POINTS AND AUTHORITIES

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Week Of	Topic	Guests (Dooley)	General
March 16 2015	**Vehicular Manslaughter Conviction Cannot be Enhanced with *any* GBI (*Cook*); Standard for when a juvenile unequivocally invokes right to counsel (*Art T.*)**	**Matt Gaidos**	**30 min**

This week's P&A discusses *People v. Cook*, in which the California Supreme Court concludes that no GBI can attach to vehicular manslaughter, and *In re Art T.*, in which the Court of Appeal defines a standard for determining whether a juvenile, after waiving *Miranda*, invoked his right to counsel

I. *People v. Victoria Cook* (2015) 60 Cal.4th 922

A defendant's vehicular manslaughter sentence may not be enhanced by great bodily injury based on injuries to a surviving victim or death of another manslaughter victim

A. The Holding

Section 12022.7, subdivision (g) of the statute says that the GBI enhancement "shall not apply to murder or manslaughter." This subdivision means what it says. The sentence for manslaughter may not be enhanced for the infliction of great bodily injury to anyone. Therefore a sentence for vehicular manslaughter of one victim may not be enhanced for defendant's infliction of great bodily injury on *other* victims. Thus, as to surviving victims or other victims who died, their injuries cannot be the basis of a GBI enhancement on the manslaughter victim.

B. The Statutory Background

1. Section 12022.7, subdivision (a), provides: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

2. Section 12022.7, subdivision (g), the applicable provision at issue in this case, provides in pertinent part: "This section shall not apply to murder or manslaughter. . . ."

3. There is no dispute that section 12022.7(g) prohibits enhancing a manslaughter or murder conviction for inflicting great bodily injury on the person who is the subject of that conviction.

4. The issue is when, if ever, a manslaughter conviction may be enhanced for the infliction of

great bodily injury on other victims during the commission of the manslaughter.

C. Review of the Cases

1. *People v. Beltran* (2000) 82 Cal.App.4th 693

a. The defendant, while fleeing from the police in a vehicle, collided with another vehicle, killing one person and seriously injuring another. In dicta, the Court of Appeal stated that no great bodily injury can attach to a murder or manslaughter conviction, and held that no such enhancement can attach to a crime for which infliction of great bodily injury is an element. (*Id*. at p. 696.)

The ensuing cases, discussed below, disagreed with *Beltran*.

2. *People v. Verlinde* (202) 100 Cal.App.4th 1146

a. The defendant was involved in an accident in which one person was killed and two persons were seriously injured. The defendant was convicted of gross vehicular manslaughter while intoxicated, and ultimately at issue was a great bodily injury enhancement based on injuries to a surviving victim. The *Verlinde* court upheld the GBI enhancement.

b. The *Verlinde* court interpreted section 12022.7(g) to bar *only* an enhancement for the injuries inflicted on the homicide victim, who obviously has suffered great bodily injury. The *Verlinde* court concluded that a defendant who engages in violent conduct that injures several persons, may be separately punished for injuring each of those persons, notwithstanding Penal Code section 654.

c. The *Verlinde* court stated that a fundamental objective of our penal justice system is that one's culpability and punishment should be commensurate with the gravity of both the criminal act undertaken and the resulting injuries. (*Verlinde*, *supra*, 100 Cal.App.4th at pp. 1168-1169.)

3. *People v. Weaver* (2007) 149 Cal.App.4th 1301

a. In *Weaver*, the defendant pled guilty to gross vehicular manslaughter while intoxicated and admitted the truth of a great bodily injury enhancement allegation.

b. The enhancement did not concern the subject of the manslaughter conviction, but rather, another victim who survived. Relying on *Verlinde* (above), the Court of Appeal upheld application of the enhancement.

c. The *Weaver* court said that the express language of section 12022.7, subdivision (a) does not limit its application to a specific victim of a felony offense. Rather, it applies to great bodily injuries sustained by "any person other than an accomplice." (§ 12022.7, subd. (a).) The *Weaver* court found section 12022.7's language "sufficiently broad to include persons other than the victim of a victim-specific felony offense who sustain great bodily injury during the defendant's commission of that offense. (*Id*. at p. 1330.)

d. Additionally, the Court of Appeal in *Weaver* said it is generally appropriate, and consistent with our criminal justice system, that a defendant be subject to greater punishment for committing an offense that causes injuries to multiple persons. (*Id*. at p. 1331.)

