POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit toward California Criminal Law Specialization: -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider #172.

Week Of	Topic	Guest	General
May 14, 2018	Voluntary Intoxication & Imperfect Self-Defense	DAG Amit Kurlekar	30 min

This week's accompanying P&A video does three things:

First, it discusses the California Supreme Court decision in *People v. Soto* [2018 WL 1999342] with the deputy AG who argued the case in the Supreme Court. More detail of the case is provided in the handout.

Not included in the handout, however, the video discusses generally the process by which the Supreme Court selects the cases it will take up on review, and the process by which the Supreme Court opinion is drafted.

The video also includes portions of the actual argument that occurred in this *Soto* case to illustrate the kind of questioning that occurs at oral argument.

This week's P&A discusses The California Supreme Court decision in *People v. Soto* [2018 WL 1999342]. In this homicide case, the People proceeded on a theory of express malice murder. The defendant claimed he killed in imperfect self-defense. The issue before the Supreme Court: Did the trial court err in refusing to instruct the jury that it could consider voluntary intoxication on the question of whether the defendant believed he needed to act in self-defense? The Supreme Court majority said no. Evidence of voluntary intoxication is not admissible on the question of whether a defendant believed it was necessary to act in self-defense.[1]

Penal Code section 29.4

This statute limits the use of evidence of voluntary intoxication as follows:[2]

(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or *harbored express malice aforethought*.

(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

I. Factual and Procedural Background: Trial Court

The Supreme Court quoted certain facts as stated in the Court of Appeal opinion (*People v. Soto* (2016) 248 Cal.App.4th 884) so this P&A does likewise, with additional facts from the Court of Appeal opinion.

1. The defendant, looking for a former employer and armed with a knife, kicked in the front door of Israel Ramirez's apartment. The men did not know each other. Ramirez and his partner, Patricia Saavedra, were sitting on the living room couch watching television. Their young son was sitting on the floor about two feet away.

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[1] Justice Liu and Justice Thompson (sitting by assignment) dissented in the reasoning of the majority but concurred that the exclusion of evidence of voluntary intoxication was harmless.

[2] The P&A of April 16, 2018 was devoted exclusively to evidence of voluntary intoxication. The *Soto* opinion had not yet been issued by the Supreme Court as of that date.

2. The defendant started walking slowly towards Ramirez and Saavedra while looking from side to side with his hand in his right pocket. Ramirez asked the defendant what he wanted, and the defendant kept asking Ramirez if he was alone. When the defendant reached the couch, he stabbed Ramirez in the neck. Ramirez got up and went into the kitchen. The wound to the neck had not penetrated any large blood vessels. The defendant followed Ramirez into the kitchen, while Saavedra grabbed her son and hid in a nearby room. She could hear the two men "grabbing each other."

3. Saavedra testified at trial that the defendant stabbed Ramirez first. Her testimony was supported by evidence that a drop of blood was found on the floor several inches in front of the couch where Ramirez was sitting. DNA testing of the blood showed it matched a sample of Ramirez's DNA. Ramirez died from wounds incurred in the struggle with the defendant. He suffered 10 stab wounds; the most critical was a stab wound to the upper chest, which punctured the heart.

4. The defendant testified that he had never seen Ramirez or Saavedra before the night of the offense. In the three or four-day period before the offense, he had been living on the street drinking alcohol and using methamphetamine. After kicking in the door, he saw the woman go into another room and close the door and Ramirez went into the kitchen. The defendant testified that he started to leave, but while in the hallway, Ramirez approached him with a knife, "swinging and jabbing the knife."

5. The defendant said he was scared for his life. He put up his hands to defend himself but Ramirez "kept coming at him swinging and jabbing the knife." The two men fought each other with their knives in the hallway and in the kitchen. Defendant testified that he ran into the hallway outside the apartment, but Ramirez followed him. Ramirez was swinging the knife at him, and the defendant was moving backwards trying to block the knife when he fell backwards. Ramirez landed on top of him and tried to stick his knife in the defendant's chest. The defendant said that, while holding Ramirez's arm, he began stabbed Ramirez with his other hand. Ramirez collapsed on top of him. The defendant left the scene.

6. When the police made contact with the defendant several hours later, he appeared intoxicated and was suffering from two puncture wounds and a laceration. He tested positive for methamphetamine, marijuana and opiates.

7. The defendant was charged with first degree murder and first degree burglary, with a weapon use enhancement alleged as to both counts. He claimed he acted in self-defense. "Particularly relevant here, he also claimed he was guilty of at most voluntary manslaughter because he killed in what is called unreasonable (or, as courts sometime refer to it, imperfect) self-defense; that is, he actually believed he needed to act in self-defense even if that belief was unreasonable. (Citation.)" (p.*3.)

8. In addition to instructions on first degree murder, the court instructed the jury on second degree murder, based on either implied or express malice, as well as on voluntary manslaughter, based on the doctrine of unreasonable self-defense. (p.*3.)

9. “The court also instructed the jury with CALCRIM No. 625, as adapted to the case: “You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. Voluntary intoxication can only negate express malice, not implied malice. ... You may not consider evidence of voluntary intoxication for any other purposes.” (p.*3.)

