

THIS WEEK:

- **Motions for New Trial; Newly Discovered Evidence**
- **Habeas Corpus; Merger**
- **Waiver of Right to Appeal; Waiver of Right to Petition for Habeas Corpus**

Motions for New Trial; Newly Discovered Evidence

Jackson v. State, S18A1438 (12/10/18)

Appellant was convicted of malice murder and other offenses. The evidence, briefly stated, showed that McCain drove appellant and Jackson to the victim's house. There was a house party going on at the time. Appellant and Jackson went into the house and one of them shot the victim. McCain then picked them up and drove off. The defense presented the testimony of Adams, who claimed that he saw Jackson (carrying a gun) and McCain, but not appellant, walking up the street by the victim's house on the night of the shooting.

Appellant contended that the trial court erred in denying his motion for new trial based on newly discovered evidence. The Court noted that under *Timberlake v. State*, 246 Ga. 488, 491 (1) (1980), a defendant must meet the following six requirements in order to secure a new trial: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that he did not acquire it sooner; (3) the evidence is so material that it probably would produce a different verdict; (4) the evidence is not merely cumulative; (5) the affidavit of the witness himself has been procured or its absence accounted for; and (6) impeaching the credibility of a witness will not be the only effect of the evidence.

Appellant's newly discovered evidence was the testimony of McGlotha, who stated that he saw Jackson and McCain enter the house, heard gunshots about five minutes later, and then saw two men wearing the same clothes that Jackson and McCain had been wearing "running after" the victim. McGlotha testified that he did not see appellant at the victim's house that night. Appellant testified at the hearing that, although he had known McGlotha for more than a decade, he did not realize McGlotha had been at the scene of the shooting until the two were placed in the same jail dorm subsequent to trial. Trial counsel testified at a hearing on the motion for new trial that he was not familiar with McGlotha.

The Court, pretermitted whether McGlotha's testimony was cumulative, found that the trial court did not abuse its discretion in denying the motion for new trial. Implicit in the trial court's evaluation of the diligence used to procure McGlotha's testimony was a finding that one of two things were true: either (1) McGlotha actually was present near the scene of the crime on the night in question, in which case appellant could have secured his presence for trial had he exercised proper diligence; or (2) McGlotha was not present at the scene as he claimed and thus his testimony was not credible. The Court held that the finding that the defense would have discovered McGlotha was a witness in time for trial had he actually been present at the scene was not an unreasonable one, given McGlotha's testimony that he stood by the house where the shooting took place talking to "a girl" before and after Jackson and McCain approached him and that other people were going in and out of the house and congregating in the yard. And a finding that a putative "new" witness

could have been identified prior to trial through other witnesses known to the defense is a basis for denying a motion for new trial premised on new evidence. Furthermore, the Court stated, if testimony is not credible, it is not so material that it would probably produce a different verdict. Therefore, the Court concluded, the trial court did not abuse its discretion in rejecting McGlotha's testimony as the basis for a new trial.

Habeas Corpus; Merger

Johnson v. Williams, S18A1311 (12/10/18)

Appellant was convicted in 2006 of armed robbery, aggravated assault with intent to rob, and unlawful possession of a firearm during the commission of a crime. His conviction was affirmed on direct appeal. *Johnson v. State*, 285 Ga. App. 590 (2007). Thereafter, he filed a habeas corpus petition alleging that the aggravated assault with intent to rob merged with the armed robbery of which he was convicted, and he should not have been separately convicted of the aggravated assault. The habeas court denied his petition, appellant appealed and the Court granted him a certificate of probable cause.

Initially, the Court noted, merger claims like this one are cognizable in habeas proceedings. The Court then stated that it applies the required evidence test adopted in *Drinkard v. Walker*, 281 Ga. 211, 217 (2006) to determine if crimes arising from the same conduct merge. Under the *Drinkard* test, to decide whether there are two offenses or only one, the Court must determine whether each provision requires proof of a fact which the other does not. Here, the Court found, the record of appellant's trial showed that the aggravated assault and armed robbery occurred at the same time and resulted from the same conduct. Appellant entered a retail store and held the victim shopkeeper at gunpoint, took money from the cash register, and fled from the store. Thus, the facts establishing the elements of armed robbery also established the elements of aggravated assault with intent to rob, and the two offenses merged. Further, although there was a brief interval when appellant pulled the gun away from the victim, swept the gun under the counter, and then pointed the gun back at the victim, this was not sufficient to establish two distinct acts and authorize two separate convictions.