4. *People v. Julian* (2011) 198 Cal.App.4th 1524

a. The defendant was involved in an accident in which a mother (Terri) was killed immediately, one daughter (Amanda) died after being in a coma for several months, and a second daughter (Alexis) was badly injured but survived.

b. A jury convicted the defendant of two counts of vehicular manslaughter while intoxicated without gross negligence (§191.5, subd.(b)) based on one count for Terri's death and one count for Amanda's death. The defendant was charged with no substantive count as to Alexis, the surviving victim.

c. The jury also found true two great bodily injury enhancement allegations as to each manslaughter count.

(i) As to Terri, the two GBI enhancements were based on: 1) the coma Amanda suffered before she died, as §12022.7, subdivision (b), imposes a five-year enhancement for great bodily injury "which causes the victim to become comatose due to brain injury," and 2) Alexis's injuries.

(ii) As to Amanda, the two GBI enhancements were based on: 1) the death of mother Terri and 2) Alexis's injuries.

d. The trial court sentenced the defendant to prison for 12 years for Terri's manslaughter, consisting of the upper term of four years for the manslaughter itself, five years for Amanda's coma, and three years for Alexis's great bodily injury. The court also imposed a sentence for Amanda's manslaughter with the two three-year great bodily injury enhancements attached to that count. But to avoid punishing the defendant twice for Amanda's and Alexis's injuries, the court stayed that sentence under section 654, which prohibits multiple punishment for a single act or omission. (*Julian*, *supra,*198 Cal.App.4th at p. 1526.)

e. The Court of Appeal in *Julian* upheld the great bodily injury enhancements and the sentencing. It followed *Weaver* and *Verlinde* regarding imposition of the great bodily injury enhancement for the victim who survived (Alexis.) (*Julian*, *supra*, 198 Cal.App.4th at p. 1530.)

f. The Court of Appeal in *Julian* then looked that the injuries of the victim who died, Amanda. "The fact Amanda died from her injuries cannot, by itself, prevent those injuries from being used as an enhancement to Julian's punishment for Terri's death. Amanda's injuries were just as distinct from Terri's injuries as Alexis's injuries and under *Verlinde* and *Weaver* their separate and distinct nature permits the injuries to be used as an enhancement. To hold Alexis's injuries will support an enhancement but, because she died, Amanda's injuries will not, would permit a defendant, such as Julian, to benefit to some extent from the fact one of his multiple victims died rather than survived." (*Julian*, *supra*, 198 Cal.App.4th at pp. 1530-1531.)

g. The *Julian* court stated further, ""Moreover, the fact Amanda's fatal injuries led to a second distinct manslaughter conviction did not prevent the trial court from imposing a section 12022.7, subdivision (b) enhancement to Terri's manslaughter based on Amanda's injuries. Under section 654 Julian could not and was not punished twice for the fatal injuries Amanda suffered. As we have noted, although Amanda's fatal injuries were the basis for both the five-year enhancement imposed for Terri's death and the four-year upper term imposed for the second manslaughter conviction, the trial court properly stayed execution of the second manslaughter sentence under section 654. Thus, a broader interpretation of section 12022.7, subdivision (g) is not necessary to avoid dual punishment." (*Julian*, *supra*, 198 Cal.App.4th at pp. 1530-1531.)

5. *People v. Cook* (formerly cited at 222 Cal.App.4th 1)

a. The *Cook* case is the subject of the Supreme Court's review here. The case involved an automobile accident in which three persons were killed and a fourth person was seriously injured.

b. A jury found defendant guilty of three counts of gross vehicular manslaughter, one count for the each of the three persons who died. (§ 192, subd. (c)(1).) As to count one, the jury also found true three allegations that defendant personally inflicted great bodily injury. Two of the great bodily injury allegations related to the other two victims who died and were the subject of separate manslaughter convictions. The third great bodily injury enhancement related to the person who was injured but survived. This third person was not the subject of any other charge or conviction.

c. The sentencing range for section 192(c)(1) is 2-4-6 years. The trial court sentenced the defendant to an aggregate term of nine years eight months. It imposed the midterm of 4 years on count one and imposed the three-year GBI enhancement as to the surviving victim, and added one-third the midterm as to the other two manslaughter victims (1 year, 4 months respectively).

d. The Court of Appeal reversed the true findings on the section 12022.7 enhancements as to the other two manslaughter victims, and affirmed the all other respects.

e. The Court of Appeal agreed with *Verlinde*, *Weaver* and *Julian* that section 12022.7, subdivision (g) appears to allow a GBI enhancement as to other victims for whom the defendant was *not* convicted of manslaughter or murder, in other words a surviving victim.

f. However, the Court of Appeal in *Cook* disagreed with the *Julian* court's construction of section 12022.7 (g) to allow a GBI based on the death of other victims. The Court of Appeal in *Cook* court said section 12022.7(g) "would appear to mean what is clearly reads" – "an enhancement does not attach with regard to a victim of murder or manslaughter for which a conviction on the substantive count has been obtained." Thus, under the Court of Appeal's interpretation of section 12022.7(g), the fatal injuries of a separate manslaughter victim could not be used under GBI to enhance the conviction of another manslaughter victim.

