



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, September 14, 2015

10:00 A.M. Session

RIVERA V. WASHINGTON (S15G0887)

A probation officer, who claims she is immune from a lawsuit alleging she falsely arrested a man after he had paid his probation fee, is appealing a Georgia Court of Appeals ruling that says otherwise. The appellate court dismissed her appeal of a Bulloch County judge's refusal to throw out the man's lawsuit.

FACTS: Akeem Washington sued Shannon R. Rivera, a probation officer who worked for the **Bryan County** Sheriff's Department, and her secretary, Tina Ellis, for false arrest. Washington claimed that after he was issued a speeding ticket, on Oct. 10, 2011 he pleaded guilty and was sentenced to 12 months on probation with the stipulation that the probation would be terminated "upon full payment of fine and fee," which was a total of \$895. That same day, Washington paid the full amount to the Clerk of Bryan County State Court. The Clerk told Rivera's secretary (Ellis) that Washington had made the payment, but Ellis failed to apprise her boss, probation officer Rivera. On Feb. 7, 2012, Rivera swore out a warrant for Washington's arrest, alleging he had failed to report to his probation officer and failed to pay fines and probation supervision fees. As a result of his arrest, Washington claimed he was fired from his job with the Georgia Department of Corrections as a corrections officer and forced to withdraw from Georgia Southern University.

After Washington sued, Rivera filed a motion asking the court to dismiss the suit, claiming she was entitled to “quasi-judicial” immunity based on her duty to report probation violators to the court and testify against them. At the very least, she argued she was immune under the Georgia Tort Claims Act because she was “acting on behalf or in service of the state in any official capacity,” based on the Georgia Court of Appeals’ 2002 ruling in *Huzzie v. State* that a “probation officer acts as a State agent in the preparation and filing of a petition for revocation of probation.” The trial judge denied Rivera’s motion, noting that “further discovery was necessary in order to determine whether these two defendants [i.e. Rivera and Ellis] would be entitled to qualified immunity.” The judge also noted that the “extent of county probation officers’ immunity is not a matter of well-settled Georgia law.” (“Discovery” is the pre-trial procedure in a lawsuit in which each party finds out what evidence the other side has through a request for documents and through out-of-court testimony by witnesses, or “depositions.”)

Rivera then appealed to the Court of Appeals, but that court dismissed her appeal because she failed to file an application seeking permission to appeal, before filing an appeal directly with the court. In a technical ruling, the Court of Appeals ruled that under the “collateral order rule,” a party may directly appeal an order denying a motion to dismiss “based on a conclusive determination that the State (or state officer or employee) is not immune from suit on the basis of sovereign immunity.” But here, the “trial court expressly refused to make any conclusive determination” as to the probation officers’ immunity, the Court of Appeals ruled. Therefore, Rivera was required to follow the “interlocutory appeal” procedures, which required her first to request and gain permission to appeal, as opposed to filing a direct appeal. Rivera now appeals to the state Supreme Court which has agreed to review the case to determine whether the Court of Appeals was correct to dismiss Rivera’s direct appeal on immunity grounds.

ARGUMENTS: Rivera’s attorneys argue the appellate court erred. Although the Georgia Supreme Court ruled in *Waldrip v. Head* (2000) that “the Georgia Code limits the right of direct appeal to final judgments or rulings that have a final or irreparable effect on the rights of parties,” it created an exception for “collateral orders.” However, for the collateral order doctrine to apply, “the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.” In this case, Rivera filed a motion to dismiss the lawsuit on immunity grounds. “Absolute immunity protects those entitled to that immunity from ‘other burdens attendant to litigation, including pretrial discovery,’” Rivera’s attorneys argue in briefs. “Thus, the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor’s entitlement not to have to answer for his conduct in a civil damages action.” Here the trial court denied Rivera’s motion to dismiss “based upon a perceived need for further discovery,” the attorneys point out. “The effect of the trial court’s denial, of course, forces Rivera into bearing the burdens of discovery, among other things.” “One of the issues in this case is whether a trial court’s denial of a motion to dismiss based on immunity... ‘conclusively’ determines the issue.” Rivera’s attorneys argue it does. “A trial court’s order denying immunity or deferring ruling on immunity – provided that it turns on an issue of law – is appealable under the collateral order doctrine because it ‘conclusively determines that the defendant must bear the burdens of discovery; is conceptually distinct from the merits of the plaintiff’s claim; and would prove effectively unreviewable on appeal from a final judgment.” “A deferral of ruling on immunity before the

