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MOTOR VEHICLES AND TRAFFIC

Uniform Rules of the Road: Provide Criminal Penalty for Vehicular Feticide

CODE SECTIONS: O.C.G.A. § 40-6-393.1 (new)
BILL NUMBER: SB 58
ACT NUMBER: 460
SUMMARY: The Act defines the offenses of feticide by vehicle in the first and second degree. The Act also provides penalties for the commission of those offenses.
EFFECTIVE DATE: July 1, 1991

History

Since November 1, 1982, Georgia has had a statute providing for the crime of feticide and the penalties for commission of this crime.¹ This statute requires that there be malice involved in causing the death of the fetus.² The statute providing for vehicular homicide specifically applies to a person who causes the death of another "without malice aforethought" or "without an intention to do so."³ Therefore, the feticide statute does not address the death of a fetus caused by an unintentional vehicle collision.⁴

Georgia's vehicular homicide statute provides that any person who causes the death of another "person" through the violation of any of a

1. O.C.G.A. § 16-5-80 (1982) reads:

(a) A person commits the offense of feticide if he willfully kills an unborn child so far developed as to be ordinarily called "quick" by any injury to the mother of such child, which would be murder if it resulted in the death of such mother.

(b) A person convicted of the offense of feticide shall be punished by imprisonment for life.

Id.

2. According to O.C.G.A. § 16-5-80 (1982), a person must "willfully" kill an unborn child. *See also* Telephone Interview with Kermit McManus, Chief Assistant District Attorney, Conasauga Circuit (Apr. 4, 1991) [hereinafter McManus Interview].

3. O.C.G.A. § 40-6-393 (1989). The language "without malice aforethought" is used in the definition of first degree vehicular homicide. O.C.G.A. § 40-6-393(a), (c) (1989). The language "without an intention to do so" is used in the definition of second degree vehicular homicide. O.C.G.A. § 40-6-393(b) (1989).

4. *See* O.C.G.A. § 16-5-80(a) (1982).

number of traffic laws has committed vehicular homicide.⁵ In *Billingsley v. State*,⁶ the Georgia Court of Appeals held that a fetus did not fall within the definition of "person" for the purposes of the vehicular homicide statute.⁷ Although the definition of "person" had been held to include an unborn child in many civil cases,⁸ the court recognized that a statute that is criminal in nature should be narrowly construed.⁹ The court also noted that the term "person" is not clearly defined in the criminal code.¹⁰ Furthermore, the court found that since the General Assembly had created an independent crime of feticide,¹¹ there was evidence that the General Assembly did not intend to include an unborn child in the definition of "person."¹² The court therefore held that unborn children were not covered by the vehicular homicide statute.¹³

In 1990, the case of *State v. Godfrey*¹⁴ addressed the issue of vehicular feticide directly.¹⁵ While driving under the influence of alcohol,¹⁶ the

5. O.C.G.A. § 40-6-393 (1989). The offense is then classified as either first or second degree vehicular homicide depending upon which traffic law was violated. *Id.*

6. 360 S.E.2d 451 (Ga. Ct. App. 1987).

7. *Id.* at 451. In this case, the appellant had been convicted of two counts of vehicular homicide for causing the deaths of an adult woman and her unborn child. *Id.* The court reversed the conviction for the death of the unborn child. *Id.* at 452.

8. Among the cases recognized by the court were *Tucker v. Howard L. Carmichael & Sons*, 65 S.E.2d 909 (Ga. 1951) (suit permitted alleging prenatal injury to "quick" child), and *Gulf Life Ins. Co. v. Brown*, 351 S.E.2d 267 (Ga. Ct. App. 1986) (life insurance company denied summary judgment on issue of whether policy covered stillborn child). *See also* *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. Ct. App. 1955) (civil wrongful death action cases defining child as "quick" unborn fetus).

9. *Billingsley*, 360 S.E.2d at 452 (citing *Hayes v. State*, 75 S.E. 523 (Ga. Ct. App. 1912)). The court in *Billingsley* held that the narrow construction given penal statutes required the term "person" to be limited to those living outside the womb. *Id.*

10. According to the court, the term "person" is defined only to mean an "individual." *Id.* There is no further definition or explanation of the term "individual" in the Code. *Id.* The only additional qualification of the term is that "individual" includes corporations. O.C.G.A. § 1-3-3(14) (1990).

11. *See* O.C.G.A. § 16-5-80 (1982).

