Case No. S24I-1123

Supreme Court of Georgia

Aaron Lewis, Appellant

vs.

State of Georgia, Appellee

Brief of Appellant

David Whitman
Attorney for Appellant
State Bar no. 756293

P.O. Box 1183
Lawrenceville, Georgia 30046
(770) 339-1625
david@cdavidwhitmanlaw.com

David E. Clark
Attorney for Appellant
State Bar no. 126660

CLARK & TOWNE, P.C.
753 Cherokee Avenue SE
Suite A #55
Atlanta, Georgia 30315
(770) 338-2338
dave@clarktowne.com

Introduction

This is an interlocutory appeal in a murder prosecution. Appellant seeks reversal of the trial court's ruling denying his motion to dismiss (general demurrer). The question presented is whether a felony murder indictment alleging that the defendant sold illegal narcotics in DeKalb County to two persons who later overdosed and died in Gwinnett is sufficient to allege venue in Gwinnett. The ruling below was that the indictment properly alleged venue in Gwinnett County because it was reasonably foreseeable that the Appellant's actions in DeKalb County could result in death, which occurred in Gwinnett.

Jurisdictional Statement

This case is an interlocutory appeal in a criminal case including a charge of murder. This court has jurisdiction over all murder appeals.[1] This court's order granting interlocutory review is attached hereto.

Judgments Appealed

Order denying defendant's amended motion to dismiss, filed May 28, 2024.[2]

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[1] Constitution of Georgia, Article VI, Sec. 6, Para. 3; *State v. Murray*, 286 Ga. 258 (2009).

[2] (V1 - 7)

Statement of Material Facts

On May 13, 2021, Appellant was indicted in Gwinnett County on eight counts related to the deaths of Dietrick Stephen Duricker and Alexandria Delia Thompson. According to the indictment, Duricker and Thompson each overdosed and died some unspecified time after buying illegal drugs from Appellant in DeKalb County between February 12 and 13, 2020. Counts 1 and 2, relating to Duricker, allege felony murder by selling "heroin that contained fentanyl." Count 1 alleges that the cause of death was "sale and distribution of fentanyl," and Count 2 alleges that the cause of death "sale and distribution of heroin." The two counts are otherwise identical:

> COUNT 1
>
> THE GRAND JURORS AFORESAID, IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, charge and accuse AARON DEVERO LEWIS with the offense of FELONY MURDER (O.C.G.A. 16-5-1(c)), for that the said accused, in the County and State aforesaid, between the 12th day of February, 2020, and the 13th day of February, 2020, the exact date of the offense being unknown to the Grand Jury, did commit the offense of murder when the accused caused the death of Dieterick Stephen Duncker, a human being, irrespective of malice while in the

commission of a felony, to wit: the sale and distribution of fentanyl in violation of O.C.G.A. 16-13-30(b), by selling Dieterick Stephen Duncker, in Dekalb County, heroin that contained fentanyl which caused Dieterick Stephen Duncker to overdose and die in Gwinnett County, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 2

THE GRAND JURORS AFORESAID, IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, charge and accuse AARON DEVERO LEWIS with the offense of FELONY MURDER (O.C.G.A, 16-5-1(c)), for that the said accused, in the County and State aforesaid, between the 12th day of February, 2020, and the 13th day of February, 2020, the exact date of the offense being unknown to the Grand Jury, did commit the offense of murder when the accused caused the death of Dieterick Stephen Duncker, a human being, irrespective of malice while in the commission of a felony, to wit: the sale and distribution of heroin in violation of O.C.G.A. 16-13-30(b), by selling Dieterick Stephen Duncker, in Dekalb County, heroin that contained fentanyl which caused Dieterick Stephen Duncker to overdose and die in Gwinnett County, contrary to the laws of said State, the good order, peace and dignity thereof.[3]

[3] (V1 - 17)

Counts 3 and 4 allege felony murder, again relating to Duncker, based on using a cellphone to sell drugs in Gwinnett County. Those counts are not at issue here.