completion of discovery is effectively a denial of immunity,” the attorneys contend. “In sum, Rivera is entitled to quasi-judicial immunity, the plaintiff’s lawsuit against Rivera is barred, and the trial court erred in holding otherwise and the Georgia Court of Appeals erred in dismissing the appeal.” She is also immune from suit under the Georgia Tort Claims Act because she was “acting on behalf” of or “in service of the state” as a probation officer by serving “as an investigative and supervisory arm of the court” through her work of monitoring probationers and providing required reports.

Washington’s attorneys argue the Georgia Court of Appeals was correct to dismiss Rivera’s appeal. “She could have sought and secured interlocutory appellate review or she could have sought to limit discovery,” they argue in briefs. “Having done neither, Rivera insists that this Court impose a strict rule that a trial court’s deferral of a ruling of law on the availability of immunity is ‘effectively a denial of immunity,’ thus making any such denial immediately appealable.” Adopting Rivera’s argument would be “neither consistent with Georgia’s collateral order doctrine nor necessary for the orderly adjudication of claims to immunity from suit.” The trial court found that it was possible Washington “could introduce evidence within the framework of the pleadings sufficient to warrant a grant of the relief sought.” More discovery was needed to justify dismissal based on immunity, the court ruled. “Where the material facts are in dispute upon which an official’s claim of immunity from suit depends, then the appellate courts lack interlocutory appellate jurisdiction,” the attorneys contend. This Court does not need to alter the collateral order doctrine and declare that a trial court’s deferral of a ruling on a motion to dismiss based on immunity “conclusively” determines the issue “and thereby authorizes a direct appeal by operation of the collateral order doctrine.” There is no support at this stage of the proceedings that Rivera deserves quasi-judicial immunity. “The actions of probation officers who initiate and secure the arrest of probationers are ‘more akin to that of a police officer in deciding whether there is probable cause for arrest than it is to that of a prosecutor in deciding whether to initiate a prosecution.’ River also “failed to demonstrate that, as a matter of law, she enjoyed sovereign immunity as a state employee.” She does not work for a state agency, nor does she qualify as a state employee under the Georgia Tort Claims Act. In sum, the “trial court and the Court of Appeals both ‘got it right’ by denying Rivera’s motion to dismiss and thereafter denying her direct appeal,” Washington’s attorneys argue.

Attorneys for Appellant (Rivera): Richard Strickland, Paul Scott

Attorneys for Appellee (Washington): G. Brian Spears, Mawuli Davis

FORSYTH COUNTY, GEORGIA V. APPELROUTH ET AL. (S15G0912)

The government of **Forsyth County**, claiming to be immune from property owners’ lawsuits over water damage, is appealing a Georgia Court of Appeals order that dismissed the County’s appeal of a lower court’s refusal to throw out the lawsuits against it. While the facts of this case differ, the legal issues are the same as in *Rivera v. Washington (S15G0887)*.

FACTS: Dan and Arlene Appelrouth own a home in Cumming, GA next door to Cesar and Janis Rodriguez. The Appelrouths sued the Rodríguezes and the County, alleging that in the course of renovating their home, the Rodríguezes were responsible for water flowing from their property onto the Appelrouths’ property, causing damage. They claimed the County “contributed to the flooding” through the way it maintained the County-owned right of way and drainage ditch in front of their home. In their complaint against the County, the Appelrouths alleged eight

separate counts, including breach of legal duty, negligence per se, trespass, nuisance, and “inverse condemnation,” which refers to the legal procedure for obtaining compensation when a property interest has been diminished in value by a governmental body. In September 2014, the County filed a motion to dismiss the Appelrouths’ suit. It also filed a motion to dismiss the cross-claim brought against it by the Rodriguezes. In November 2014, the trial court issued an order denying both motions to dismiss, finding that if certain allegations made by the Appelrouths and Rodriguezes were established by the evidence when the case goes to trial, they could prevail in their argument that the County is not immune under the law. The County then appealed to the Court of Appeals. But as it did in *Rivera*, the appellate court dismissed the appeal on the ground that the trial court had not made a “conclusive determination” about the issue of immunity because it would depend on the evidence presented at trial. Therefore the “collateral order rule” did not apply, the appellate court ruled, the County was not authorized to file a direct appeal, and it instead was required to follow “interlocutory appeal” procedures, which meant it had to request and receive permission to appeal. Under the “collateral order rule,” a party may file a direct appeal only if the denial of a motion to dismiss is based on “a conclusive determination” that the party was not immune from the lawsuit. The County now appeals to the state Supreme Court which has agreed to review the case to determine whether the Court of Appeals was correct to dismiss its direct appeal on immunity grounds.

