

1. Count 1 of the indictment charged murder and Count 2 charged possession of a firearm by a convicted felon. The jury was instructed as to malice murder and felony murder, and returned a verdict of "guilty on both counts."

[1,2] When a verdict is unclear as to which type of murder (malice or felony) is found, a defendant is deemed guilty of the lesser offense of felony murder. *Burke v. State*, 248 Ga. 124, 281 S.E.2d 607 (1981). In this case, however, because Count 1 of the indictment charged only malice murder, and the jury returned a verdict of guilty on *that count*, there is no ambiguity. Accordingly, Stone was convicted of malice murder.

[3,4] 2. A defendant may not be convicted lawfully of felony murder and the underlying felony, OCGA § 16-1-7, and a defendant so convicted is entitled to have the conviction for the underlying felony set aside. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981). Because Stone was found guilty of *malice* murder, he was convicted properly also of the possession count, it being unrelated to malice murder.

[5] 3. Stone's final enumeration of error is that the trial court erred in refusing to sever for trial the two counts of the indictment, as a result of which, proof of a prior conviction to establish his status as a convicted felon on the firearms count placed his character in issue as to murder count.

In other circumstances, this might be harmful error. See *Head v. State*, involving an armed robbery charge, 253 Ga. 429, 320 S.E.2d 759 (1984), discussing *Panzavecchia v. Wainwright*, 658 F.2d 337 (5th Cir.1981). In this case, however, the evidence of guilt is so overwhelming that it is unlikely that the introduction of the prior conviction contributed to the guilty verdict. *Johnson v. State*, 238 Ga. 59, 230 S.E.2d 869 (1976).

Judgment affirmed.

All the Justices concur, except HILL, C.J., and SMITH, J., who concur in the judgment only, and GREGORY, J., disqualified.



253 Ga. 447

CITY OF ATLANTA

v.

PETKAS.

No. 41174.

Supreme Court of Georgia.

Oct. 17, 1984.

Rehearing Denied Oct. 29, 1984.

Appeal was taken from an order of the Fulton Superior Court, G. Mallon Faircloth, J., finding that city and transit authority acted in bad faith in condemning easement to construct underground pedestrian tunnel to rapid transit station and enjoining exercise of right of eminent domain. The Supreme Court, Clarke, J., held that avoidance of congestion caused by crossings of bank employees across street to rapid transit station was sufficient public purpose to remove actions of city and condemning easement to construct underground pedestrian tunnel from the category of bad faith.

Reversed.

Smith, J., dissented.

1. Eminent Domain ⇌19

Even if city's modification of plans for pedestrian tunnel to a rapid transit station to include a stairway from a street was utilized to veil real purpose of a tunnel to station for bank employees, city's right to condemn was not defeated.

2. Eminent Domain ⇌19

Avoidance of congestion caused by crossing of bank employees across street to

rapid transit station was sufficient public purpose to remove actions of city and transit authority in condemning property for a tunnel to the station from category of bad faith in condemning easement to construct underground pedestrian tunnel.

Marva Jones Brooks, Thomas A. Bowman, David D. Blum, Charles N. Pursley, Jr., Kutak, Rock & Huie, Atlanta, Joseph F. Page, for City of Atlanta et al.

Peek & Whaley, J. Corbett Peek, Jr., James Garland Peek, Robert N. Meals, Meals & Parks, P.C., Charles M. Kidd, Atlanta, Stanley E. Kreimer, Jr., for Jim Petkas et al.

CLARKE, Justice.

This appeal calls into question the right of the City of Atlanta to condemn an easement to construct an underground pedestrian tunnel to a Metropolitan Atlanta Rapid Transit Authority (MARTA) station. The trial court found the city and MARTA acted in bad faith and enjoined the exercise of the right of eminent domain. The condemnors appeal and we reverse.

This is the second condemnation action filed against appellees. Both actions originally sought to condemn the property involved here. In the first proceeding the right-of-way for the tunnel was included with other lands of the condemnees. Needing to acquire the remaining property quickly and faced with an objection to the acquisition of the tunnel right-of-way, the city and MARTA amended their pleadings to delete the right-of-way for the tunnel.

The pedestrian tunnel was to serve persons working at a First National Bank (FNB) operations center located across Lindbergh Drive from the MARTA station. The bank had 1500 employees at the center and actively sought access to the station by tunnel. After the first condemnation, it was anticipated that FNB would acquire the necessary right-of-way, but it was then discovered that the Department of Transportation (DOT) was planning to acquire all of the affected lands. Consequently MARTA's plan was adjusted to call for a construction of the portion of the tunnel which

was not on the condemnee's property and to finish the project after DOT acquired the necessary lands. As it developed, tunnel construction encroached upon the condemnee's lands to the extent of approximately four feet by seventeen feet. The area of encroachment was a part of a temporary construction easement held by the condemnors.

