

FYI: COLLIER v. STATE

The Georgia Supreme Court disapproves of language used in any Georgia appellate decision that suggests an appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record or that a defendant who seeks an out-of-time appeal on the ground that his right to appeal was thwarted by counsel's ineffectiveness must show that the appeal would have had merit.

In *Collier v State*, Case No. S19A0658 (October 21, 2019), Collier entered a negotiated plea to felony murder in 2009. In 2018, he filed a pro se motion for an out-of-time appeal, contending that his plea counsel was ineffective for failing to inform him of his right to appeal. The trial court, after reviewing "the record and applicable law," summarily denied the motion.

The Court stated that under *Strickland v. Washington*, a criminal defendant is entitled to an out-of-time appeal if his counsel's constitutionally deficient performance deprived him of an appeal of right that he otherwise would have pursued. As to the prejudice prong of the *Strickland* test, the U. S. Supreme Court has squarely rejected the argument that the defendant must show that he would have actually prevailed in a timely appeal. See *Roe v. Flores-Ortega*, 528 U. S. 470 (120 S Ct 1029, 145 LE2d 985) (2000) and *Garza v. Idaho*, ___ U. S. ___ (139 S Ct 738, 203 LE2d 77) (2019). Instead, a defendant is required to demonstrate only that there is a reasonable probability that, but for counsel's deficient performance, he would have timely appealed. This standard applies whether a defendant seeks an out-of-time appeal from a final judgment of conviction entered following a trial or following a guilty plea.

However, the Court found, our courts have long erroneously held that a defendant seeking an out-of-time appeal directly from a judgment entered on a guilty plea must satisfy the prejudice component of the *Strickland* standard by showing that his appeal would have had merit. And, our courts have further held erroneously that if the defendant cannot show that his appeal would have had merit, the trial court may forgo an inquiry into whether counsel's performance with respect to the appeal was constitutionally deficient. Thus, because these cases conflict with controlling United States Supreme Court precedent, any Georgia Supreme Court case or Court of Appeals case so holding are overruled (the number of such cases is so extensive that the Court listed them in an Appendix to its opinion).

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Next, the Court overruled *Morrow v. State*, 266 Ga. 3, 3-4 (463 SE2d 472) (1995) and its progeny. The Court referred to it as a “peculiar line of cases where we held that a criminal defendant’s right to appeal directly from a judgment entered on a guilty plea is qualified in scope; that is, the right to appeal is limited to those cases in which the issue on appeal can be ‘resolved by facts appearing in the record.’” The Court found that *Morrow* must be overruled because it too rests on a foundation that is inconsistent with the holdings in *Flores-Ortega* and *Garza*.

Nevertheless, the Court stated, when a defendant files a motion for an out-of-time appeal in the trial court, the State may argue that the defendant’s delay in doing so has unduly prejudiced the State’s ability to respond to the motion. Although a motion for an out-of-time appeal is not directly barred by the application of any statute of limitation, the State may argue and the trial court may consider the time periods, factors, and other criteria set out in the most analogous limitation and laches provisions — those found in the Habeas Corpus Act — in determining whether the State’s defense has merit and the defendant’s motion should be dismissed.

In so holding, the Court declined the District Attorney’s request that the Court abolish the practice of allowing defendants to file a motion for an out-of-time appeal in the trial court. The Court noted that Georgia’s out-of-time appeal jurisprudence has been focused more on the remedial purpose served by an out-of-time appeal and less on the nature of the remedy or the appropriate process for obtaining it. For decades our courts have allowed two methods for obtaining an out-of-time appeal to co-exist: through the trial court or through habeas corpus. The Court stated that the trial court process is faster and more efficient than the habeas process in many cases, and eliminating post-conviction delay before appeal is an important interest in our criminal justice system. However, the trial court process is certainly an exception to the general rule that a trial court’s jurisdiction ends following a final conviction and the end of the term of court. Thus, the Court stated, whether sound reasons exist to direct all out-of-time appeal requests to habeas proceedings is a matter that might well be better addressed by legislation than by case law. The General Assembly can balance the competing policy interests with broader input by all those affected, and those considerations may change as the effects the Court’s decision “ripple through the criminal justice system.”

In fact, a concurring opinion of four justices stated that the tangle of our state’s out-of-time procedural rules might be beyond the Court’s ability to unweave it. But, it is certainly not beyond the power of the General Assembly. Thus, the concurrence noted, none of the procedures that

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the Court has created are of constitutional dimension, and consequently they can be changed or eliminated by ordinary legislation if the General Assembly so desires.

Finally, the Court remanded the case back to the trial court to hold an evidentiary hearing consistent its decision.

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