ARGUMENTS: The County’s attorneys – one of whom also represents Shannon Rivera in her appeal – argues the Court of Appeals erred in ruling that this appeal was not directly appealable under the collateral order doctrine. Under Georgia law, sovereign immunity is an immunity from a lawsuit, and it is effectively lost if a case is permitted to go to trial. “An order which denies sovereign immunity at the Motion to Dismiss stage is a conclusive determination,” the lawyers argue in briefs. This is clearly the case because “the Order removes one of the important benefits of sovereign immunity – the right not to have to answer for one’s conduct or be burdened by discovery in a civil action.” “In the present case, the Court of Appeals dismissed the appeal, holding that the trial court had not made a ‘conclusive determination’ with regard to the sovereign immunity defense. The defendant respectfully submits that every denial of a Motion to Dismiss based on sovereign immunity is a ‘conclusive determination’ that is subject to appeal pursuant to the collateral order doctrine. Therefore the Court of Appeals erred in holding that a ‘conclusive determination’ had not been made, and this Court should reverse the Court of Appeals and remand the case with direction to review the merits of the appeal.” The attorneys argue that when a trial court declines to give an immunity “defense at the dismissal stage of litigation a hard look, it risks unwittingly the forfeiture of some protections afforded by that defense.” “It is therefore incumbent on the courts to review the immunity defenses critically at an early stage of the proceedings.” Forcing the County to undergo discovery “effectively removes its immunity from suit.”

Attorneys for the Rodriguezes and Appelrouths argue that if they can establish their claims for “inverse condemnation,” the County is not entitled to the protection of sovereign immunity. Inverse condemnation – a lawsuit filed by a property owner for the purpose of being compensated by a governmental body that has reduced the value of the property – “is generally not barred by sovereign immunity,” the attorneys contend. “The law regarding maintenance of a drainage ditch owned by the County is well established.” Under the Georgia Supreme Court’s 1999 ruling in *Columbia County v. Doolittle*: “To state a claim for inverse condemnation, the

property owner does not have to show a physical invasion that damages the property, but only an unlawful interference with the owner's right to enjoy the land. Private property owners may be compensated in inverse condemnation actions for the temporary taking of land for the paving of a turn lane...and flooding, siltation, and pollution from surface water diverted by roadway maintenance." "A drainage ditch for a right of way is built for a public purpose, and where it interferes with the use and enjoyment of adjacent property, the constitution requires that just compensation be paid." "Furthermore, the Court of Appeals did not hold that all orders denying a motion to dismiss an inverse condemnation claim based on sovereign immunity had to be brought by the interlocutory appeal procedures," the attorneys argue. "To the contrary, the Court held that the trial court's order on sovereign immunity in this case was not a final...order on the matter of the sovereign immunity defense. The Court of Appeals stated that the trial court did not foreclose sovereign immunity as a possible defense and that no final order had been issued on that subject that would trigger a direct appeal." The attorneys emphasize that the County simply could have followed the interlocutory appeal procedures.

Attorneys for Appellant (County): G. Todd Carter, Richard Strickland

Attorneys for Appellees (Rodriguezes and Appelrouths): William Hewitt, Stuart Teague

THE STATE V. RANDLE (S15G0946)

The State is appealing a ruling by both the Georgia Court of Appeals and **Coweta County** Superior Court that a man who pleaded guilty 22 years ago to one count of child molestation is eligible to be released from the requirement that he register as a sex offender.

