeal, the Court of appeals, 154 Ga.App. 658, 269 S.E.2d 878, Deen, C. J., affirmed, and city appealed. The Supreme Court, Undercofler, C. J., held that where bad faith on part of condemning authority was not demonstrated, and it was not established that city exceeded its lawful authority in taking property for development of "kiss–ride" facility, neither the trial court nor the Court of Appeals should have interfered with decision of condemning authority in determining public need for and amount of property to be taken for facility.

Reversed.

1. Eminent Domain ⇐66

Court should not interfere with exercise of discretion of condemning authority determining necessity of taking land for public purposes and selecting location and amount of land reasonably necessary unless condemning authority abused its discretion or exceeded its authority. Code, § 36–603(a).

2. Eminent Domain ⇐66

Where bad faith on part of condemning authority had not been demonstrated, and it was not established that city exceeded its lawful authority in taking property for development of "kiss–ride" facility, neither the trial court nor the Court of Appeals should have interfered with decision of condemning authority in determining public need for and amount of property to be taken for facility. Code, § 36–603(a).

3. Eminent Domain ⇐55

Assuming that special master, trial court, and Court of Appeals had right to determine whether original site selected for the "kiss–ride lot" was adequate for needs of city transit authority, and assuming that original site was in fact adequate for such purpose, mere fact that original location was feasible, practicable and desirable would not force city transit authority to utilize it in lieu of additional property sought to be condemned. Code, § 36–603(a).

Ferrin Y. Mathews, Roswell, for appellant.

Charles E. Watkins, Jr., Charles N. Pursley, Jr., Jefferson D. Kirby, III, Atlanta, for appellees.

UNDERCOFLER, Chief Justice.

Certiorari was granted to review the decision of the Court of Appeals affirming the superior court's affirmance of the special master's order that disallowed condemnation of a parcel of land by the City of Atlanta on the ground that the city was "'making an effort to take more land than is reasonably necessary for the accomplishment of the public purpose and that the reasons given for abandoning the previously acquired property in favor of the condemnation of the subject property are arbitrary, capricious and indicative of bad faith.'" *City of Atlanta v. First National Bank*, 154 Ga.App. 658, 659, 269 S.E.2d 878 (1980). We reverse.

[1] A court should not interfere with an exercise of the discretion of a condemning authority determining the necessity of taking land for public purposes and selecting the location and amount of land reasonably necessary unless the condemning authority abused its discretion or exceeded its authority.[1] This principle often has been stated in terms of "bad faith."[2] In the context of abuse by a public officer of his official discretion, the term "bad faith" has been sharply distinguished from negligence or bad judgment and has been equated with conscious wrongdoing motivated by improper interest or by ill will.[3] The term "bad faith" has been used side by side with the word "fraud" in describing those exercises

1. "[S]uch selection should not be interfered with or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter." *Piedmont Cotton Mills v. Georgia, etc., Co.*, 131 Ga. 129, 134, 62 S.E. 52 (1908).

2. "'In the absence of bad faith, the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity, and what and how much land shall be taken.' *King v. City of McCaysville*, 198 Ga. 829, 33 S.E.2d 99 (1945); *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959)." *City of Atlanta v. Heirs of Champion*, 244 Ga. 620, 621, 261 S.E.2d 343 (1979).

3. "'Bad faith' is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will....

"'Bad faith', though an indefinite term, differs from the negative idea of negligence, in that it contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." *Vickers v. Motte*, 109 Ga.App. 615, 619–20, 137 S.E.2d 77 (1964).

of official discretion to condemn lands with which the courts will interfere.[4]

[2] Bad faith in the sense of the foregoing decisions has not been found in the present case by the special master or the trial court. Neither has it been established that the city exceeded its lawful authority. Instead, the special master, the trial court and the Court of Appeals merely have substituted their discretion for that of the condemning authority as to whether the tract originally purchased was just as suitable, desirable or adequate for construction of the Metropolitan Atlanta Rapid Transit Authority (MARTA) "kiss–ride" parking lot as the tract sought to be condemned in the present case.

[3] We will not compound error by expressing our opinion regarding the adequacy of the original tract.[5] Rather, our decision turns upon the precept that no court in these circumstances should have interfered with the decision of the condemning authority. Code Ann. § 36–603a provides that the condemning body shall be the *exclusive* judge of the public need for, and amount of, property to be taken, and the courts may not interfere with that legislative discretion *unless* the condemning authority has acted in bad faith or beyond the power conferred upon it by law. *City of Atlanta v. Heirs of Champion*, 244 Ga. 620, 621, 261 S.E.2d 343 (1979).[6]

Judgment reversed.

All the Justices concur.

4. "... unless the determination made by the condemning authority is birthed by fraud or bad faith on the part of the condemning authority." *Coffee v. Atkinson County*, 236 Ga. 248, 249, 223 S.E.2d 648 (1976).

5. Assuming, incorrectly, that the special master, the trial court and the Court of Appeals had a right in this case to determine whether the original site selected for the "kiss–ride lot" was adequate for MARTA's needs, and further assuming that the original site was in fact adequate for those purposes, the judgment of the Court of Appeals still would be erroneous because the mere fact that the original location was feasible, practicable and desirable would not of itself force MARTA to utilize it in lieu of the property here sought to be condemned. *Piedmont Cotton Mills v. Georgia, etc., Co.*, 131 Ga. 129, 133–34, 62 S.E. 52 (1908). "'A landowner cannot prevent the taking of his property for public purposes merely because there is other property which might have been suitable for the purpose.'" *Miller v. Ga. Power Co.*, 222 Ga. 239, 241, 149 S.E.2d 479 (1966); *Miles v. Brown*, 223 Ga. 557, 559, 156 S.E.2d 898 (1967).

6. The present case is distinguishable from *Heirs of Champion*, supra, in that here there is *no* evidence indicating that both tracts of land, the parcel originally purchased and the parcel sought to be condemned, will be used for any purpose other than MARTA's public purposes. Accordingly, no question is presented as to whether a majority of this court was correct in applying an "any evidence" test to affirm the trial court in *Heirs of Champion*, supra.

246 Ga. 426

SULLIVAN

v.

The STATE.

No. 36541.

Supreme Court of Georgia.

Submitted Aug. 8, 1980.

Decided Sept. 24, 1980.

Defendant was convicted before the Crawford Superior Court, Culpepper, J., of aggravated assault and murder, and he appealed. The Supreme Court, Marshall, J., held that: (1) where appellant's counsel was retained at least one week prior to indictment, where he presumed that the grand jury then in session would indict appellant, where he came to the county one week prior to indictment and discussed the question of bond with the trial judge but apparently made no effort to learn who was on the grand jury, where, about one week prior to calendar call, he was given a copy of the indictment which showed on its face that an individual, known to him to be a member of the county board of education, was one of the grand jurors, and where, under the local court rule, all pretrial motions were to be filed by calendar call, these facts showed that counsel had both actual and construc-