12. *Billingsley*, 360 S.E.2d at 452.

13. *Id.* In 1989, the holding in *Billingsley* was distinguished from that in *State v. Hammett*, 384 S.E.2d 220 (Ga. Ct. App. 1989). In *Hammett* the appellee was charged with second degree vehicular homicide for causing injuries to an unborn child that led to the child's death 11 hours after birth. *Id.* at 220. The appellee contended that the crucial issue was that the child was not born at the time of the accident, and therefore not a "person" within the meaning of O.C.G.A. § 40-6-393(b). *Id.* The court, however, held that the child, who had been delivered by Caesarean section after the accident, was a "person" at the time of his death and therefore the appellee had "cause[d] the death of another person" within the meaning of the statute. *Id.* at 221. The court stated, "It is thus apparent that it is not the victim's status at the time the injuries are inflicted that determines the nature of the crime . . . , but the victim's status at the time of death which is the determinative factor." *Id.*

14. *State v. Godfrey*, No. 27746 (Super. Ct., Whitfield Co., Ga., Nov. 19, 1990).

15. *McManus* Interview, *supra* note 2.

16. Mr. Godfrey was initially charged with the offense of driving under the influence,

defendant collided with a vehicle carrying three adult passengers, one of whom was pregnant, causing the death of all three and the unborn child.¹⁷ Although Godfrey pleaded guilty to three counts of vehicular homicide,¹⁸ no provision of the law allowed him to be charged with the death of the fetus.¹⁹ Public concern was expressed that the death of the fetus went unpunished.²⁰ In response to this concern, the District Attorney handling the case decided to support legislation that would provide a penalty for vehicular feticide.²¹

SB 58

The Vehicular Feticide Act provides for the crime of vehicular feticide in the first and second degrees and for penalties for commission of those crimes.²² The Act amends Code section 40-6-15 by adding a new Code section 40-6-393.1.²³ The Act defines first degree vehicular feticide as causing the death of an unborn child by driving recklessly or driving under the influence.²⁴ The punishment for first degree vehicular feticide is imprisonment of two to fifteen years.²⁵ The Act then defines second degree vehicular feticide as causing death of an unborn child by violating any other provision of title 40 with two exceptions.²⁶ The penalty for

16. Mr. Godfrey was initially charged with the offense of driving under the influence, but this offense merged with the three counts of vehicular homicide with which he was charged and to which he pleaded guilty. *Id.* The defendant also pleaded guilty to driving on the wrong side of the road. *Id.*

17. *Id.* The three victims were Mike Terrell, Shirley Terrell (the pregnant victim), and Roderick Queen. *Id.*

18. *Id.*

19. *Id.* See also *supra* notes 1-13 and accompanying discussion of vehicular homicide statute.

20. McManus Interview, *supra* note 2.

21. *Id.* See also Telephone Interview with Sen. Tom Ramsey, Senate District No. 54 (Apr. 4, 1991) [hereinafter Ramsey Interview]. Jack Partain is District Attorney for the Conasauga Circuit. McManus Interview, *supra* note 2. He was unable to continue work on the legislation after being activated for service in Saudi Arabia, but his efforts were carried on by his chief assistant, Mr. McManus, who served temporarily as District Attorney during Mr. Partain's absence. *Id.*

22. O.C.G.A. § 40-6-393.1 (1991).

23. *Id.*

24. O.C.G.A. § 40-6-393.1(a)(1) (1991). Driving recklessly is defined in O.C.G.A. § 40-6-390 (1989). Driving under the influence of drugs or alcohol is defined in O.C.G.A. § 40-6-391 (1989).

25. O.C.G.A. § 40-6-393.1(a)(2) (1991). This penalty is the same as for first degree vehicular homicide if based on violation of either O.C.G.A. section 40-6-390 (1989) or section 40-6-391 (1989). O.C.G.A. § 40-6-393(a) (1989).