FACTS: In 1993, Blake Randle pleaded guilty to child molestation for touching the penis of a 10-year-old boy when Randle was 19 years old. He received an 8-year sentence with the first three to be served in confinement followed by five years on probation. As a result of his conviction, he was required to register as a sex offender. Randle served his sentence and was released from probation in 2001. In 2013, Randle filed a petition for release from the sex offender registration requirements. Under Georgia Code § 42-1-19, a defendant may file such a petition if 10 years have elapsed since he completed his sentence, and if six criteria are met under another statute, § 17-10-6.2. Among the criteria is one that states the victim could not have suffered "any intentional physical harm during the commission of the offense." At issue in this case is the interpretation of the phrase, "intentional physical harm." The trial court conducted a hearing where the evidence showed Randle had committed no other crimes, had completed all required sex offender treatment, had committed no probation violations, and had done "well while on probation and as well in his treatment." By then 42 years old, Randle testified he had had physical custody of his 14-year-old daughter for five years, had been working in the technology field for 15 years, provided for himself and his daughter and had continued treatment after his probation ended because he "felt that it was very helpful." Randall testified that he wanted to be removed from the sex offender registry so that his daughter would not be bullied by those who might find his registration online and because signs with his picture identifying him as a sex offender who "lives here" had been left in his yard. Under cross-examination, Randle admitted that given his victim's age, the child likely had not liked the touching. Following the hearing, the trial judge granted Randle's petition, noting that while he, the judge, had never released someone from the sex offender registration requirements, Randle's offense had occurred 21 years earlier, there had been no other incidents since then, and based on his testimony, the

judge was “convinced that this will never happen again.” The State then appealed to the Court of Appeals, arguing that Randle’s act of touching the child’s genitals with his hand necessarily resulted in the victim suffering “intentional physical harm,” and therefore prevented Randle’s release from the registration requirements under Georgia Code § 17-10-6.2. But in a 4-to-3 decision, the Court of Appeals disagreed and upheld the trial court’s ruling, finding that the term, “intentional physical harm,” “contemplates conduct that goes beyond offensive and unwanted touching and involves the intentional infliction of physical pain or injury upon the victim.” The State now appeals to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in its interpretation of “intentional physical harm.”

ARGUMENTS: The District Attorney argues for the State that the Court of Appeals was wrong in its interpretation that requires “a showing of pain or injury to show harm and which excludes unwanted and offensive touching as a recognized source of intentional physical harm in this specific context.” The State argues it is necessary that Georgia’s highest court now interpret the phrase. Under Georgia law, a defendant who is required to comply with the sex offender registration requirements imposed by Georgia Code 42-1-12 must do so for life, and consistent “with protecting the public, the General Assembly has recognized only very limited exceptions where sexual offenders are eligible to no longer be required to register,” the State argues in briefs. “However, by narrowly defining ‘intentional physical harm’ as excluding sexual offenses involving unwanted and offensive physical contact, the Court of Appeals has broadened the aforementioned limited exception and made it possible for a much larger class of sexual offenders to no longer have to register.” Under the Court of Appeals’ definition, “a sexual offender has no burden whatsoever of proving their victim suffered no intentional physical harm in cases involving ‘unwanted and offensive touching’ – even in child molestation cases such as the instant case,” the State argues. “Such sexual offenders should not be relieved of this burden under these circumstances.” The term “harm” should be “interpreted broadly as meaning the sexual offender caused the victim *any* amount of physical discomfort,” the State argues. “No further degree of harm (such as injury or pain) should be required, as no specific degree of harm is listed in the statute.” The State offers as the definition of “intentional physical harm” that it occurs “when during the sexual offense the sexual offender intentionally makes physical contact with the victim, contact which by its nature may reasonably be expected to physically harm the victim, and as a result of such contact, the victim suffers any amount of physical discomfort.” It urges the Supreme Court “to hold that acts of child molestation involving physical contact necessarily involve physical harm to the victim. These types of child molesters would therefore be required to continue to register for life and would be ineligible under § 17-10-6.2 for removal from the registration requirements.”

