

**Court of Criminal Appeals**  
**October 22, 2014**

**Aekins v. State of Texas**

No. PD-1712-13

Case Summary written by Chase Goetz, Staff Member.

The following opinion was delivered by Cochran, J., joined by Meyers, Womack, Johnson, and Alcala, JJ.:

Jessica Parnell (a pseudonym) agreed to babysit Amanda Aekins children, on the condition that Donald Aekins, Amanda's husband, would not be present (Jessica based this request on previous interaction with Donald, who was flirtatious toward her, kissed her neck, and made sexual comments toward her). When Jessica arrived, Donald was present, but Amanda assured Jessica that he would soon be leaving. After Amanda left, Donald remained at the house with Jessica. Later, Jessica was called into the Aekins's bedroom to bottle feed the baby. After Jessica entered the bedroom, Donald closed and barred the door, approached her, climbed on her, and removed her pants. Against her will, he then performed oral sex on her, and penetrated her vagina with his fingers. Donald was charged with three counts: (1) penetration of Jessica's female sexual organ with his finger; (2) penetration of her female sexual organ with his mouth and/or tongue; and (3) contacting her female sexual organ with his mouth. A jury convicted him of all three counts. Donald appealed, arguing that convictions on count 2 and 3 violate the Fifth Amendment's prohibition on double jeopardy, because his contact and penetration—via his mouth—constituted a single criminal act. The court of appeals agreed, vacating count 3's judgment. The State filed a petition for discretionary review, which was granted.

Issues: Did the court of appeals err in determining: (1) During sexual assault, contact is “incident to and subsumed by” later penetration; and (2) the Fifth Amendment’s guarantee against double jeopardy prevents convictions that covered by the doctrine of subsumed acts?

The Supreme Court has stated that the Fifth Amendment protection against double jeopardy protects against multiple punishments for the same offense. To determine whether criminal acts fall under the doctrine of subsumed acts (also called the merger doctrine), the Texas Court of Criminal Appeals relied on *Blockburger v. United States*, 284 U.S. 299 (1932). *Blockburger* provides two tests: (1) whether each criminal act is separate, distinct, and separated by time; and (2) whether the each criminal act requires a unique proof of fact. However, the

Supreme Court has also stated that circumstances may arise where the “same” acts may both be punished—or “different” acts may not be punished—depending on legislative intent. Here, because Donald’s oral contact and penetration are considered part of a continuing sexual assault resulting in penetration, and proof of contact is necessary to establish proof of penetration, these convictions may not be separated under *Blockburger*. Additionally, in Texas, the legislature intends to punish criminal acts committed as part of a continuing sexual assault resulting in penetration as one offense; it has not authorized “stop-action” prosecutions that would permit multiple punishments. As such, the judgment of the court of appeals was affirmed.

Keller, P.J., joined by Price, Keasler, and Hervey, JJ., concurring:

The concurring judges refused to join based on the test utilized by the majority. The majority’s test was considered dangerously close to the “same conduct” analysis rejected by the Supreme Court in *United States v. Dixon*, 509 U.S. 688 (1993). The proper test is whether the offenses are the same with respect to their elements, and allow the same unit of prosecution. If the offenses are from the same section of the penal code, they are presumed to violate the same statutory provision and, therefore, have the same elements. Regarding the unit of prosecution, the conduct must be distinct, which may be determined through an activity’s proscription in separate subsections.

Here, the conviction on count 3 was prohibited by double jeopardy. The “elements” portion of the test was satisfied because the counts were taken from the same penal section. Despite the activity’s proscription in multiple subsections, the “units” portion of the test was satisfied because penetration necessarily included contact, and was the only instance of oral sex.

Keasler, J., joined by Keller, P.J., and Hervey, J., concurring:

This concurring opinion was concerned with the majority’s use of “impulse” when determining double jeopardy. The majority misconstrued the *Blockburger*’s use of impulse. Here, the majority focused less on the legislative intent of the penal section, instead focusing on its interpretation of the facts. Additionally, the majority’s use of impulse bears a remarkable resemblance to the long-rejected “carving doctrine.” In short, the majority does not provide enough guidance on how this new “impulse theory” is intended to work in double jeopardy cases.

***State v. Copeland***

No. PD-1802-13

Case Summary written by Theresa Golde, Staff Member.

ALCALA, J., delivered the opinion of the Court in which KELLER, P.J., PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and COCHRAN, JJ., joined. MEYERS, J., filed a dissenting opinion.

