

THIS WEEK:

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Guilty Pleas; Out-of-Time Appeals

Orozco v. State, A21A1757 (1/28/22)

Appellant entered a negotiated plea to one count of armed robbery and one count of aggravated assault. The State, as part of the negotiated plea agreement, dismissed one count of aggravated assault and possession of a weapon during the commission of a felony. Almost two years later appellant filed a pro se motion for an out-of-time appeal. He contended he received ineffective assistance in that his trial counsel failed to inform him that he could appeal his conviction. After a hearing, the motion was denied.

Appellant argued that his counsel was ineffective because he failed to advise him of his right to appeal. But, the Court stated, failing to consult with a defendant about an appeal is not automatically deficient performance. Instead, failing to consult about an appeal amounts to deficient performance only if there was “reason to think” one of two things at the time: either that (1) a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. The defendant's acceptance of a plea is a highly relevant factor in this inquiry because a guilty plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings. And even when the defendant has accepted a guilty plea, the court must consider factors such as whether the defendant received the sentence bargained for and whether the plea expressly reserved or waived some or all appeal rights.

First, the Court noted, appellant made no argument that there was reason to think at the time that a rational defendant would have wanted to appeal under these circumstances. To the contrary, the record showed that appellant likely (and rationally) sought a plea to prevent a jury from seeing his recorded confession and to avoid the possibility of receiving a harsher sentence after a trial. Taking the plea bargain that the prosecutor offered gained appellant the significant benefits of receiving the sentence he bargained for, thus avoiding a potential life sentence, and dropping two other charges against him. The Court also noted that appellant did not argue at any length or provide legal authority or citations to the record showing that he had colorable grounds for appeal after agreeing to his plea deal. Thus, the Court found, the trial court did not abuse its discretion in concluding that a rational defendant would not have wanted to appeal under these circumstances.

Second, the record did not show that appellant demonstrated any interest in appealing or in withdrawing his plea either during the plea colloquy or immediately after sentencing. The transcript of the plea hearing offered not even a hint that appellant was dissatisfied with his plea at that time, and the undisputed evidence showed that appellant did not express dissatisfaction with his plea until months later, well after the window for a direct appeal had closed. Accordingly, the Court concluded, appellant failed to show that counsel's failure to consult with him about an appeal of his negotiated guilty plea amounted to deficient performance.

Reckless Conduct; Authentication

In re A. A., A21A1724 (1/31/22)

Appellant was adjudicated delinquent on a count of reckless conduct. The evidence showed that appellant lived at a residence with her legal guardian, who reported finding a cell phone containing a video depicting appellant inserting a toothbrush into her vagina in the bathroom where the guardian's two biological children kept their toothbrushes. A week or so before this incident, the guardian took appellant to receive a second treatment for gonorrhea, a sexually transmitted illness. Appellant admitted to inserting at least one of the children's toothbrushes into her vagina, that she was the person on the video, and that she did so because she found the children "annoying."

Appellant argued that the trial court erred in its interpretation of the reckless-conduct statute, OCGA § 16-5-60. She contended that the statute cannot be read as "relating to the negligent or purposeful spread of any disease both because of the content of the statute as a whole and because of the logical implication of interpreting the statute in that way." Specifically, she noted that the relevant statute subsequently mentions only HIV and no other communicable diseases. The Court disagreed.

OCGA § 16-5-60 (b) provides as follows: "A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor." Thus, the Court stated, while appellant is correct that OCGA § 16-5-60 goes on to discuss HIV *specifically in other subsections of the statute*, it does so in terms of criminalizing instances in which a person who is knowingly infected with HIV does not disclose this information before engaging in sexual intercourse or sexual acts with another, sharing hypodermic needles or syringes, performing sexual acts for money, soliciting or submitting to sodomy for money, or donating blood or other bodily fluid. The statute also criminalizes the knowing attempt to infect a peace officer or correctional officer with HIV or hepatitis. But none of this additional statutory language suggests the General Assembly did not intend for OCGA § 16-5-60 (b) to encompass other communicable diseases.