Randle’s attorney argues that the Court of Appeals did not err in its interpretation and that the “State’s proposed definition of the term intentional physical harm is not only unsupported by the rules of statutory construction, but it would lead to absurd results in contradiction to the clear intention of the General Assembly in enacting § 42-1-19.” While the State argues that “anyone convicted of a sexual offense against a minor that involves touching should remain on the sexual offender registry for life, it is clear that the General Assembly, in passing § 42-1-19 does not agree with the State,” the attorney argues in briefs. When the General Assembly enacted that law in 2010, “it explicitly included those convicted of rape, statutory rape, aggravated sodomy, aggravated sexual battery, aggravated child molestation, incest, sexual

assault against a person in custody and sexual battery (all crimes which by their very definition require intentional physical contact with the victim) as eligible for removal from the sexual offender registry.” Here, the “State seeks to have this Court define ‘intentional physical harm’ to include any unwanted or offensive touching.” If this Court adopted the State’s definition of intentional physical harm, “judicially, this Court would exclude anyone convicted of rape, statutory rape...and sexual battery from being removed from the registry, even though the General Assembly specifically included them,” the attorney argues. “If the General Assembly intended that any ‘touching’ would prohibit removal from the sex offender registry, then it would have limited the crimes eligible for removal to crimes that do not involve touching.”

Attorneys for Appellant (State): Peter Skandalakis, District Attorney, Robert Mooradian, Asst. D.A.

Attorney for Appellee (Randle): Christa Kirk

GATES V. THE STATE (S15A1407)

Lamar Gates, who was convicted in **DeKalb County** of murdering a man who texted naked pictures of his genitals to Gates’ girlfriend, is appealing his conviction and life prison sentence, arguing that the trial court improperly allowed in evidence that Gates bought and owned guns, none of which was tied to the crime.

FACTS: On Nov. 30, 2012, Anthony “Ant” Wilson was shot with a 9 mm handgun in broad daylight in front of the Laurel Mills Apartments where Gates, also known as “West Side,” lived with his girlfriend, Elizabeth Petricari. Witnesses testified that Wilson was a local drug dealer who was in the process of making a drug deal when he was shot. At trial, the defense argued Gates was not involved in the shooting and had already left the area before the shooting occurred. But prosecutors for the State told jurors that Gates shot Wilson because the day before, Wilson had sent Petricari a series of pictures of his private parts. Two witnesses – a neighbor, Latrice Wheeling, and a woman who said she was buying marijuana from Wilson at the time – identified Gates as the shooter. Wheeling said she was taking a nap when she awoke to gunshots, went to the window of her apartment and saw Gates, who lived in the apartment below hers, shoot Wilson, put the gun in his pants, walk to a green pickup truck and drive away. Unlike Wheeling, the other woman did not know Gates, but later picked him out in a photographic lineup and at trial. Like Wheeling, she identified the shooter as wearing dark clothes and a skull cap and as driving away in a green pickup truck. At trial, Petricari testified that Gates drove a green pickup truck. Wheeling’s husband, Corey Perry, testified that Gates regularly showed him guns he bought a couple of times each month. The Sunday before the shooting, Gates showed both Perry and his wife a .40 caliber handgun he had just purchased. Perry also testified that the night before the killing, Gates had taken him to McDonald’s and complained that Wilson was sending his girlfriend sexual pictures of himself and that he was going to “see about him.” Four days after the shooting, the fugitive squad arrested Gates while sitting in the green pickup truck with his dog and children. On the front driver’s seat was a loaded .45 caliber handgun. Although it was not the caliber gun used to kill Wilson, the State argued at trial – and the trial judge agreed – that the .45 was “relevant to complete the story of the crime.” The gun used in the crime was never found. In November 2013, a DeKalb County jury found Gates guilty of murder, aggravated assault, and gun charges, and he was sentenced to life plus five years in prison. The

trial court denied his motion requesting a new trial, and Gates now appeals to the Georgia Supreme Court.

