



March 17, 2022

FYI: COOK v. STATE

The Georgia Supreme Court holds that the trial court out-of-time appeal procedure is not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations, overruling Rowland v. State, 264 Ga. 872 (1995) and its progeny.

In *Cook v. State*, S21A1270 (3/15/22), the record showed that appellant entered a negotiated plea of guilty to charges of felony murder and armed robbery in 2013. She did not file a timely appeal, but more than six years later, she filed a motion for out-of-time appeal in the trial court, contending that she was deprived of her right to appeal because of her plea counsel's ineffective assistance. After a hearing, the trial court denied appellant's motion for out-of-time appeal on the merits, and she timely appealed that decision. After the State and appellant filed their briefs, the Court requested supplemental briefs on whether the Court should reconsider whether a criminal defendant who alleges that she was deprived of her right to appeal because of her counsel's alleged ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (104 S.Ct. 2052, 80 LE2d 674) (1984), be permitted to seek a remedy for that alleged constitutional violation by filing a motion for out-of-time appeal in the trial court, as opposed to filing, as her exclusive remedy, a petition for writ of habeas corpus? The Court also asked amicus curiae for major participants in the criminal justice system to address the question.

The Court noted that in the Habeas Corpus Act of 1967, now codified as OCGA § 9-14-40 et seq., the General Assembly created a post-conviction procedure for defendants to raise constitutional claims. Defendants in Georgia began doing so, and in 1974, the Court held in *Neal v. State*, 232 Ga. 96 (1974) that a defendant could not seek an out-of-time appeal from his conviction by motion in the trial court, explaining that he must file a petition for a writ of habeas corpus to seek relief for the "denial of the right of appeal or of the effective assistance of counsel on appeal" and affirming the trial court's order dismissing the defendant's motion.

Nevertheless, the following year, without mention of *Neal* or the Habeas Corpus Act, the Court noted that it began to review appeals of trial court orders denying motions for out-of-time appeals on the merits and appeals following orders by trial courts granting out-of-time appeals. See *King v. State*, 233 Ga. 630, 630-631 (1975); *Furgerson v. State*, 234 Ga. 594, 595-596 (1975). Although *King* and *Furgerson* did not constitute precedent on the proper way to seek an out-of-time appeal, the Court noted that in *Rowland v. State*, 264 Ga. 872, 875 (1995), it for the first time held—without citing any applicable legal authority and without acknowledging or overruling the contrary holding in *Neal*—that a convicted

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defendant could seek an out-of-time appeal either in the trial court or in habeas corpus. Trial courts thus continued to entertain motions for out-of-time appeal, and appellate courts continued to decide appeals following the rulings on such motions for many more years. However, in *Collier v. State*, 307 Ga. 363 (2019) and then again in *Schoicket v. State*, 312 Ga. 825 (2021), the Court noted that it began to question the validity of the trial court out-of-time appeal procedure as a valid alternative to habeas corpus.

After a thoughtful and thorough analysis of the underpinnings of its precedent, and after engaging in an exhaustive stare decisis analysis, the Court concluded that the trial court out-of-time appeal procedure is not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations. Accordingly, the Court overruled *Rowland* and any other decisions that approved the judicially created motion for out-of-time appeal in trial courts, to the extent that they endorsed this procedure. The Court also disapproved *King*, *Ferguson*, and any other decisions that have allowed out-of-time appeal claims to be litigated in trial courts without addressing the propriety of that procedure. In so doing, the Court stated that it is not undoing what has been done with respect to out-of-time appeals that already have been granted where the ensuing appeal has concluded.

Next, the Court turned to how its analysis applies to appellant's case and others going forward. Appellant and amicus curiae GACDL suggested that the Court should announce that this decision is to be applied prospectively and set a specific date after which no motion for an out-of-time appeal may be filed. The Court rejected this recommendation. Instead, citing *Taylor v. State*, 262 Ga. 584, 586 (1992), the Court announced it would apply the "pipeline" approach which Georgia has long followed for the application of new rules of criminal procedure to criminal cases that are pending on direct review or not yet final.

Accordingly, the Court concluded, the trial court was without jurisdiction to decide appellant's motion for out-of-time appeal in this case, and because the trial court's order plainly showed that it denied appellant's motion on the merits, the trial court's order must be vacated, and the case remanded to the trial court with direction that the motion be dismissed. Thus, appellant's remedy, if any, lies in habeas corpus. See *Rutledge v. State*, S21A1036 (March 15, 2022) (Rutledge had no right to file a motion for an out-of-time appeal and the trial court on remand was directed to vacate its order denying the motion and enter the appropriate order dismissing the motion for lack of jurisdiction).

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