Also, the Court noted, unlike OCGA § 16-5-60 (b), these latter provisions constitute felonies. And all OCGA § 16-5-60 (b) requires, by its plain terms, is proof that a person consciously disregarded a substantial and unjustifiable risk that his act would harm another person or endanger the other person's safety. Accordingly, the Court determined, the trial court did not err in concluding that OCGA § 16-5-60 (b) could apply to the potential transmission of gonorrhea which, as it

happens, the General Assembly has elsewhere “declared to be contagious, infectious, communicable, and dangerous to the public health.” OCGA § 31-17-1; see OCGA § 42-1-7 (a).

Appellant next contended that the trial court erred by overruling her objection and admitting text messages that were unsupported by proper authentication. The record showed that the State introduced screen shots of text messages between appellant and another individual. And while those messages did not show the time or date on which they were sent and received, appellant mentions within them that she is at “a foster home called angels house” and her guardian found out about “the toothbrush thing.” Additionally, appellant’s guardian testified that the text messages were found on a phone appellant used, which was the same phone that stored the toothbrush video. And in the text messages, appellant disclosed to the other individual that her guardian had “found out about the toothbrush thing but [appellant] had washed them off and everything after.”

Appellant argued that her guardian’s testimony regarding the text messages was insufficient to authenticate them because she was not the recipient of those messages. In doing so, appellant contrasted this case from those in which texts were authenticated by a participant in the text exchange, when a phone was confiscated from the person who sent the text messages, or when cell-phone records demonstrated the subscriber’s identity.

However, the Court found, OCGA § 24-9-901 (b) describes, but does not limit, examples of means by which authentication or identification may be accomplished, including “[t]estimony of a witness with knowledge that a matter is what it is claimed to be” and “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” Indeed, there are no special rules under Georgia law governing the authentication of electronic documents or communications. As a result, after the party seeking to authenticate evidence presents a prima facie case that the evidence is what it purports to be, the evidence is properly admitted, leaving the ultimate question of authenticity to be decided by the jury.

Nevertheless, the Court acknowledged that every form of electronic communication can be “spoofed,” “hacked,” or “forged,” but this does not and cannot mean that courts should reject any and all such communications. Instead, the vast majority of these electronic communications are just as they appear to be—quite authentic. And here, the State presented sufficient evidence to authenticate the text messages from the phone when the content of those messages—taken together with the fact that they were on the same phone appellant *admittedly* used to film herself inserting a toothbrush into her vagina—all supported the guardian’s testimony that appellant was the one who used that particular cell phone.

Right to Counsel; Post-Conviction Proceedings

Donovan v. State, A21A1407 (1/31/22)

Appellant was charged with two counts of felony cargo theft. He requested to be allowed to represent himself, but either before trial or during trial, decided to allow stand-by counsel to take over. Following his conviction, the trial court again allowed him to represent himself. Acting pro se, appellant filed an unsuccessful motion to modify his sentence and represented himself in proceedings related to a motion for new trial previously filed by counsel. Appellant contended that he did not validly elect to represent himself in post-conviction proceedings. The Court agreed.

The Court stated that a defendant has a right to counsel in post-conviction proceedings, including the proceedings related to his motion for new trial. The record showed that, after appellant asked to represent himself post-conviction, the trial court held another hearing that the transcript describes as a *Faretta* hearing. But, the Court found, the colloquy about self-representation at that hearing was extremely limited. After this colloquy, the trial court and appellant discussed other topics related to his post-conviction proceedings. No further mention was made of the dangers of self-representation in post-conviction proceedings, and the trial court did not expressly find that appellant had knowingly, intelligently, and voluntarily waived his right to post-conviction counsel.