ARGUMENTS: Gates' attorney argues that seven mistakes were made during his trial and his convictions and sentence must be reversed. Among them, the trial court made erroneous findings based on the admission of unrelated gun evidence. Under Georgia's new evidence code: "Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person" in order to show that a defendant's behavior on one occasion conformed with his behavior on another. "It may, however, be admissible for other purposes, including...proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The trial court found that the evidence regarding Gates' firearms was admissible to prove intent, motive, preparation, and that Gates "had access to handguns similar to the one used in the charged crimes." It was error to admit this evidence for these purposes, his attorney argues. "Evidence that Mr. Gates allegedly possessed firearms on other occasions was not relevant at trial and it was admitted for an improper purpose," the attorney argues in briefs. Evidence that he possessed a firearm when he was arrested that was different from the gun used to shoot Wilson also did not serve the purpose of showing proof of motive, opportunity, etc. because "none of these issues was material to the charges or to the defense." The evidence about the guns was admitted for the sole purpose of showing that Gates had an alleged propensity to commit violent crimes. "Because the evidence of Mr. Gates' alleged possession of unrelated firearms was not relevant to the crimes charged and because it was offered only to show his alleged propensity to commit the crimes at issue in this case, it was plain error to admit such evidence," the attorney argues. Furthermore, the testimony about the unrelated guns "was extremely prejudicial given the fact that Mr. Gates was charged with murder (with the use of a gun), possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime." Gates' attorney argues that Gates' trial attorney provided "ineffective assistance of counsel" in violation of his constitutional rights for failing to object to the improperly elicited testimony regarding Gates' alleged possession of unrelated firearms. "Trial counsel's failure to object to the introduction of unrelated gun evidence, along with his injection of the *ONLY* statements presented alleging that Mr. Gates possessed a 9 mm handgun prior to the shooting, cannot be construed as part of a sound trial strategy because there is no reasonable strategy that would dictate the admission of this evidence." Among other arguments, Gates' attorney argued the evidence was insufficient to convict Gates of the crime. The witnesses' testimony was unreliable. And while they testified Wilson was a drug dealer in the process of making a deal when he was killed, no drugs or money were found on his body. "Certainly the evidence presented is as consistent with a random robbery as it is with the conclusion that Mr. Gates shot Mr. Wilson in a jealous rage," Gates' attorney argues.

The District Attorney argues for the State that the evidence of Gates' possession of firearms and the gun found in his truck when he was arrested was properly admitted. While the gun found at his arrest was later determined not to be the gun used in the charged crimes, it was a semi-automatic handgun similar to the one used to kill Wilson. "Relevant evidence of a charged crime is always admissible unless it falls under a specific rule of exclusion," the State argues in briefs. "To be relevant, the evidence must have a tendency to make a fact more or less probable than it would without the evidence." "In this case, evidence that Appellant [i.e. Gates] had access to weapons that could have potentially been the murder weapon was relevant to the charged

crimes....” Also, the evidence “complained of did not involve a prior conviction or even a prior arrest and thus was not evidence of ‘other crimes, wrongs, or acts,’” the State argues. “Further, the evidence was not offered to prove Appellant’s criminal propensity because it merely showed his access to handguns, not that he had the propensity to use those handguns.” Rather the “evidence created the circumstances that supported the chain of events which led to the shooting,” the State contends. Under the law, “the evidence was admissible to show knowledge, opportunity, and intent. Appellant was angry at the victim for sending nude photos of himself to his girlfriend. The ready availability of a handgun when he saw Wilson talking with his girlfriend and when he made the decision to shoot Wilson rendered the evidence admissible.” The State also argues that Gates’ trial attorney, who had been lead counsel in about 40 criminal trials, was not incompetent or ineffective. He strategically chose not to object to the admission of the gun found in Gates’ possession upon his arrest, in part because it was not the gun used to kill Wilson. Also, the gun evidence was harmless to Gates’ case, the State argues, given two eye-witness accounts and the other evidence in the case. Finally, there was sufficient evidence to support the jury’s verdict, and there is no ground for granting a new trial.

Attorney for Appellant (Gates): Saraliene Durrett

Attorneys for Appellee (State): Robert James, District Attorney, H. Steve Ruth, Dep. Chief Asst. D.A., Deborah Wellborn, Asst. D.A.

2:00 P.M. Session

PNC BANK, NATIONAL ASSOCIATION V. SMITH ET AL. (S15Q1445)

This case involves a default on a loan for development of a shopping center. The bank that lent the money is opposing a motion to dismiss the case filed in federal court by the loan’s guarantors. Before ruling on the matter, the federal court is asking the state Supreme Court to answer questions related to Georgia law.

