

IN THE SUPERIOR COURT OF POLK COUNTY  
  
STATE OF GEORGIA

STATE OF GEORGIA,

vs.

OTHEL DOYLE KELLEY, III,  
a/k/a TREY KELLEY,

Defendant.

Criminal Docket No. 2020CR-1612-  
JSS

**ORDER GRANTING DEFENDANT OTHEL DOYLE KELLEY, III**  
**a/k/a TREY KELLEY'S GENERAL DEMURRER AND**  
**ORDER QUASHING THE INDICTMENT**

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This matter came before the Court on June 4, 2021 on Defendant Othel Doyle Kelley, III a/k/a Trey Kelley's (KELLEY) Motion to Quash Indictment and General Demurrer. The Court, having carefully considered Defendant's motion and brief in support, the State and Defendant's oral arguments, the record, the legal authority presented and the extensive proposed findings of fact and conclusions of law presented by the State and the Defendant GRANTS the motion quashing the indictment and shows as follows:

1.

### The Indictment

The Indictment is 2020-CR-1612 and is a special presentment of the Polk County Grand Jury. It was presented and filed by the District Attorney Oliver J. Browning, Esq. on December 10, 2020. Count I charges Ralph William Dover, III, AKA Ryan Dover (DOVER) with the offense of Hit and Run in violation of O.C.G.A. 40-6-270(b). Count 2 of the indictment charges both DOVER and KELLEY individually and as parties concerned in the commission of a crime with the offense of Reckless Conduct in violation of O.C.G.A. 16-5-60(b).

2.

### The Defendants

The Defendants are Ralph William Dover, III, AKA Ryan Dover (DOVER) and Othel Doyle Kelley, III a/k/a Trey Kelley's (KELLEY). DOVER is charged in Counts 1 and 2 and KELLY is charged in count 2 only.

3.

### The Facts

The parties have not stipulated to a set of facts. They have both argued that DOVER was driving his vehicle on Georgia Highway 1 and was involved in an accident with Mr. Keais who was on a bicycle. They have both argued that at a

point subsequent to the accident DOVER contacted KELLEY. The parties agree that Mr. Keais died subsequent to the accident. The parties otherwise agree that the court is bound by the allegations and charges in the indictment. This applies to what the indictment directly alleges and fails to allege.

4.

#### Matters Not Alleged

The indictment does not charge DOVER with causing the accident. There is no mention of a causation charge such as Reckless Driving O.C.G.A. 40-6-390 or Homicide by Vehicle O.C.G.A. 40-6-393 in this indictment or any other charging instrument. It must be noted that that the Hit and Run statute does not require causation of the accident in order to be charged. KELLEY is not charged in Count 1 as a party to the crime pursuant to O.C.G.A 16-2-20.

5.

#### Statutes

O.C.G.A 40-6-270 commonly known as the Hit and Run or Leaving the Scene of an Accident.

O.C.G.A 16-5-60(b) Reckless Conduct.

O.C.G.A 16-2-20 When a person is a party to a crime.

### Statutory Construction

The late Justice Antonin Scalia during his term on the U. S. Supreme Court explained the interpretation of statutes by taking an originalism and textualist approach. Simply stated a judge does not bend laws to fit a desired outcome. A judge follows the law and words are given their ordinary and everyday meaning. They are to be given the meaning assigned to them when a statute is made into law. Consistent with this is the view that criminal statutes are to be strictly construed.

William Blackstone wrote in 1765 "Penal statutes must be construed strictly." The late Justice Ruth Ginsburg has written in favor of this rule of lenity (*Yates v. United States*, 135 S. Ct. 1074 (2015)) and the conservative Texas Legislature has codified this rule (cite omitted).

This court will abide by these rules of construction. Statutes mean what they state and any ambiguity is in favor of the accused. This court will not judicially legislate a criminal offense.

7.

### The Motion

Defendant KELLEY has filed a General Demurrer and Motion to Quash the indictment. The General Demurrer argument is that KELLEY can admit the allegations in Count 2 and since he has no legal obligation or obligation proscribed by criminal statute to Mr. Keais the conduct cannot be charged as a violation of a criminal statute. The second argument is that Reckless Conduct O.C.G.A 16-5-60(b) is unconstitutionally vague and violates KELLEY'S constitutionally protected right of due process under the State and U. S. Constitution.

8.