The Court noted that there is no specific colloquy that trial courts must use before a waiver of post-conviction counsel is valid. But, the Court found, the colloquy that did occur did not reflect a finding on the part of the trial court that appellant validly chose to proceed pro se in the post-conviction proceedings or that this choice was made after appellant was made aware of his right to counsel and the dangers of proceeding without counsel in those proceedings. Therefore, the Court held, although appellant made a valid election to represent himself at trial, he did not expressly waive his right to post-conviction counsel.

Furthermore, the Court noted, the State did not argue, and the record did not show, that appellant functionally waived his right to post-conviction counsel when the trial court permitted him to represent himself in April 2019. In the case of an indigent defendant such as appellant, a functional waiver occurs when the trial court concludes that the defendant is attempting to use the discharge and employment of counsel as a dilatory tactic and declines to continue a proceeding until the defendant obtains new counsel. Here, the Court found, the trial court made no such conclusion in April 2019 when it ruled that appellant could represent himself, and there was no evidence that, up to that point, appellant was engaging in dilatory conduct in the post-conviction proceedings. Nevertheless, the Court noted, a year and a half later, the trial court cited dilatory conduct as a factor in the court's decision to deny appellant's request to reinstate counsel and continue the hearing on his motion for new trial. But, the Court found, that conduct occurred during the time period *after* the trial court permitted appellant to proceed pro se, and so it could not support the trial court's earlier ruling that appellant could represent himself.

Accordingly, the Court vacated the trial court's order denying appellant's motion for new trial and order denying appellant's motion to modify sentence and remanded the case to the trial court for appellant's post-conviction process to start anew. Appellant may then file an amended motion for new trial, either with counsel or pro se if he first knowingly, intelligently, and voluntarily elects to represent himself in post-conviction proceedings after being properly advised of the risks of doing so, or if the trial court first makes a proper finding that he has functionally waived his right to post-conviction counsel.

Right to Counsel; Post-Conviction Proceedings

Britt v. State, A21A1695 (2/1/22)

Appellant entered a negotiated *Alford* plea to failure to register as a sex offender. Briefly stated, the record showed that at a pre-trial hearing, the trial court discussed with appellant his desire to represent himself. After questioning appellant, the trial court allowed him to represent himself but warned him of the potential dangers. The trial court did not mention the post-conviction process during its colloquy with appellant. At his later plea hearing, appellant reiterated his desire to

represent himself. After the trial court again warned him of the dangers of representing himself at the plea hearing or at trial, Appellant was allowed to proceed pro se. The trial court sentenced appellant to a term of ten years, with three to be served in confinement, and his conviction was entered. However, within 30 days of his guilty plea, and within the same term of court, appellant filed a pro se "Motion to Withdraw Void Sentence and Pleas."

Appellant also filed a "request for appointment of effective [assistance] of counsel," and the trial court appointed appellant counsel.

At the hearing on appellant's motion to withdraw his guilty plea, appellant expressed his desire to represent himself because his appointed counsel had filed a motion for a continuance, and he did not want the hearing to be continued. The trial court asked appellant again if he wanted to represent himself, and appellant responded affirmatively but requested that his appointed counsel remain in the courtroom on a standby basis. The trial court denied appellant's request for standby counsel, and, after confirming that appellant wanted to proceed pro se, dismissed appellant's counsel.

Appellant argued that the court erred by allowing him to represent himself during his motion to withdraw his plea. Specifically, appellant contended, the trial court failed to warn him of the risks of proceeding pro se in his post-conviction proceeding, and therefore, he did not make a knowing waiver of appellate counsel. The Court agreed.

The Court noted that a plea withdrawal proceeding is a critical stage of criminal prosecution wherein defendants are entitled to counsel. And here, the Court found, while the record showed that appellant was warned of the dangers of self-representation at *trial*, he was not advised of the dangers of self-representation in his post-conviction proceeding. An examination of the record revealed that there were no discussions at any of the hearings about the dangers of self-representation in appellant's post-conviction proceeding. Furthermore, while the order dismissing appellant's post-conviction counsel, which was prepared by appellant's counsel, stated that appellant had been "formally advised by [the trial court] . . . about the dangers of self-[representation]", the hearing transcripts showed no such advice from the trial court regarding post-conviction self-representation.