10. The jury acquitted defendant of first degree murder, but it found him guilty of second degree murder and first degree burglary. It also found the weapon use allegation true as to both counts. (p.*3.)

II. The Court of Appeal Decision

1. On appeal, the defendant contended that the trial court erroneously prohibited the jury from considering evidence of voluntary intoxication on the question of whether he believed he needed to act in self-defense.

2. The Court of Appeal agreed, stating: “Penal Code section 29.4 expressly allows for consideration of voluntary intoxication with respect to express malice. Because an actual but unreasonable belief in the need for self-defense negates express malice, Penal Code section 29.4 makes evidence of voluntary intoxication relevant to the state of mind required for imperfect self-defense. We therefore hold the trial court erred by precluding the jury from considering evidence of defendant's voluntary intoxication with respect to his claim of imperfect self-defense.” The Court of Appeal, however, also found the error harmless and affirmed the judgment.

III. The Applicable Principles, as quoted by the Supreme Court

1. “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.” (§ 187, subd. (a).) “Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (§ 188.)

2. Implied malice has both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. The mental component is the requirement that the defendant knows that his conduct endangers the life of another and acts with conscious disregard for life. (p.*3, quoting *People v. Watson* (1981) 30 Cal.3d 290, 300.)

3. Voluntary manslaughter, “a lesser included offense of murder, is an unlawful killing without malice. . . . Two factors may preclude the formation of malice and reduce murder to voluntary manslaughter: heat of passion and unreasonable self-defense.” (*People v. Elmore* (2014) 59 Cal.4th

121, 133.) (p.*4.)

4. "Self-defense, when based on a reasonable belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime. [Citations.] A killing committed when that belief is unreasonable is not justifiable. Nevertheless, 'one who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.' " (*People v. Elmore*, *supra*, 59 Cal.4th at pp. 133-134.) (p.*4.)

5. "A person who actually believes in the need for self-defense necessarily believes he is acting lawfully. Because express malice requires an intent to kill unlawfully, a killing in the belief that one is acting lawfully is not malicious. The statutory definition of implied malice does not contain similar language, but we have extended the imperfect self-defense rationale to any killing that would otherwise have malice, whether express or implied. A defendant who acts with the requisite actual belief in the necessity for self-defense does not act with the base motive required for implied malice." (*People v. Elmore*, *supra*, 59 Cal.4th at p. 134, internal citations omitted.)

IV. Supreme Court's Analysis

A. Defendant's Argument

1. The defendant relied on the doctrine of unreasonable self-defense at trial. He argued in the Supreme Court that by giving CALCRIM No. 625, the trial court improperly limited the jury's consideration of his evidence of voluntary intoxication to the question of whether he intended to kill, and erred in prohibiting the jury from considering the evidence on the question of whether he actually believed he needed to act in self-defense. (p.*4.)

2. The defendant argued that because express malice requires an intent to kill "unlawfully" (Pen. Code, § 188), the Court of Appeal correctly held that section 29.4 permits evidence of voluntary intoxication on the question of whether he actually believed in the need for self-defense, that is, whether he intended to kill *unlawfully.* (p.*4.)

B. The Supreme Court's Response: The Text of the Penal Code section 29.4

1. The Supreme Court first looked at the text of Penal Code section 29.4, which it said, "in short, does not clearly support defendant's proposed reading of section 29.4 [i.e., that the statute permits evidence of voluntary intoxication on the question of whether he actually believed in the need for self-defense.]" (p.*5.)

2. By its terms, Penal Code section 29.4, subdivision (b) [see statute above] permits evidence of voluntary intoxication "solely" on the question of whether the defendant "formed a required specific intent," "premeditated," "deliberated," or "harbored express malice aforethought." (p.*5.)

3. Implied malice does not require an intent to kill. Because "harbored *implied* malice" does not appear in section 29.4's enumerated list, the statute prohibits evidence of voluntary intoxication to establish that a defendant had no implied malice when he killed. (p.*5.)

4. "The primary difference between express malice and implied malice is that the former requires an intent to kill but the latter does not. And reading the reference to express malice in context, it is apparent the Legislature was particularly concerned with this 'required specific intent' (§ 29.4, subd. (b)) component of express malice. By contrast, the absence of a belief that the killing was necessary for self-defense is not a 'required specific intent.' Nor is it a matter unique to cases of express malice; the absence of such a belief is equally relevant in cases of implied malice, which are excluded from the reach of section 29.4". (p.*5, internal citations omitted.)

5. Finding no textual support for the defendant's argument, the Supreme Court next turned to the history of the statute, which was formerly Penal Code section 22. (p.*5.)

C. The Supreme Court's Response: The Legislative History of section 29.4

1. In 1995, when former Penal Code section 22 was amended and renumbered to the current section 29.4, the Legislature rejected the application of voluntary intoxication to implied malice and limited it solely – when charged with murder – to whether a defendant premeditated, deliberated or harbored express malice aforethought. (p.*5.)