Counts 5 and 6 are the same as Counts 1 and 2, except that they relate to the second overdose victim, Thompson:

> COUNT 5
>
> THE GRAND JURORS AFORESAID, IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, charge and accuse AARON DEVERO LEWIS with the offense of FELONY MURDER (0.C.G.A. 16-5-1(c)), for that the said accused, in the County and State aforesaid, on the 15th day of February, 2020, did commit the offense of murder when the accused caused the death of Alexandra Delia Thompson, a human being, irrespective of malice while in the commission of a felony, to wit: the sale and distribution of fentanyl in violation of 0.C.G.A. 16-13-30(b), by selling Alexandra Delia Thompson, in Dekalb County, heroin that contained fentanyl which caused Alexandra Delia Thompson to overdose and die in Gwinnett County, contrary to the laws of said State, the good order, peace and dignity thereof.
>
> COUNT 6
>
> THE GRAND JURORS AFORESAID, IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, charge and accuse AARON DEVERO LEWIS

> with the offense of FELONY MURDER (O.C.G.A. 16-5-1(c)), for that the said accused, in the County and State aforesaid, on the 156th day of February, 2020, did commit the offense of murder when the accused caused the death of Alexandra Delia Thompson, a human being, irrespective of malice while in the commission of a felony, to wit: the sale and distribution of heroin in violation of 0.C.G.A. 16-13-30(b), by selling Alexandra Delia Thompson, in Dekalb County, heroin that contained fentanyl which caused Alexandra Delia Thompson to overdose and die in Gwinnett County, contrary to the laws of said State, the good order, peace and dignity thereof.[4]

Counts 7 and 8 similarly allege felony murder relating to Thompson based on using a cellphone to sell her narcotics in Gwinnett County. Those counts are not at issue here.

Motion to Dismiss / general demurrers

Appellant filed a series of general demurrers and ultimately an "Amended Motion to Dismiss," specifically praying that the court "dismiss the indictment based on lack of venue."[5] The court held a hearing, which included testimony as to other unrelated motions to suppress, and arguments of counsel as to the

[4] (V1 - 18-19)

[5] (V1 – 33, 65, 96, 110) The general demurrer filed July 2, 2022 (V1 – 96) specifically lists Counts 1, 2, 5, and 6. Counsel's arguments were limited to those counts. (V2 - 75)

demurrer. During the hearing there were no express stipulations of fact by the parties, although the court ruled that "[t]he indictment alleges, *and the parties agree*, that the predicate sales of drugs occurred in DeKalb County and the overdoses and deaths occurred in Gwinnett County."[6] The trial court ruled that

> The indictment alleges that the sale of drugs led to the causes of death … the cause of death was inflicted where the ingestion of the narcotics took place (Gwinnett County) — the ingestion of said narcotics being the natural and reasonably foreseeable result of the purchase of said narcotics. … Pursuant to evidence submitted at hearing, Gwinnett County is the location in which the cause of death, the ingestion of the narcotics, and the *res gestae* of the Defendant's actions resulted. The ingestion of narcotics being the naturally and reasonably foreseeable result of the purchase of narcotics. As such, venue is proper in Gwinnett County. Defendant's Amended Motion to Dismiss is DENIED as to Counts 1, 2, 5 and 6 of the indictment.[7]

A certificate of immediate review was issued, and an application for appeal was filed with this court. In its order granting the application, this court noted three particular areas of concern:

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[6] (V1 - 11-12)

[7] (V1 - 12-13)

1. When a defendant is charged with felony murder predicated on the sale or distribution of drugs and his conduct underlying the predicate felony is alleged to have been completed in one county, but the death by drug overdose allegedly caused in the commission of that felony occurs in another county, what is the "cause of death"? O.C.G.A. § 17-2-2 (c). For example, is the "cause of death" the defendant's alleged affirmative conduct (the sale of drugs), the apparent immediate cause of death (drug overdose), either of those things, both of those things, or something else?

2. Under the above circumstances, in which county or counties was the "cause of death" "inflicted?" See id.

3. Under the above circumstances, could venue be proper in both counties?

Enumeration of Error

The trial court should have granted the motion to dismiss Counts 1, 2, 5, and 6 because they allege exclusive venue in DeKalb County rather than Gwinnett.