Moreover, the Court found, the record did not reflect that the trial court found a functional equivalent of a knowing and voluntary waiver of counsel. Functional waiver of appointed counsel can occur when a defendant engages in dilatory tactics. At the hearing on his motion to withdraw his guilty plea, appellant expressed his desire to proceed pro se rather than with counsel because his appellate counsel had requested a continuance. As such, the record did not reflect that appellant functionally waived his right to appointed counsel through dilatory tactics.

Thus, the Court concluded, the trial court failed to advise appellant of the dangers of self-representation in his post-conviction proceeding, and the record did not include a clear waiver of appellate counsel. Therefore, the Court held that the trial court abused its discretion by finding a waiver of counsel. Accordingly, the Court reversed and remanded the case to the trial court for a re-hearing on appellant's motion to withdraw his guilty plea.

Waiver of Right to Appeal; Out-of-Term Court Modification Orders

Howard v. State, A21A1618 (2/1/22)

In March 2010, appellant was tried before a jury on multiple felony counts. Briefly stated, the record showed that appellant absconded prior to closing arguments on March 11, 2010, and the trial concluded without him. He was convicted on March 15, 2010, after the trial court sentenced him in absentia. Appellant re-entered the county jail on May 25, 2010. Pursuant to a consent agreement reached by the State and appellant's newly-appointed appellate counsel, the trial court granted appellant an out-of-time appeal on October 5, 2018. The trial court recited the parties' agreement that trial counsel "failed to file a motion for new trial due to no fault of [appellant]" and that the grant of an out-of-time appeal was "appropriate under these circumstances." Ultimately, the court concluded: "[Appellant] wanted to appeal his case and bore no responsibility for the lack of a timely-filed notice of appeal or motion for new trial." However, in 2020, before the trial court addressed the motion for new trial, the State moved to vacate the October 2018 order granting appellant an out-of-time appeal. Asserting that appellant had absconded during the trial in 2010, the State argued that he had waived his right to appeal by remaining a fugitive during the original window for filing a motion for new trial and notice of appeal. The trial court agreed and vacated the order granting appellant an out-of-time appeal and dismissed his motion for new trial.

The Court noted that a defendant waives his right to appeal by remaining a fugitive during the period when he was authorized by statute to file a motion for a new trial or a notice of appeal. Thus, given appellant's fugitive status, he may not have been entitled to an out-of-time appeal. Nevertheless, the State consented to appellant's out-of-time appeal request, and the trial court entered the order granting him an out-of-time appeal on October 5, 2018.

The Court stated that generally, a trial court lacks jurisdiction to revise, correct, revoke, modify or vacate any judgment outside the term of court in which the judgment was entered. And without dispute, the trial court acted well outside of the applicable court term when it vacated the order granting appellant an out-of-time appeal and dismissed his motion for new trial. The State argued, however, that the court was authorized to act because appellant fraudulently induced the grant of an out-of-time appeal by misrepresenting his responsibility for the lack of a timely appeal. Specifically, the State pointed to appellant's assertion in his notarized, pro se motion for out-of-time appeal that "[b]y no conduct attributable to Defendant has Defendant's appeal been forfeited."

The Court stated that under OCGA § 17-1-4, "[t]he judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." In the civil context, a judgment procured by fraud is considered void. But even if this rule applies to criminal cases, a party seeking to set aside a judgment based on fraud must demonstrate that (1) the fraud was committed by the party's opponent and/or the opponent's attorney; (2) the party had no knowledge of the fraud; and (3) the party could not have discovered the fraud through the exercise of reasonable diligence.

And here, the Court found, the record showed that the State was - or should have been - well-aware that appellant absconded at the end of his trial in 2010. The State, therefore, did not demonstrate that it was unaware of that status - or could not have reasonably discovered it -- when it consented to appellant's request for an out-of-time appeal.