6. <u>Hale v. Superior Court</u> (2014) 225 Cal.App.4th 268

a. In *Hale,* the defendant was involved in an accident in which three persons were killed. He was charged with three counts of vehicular manslaughter while intoxicated (§191.5, subd.(b)), one count for each person who died. Each of the three counts included two great bodily injury enhancement allegations under section 12022.7, one each for the other two deceased victims, for a total of six great bodily injury allegations. (*Hale, supra, at p. 270*.)

b. In a pretrial writ matter, the Court of Appeal ordered all of the enhancement allegations dismissed. The *Hale* court disagreed *with People v Julian* that a great bodily injury enhancement can be imposed on one manslaughter for injuries suffered by another, separately charged, manslaughter victim. (*Id*. at p. 274.)

c. "Great bodily injury is by definition inherent in a murder or manslaughter victim's injuries that result in death. Consequently, great bodily injury is necessarily proven when the victim's death is proven as an element of those offenses. By statutory command, a [great bodily injury] enhancement therefore 'shall not apply.' (§ 12022.7, subd. (g).) We must give effect to this plain language." (*Id.* at p. 275.)

d. The *Hale* court said that the purpose of the great bodily injury enhancement is not to maximize punishment "under every pleading artifice a prosecutor can devise." (*Id*. at p. 275.)

D. Supreme Court's Analysis

1. The Supreme Court in *Cook* said that the relatively early case of *Beltran, supra*, 82 Cal.App.4th 693, got it right when it said that that no great bodily injury enhancement can attach to a murder or manslaughter conviction. Later cases erred when they began to find exceptions to the command of section 12022.7, subdivision (g) that great bodily injury enhancements "shall not apply to murder or manslaughter." (*Cook*, *supra*, 60 Cal.4th at p. 935.)

2. "Subdivision (g) means what it says—great bodily injury enhancements simply do not apply to murder or manslaughter." (*Id*. at p. 935.)

3. As a result, the prosecution cannot enhance vehicular manslaughter convictions with great bodily injury enhancements. Instead, "[t]he prosecution can charge a defendant for each manslaughter the defendant committed and, if appropriate, for crimes committed against surviving victims, and the court can sentence the defendant for each crime against separate victims for which the defendant is convicted to the extent the sentencing laws permit." (*Id*. at p. 936.)

4. The cases discussed above that incorrectly interpreted section 12022.7 (g) argued that a defendant should be punished commensurately with the gravity of the criminal act, and more harshly than a defendant who only injures one person. But the Supreme Court here in *Cook* said the requirement to charge a defendant with separate crimes against separate victims, and permitting the court to sentence the defendant for those crimes, *does* result in a more severe punishment for a defendant who injures multiple persons. Here *in Cook*, "the defendant was convicted of three counts of vehicular manslaughter. The court sentenced the defendant to prison for the midterm of four years for one of the manslaughters, and consecutive terms of one year four months (one-third of the midterm) for the other two manslaughters. Presumably, if defendant had been charged with and convicted of a crime as to the surviving victim, the court could have imposed a consecutive sentence for that crime." (*Id*. at p. 936.)

5. The Supreme Court recognized that in cases of vehicular manslaughter, the increase in punishment for additional persons injured will be less than it would be under an interpretation permitting great bodily injury enhancements for other victims to attach to a manslaughter conviction. But this result is because the statutory punishment for vehicular manslaughter is relatively short and even shorter for additional victims. (*Id*. at pp. 936-937.)

6. As the Supreme Court explained using the *Cook* case, the vehicular manslaughter conviction was punishable by two, four, or six years. (§193, subd.(c)(1).) A consecutive sentence for additional convictions would be for one-third of the mid term of four years, or one year four months. (§1170.1, subd.(a).) One year four months is shorter than the three-year great bodily injury enhancement specified in section 12022.7, subdivision (a), and even more so than the longer enhancements specified in other subdivisions of that section, such as section 12022.7, subdivision (b)'s five-year enhancement for causing a coma. (*Id*. at p. 937.)

7. But the Supreme Court said that as to vehicular manslaughter, section 193, subdivision (c)(1), establishes what the Legislature has determined is the appropriate punishment for vehicular manslaughter, and section 1170.1, subdivision (a), establishes what the Legislature has determined is the proper way to sentence consecutively when there are multiple victims. (*Ibid*.)