Standard of Review

Venue is a material element which must be alleged in any indictment or accusation.[8] A failure to allege venue "goes to the merits ... and renders an indictment or accusation subject to a general demurrer."[9] The motion at issue, while styled a "motion to dismiss," was in substance a general demurrer. A trial court's ruling on general demurrer is a matter of law subject to de novo review.[10] "We therefore review the trial court's order based on the understanding that the indictment was dismissed based on a general demurrer, and we conduct that review de novo in order to determine whether the allegations in the indictment are legally sufficient."[11]

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[8] *Brown v. State*, 181 Ga. App. 865 (1987).

[9] 181 Ga. App. at 866.

[10] See *State v. Henderson*, 283 Ga. App. 111, 112 n.6 (2006) (evaluating and reversing trial court's dismissal of a criminal charge and noting that even where a defendant should have filed a demurrer instead of a motion to dismiss, it "is the substance and function of a motion and not its nomenclature that controls.")

[11] *State v. Mondor*, 306 Ga. 338, 341 (2019).

Review is limited to the four corners of the indictment and any facts stipulated to by the parties. As a general matter, a demurrer (whether general or special) must allege some flaw on the face of the indictment itself; a demurrer ordinarily cannot rely on extrinsic facts that are not alleged in the indictment.[12] However, "[t]here is an important exception to the general rule that a court cannot go beyond the four corners of the indictment in considering a demurrer. If the State stipulates or agrees to the facts that form the basis for the charges in the indictment, a court can rely on those facts in its consideration of a demurrer, whether or not the facts appear on the face of the indictment."[13]

For purposes of this appeal, every allegation in the indictment is presumed true. "A demurrer to an indictment admits every matter of fact well pleaded."[14]

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[12] See *Schuman v. State*, 264 Ga. 526, 526 (1994) (a demurrer that "add[s] facts not appearing on the face of the indictment" is a "speaking demurrer" that "presents no authority for quashing an indictment and is void"). See also *State v. Grube*, 293 Ga. 257, 258 (1), (2013) (defendant's demurrer was not an improper "speaking demurrer" because his challenge to the indictment could be determined "without reaching matters outside the four corners of the indictment").

[13] *State v. Williams*, 306 Ga. 50, 53 (2019).

[14] *United States v. Cook*, 84 U.S. 168, 21 L. Ed. 538 (1872).

Argument and Citation of Authority

1. Brief answers to the court's questions.

(a) What is the 'cause of death'?

The only material "cause of death" in a felony murder indictment is the predicate felony, which is the intentionally "inflicted" cause of unintentional death. Counts 1, 2, 5, and 6 state that the "inflicted" cause of death as to each victim was the sale of heroin tainted with fentanyl. The allegation that the fentanyl "caused" the victims to overdose and die in Gwinnett County is surplusage, and not an allegation that Appellant committed any act resulting in death while in Gwinnett.

(b) In which county was the "cause of death" inflicted?

The cause of death was inflicted in DeKalb County. The locus of infliction of the material cause of death (the predicate felony) determines venue in a felony murder case, not the locus of *any* contributing cause of death.

(c) Can venue be proper in both counties?

No. When the county where the cause of death was inflicted is known, the law

assigns venue only to that county. O.C.G.A. § 17-2-2(c). In order to authorize a prosecution in Gwinnett, the indictment must state that "it cannot be determined in which county the cause of death was inflicted," and the State must prove it at trial.

2. Discussion

(a) Review is limited to the four corners of the indictment.

This appeal presents a limited question of law involving the sufficiency of an indictment in alleging venue. While issues of proximate cause and possible alternative venues naturally arise in considering this matter, those rabbits must not be chased. The general demurrer here alleged only that Counts 1, 2, 5, and 6, as written, failed to adequately allege venue. A general demurrer challenges the validity of an indictment by asserting that the substance of the indictment is legally insufficient to charge an actionable crime.[15] A general demurrer is essentially a claim that the indictment is void on its face.[16] "[T]he true test of the sufficiency of an indictment to withstand a general demurrer … is found in the answer to the question: Can the defendant admit the charge as made and still be

[15] *Stinson v. State*, 279 Ga. 177, 180 n. 3 (2005), *State v. Meeks*, 309 Ga. App. 855, 856 (2011).

