

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 3, 2014

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THIS WEEK:

- Appellate Jurisdiction; Sentencing
- Guilty Pleas; Immigration Status
- Right to Counsel
- Dying Declarations

Appellate Jurisdiction; Sentencing

State v. Hood, S14A0763 (9/22/14)

Hood was convicted of murder and related crimes. The trial court sentenced him to life with the possibility of parole. Hood filed a motion for new trial. The State appealed from the sentence, contending that the trial court was required to sentence Hood to life without the possibility of parole.

The Court held that it did not have jurisdiction to hear the appeal. Since the motion for new trial remained pending in the trial court, the State's notice of appeal had "not yet ripened." The Court stated that if the motion for new trial is granted, the judgment from which the State sought to appeal will be set aside, and the notice of appeal previously filed by the State will be rendered moot, although the State might then file another notice of appeal to exercise its statutory prerogative to appeal from the grant of a new trial. If the motion for new trial is denied, the judgment from which the State sought to appeal will stand, and the notice of appeal previously filed by the State then will ripen. Nevertheless, in the meantime, the Court held, the case properly remains within the jurisdiction of the trial court.

Guilty Pleas; Immigration Status

Encarnacion v. State, S14A0690 (9/22/14)

Petitioner pled guilty to burglary and was sentenced as a first offender. Before petitioner entered his guilty plea, appointed trial counsel advised petitioner that a guilty plea to burglary "may" impact petitioner's immigration status, and that petitioner should seek the advice of an immigration attorney. He also informed petitioner that he "could" be deported even if he received first offender treatment. During the plea proceedings, the State asked if petitioner understood that his guilty plea "may have an impact" on his immigration status and that he "may be deported as a result of this plea." Petitioner responded affirmatively. Petitioner contended that his counsel rendered ineffective assistance in advising him about his immigration status and that he was entitled to habeas corpus relief. Specifically, that his attorney informed him that a burglary conviction "could" result in deportation; but that, if he completed his sentence as a first offender, he "would not have a conviction for burglary"; and that, on the basis of that information, petitioner presumed he would not be deported as long as he successfully completed his first offender sentence.

In *Padilla v. Kentucky*, 559 U. S. 356 (2010), the Supreme Court found that the Sixth Amendment's guarantee of effective assistance of counsel protects a criminal defendant from erroneous advice about deportation. It is therefore the duty of defense counsel to give correct advice when the deportation consequences of a plea are clear. Here, the Court found, it was clear that

Georgia's burglary statute meets the INA's definition of "aggravated felony" and federal immigration law provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." Furthermore, the mere fact that petitioner was given first offender treatment is of no import, because federal immigration law treats a guilty plea to an aggravated felony as a conviction even if the conviction is ultimately expunged. Thus, the applicable federal statutes make it clear that a conviction for an aggravated felony automatically triggers the removal consequence and almost always leads to deportation.

Therefore, the Court found, where, as here, the law is clear that deportation is mandatory and statutory discretionary relief is unavailable, an attorney has a duty to accurately advise his client of that fact. It is not enough to say "maybe" when the correct advice is "almost certainly will." Accordingly, the Court held, because defense counsel had no reason to believe there was a realistic probability that his client would escape deportation, defense counsel rendered deficient performance by failing to advise petitioner that he would be deported as a result of his guilty plea.

The case was remanded to for the habeas court to consider the second prong of petitioner's ineffective assistance claim: whether petitioner's counsel's deficient performance prejudiced his defense. To satisfy this prong in the guilty plea context, petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Right to Counsel

Trauth v. State, S14A0979 (9/22/14)

Appellant pled guilty to the murder of his wife. He then filed a pro se motion to withdraw his guilty plea and he was appointed counsel. The motion was denied and counsel was allowed to withdraw. However, the trial court never informed appellant that, as an indigent, he was entitled to appointed counsel on appeal from the denial of his motion to withdraw his guilty plea. Appellant was then left to pursue his first appeal pro se, and the Supreme Court affirmed the trial court's denial of his motion. *Trauth v. State*, 283 Ga. 141 (2008).

Appellant thereafter filed a habeas petition with the benefit of counsel and the habeas court granted the petition, allowing appellant "an out-of-time direct appeal from the trial court's denial of [appellant's] motion to withdraw his guilty plea." Appellant then filed his Notice of Out-of-Time Appeal. He argued that his trial counsel and post-conviction counsel were ineffective.