This case arises out of a vehicular search following a traffic stop. Deputy Garza (“the deputy”) followed a sport utility vehicle (“SUV”) after observing the SUV stop at a house that was under investigation for illegal-narcotics activity. The SUV was pulled over after the driver committed a traffic violation. The driver, Wayne Danish (“Danish”), was asked to step out of the vehicle, at which point he was questioned and asked for consent to have the SUV searched. Danish agreed to the search, but his passenger, Shirley Copeland (“Copeland”), the appellee, refused to allow the search. Danish and Copeland told the deputy they had a common law marriage. Danish consented to the search a second time, despite Copeland’s continued refusal. Two pills, identified as Tramadol, were found, and Copeland was thereafter arrested and charged with a misdemeanor—possession of a dangerous drug.

Copeland filed a motion to suppress evidence claiming a violation of her constitutional rights. She had two bases in challenging legality of the search. First, she contended that the search was unlawful because despite the consent given by one person who had authority to consent—Danish, the vehicle’s owner—if that consent is refused by someone of equal authority—herself, the common-law spouse—then such consent is not valid. Second, she contended that the extended detention by the deputy invalidated the search. At the hearing, the parties disputed three arguments: (1) Copeland’s standing to contest the search based on her common law marriage, (2) Copeland’s authority to refuse consent to search, and (3) whether the detention before the search of approximately twenty minutes amounted to “an unreasonable amount of time.” Holding in favor of Copeland by granting the motion to suppress, the trial court determined that Copeland did have standing as the common-law spouse and that Copeland’s refusal to allow the deputy to search the SUV did negate Danish’s consent. With regard to the third argument, however, no findings of fact or conclusions of law were made.

The State appealed, and the court of appeals upheld the trial court’s holding granting the motion to suppress. The issue regarding the unreasonableness of the detention length was not addressed. A petition for discretionary review was then filed with the Court of Criminal Appeals, in which the Court reversed the decision of the appellate court and held that *Georgia v. Randolph*, 547 U.S. 103 (2006) was improperly applied by the trial court. Accordingly, the Court remanded the case to the court of appeals for a determination of whether an alternative basis existed to uphold the trial court’s ruling.

**Issue:** The Court of Criminal Appeals identified an area in which there may have been a procedural default by the State. The issue on remand was therefore

whether procedural default occurred with regard to Copeland's argument of an unreasonable detention length.

On remand, the court of appeals failed to address this issue. Instead, the court addressed an alternative basis for a finding of procedural default—the State, operating without a warrant, had not met its burden of proof with regard to showing that Danish's consent was made freely and voluntarily. The court determined that the State procedurally defaulted at the trial court by not providing adequate evidence of Danish's free and voluntary consent. Even if no procedural default occurred at the trial court, however, the court of appeals still determined that a default occurred on appeal because the State's brief was silent on the voluntariness of the consent. Thus, the court of appeals reaffirmed the trial court's ruling on the motion to suppress.

The State again petitioned for discretionary review, and the Court of Criminal Appeals held that it was error for the appellate court to find a procedural default with regard to the voluntariness of the consent. The Court determined that evidence was introduced to show that Danish freely and voluntarily consented. Yet, “even if the State had not presented evidence that Danish's consent was freely and voluntarily made, the State could not be faulted for that in light of the fact that Copeland's motion to suppress never asserted that the search was illegal based on a lack of valid consent from Danish, nor was that treated as a disputed issue at the suppression hearing.”

Furthermore, the Court held that the court of appeals erred in determining that the State procedurally defaulted because of its inadequate briefing. The Court emphasized: “Copeland never asserted any legal theory challenging the voluntariness of Danish's consent, and, therefore, if the State had not presented arguments with respect to that theory in its appellate brief, then that omission would not be a basis for finding procedural default.” Consequently, the Court remanded the case to the appellate court again for a determination of the original issue regarding the unreasonableness of the detention length.

**MEYERS, J., dissenting.**

The dissent disagrees that the court of appeals erred in finding a procedural default on the voluntariness of the consent. Judge Meyers believes that the State did not meet its burden of proof to show that the consent was freely and voluntarily made. Thus, the State did procedurally default, and the court of appeals decision should have been affirmed. According to the dissent, the majority's decision is “just wasting judicial resources by trying to avoid the correct conclusion that the evidence was validly suppressed.”