[16] *McDaniel v. State*, 298 Ga. App. 558, 559–560 (2009); see O.C.G.A. § 16–1–6; *Morris v. State*, 310 Ga. App. at 129(2), 310 Ga. App. 126.

innocent? If he can, the indictment is fatally defective."[17] On the other hand, if the defendant cannot admit all of the facts in each count of the indictment and still be innocent of committing any crime, the indictment is legally valid and will survive a general demurrer.[18] As applied to this case, the question is whether venue lies in Gwinnett County after admitting every specific allegation in Counts 1, 2, 5, and 6. This court reviews a lower court ruling on general demurrer *de novo*. The trial court was wrong to consider evidence and make findings of fact. Review here is limited to the four corners of the indictment, and no deference is required as to any factual findings. The trial court was supposed to look only to the language of the indictment and make a legal ruling. Instead, it based its ruling on evidence and made several unnecessary findings:

> *Pursuant to evidence submitted at hearing*, Gwinnett County is the location in which the cause of death, the *ingestion* of the narcotics, and the *res gestae* of the Defendant's actions resulted. The *ingestion of narcotics* being the naturally and reasonably foreseeable result of the purchase of narcotics. As such, venue is proper in Gwinnett County.[19]

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[17] *State v. Meeks*, 309 Ga. App. 855, 856. Accord, *Stinson*, *supra*, 279 Ga. at 179.

[18] State v. Wilson, 318 Ga. App. 88, 91–92 (2012), citing *Harris v. State*, 258 Ga. App. 669, 671–672 (2002) ("[I]f, taking the facts as alleged in the indictment, the guilt of the accused follows as a legal conclusion, the indictment is good.")

[19] (V1 – 7, 13) (emphasis added)

The court had no business making a demurrer ruling "pursuant to evidence submitted at hearing." A court's ruling on a demurrer must be based only on the language within the four corners of the indictment, except for facts stipulated by the parties.[20] Nothing in the indictment says that the victims "ingested" anything. The "*res gestae* of the defendant's actions" is not mentioned in the indictment, nor is there any allegation as to when the deaths occurred relative to the sale. It was not alleged that Appellant *knowingly* sold the victims any fentanyl, or that he should have known it was mixed in with heroin. There was no language in the indictment alone upon which to base a theory of "foreseeability."

And foreseeability does not play into venue. The State's argument at the motions hearing, which the court accepted, conflated venue with causation. Nothing in O.C.G.A. §17-2-2 suggests that venue in a criminal homicide case lies where the accused should reasonably have foreseen a death to occur. Foreseeability is not the test, as pointed out by trial counsel:

[20] See, *Powell v. State*, 318 Ga. 875, 879–80 (2024)("As a general matter, a demurrer (whether general or special) must allege some flaw on the face of the indictment itself," and "a court cannot go beyond the four corners of the indictment in considering a demurrer.") citing *State v. Williams*, 306 Ga. 50, 53 (2019). See also *Bullard v. State*, 307 Ga. 482, 486 (2) n.5 (2019) (noting that "the trial court could not look beyond the four corners of the indictment in considering [the defendant's] demurrer").

> THE STATE: Your Honor, the State's position is not that the sale is the infliction. The sale leads to the infliction, which is the overdose in and of itself, the ingestion of the narcotics and that occurred in Gwinnett County.
>
> THE COURT: Is it, I guess, it is illegal to ingest illegal narcotics. But that's a crime that wasn't committed by him. It was a crime that was committed by the victim. So how does that give me venue?
>
> THE STATE: Well, again, the ingestion of the narcotics is the reasonably foreseeable outcome based upon the sale --
>
> THE COURT: Of sale?
>
> THE STATE: -- yes. Yes.
>
> THE DEFENSE: That's not the test, [under] 17-2-2.[21]

This indictment does not state that Appellant "inflicted" the overdose; that would be malice murder. According to the indictment, he caused the deaths by unknowingly selling heroin containing fentanyl. There are no facts alleging *scienter* – that Appellant knew or should have known an overdose was likely, such as would place the locus of infliction anywhere the victims happened to be when they died.