8. "[T]he Legislature's purpose is not to maximize the punishment under any pleading artifice imaginable, but to impose the punishments it established by statute." (*Ibid.)*

9. **So the bottom line:** "We conclude that no great bodily injury enhancement can attach to a conviction for murder or manslaughter." (*Id*. at p. 938.)

10. As a result, the Supreme Court reversed the judgment of the Court of Appeal and remanded the matter to the Court of Appeal for further proceedings. It disapproved *Julian*, *Weaver* and *Verlinde* to the extent they are inconsistent with its opinion here in *Cook*.

II. *In re Art T.* (2015) 223 Cal.App.4th 335

Court of Appeal concludes 13-year-old suspect undergoing custodial interrogation unambiguously invoked his right to counsel, and the Court holds that a minor's age is a factor to be considered in evaluating whether invocation is clear and unambiguous.

A. *Arrest and Interview*

1. The juvenile (Art), who was 13-years old, was the focus of an investigation into the shooting of one victim and the wounding of two others outside a store. The shooting was captured on two surveillance cameras. Art was brought to the police station where three Los Angeles police detectives interrogated him. The interrogation was videotaped and subsequently transcribed, but as will be explained, only the transcription was before the court. At the outset, one of the detectives conducted a *Gladys R.* inquiry (1 Cal.3d 855) for the purpose of determining whether Art knew right from wrong.

2. It was not until page 21 of the transcript of the interrogation that the detective advised Art of his *Miranda* rights. Although the detective asked if Art understood each of those rights, the detective never secured an express waiver of the rights.

3. The detective started talking to Art. He showed Art the video taken of the shooting and said, "That, my friend, would be you." Art denied any complicity in the shooting and denied he was the person in the video. At page 30 of the transcript, Art said, "Could I have an attorney? Because that's not me." The detective responded, "But – okay. No, don't worry. You'll have the opportunity."

4. The interrogation continued. The Court of Appeal stated: "In the 32 pages of transcript memorializing the interrogation between the time Art asked for an attorney and the time he confessed, Art continued to deny any involvement in the shooting. He also made multiple requests to speak with his mother and girlfriend, which were denied."

5. Art made his first incriminating statement on page 63 of the transcript, and eventually admitted the shooting.

6. The People filed a Welfare and Institutions Code section 602 petition alleging that Art committed one count of murder and two counts of attempted murder.

B. *Motion to Suppress*

1. Art filed a motion to suppress all statements. When asked by the juvenile court to "frame the issue," Art's trial counsel argued that Art's statement "Could I have an attorney? Because that's not me," invoked his right to counsel and that the detectives improperly continued to question him.

2. Neither the prosecution nor defense presented any testimonial evidence at the hearing. Although the police videotaped the interrogation, the juvenile court had only the written transcript. The court, which pointed out that it was relying on a "cold transcript," denied the motion.

3. At the conclusion of the adjudication hearing, the juvenile court sustained one count of first-degree murder and two counts of attempted murder.

C. Court of Appeal Analysis

1. General Interrogation Principles Reviewed by the Court of Appeal

a. Even where an accused waives his Miranda rights, once he assert his right to counsel, the interrogation must cease until an attorney is present. (*Miranda v. Arizona* (1966) 384 U.S. 436, 474.)

b. Subsequent statements are presumed involuntary and inadmissible if made without a lawyer. Questioning can only continue where the accused initiates further communication. (*Edwards v. Arizona* (1981) 451 U.S. 477, 482, 485.)

c. However, questioning does not need to cease where the request for counsel is ambiguous or equivocal. It is not enough that a suspect makes a reference to attorney in which "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel" because in that circumstance "our precedents do not require the cessation of questioning." (*Davis v. United States* (1994) 512 U.S. 452, 459.) Moreover, the United States Supreme Court declined to adopt a rule that would require officers to ask clarifying questions where the request for a lawyer was ambiguous or equivocal. It held instead that officers have no obligation to stop questioning. (*Id*. at pp. 454-460.)

d. The statement by defendant in *Davis* "maybe I should talk to a lawyer" was considered equivocal. (*Davis*, supra, 512 U.S. at p. 462.)