Thus, the Court concluded, if, as the States contended, appellant remained a fugitive for the entire appeal window following his conviction, the trial court may have erred in granting him an out-of-time appeal. But a ruling is not void simply because it is erroneous. And the State cited no authority establishing that the trial court lacked jurisdiction to enter the 2018 consent order or that the order was otherwise void. Accordingly, because the trial court improperly acted outside the applicable term of court, the Court reversed the court's order vacating the grant of an out-of-time appeal and dismissing appellant's motion for new trial.

Ineffective Assistance of Counsel; Expert Witnesses

Priddy v. State, A21A1308 (2/1/22)

Appellant was convicted of rape, incest, aggravated child molestation, aggravated sodomy, three counts of child molestation, three counts of sexual battery, and cruelty to children in the first degree. Citing *Hinton v. Alabama*, 571 U. S. 263, 273 (II) (A) (134 SCt 1081, 188 LE2d 1) (2014), he argued that his trial counsel was ineffective by calling an expert witness who did not have sufficient qualifications, training, or expertise. Specifically, appellant contended that his lead counsel hired the expert "to critique the [victim's] forensic interview and expose [the victim's] gaps in memory as fabrications rather than evidence of sexual abuse." However, the expert "fell apart" under cross-examination, and co-counsel testified during the hearing on appellant's motion for a new trial that she believed the expert "ended up hurting . . . [appellant's] case because [of] the way he testified." Co-counsel further testified that she would not have called the expert to testify because she did not think it "was the best option." Appellant asserted that the expert was not merely less qualified, he was unqualified to help the defense.

The Court stated that the decision whether to present an expert witness, like other decisions about which defense witnesses to call, is a matter of trial strategy that, if reasonable, will not sustain a claim of ineffective assistance. Where a defendant contends a strategic decision constitutes deficient performance, it must be shown that no competent attorney, under similar circumstances, would have made it. Moreover, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Here, the Court found, appellant's lead counsel testified during the hearing on appellant's motion for a new trial that the defense expert was hired to address the victim's forensic interview and provide assistance with "general psychology." Lead counsel further explained that the expert also was retained to address the victim's memory as it related to her prior abuse, but this goal could not be accomplished after the trial court denied the defense's motion in limine to pierce the Rape Shield Statute. Although appellant's co-counsel did not believe the expert's testimony helped the defense, she acknowledged that one of the reasons he was retained was to look at the forensic interview video and address any "red flags." In addition, co-counsel admitted that the public defender's office "quite often" used the defense expert hired in this case to testify about forensic interviews in child sex abuse cases.

The Court also found that the defense expert testified at trial that the victim's version of the events and the circumstances surrounding the outcry to her mother raised "red flags." He also testified about suggestibility and how a victim's memory can be tainted, specifically pointing out that the forensic interviewer in this case used leading and repeated questions, which could "cause a child to say things that [were] not factually true, to bend, to yield to that pressure." The expert mentioned

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additional "red flags" in this case based on the interviewer's request that the victim "help" her, which potentially pressured and motivated the victim to agree with the interviewer's leading questions. According to the expert, false accusations could be made even in "good interviews." Appellant's lead counsel relied upon the expert's testimony to argue that the jury should not believe the victim's outcry given the circumstances under which it was made.

Thus, the Court held, notwithstanding co-counsel's testimony, appellant failed to show that - given the facts and circumstances of this case - no competent attorney, under similar circumstances, would have called the expert to testify. In *Hinton*, defense counsel called an expert he believed was inadequate due to his mistaken assumption that he could not obtain additional money for expert fees. Here, however, there was no similar mistaken assumption. Lead counsel in the present case believed the expert's testimony would be beneficial to accomplish the goals of the defense. The fact that the expert may have "fallen apart" or that co-counsel might have chosen a different trial strategy does not render lead counsel's belief in that regard unreasonable or otherwise equate to ineffective assistance of counsel. Thus, the Court concluded, viewed without the distorting effects of hindsight, appellant failed to show that his lead counsel's decision to call the expert in this case was deficient.