When the condemnors discovered that the DOT acquisition plans had been delayed, construction on the tunnel was continued and the city on behalf of MARTA filed a second condemnation action, this time seeking only to acquire a permanent sub-surface easement for a portion of the tunnel. The area sought to be condemned contains 555 square feet.

MARTA's plan for the tunnel was also modified to include a stairwell from the south side of Lindbergh Drive to the tunnel as well as an entrance from the FNB building.

The condemnees contended that the city and MARTA had acted in bad faith in that there was no public purpose or necessity for the construction of the pedestrian tunnel since it effectively served only the private use of those persons who were in the FNB building. The trial court agreed, saying that the second condemnation action was made necessary by reason of the failure of FNB to privately acquire the property necessary for a "private pedestrian tunnel." The court went on to say that the addition of the stairwell was not shown to be a public necessity but was a mere subterfuge used to veil the real purpose for condemning the property.

This court has been reluctant to find bad faith on the part of a condemnor in its determination of public purpose in the exercise of the right of eminent domain. *City of Atlanta v. Heirs of Champion*, 244 Ga. 620, 261 S.E.2d 343 (1979); *City of Atlanta v. First Nat. Bank*, 246 Ga. 424, 271 S.E.2d 821 (1980). The condemnee relies heavily upon our decision in *Earth Management v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981). We do not find *Earth Management* to be applicable in this case. Our

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Cite as 321 S.E.2d 727 (Ga. 1984)

holding in *Earth Management* did not erode the authority of condemning bodies nor change the law as pronounced in *Heirs of Champion* or *First National Bank*. Rather, the import of that holding is that a condemning authority may not utilize the power of eminent domain to restrict a legitimate activity in which the state has an interest.

[1, 2] The appellee also insists that the modification of the plans for the tunnel to include a stairway from Lindbergh Drive was utilized to veil the real purpose of the tunnel. Even if we found this to be true, we cannot hold that the city's right to condemn has been defeated. One thousand five hundred people work in the bank building. There is evidence that many of these persons will use MARTA at the Lindbergh station. There is evidence that the absence of the tunnel will cause them to cross Lindbergh Drive at the motor vehicular traffic level. The avoidance of the congestion caused by such crossings is a sufficient public purpose to remove the actions of the city and MARTA from the category of bad faith.

Judgment reversed.

All the Justices concur except SMITH, J., who dissents.



253 Ga. 493

CLARK

v.

CHILDS.

No. 41150.

Supreme Court of Georgia.

Oct. 17, 1984.

Rehearing Denied Nov. 6, 1984.

Life tenant brought suit seeking to enjoin remainderman's interference with

life tenant's estate, and remainderman counterclaimed for taxes, cost of water life tenant had used, waste, and expense of maintenance, and requested that life tenant be required to insure the property. The Superior Court, Grady County, A. Wallace Cato, J., permanently enjoined remainderman, entered judgment in favor of remainderman on the issue of water and required life tenant to pay the sum of \$2 per month for the use of the water, and entered judgment in favor of life tenant on the issues of waste, taxes, and insurance. Remainderman appealed. The Supreme Court, Marshall, P.J., held that: (1) deed contained practicable description of life estate, and order delineating boundaries did not expand that description; (2) trial court erred in setting the cost of water to life tenant for the future at \$2 per month; (3) it was for jury to determine whether life tenant was required to insure the remainder interest; (4) life tenant was bound to pay current taxes; and (5) upon objection, jury, which had returned a verdict relating only to willful waste, should have been instructed to return a complete verdict as to both willful and permissive waste.

Affirmed in part and reversed in part.

Gregory, J., concurred specially and filed opinion.

Hill, C.J., dissented and filed opinion in which Smith, J., joined.

1. Deeds ⇔129(1)

Deed conveying a life estate contained a practicable description of the life estate, and order of trial judge delineating the boundaries did not expand that description.

2. Life Estates ⇔28

In suit seeking to enjoin remainderman's interference with life tenant's estate, in which suit remainderman counterclaimed for cost of water life tenant had used, trial court erred in setting the cost of water to life tenant for the future at \$2 per month, since jury's verdict on the counterclaim was for the cost of water for the past four years, and cost in the past did not establish the cost in the future.