2. A separate concurring and dissenting opinion by Justice Mosk in *People v. Whitfield* ((1994) 7 Cal.4th 437, was influential in the amendment that resulted in the current version of Penal Code section 29.4. (p.*5.)

3. In *Whitfield*, Justice Mosk noted the policy that voluntary intoxication is permitted as to specific intent crimes, but not general intent crimes. As Justice Mosk stated, "Evidence of voluntary intoxication may be introduced to negate an element of offenses requiring relatively complex cogitation—a mental function integral to many crimes that contain a 'definition [that] refers to defendant's intent to do some further act or achieve some additional consequence', because alcohol can interfere with such intent." (*Whitfield*, *supra*, 7 Cal.4th at p. 463, internal citation omitted.)

4. Justice Mosk stated that voluntary intoxication cannot exculpate implied-malice murder: "[A]lcohol intoxication naturally lends itself to the crime's commission because it impairs the sound judgment or lowers the inhibitions that might stop a sober individual from committing a highly dangerous act leading to another's death." (*Whitfield*, *supra*, 7 Cal.4th at p. 463.)

5. The Supreme Court here in *Soto* stated: "Justice Mosk's reasoning in *Whitfield* strongly supports the conclusion that section 29.4 does not permit evidence of voluntary intoxication on the question of whether the defendant believed it was necessary to act in self-defense. Unlike the mental state of intent to kill, a belief that it is necessary to kill in self-defense does not involve the ' "intent to do some further act or achieve some additional consequence." ' (*Whitfield*, *supra*, 7 Cal.4th at p. 463.) Rather,

it involves judgment. Intoxication can distort a person's perception of the unfolding circumstances, and thereby impair the sound judgment that is needed when deciding to use lethal force in self-defense. Accordingly, voluntary 'intoxication naturally lends itself to the crime's commission because it impairs the sound judgment or lowers the inhibitions that might stop a sober individual' from killing a perceived assailant. (*Ibid*.) The mental state for unreasonable self-defense is precisely what Justice Mosk argued voluntary intoxication should not negate." (p.*6.)

6. The Supreme Court here in *Soto* stated: "By prohibiting evidence of voluntary intoxication to negate implied malice, the Legislature apparently agreed with Justice Mosk that a defendant who acts with conscious disregard for life should be punished for murder regardless of whether voluntary intoxication impaired his or her judgment. Therefore, as the Court of Appeal [in this *Soto* case] seemed to acknowledge, section 29.4 prohibits evidence of voluntary intoxication to prove that defendant did not harbor implied malice for another reason—because he actually but unreasonably believed in the need to act in self-defense." (p.*6.)

7. The Supreme Court in *Soto* then turned to *express malice*, because the defendant here was charged with an express malice killing, not an implied malice killing. It stated: "The question here is whether the Legislature intended a different result in cases of unreasonable self-defense when used to negate express malice. The statutory background reveals no such purpose. Justice Mosk's reasoning applies to unreasonable self-defense when it negates express malice, too. A belief that it is necessary to kill in self-defense is still a judgment that voluntary intoxication will impair, whether used to negate implied or express malice." (p.*6.)

8. The Supreme Court in *Soto* stated further: "The inclusion of both "specific intent" and "express malice" in section 29.4, subdivision (b), suggests that the statute is best understood as not allowing evidence of voluntary intoxication to establish unreasonable self-defense and negate the unlawful aspect of express malice murder" (p.*6.)

9. The Supreme Court noted the defendant's argument that nothing in the legislative history indicates that the Legislature specifically considered the unreasonable self-defense doctrine. The Supreme Court said this circumstance is not surprising because "the doctrine is rather esoteric." (p.*7.) However, the Court stated: "But it is clear what the Legislature intended to achieve when it amended former section 22: to prohibit voluntary intoxication from being an excuse for poor judgment when someone kills. In effect, Justice Mosk's dissent in *Whitfield*, and the Legislature in adopting that dissent, say to a criminal defendant, 'If you voluntarily choose to become intoxicated and then kill someone, you may not claim that you were so intoxicated you were unaware your actions exhibited a conscious disregard for life when you killed, although you may claim you were too intoxicated to intend to kill or premeditate or—for purposes of the felony-murder rule—have the specific intent to commit the underlying felony.'[3] Similarly, [Justice Mosk's] dissent, and the Legislature, also say to a

[3] As stated in our April 16, 2018 P&A on voluntary intoxication, as to first degree murder, evidence of voluntary intoxication is admissible solely on the issue of whether the defendant premeditated, deliberated or harbored express malice aforethought (Pen. Code, § 29.4) and as to felony murder, whether the defendant had the intent

criminal defendant, 'If you voluntarily choose to become intoxicated and then kill someone, you may not claim that you were so intoxicated you were unaware your victim posed no threat to you when you killed, although you may claim you were too intoxicated to intend to kill or premeditate or have the specific intent to commit some other felony.' " (p. *7.)

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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to commit the underlying felony. Neither intent to kill, deliberation, premeditation, nor malice aforethought is needed as to felony murder. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140-1141.)