Thus, the Court held, because the aggravated assault with intent to rob merged with the armed robbery, appellant should not have been convicted and sentenced for both offenses. His conviction for aggravated assault with intent to rob is void, and it must be set aside. Accordingly, the judgment of the habeas court was reversed, and the case remanded to the habeas court.

Waiver of Right to Appeal; Waiver of Right to Petition for Habeas Corpus

Rawles v. Holt, S18A1334 (12/10/18)

Appellant was convicted of 6 counts of armed robbery, 12 counts of aggravated assault, 6 counts of kidnapping, 6 counts of false imprisonment, and 6 counts of possession of a weapon during the commission of a crime. The trial court merged the 6 counts of aggravated assault into the armed robbery convictions and sentenced him to serve 25 years followed by a term of probation. Following a motion for new trial, the State and appellant reached a plea agreement, which included appellant waiving his "right to appeal ... and be[ing] re-sentenced by th[e] court to a lesser sentence."

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 18, 2019

Issue 3-19

Two years after resentencing, appellant filed a habeas petition alleging numerous substantive errors. The habeas court dismissed the petition, finding that as part of the plea deal, appellant waived his right to petition for a writ of habeas corpus. The Court granted appellant a certificate of probable cause.

The Court, relying on *Rush v. State*, 276 Ga. 541 (2003), stated that with regard to the waiver of the right to appeal, the fact that a waiver of the right to appeal is voluntary, knowing, and intelligent may be shown in two ways. First, a signed waiver may indicate that the defendant understands the right he is waiving. Second, and more important, detailed questioning of defendant by the trial court that reveals that he was informed of his right to appeal and that he voluntarily waived that right is sufficient to show the existence of a valid, enforceable waiver. The same test is to be applied in determining a waiver of the right to petition for habeas corpus. Thus, the State must show by one or both of these means that appellant specifically waived his right to file a habeas corpus petition.

Here, the Court found, there was no written waiver, and the colloquy between the trial court and appellant shows that appellant understood that he was specifically waiving his right to appeal and that appellant affirmed that he made the decision to waive that right freely and voluntarily. However, the Court found, the record did not show that he knowingly waived the right to petition for a writ of *habeas corpus*.

The court informed appellant that he could file a habeas corpus petition within four years and then, upon inquiry by appellant, informed him that it *believed* the filing of a habeas corpus petition would be in violation of the waiver of his right to appeal. These two statements were the only mention of habeas corpus during the hearing. The court then informed appellant, “But yes, you're going to waive *any right to appeal* and you do understand that?” (Emphasis supplied.)

Thus, the Court found, it appeared that the court believed “any right to appeal” inherently included the right to petition for a writ of habeas corpus. But, the Court stated, these rights are separate and distinct. The right to appeal in a criminal case is not constitutional, but instead is purely a creature of statute, while the writ of habeas corpus is an ancient common law right preserved in the federal and state constitutions. Habeas corpus is not a criminal proceeding, but is considered to be civil in nature. It is a collateral attack that is separate and distinct from direct review, and occurs only after a prisoner has failed to obtain relief by direct appeal. It is not an extension of direct appeal.

Furthermore, the Court found, the trial court conflated the right to appeal with the right to petition for a writ of habeas corpus. And, as a result, it did not engage in the “detailed questioning” regarding waiver of the right as prescribed by *Rush*. At best, the court informed appellant of his right to file a petition for writ of habeas corpus but then withdrew its advisement that he could file a petition within four years because it believed that appellant waived the right to so do by waiving his right to appeal. It, therefore, inadequately informed appellant of his right to petition for a writ of habeas corpus and did not inquire of him whether he understood that he was waiving that specific right so that he could acknowledge such a waiver. In contrast, the applicable federal rule requires that the court address the defendant in open court to ensure that he understands the terms of any agreement waiving the right to collaterally attack the sentence. Although cases decided under the federal rule are not controlling, they illustrate the important distinction between a waiver of appeal and a waiver of the right to file a habeas petition. Accordingly, the Court concluded, because the State failed to meet its burden of showing a knowing waiver of appellant's right to file a petition for habeas corpus, the judgment of the habeas court was reversed and remanded for the court to address the merits of appellant' petition.