### The Arguments

Count 2 of the Indictment charges as follows:

The Grand Jurors, in the name and behalf of the citizens of Georgia, charge and accuse **RALPH WILLIAM DOVER, III AKA: RYAN DOVER and OTHEL DOYLE KELLEY, III, AKA: TREY KELLEY, individually and as parties concerned in the commission of a crime**, with the offense of **Reckless Conduct**, for that the said accused, in the Court aforesaid, **on or about the 11<sup>th</sup> day of September, 2019**, did unlawfully endanger the bodily safety of Eric Keais by consciously disregarding a substantial and unjustifiable risk that his/their act of not immediately contacting 911 upon learning of the hit and run incident more particularly described in Count 1 of this Indictment to ensure that emergency medical services and local law enforcement were notified for purposes of reporting the incident and making a request for assistance, and that such act of not immediately



contacting 911 constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation, in violation of O.C.G.A. 16-5-60(b), contrary to the laws of said State, the good order, peace and dignity thereof.

Count 2 of the Indictment is fatally defective as to KELLEY, because it fails to assert any conduct proscribed by Georgia law. It is established and the parties agree that the “true test of the sufficiency of an indictment to withstand a general demurrer, or a motion to quash, is found in the answer to the question: Can the defendant admit the charge as made and still be innocent.” Jenkins v. State, 121 Ga.App. 103, 104 (1970). If he can, the indictment at issue is fatally defective. Id.

Furthermore, courts in Georgia have long held that the “mere characterization of an act which may be lawfully committed as unlawful does not suffice to so inform one accused of crime the nature of the offense .... [t]o charge that an act intrinsically lawful was done unlawfully, without more, is not a statement of fact, but a mere conclusion of the pleader.” Jenkins v. State, 121 Ga.App. 103 at 104 (1970) (*citing Dukes v. State*, 9 Ga.App. 537 (1911)).

In this case, KELLEY is accused of committing the offense of Reckless Conduct. Reckless conduct, as accused by the State, means failing to immediately contact 911 when learning of an automobile accident involving a third party. Specifically, KELLEY was indicted for failing to immediately contact 911 upon learning of the alleged hit and run accident enumerated in Count 1 of the Indictment.

While not charging KELLEY with Hit and Run outright, the State instead selected the portion of the Hit and Run statute that it wanted to use against KELLEY, disregarded the fact that KELLEY'S conduct was not prohibited by that statute (he was neither driving nor even present when the accident occurred), and grafted certain elements of that offense onto the Reckless Conduct statute thus creating a "judicially crafted crime." Specifically, Count 2 of the Indictment recites the elements of Reckless Conduct: "endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his/their act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

Then, to set out the alleged substantial and unjustifiable risk purportedly disregarded by KELLEY, the State then borrowed from the following element of *Hit and Run* as KELLEY'S purported violation of the Reckless Conduct statute:

"The driver of any vehicle involved in an accident resulting in injury to or death of any person ... shall immediately stop such vehicle ... and shall ... make every reasonable effort to ensure that emergency medical services and local law enforcement are contacted for the purpose of reporting the accident and making a request for assistance[.]"  
*O.C.G.A. 40-6-270(a)(4).*

There is *no* authority either through statutory enactment or the common law, that imposes a duty on a non-driving and non-present third party to call the police upon learning of a potential automobile accident.

To follow the State's position in this case, every driver passing by a collision on the roadway must now "immediately" contact 911 or they have committed a crime. The legal authority for this proposition, however, does not exist in the Hit and Run statute or anywhere else, and the State cannot make it exist by judicially legislating from the Indictment. When the legislature first codified the Hit & Run statute in 1953, and in every subsequent amendment thereto, it perhaps could have expanded the application to include passengers of vehicles, bystanders, Good Samaritans, etc. if it so desired. It did not and has not. There is simply no such crime.

The State argues that the Indictment is sound based upon the use of the "party to the crime language" codified in O.C.G.A. § 16-2-20. This is problematic, however, first because Defendant Kelley, according to the charging language is accused of engaging in reckless conduct "individually" and as a party to the crime with Ralph "Ryan" Dover. Second, the mere fact that the State has charged two parties in an Indictment does not render KELLEY'S conduct unlawful.

The Hit and Run statute does not apply to KELLEY because he was not the driver of the vehicle involved in the accident, in the vehicle or at the scene at the time of the accident. The law imposes no duty upon KELLEY to contact law enforcement. Yet, KELLEY has now been indicted for not taking these actions, using an unrelated statute. The State cannot make Mr. KELLEY'S conduct criminal by calling it reckless conduct. The indictment must be dismissed as there is no legal

duty under which Defendant Kelley is required to act. On the civil side of the law it is an established principle that “a person is under no duty to rescue another from a situation of peril which the former has not caused.” Boller v. Robert W. Woodruff Arts Center, 311 Ga. App. 693, 696 (2011). Significantly, this is true even where failing to contact 911 in the absence of a duty delays medical treatment. Dutt v. Mannar & Co., 354 Ga.App. 565 (2020).