[21] (V2 - 84)

The court's ruling, that the victims' deaths were, by law, part of the *res gestae* of the Appellant's drug sale presumes strict liability for drug dealers when one or more of their customers dies from an accidental overdose. Georgia has not imposed strict liability for felony murder upon every seller of illegal drugs, either by statute or by judicial fiat. "We expressly do not hold, however, that every delivery or distribution of a controlled substance that results in death can support a felony murder conviction."[22] To the contrary, the accused must directly cause the victim's death while in the commission of the felony. The trial court ruled based on an assumption about cause that is contrary to law. The *res gestae* of a drug sale cannot be held to extend to a subsequent death *as a matter of law*.

There is no allegation that Appellant took any action establishing venue in Gwinnett. There is no allegation that he personally administered tainted heroin to the victims,[23] or that he should have known the victims would be in Gwinnett when they used his heroin. There is no allegation that the victims were physically under the "continuous control" of the Appellant when they died,[24] or that the deaths occurred within the *res gestae* of the predicate felony drug sale.[25]

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[22] *Hulme v. State*, 273 Ga. 676 (2001).
[23] See, *Carter v. State*, 285 Ga. 394, 395 (2009).
[24] See, *Lee v. State*, 270 Ga. 798, 801(4) (1999), and *Bradley v. State*, 272 Ga. 740, 743 (2000).
[25] *See*, *Diamond v. State*, 267 Ga. 249, 250 (1996).

This court asks: "When a defendant is charged with felony murder predicated on the sale or distribution of drugs and his conduct underlying the predicate felony is alleged to have been completed in one county, but the death by drug overdose allegedly caused in the commission of that felony occurs in another county, what is the 'cause of death'? O.C.G.A. § 17-2-2 (c)." For purposes of this appeal, the "cause of death" is what the indictment says the accused *did* to cause the death.

> *(b) Read in context with controlling authority, O.C.G.A. § 17-2-2(c) provides that venue in felony murder cases lies where the predicate offense is committed.*

Limiting review to the four corners of the indictment and presuming, for the sake of appeal, that every allegation is true, the ruling below is incorrect. When the phrase "cause of death" and the word "inflicted" in O.C.G.A. § 17-2-2(c) are considered in context, it becomes clear that venue in felony murder cases lies where the predicate offense was committed. The State constitution provides that "all criminal cases shall be tried in the county where the *crime* was committed …"[26]

[26] Ga. Const. art. VI, § 2, ¶ VI (emphasis added). See, *Lynn v. State*, 275 Ga. 288, 289 (2002). "The Georgia Constitution requires that venue in all criminal cases must be laid in the county in which the crimes allegedly took place."

And what is a crime? "A 'crime' is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence."[27] Venue generally lies where an act and intention join to form a crime. Since the death is unintentional in felony murder cases, venue lies in the county where the intent to engage in the predicate felony joined with the act of committing that felony. When a death (anywhere) results from the commission of the underlying crime, it is felony murder. But the 'crime' takes place where the law is broken, not where any subsequent injury or damage occurs.

This is consistent with O.C.G.A. § 17-2-2(c), which specifies: "Criminal homicide shall be considered as having been committed in the county in which the cause of death was inflicted." In a felony murder case, the cause of death is always inflicted through the commission of the predicate felony. This court discussed the "cause" requirement in felony murder cases in *State v. Jackson*:[28]

> We would hold that the phrase "he causes" as used in O.C.G.A. § 16–5–1(c) requires the State to prove that the defendant's conduct in the commission of the underlying felony proximately caused the death of another person. In the context of this case, proximate causation

[27] O.C.G.A. § 16-2-1(a).
[28] *State v. Jackson*, 287 Ga. 646 (2010).