26. O.C.G.A. § 40-6-393.1(b)(1) (1991). The statute specifically excludes two provisions of title 40 from serving as the underlying violation for a conviction of vehicular feticide. *Id.* First excluded is O.C.G.A. § 40-6-270 (1989) (failure to stop at the scene of an accident). *Id.* Also excluded is O.C.G.A. § 40-6-395 (1989) (eluding an officer). *Id.*

second degree vehicular feticide is a fine not to exceed \$1000 or confinement of less than twelve months.²⁷

The drafters of SB 58 carefully ensured that it tracked to the greatest extent possible the language of the current feticide statute.²⁸ The Senator introducing the bill wanted to be sure it would be construed by courts in the same manner as the feticide statute and not become "a vehicle for fresh litigation."²⁹

As introduced, SB 58 would have considered the offenses of leaving the scene of an accident³⁰ or eluding police³¹ as violations underlying a first degree vehicular feticide.³² The House Judiciary Committee offered a substitute that eliminated these two violations as grounds for a vehicular feticide conviction,³³ and this substitute was passed.³⁴ The Senate Committee on Special Judiciary also offered a substitute³⁵ that was accepted,³⁶ although the changes were merely for clarification.³⁷

A rider for SB 58 was unsuccessfully proposed in the House.³⁸ The rider would have permitted law enforcement agents to use speed detection devices on any vehicle traveling uphill on a highway with a grade greater than seven percent.³⁹ Under current law, speed detection devices may not be used on vehicles traveling either uphill or downhill on a highway with a grade greater than seven percent.⁴⁰ The amendment failed.⁴¹

27. O.C.G.A. § 40-6-393.1(b)(2) (1991). This penalty is the same as for second degree vehicular homicide. O.C.G.A. § 40-6-393(b) (1993). It is also the penalty for any misdemeanor under the Georgia Code. O.C.G.A. § 17-10-3 (Supp. 1989).

28. Ramsey Interview, *supra* note 21. The current feticide statute is located at O.C.G.A. § 16-5-80 (1982). Sen. Tom Ramsey of Senate District No. 54 introduced the bill. *Id.*

29. Ramsey Interview, *supra* note 21. For example, Sen. Ramsey carefully used the word "quick" to describe the age at which the fetus is covered by the statute. *Id.* See also SB 58, as introduced, 1991 Ga. Gen. Assem. "Quick" is also used in the feticide statute. O.C.G.A. § 16-5-80 (1988). Sen. Ramsey chose to use the term "quick" because it is already well litigated in the context of the feticide statute. Ramsey Interview, *supra* note 21.

30. O.C.G.A. § 40-6-270 (1989).

31. O.C.G.A. § 40-6-395 (1989). See also Ramsey Interview, *supra* note 21.

32. SB 58, as introduced, 1991 Ga. Gen. Assem.

33. HB 58 (HCS), 1991 Ga. Gen. Assem.

34. See O.C.G.A. § 40-6-393.1 (1991).

35. HB 58 (SCS), 1991 Ga. Gen. Assem.

36. See O.C.G.A. § 40-6-393.1 (1991).

37. Compare SB 58, as introduced, 1991 Ga. Gen. Assem. with SB 58 (SCS), 1991 Ga. Gen. Assem.

38. Rep. Lawton E. Stephens introduced the amendment. SB 58 (FA), 1991 Ga. Gen. Assem. See also Telephone Interview with Rep. Lawton E. Stephens, House District No. 68 (Apr. 3, 1991) [hereinafter Stephens Interview].

39. SB 58 (FA), 1991 Ga. Gen. Assem. See also Stephens Interview, *supra* note 38.

40. O.C.G.A. § 40-14-9 (1989). Speed detection devices are not permitted on "any portion" of a highway with a grade steeper than seven percent. *Id.* See also Stephens Interview, *supra* note 38.

41. Stephens Interview, *supra* note 38.

According to the Chairman of the Senate Special Judiciary Committee, the most surprising aspect of SB 58 was that it was not as controversial as expected.⁴² No lobbyists, experts, or other interested parties appeared to speak at either of the committee meetings discussing the bill.⁴³

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42. Telephone Interview with Sen. Arthur B. "Skin" Edge, IV, Chairman of the Senate Special Judiciary Committee, Senate District No. 28 (Apr. 4, 1991) [hereinafter Edge Interview]. Sen. Edge was surprised when the abortion lobbyists on both sides of the issue did not take stands on this bill. *Id.* According to Sen. Edge, a conflict may arise between laws that permit intentional abortion of a fetus up until the point of "quickening" but punish even the unintentional killing of a fetus after that point. *Id.*

43. No outsiders appeared to be heard during the Senate Special Judiciary Committee's discussion of SB 58. Edge Interview, *supra* note 42. Similarly no outside speakers on SB 58 appeared at any meeting of the House Judiciary Committee. Telephone Interview with Elaine Myers, Secretary, House Judiciary Committee (Apr. 3, 1991).