The Reckless Conduct statute, as enumerated in Count 2 of the Indictment, is unconstitutionally vague and violates KELLEY’S constitutional rights to due process, as protected by the State and Federal constitutions. In Hall v. State, 268 Ga. 89 (1997), the Supreme Court made clear that where, as applied, a statute: 1) fails to provide persons of ordinary intelligence that it purports to prohibit certain conduct, and 2) lacks definite and explicit standard to guide its enforcement, thus making it susceptible to arbitrary and selective enforcement by police, prosecutors, and juries, the statute violates the accused’s constitutionally protected due process rights.

The State relied upon State v. Pendergrass, 298 Ga.App. 801 (2009) for the proposition that, as a legal matter, a passenger of a vehicle could be charged and convicted of the offense of Hit and Run. However, at oral argument, the State conceded that KELLEY was not charged with Hit and Run and also conceded that KELLEY could not have been charged with Hit and Run based on the facts and circumstances known to the State at the time of the presentment of the Indictment to

the Grand Jury. No reading of either the Hit and Run statute or the Reckless Conduct statute leaves a reasonable person with the impression that a disinterested third party, not present for an automobile accident, who later learns of a purported accident is under a legal duty pursuant to the Reckless Conduct statute to immediately contact 911.

“It is axiomatic,” the Court in Hall reasoned, “that criminal statutes proscribe conduct, not results that flow from conduct.” Id at 94. In Hall, the “vague and indefinite” language of the Reckless Conduct statute, “permitted law enforcement officials, when faced with the tragic consequence of the child's death, to selectively and arbitrarily prosecute Hall.” The law requires, however, that any statute that impermissibly delegates such basic matters of policy and law-making to law enforcement officials for their subjective and ad hoc analysis violates the due process guarantees of our State and Federal Constitutions.” Id at 95.

The facts in the matter at hand are even more compelling than the facts in the Hall case. First, a person of ordinary intelligence and in KELLEY’S alleged position on September 11, 2019, would not have read the Hit & Run statute and concluded that the allegedly unlawful conduct (failing to immediately contact 911) applied to him as he was not the driver (or even the passenger) of a motor vehicle involved in any accident, nor was he even present or aware of the accident when it occurred.

It is unreasonable to expect that a person of ordinary intelligence would conclude that legal conduct (or, more precisely, conduct not made unlawful by the Hit and Run statute) becomes illegal by applying vague, indefinite concepts described in the Reckless Conduct statute. Put more simply, if Defendant Kelley cannot be charged for failing to render aid himself, it must follow that he cannot be charged with unlawful recklessness related to another's person's alleged failure to do so.

More particularly however, the charging language in the indictment accuses KELLEY of reckless conduct for not "immediately calling 911." Such an accusation seeks to use the term "immediately" to impose a heightened duty of care where, in fact, no duty of care otherwise exists. Because Mr. Kelley had no duty to call 911 under any circumstance, he cannot be charged for failing to do so "immediately." The State concedes that Mr. Kelley cannot be charged with violating the Hit and Run statute – i.e. that Mr. Kelley could admit that he never called 911 without admitting a criminal act. Proof of immediacy - or as the State would have it, delay – changes nothing.

The Supreme Court in Hall is clear: "[a]ny statute that impermissibly delegates such basic matters of policy and law-making to law enforcement officials for their subjective and ad hoc analysis violates the due process guarantees of state and federal constitutions." Thus, the State cannot turn KELLEY'S lawful conduct

into unlawful conduct simply by grafting the language of the Hit & Run statute onto the Reckless Conduct statute and adding an additional element.

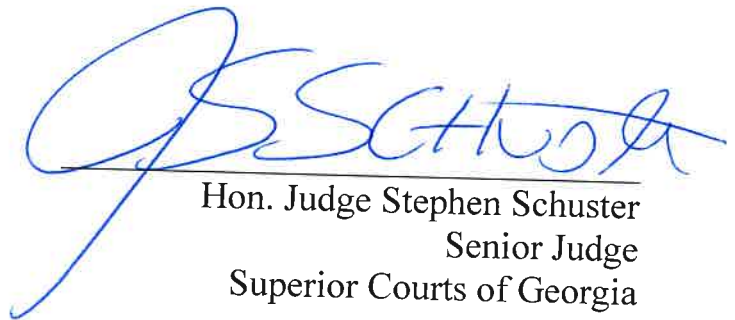
No reasonable person can read the Hit & Run statute and believe that it applied to KELLEY on the night of September 11, 2019. Likewise, no reasonable person can read the Reckless Conduct statute and believe that it applies to KELLEY in a moment where the legislature explicitly chose not to proscribe the conduct at issue. Allowing this Indictment to stand requires the judiciary to legislate and violates KELLEY'S constitutionally protected due process rights.

KELLEY'S General Demurrer and Motion to Quash is GRANTED, and the Indictment is hereby DISMISSED.

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SO ORDERED this 21 day of December, 2021.

  
Hon. Judge Stephen Schuster  
Senior Judge  
Superior Courts of Georgia

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