> would exist if … the felony the defendants committed "directly and materially contributed to the happening of a subsequent accruing immediate cause of the death …"[29]

Venue therefore lies where the predicate felony was committed because in felony murder cases, the predicate felony has to be the cause of death.[30] Venue lies in the county where the accused intentionally acted in violation of the law. Here, the indictment itself states that the *actus rea* and *mens rea* joined to form a crime in DeKalb County when Appellant sold the two victims some heroin containing fentanyl on February 12-13, 2020. For purposes of this case, then, at this stage of the proceedings, the "cause of death" was alleged to be "inflicted" in DeKalb County. Murder is the unlawful infliction of death, and felony murder is the unintentional infliction of death through the intentional commission of an inherently dangerous felony. This indictment says the accused caused the deaths "by selling them drugs" in DeKalb County. It does not accuse Appellant of committing any crime in Gwinnett.

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[29] 287 Ga. at 652, citing *Durden v. State*, 250 Ga. 325, 329 (1982)("Where one commits a felony upon another, such felony is to be accounted as the efficient, proximate cause of the death whenever it shall be made to appear either that the felony directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or that the injury materially accelerated the death, although proximately occasioned by a pre-existing cause.")

[30] Unless it cannot be determined where the cause of death was inflicted, which was not alleged here.

The question, on general demurrer, is simply whether the exact language of the indictment is sufficient to allege venue in the county bringing the charge. A felony murder indictment is not proper when it alleges that the cause of death was a predicate felony that was known to have been committed in a different county. This indictment is insufficient because it says the cause of death was inflicted in DeKalb County and it does not offer additional statutory grounds to establish venue in Gwinnett.[31] Foreseeability does not enter into it; venue is about actions, not results.

(c) State v. Eubanks is not on point.

The trial court's reliance on *State v. Eubanks*[32] is misplaced. *Eubanks* is a felony murder case, but does not address venue at all. In *Eubanks*, the victim's body was found in Forsyth County, and there was no dispute that the death was caused by heroin ingestion in Forsyth County due to the defendant's act of possessing heroin with intent to distribute while in Forsyth County. The issue was whether the evidence was sufficient to establish proximate cause where the victim died from

[31] In fact, it is doubtful that Appellant's alleged drug sales proximately caused anybody to die. This indictment does not allege that Appellant "knowingly" poisoned the victims, or even that he was criminally negligent in selling them heroin which he should have known was poisonous. For purposes of this appeal, however, we have to assume proximate cause as alleged.

[32] 317 Ga. 563 (2023).

ingesting heroin carelessly possessed by the defendant. The holding, that the Appellant could reasonably have foreseen that her developmentally delayed roommate night die from gaining access to dangerous narcotics, was limited to a unique set of facts.

Eubanks is distinguishable on its facts. *Eubanks* did not hold that the death occurred within the *res gestae* of the heroin possession – rather it held that the evidence was sufficient to support the jury's verdict that the death happened while the defendant was actively possessing heroin with intent to distribute, and that the death was proximately caused by that inherently dangerous felony. The *Eubanks* case may certainly become very important later on in this matter, but it is not useful in addressing the venue questions raised by this appeal. This is not a "possession with intent" case where the victims died during the reckless possession of heroin. A sale or distribution of heroin is all that is alleged here, and that is not a "continuing offense."[33]

What the State argued below, relying on *Eubanks*, is that there should be strict liability for drug dealers when one of their customers overdoses. Several states

[33] The State conceded in argument that the sale of heroin here was not a continuing offense. (V2 - 80)

have passed laws to this effect; Georgia is not one of them, and *Eubanks* does not establish such a rule.[34] The trial court endorsed the State's novel strict liability theory by ruling that the deaths occurred within the *res gestae* of the heroin sale. It reasoned that since a drug dealer is strictly responsible for the consequences of selling drugs, venue must lie in any county where an alleged sale had deadly consequences. Again, while it may be ultimately proven that these deaths occurred "within the *res gestae* of the drug sale," such was not alleged, and cannot be assumed without hearing evidence, as set forth in *Hulme v. State*.