. *2. Miranda Principles Applied to Juveniles*

a. The United States Supreme Court has held that in determining whether a juvenile has knowingly and voluntarily waived his rights under *Miranda*, the court should consider the totality of the circumstances surrounding the confession, including the juvenile's age. (See *Fare v. Michael C*. (1979) 442 U.S. 707, 720–723.)

b. The Supreme Court in *Fare* said "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Id*. at p. 725.)

c. The Supreme Court in *Fare* specifically addressed the "special concerns" that must be considered with juveniles, holding that the juvenile court has the expertise to "take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved." (*Fare*, *supra*, 442 U.S. at pp. 725–726,

d. The Supreme Court in *Fare* said this approach gives flexibility to police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation. (*Ibid.*)

3. Request for Attorney Applied to Juveniles

a. The California Supreme Court held in *People v. Nelson* (2012) 53 Cal.4th 367, that the subjective "totality of the circumstances" test does not apply to determine whether a juvenile suspect, after waiving his *Miranda* rights, intended to invoke his right to counsel. (*Id*. at p. 384.) Rather, the objective test of *Davis*, *supra*, 512 U.S. 367, must apply to such a juvenile. (*Id*. at p. 385.)

b. While the *Nelson* case was pending, the United States Supreme Court decided *J.D.B*. v. *North Carolina* (2011) 131 S.Ct. 2394, in which the high court considered whether the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis. The Supreme Court concluded that a 13-year-old seventh grader who was questioned by two police officers with two school administrators present in a closed school conference room was in custody for the purpose of application of *Miranda*. (*Id*. at pp. 2398-2399.)

c. The Supreme Court in *J.D.B*. held that, while the question of custody for *Miranda* purposes is an objective inquiry, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. . . . It is, however, a reality that courts cannot simply ignore." (*J.D.B*., *supra*, at p. 2406, fn.omitted.) The Supreme Court in *J.D.B.* stated that the pressures of custodial interrogation are "more troubling" when the subject of custodial interrogation is a juvenile. *(Id*. at p. 2401.)

d. The Supreme Court in *J.D.B.* said "the same 'wide basis of community experience' that makes it possible, as an objective matter, 'to determine what is to be expected' of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning." (*J.D.B*., *supra*, 131 S.Ct. at p. 2404.)

e. The Court of Appeal in *Art. T*. applied those same considerations to the type of objective inquiry a court should make when considering whether a juvenile, after waiving *Miranda* rights, has invoked his or her right to an attorney. The *Art T*. court concluded: "We find that, as in the custody context addressed in *J.D.B*., a court should consider a juvenile's age for purposes of analyzing whether the juvenile has unambiguously invoked his or her right to counsel."

f. The Court of Appeal in *Art. T*. stated: "Applying the same standard to the context of a post-waiver invocation of a juvenile's right to counsel, we find that this analysis requires consideration of whether a reasonable officer in light of the circumstances known to the officer, or that would have been objectively apparent to a reasonable officer, including the juvenile's age, would understand the statement by the juvenile to be a request for an attorney."

D. *Application in Art. T.*

1. The Court of Appeal concluded In this case: "The detectives knew at the time of the interrogation that Art was 13 and an eighth grade student in middle school. While neither the juvenile court nor this court has had the benefit of viewing the videotape for the purpose of considering the circumstances of Art's statements to the officers in considering the motion to suppress, we find that Art's age of 13 and middle school level of education, combined with his repeated requests for his mother, would have made his lack of maturity and sophistication objectively apparent to a reasonable officer. In this context, Art's statement after viewing the video of the shooting, "Could I have an attorney? Because that's not me," was an unequivocal request for an attorney

2. All statements made by Art to the officers after he requested an attorney were presumed involuntary and inadmissible, and should have been suppressed.

3. During the adjudication hearing, the juvenile court viewed the video tape of the shooting. At the conclusion of the adjudication hearing, the juvenile court stated that it could not determine from the video whether Art was the person shooting. The juvenile court concluded however, that based on the totality of the circumstances, which included Art's confession, that " 'it would be hard-pressed to come to a different conclusion,' " and sustained the petitions.

4. Because the confession was relied on by the juvenile court and was an essential factor in its sustaining of the petition, the error in admitting Art's confession was not harmless beyond a reasonable doubt, and the jurisdictional findings and dispositional order were reversed.

5. Moreover, the Court of Appeal here in *Art. T*. noted, the following statements have been found sufficiently clear to invoke the accused's right to counsel: "Can I have a lawyer?"; "Can I get an attorney right now?"; "Can I call my attorney?" The Court of Appeal stated: "Therefore, even if this request had been made by an adult, we believe it would have been an unequivocal request for counsel.

NEXT WEEK: PACKAGE PLEAS AGREEMENTS FOR MULTIPLE DEFENDANTS AND AGGRAVATED KIDNAPPING AS APPLIED TO HOME INVASION ROBBERIES

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