The Court noted that the habeas court was correct to conclude that appellant, as an indigent, was entitled to the appointment of new counsel for his first appeal after his post-conviction counsel was allowed to withdraw from representing him. Furthermore, where, as here, a pro se defendant has been improperly denied counsel for his first appeal, he is entitled to relief in the form of having counsel appointed to determine if there is any justifiable ground for an appeal from the original convictions, and if such determination is in the affirmative, file and prosecute a new direct appeal with the benefit of counsel. In this regard, because the defendant now has the benefit of counsel to pursue on appeal "any justifiable ground" relating to his original convictions (or, in this case, his guilty plea), even those issues that were raised by the defendant in his first pro se appeal could be considered anew in his second appeal. In this sense, much in the way that the grant of a new trial has the effect of setting aside all proceedings in the old trial, the grant of a new appeal to a defendant who was improperly forced to proceed pro se in his first appeal would have the effect of eliminating any proceedings relating to that defendant's first appeal.

Nevertheless, the Court noted, it is important to distinguish cases in which a defendant is improperly deprived of any attorney at all for his first appeal from those cases where a defendant *has* an attorney who prosecutes the defendant's first appeal but renders ineffective assistance for that appeal. In cases where a defendant has an ineffective appellate attorney who prosecutes the defendant's first direct appeal, the defendant is not entitled to a new appeal as a remedy for that counsel's ineffectiveness. This is so because, in those appeals where an outright acquittal would not be the appropriate remedy for a successful appeal, counsel's failure to raise a meritorious issue on appeal necessarily would have caused the defendant's conviction to be

affirmed rather than reversed, which in turn would have deprived the defendant of the new trial that he would have otherwise received had his appeal been properly presented. On the other hand, in a situation where a defendant has been improperly denied his right to any attorney at all in his first direct appeal, an appellate court has no way of knowing what issues an attorney would have raised in that appeal that may have been beneficial to the defendant or how those issues would have been presented. In other words, the Court stated, even if a pro se defendant were capable of raising meritorious issues on appeal on his own without an attorney, this still would not inform an appellate court of any meritorious issues that an attorney might have raised. Accordingly, the only way to remedy the harm created from the defendant having been deprived of the right to an attorney to present his or her first appeal is to grant the defendant an attorney for the purposes of presenting a brand new appeal.

This being said, the Court then addressed the merits of appellant's claims of ineffective assistance of counsel. The Court first found appellant failed to offer any evidence that the attorney who represented him at the hearing on his motion to withdraw his plea did not render ineffective assistance. Second, as to appellant's claim that counsel who represented him at his guilty plea hearing rendered ineffective assistance, appellant argued that his trial attorneys were ineffective by failing to properly inform him about the possibility of voluntary manslaughter and involuntary intoxication defenses, including a defense based on committing a crime of passion. The Court disagreed, finding that he was so properly informed. Therefore, the trial court did not err in denying his motion to withdraw his guilty plea.

Dying Declarations

Wiggins v. State, S14A0853 (9/22/14)

Appellant was convicted of felony murder and other offenses. The evidence showed that the victim sustained severe injuries from multiple gunshot wounds, and was transported to a hospital where he died following three surgical procedures in an attempt to save his life. Shortly after the first surgery, the victim made two non-verbal statements—one to his brother and another

to his wife—indicating that it was appellant who shot him. Appellant contended that the trial court erred in admitting evidence of the statements as an exception to hearsay testimony as the victim’s dying declarations because the victim was not in the “article of death” at the time such statements were made.

The Court stated that for a statement to be admissible as a dying declaration under former O.C.G.A. § 24-3-6, the deceased must have been conscious of his condition; however, it need only appear to the court from the circumstances of the case that there was a probability that the deceased was conscious of his condition at the time he made the statement. The testimony which is introduced as a dying declaration does not have to contain any statement by the deceased to the effect that he is conscious of his impending death at the time the declaration is made; this may be inferred from the nature of the wounds and other circumstances.

Here, the Court found, the circumstances in this case demonstrated that the victim was conscious of his dire condition at the time he made the non-verbal statements inculcating appellant as the shooter. Although the victim was on medication for pain, he was awake and alert after the first operation; and his mental status was evaluated as “11T,” meaning he was following commands and able to make motions. However, after a second operation on the victim, he developed a serious infection that caused him to “swell up like a balloon”; and his medical condition was critical. By the next day, the victim was not responsive and had to breathe with the aid of a breathing machine. He died four days after the shootings due to multi-organ failure caused by the gunshot wounds to his chest and abdomen that led to sepsis. Thus, the Court found, these circumstances made a prima facie showing for the admission of the subject statements as the victim’s dying declarations.