[34] See ARIZ. REV. STAT. ANN. § 13-1105 (Supp. 1985) ("A person commits first degree murder if [he] commits or attempts to commit . . . narcotics offenses under § 13- 3406 [supplying of dangerous drugs] and in the course of and in furtherance of such offense... causes the death of any person."); CONN. GEN. STAT. § 53a-54b(6) (1985) (person is guilty of a capital felony if convicted of "the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone"); FLA. STAT. ANN. § 782.04 (West Supp. 1984) ("[U]nlawful killing ... which results from the unlawful distribution of opium..., when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony ....); NEV. REV. STAT. § 200.010 (1985) ("Murder is the unlawful killing of a human being ... caused by a controlled substance which was sold to a minor ... ."); TENN. CODE ANN. § 39-2-211(b) (Supp. 1985) ("Death which results from the unlawful distribution of opium .. ., when such drug is proven to be the proximate cause of the death of the user shall be deemed at least murder in the second degree.").

(d) O.C.G.A. § 17-2-2(c) does not allow for venue in both counties where the locus of infliction is known.

Finally, venue cannot be proper in both Gwinnett and DeKalb counties under the circumstances alleged in this indictment. A person cannot murder the same victim in two counties at once. The venue statute focuses on the criminal act, and limits venue in criminal homicide cases to the county where the crime took place, in harmony with controlling constitutional and statutory authority.

O.C.G.A. § 17-2-2(c) has a definite structure. The State elected here to proceed under its first clause: the State alleged that it knew both the cause of death and where it was "inflicted." The indictment states that the cause of death was a drug sale that took place in DeKalb County – indeed it *must* allege that the predicate felony caused the death. The State did not allege that it "cannot be determined" where the cause of death was inflicted. Neither did it allege that a body was found in Gwinnett and it cannot be determined where the death occurred. "The county in which a body is found, however, establishes venue for a homicide only when it cannot be readily determined in what county the cause of death was inflicted."[35] It's not both. Venue lies in DeKalb, and Gwinnett is ruled out.

[35] *Twitty v. State*, 298 Ga. 204, 206-207 (2015).

When the State, in alleging a material element in an indictment, wishes to rely on some saving provision requiring a unique fact pattern, those facts must be both alleged and proved. For example, when a tolling provision is relied upon by the State to avoid a statue of limitations problem, the facts supporting tolling must be alleged. "Where an exception is relied upon to toll the statute of limitation, it must be alleged in the indictment and proved."[36] This situation is similar – where particular facts are relied upon to establish venue in a given prosecution, they must be both alleged and proven. If not, the indictment is subject to demurrer.

Gwinnett County has an interest in local prosecution when a death occurring within its borders is determined to be a homicide. However, the legislature has not established joint venue for felony murder where a local death was caused by a crime committed in a different county. Under current law, it is the location of the crime that controls, and Counts 1, 2, 5, and 6 affirmatively establish exclusive venue in DeKalb County. The trial court's ruling was error and must be reversed.

[36] *Jannuzzo v. State*, 322 Ga. App. 760, 765 (2013).

RESPECTFULLY SUBMITTED August 23, 2024. "This submission does not exceed the word-count limit imposed by Rule 20."

s:/ David E. Clark
David E. Clark, Attorney for Appellant
State Bar no. 126660

CLARK & TOWNE, P.C.
753 Cherokee Avenue SE
Suite A #55
Atlanta, Georgia 30315
(770) 338-2338
dave@clarktowne.com

s:/ David L. Whitman
David L. Whitman, Attorney for Appellant
State Bar no. 756293

P.O. Box 1183
Lawrenceville, Georgia 30046
(770) 339-1625
david@cdavidwhitmanlaw.com

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing BRIEF OF APPELLANT upon all interested parties by e-filing and by email, addressed as follows:

Clifford L. Kurlander, A.D.A.
District Attorney's Office
75 Langley Drive
Lawrenceville, GA 30045
Clifford.kurlander@gwinnettcounty.com

Elizabeth Brock, Deputy Attorney General
Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, GA 30334
ebrock@law.ga.gov

"I certify that there is a prior agreement with Clifford Kurlander and with Elizabeth Brock to allow documents in a PDF format sent via e-mail to suffice for service under Supreme Court Rule 14."

/s/ David E. Clark
David E. Clark, Attorney for Appellant