FACTS: In 2004, Hoschton Towne Center took out a loan from The Peachtree Bank to purchase commercial property in **Jackson County** where it intended to build a shopping center. Financially interested parties in the property – Kenneth Smith, William Dooley, Terry Dooley, Robert McNaughton, Chris Dooley, and Timothy Sterritt, along with New South Vision Properties, LLC – guaranteed the original loan and subsequent modifications. A promissory note signed May 6, 2004 by Hoschton Towne Center was for the principal amount of \$2.5 million. Also on May 6, Hoschton executed a Deed to Secure Debt and Security Agreement in favor of the bank. (PNC is the eventual successor to The Peachtree Bank.) The Deed grants the bank the right to sell the property in the event the borrower defaulted on the loan. Hoschton defaulted on April 7, 2011 when the note matured. Following attempts to resolve the default, PNC Bank notified the borrower and Smith and the other guarantors that it intended to exercise the power of sale clause in the Deed to Secure Debt. In August 2013, the bank conducted the foreclosure sale of the property and purchased it for \$730,000. Following the sale, the bank filed in court an Application for Confirmation of the foreclosure sale. But after the bank sold the property to a third-party buyer for \$1.03 million, it filed a notice dropping that application, and never got the bank’s confirmation. The bank then sued Smith and the other guarantors in the United States District Court for the Northern District of Georgia for the remaining amount due on the loan. In

response, the guarantors filed a motion to dismiss the lawsuit, based on Georgia Code § 44-14-161. Called the “Confirmation Statute,” the statute says: “When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds...and at the sale the real estate does not bring the amount of the debt secured by the deed,...no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of superior court of the county in which the land is located...and shall obtain an order of confirmation and approval thereon.” The purpose of the judicial confirmation is to ensure that the property sold at foreclosure brought its true market value rather than being bought by the lender at a depressed price. The defendants argued that confirmation was required to bring an action for deficiency following a foreclosure sale. The bank, however, argued the defendants had waived the confirmation requirement of § 44-14-161 through the waivers included in the various guaranties they had signed. The federal judge denied the guarantors’ motion to dismiss but granted their motion to certify two questions about Georgia law to the state Supreme Court, stating that “Due to recent decisions by the Georgia Court of Appeals, the state of the law on this issue is unclear.” The judge referenced two decisions by the Georgia appellate court, including *HWA Props., Inc. v. Comm. & S. Bank*.

ARGUMENTS: Attorneys for the PNC Bank argue that a lender’s compliance with § 44-14-161 is not required for the lender to pursue a borrower or guarantor to pay back what is owed following a foreclosure sale. “Guaranties, security deeds, and notes are all contracts, which outline the terms agreed upon expressly by their respective signatories,” the attorneys argue in briefs. “Foreclosure of real property securing the note and post-foreclosure confirmation, pursuant to § 44-14-161, only involves the debt owed by the borrower and, thus, only protects the borrower.” Georgia law permits the bank to pursue payment of the indebtedness directly from Smith and the other guarantors, without the need for confirmation. “Unconditional, absolute, and continuing guaranties are just that,” the attorneys argue. “Under Georgia law, no condition precedent exists to prevent a creditor from pursuing direct payment from a guarantor when, as here, the guaranties are unconditional and absolute.” Here, the guarantors “agreed to unconditionally and absolutely remain liable to Appellant [i.e. PNC Bank] in the event borrower defaulted on the loan.” The Georgia legislature’s intent in passing § 44-14-161 “was to only protect borrowers from deficiency judgments when no confirmation has occurred,” the attorneys contend. Indeed, the “Confirmation Statute, as Depression-era legislation meant to protect homeowner borrowers, has remained unchanged since its enactment in 1935. Since then, commercial guarantors, such as Appellees [i.e. Smith et al.], have benefitted from misapplication of the statute’s intent to wipe away millions of dollars of debt that remained post-foreclosure.” Also, the guarantors waived their use of certain legal defenses by signing the unconditional guaranties which reinforce their debt obligation. “Regardless of whether guarantors are initially entitled to any protections afforded by the Confirmation Statute, Georgia courts have long abided by the principle that ‘It is essential to all business relationships that the validity and solemnity of written contracts, freely and voluntarily executed, be upheld,’” the bank’s attorneys argue “Appellees guaranteed the full indebtedness would be repaid; they should be held to their promise.”

Attorneys for Smith and the other commercial guarantors first argue that the Georgia Court of Appeals decision in *HWA Props., Inc. v. Comm. & S. Bank*, in which the appellate court ruled for the first time that guarantors can waive the statutory protections of § 44-14-161, is a

“dramatic change in the law” that “threatens to undermine, in its entirety § 44-14-161’s statutory protections – and therefore the entire statute itself – not just for guarantors, but also as to the primary obligors themselves.” The *HWA* ruling “will not only have grave, unjust consequences on both borrowers and guarantors individually, but will also stifle investment in Georgia generally and nullify the statute itself,” the attorneys argue in briefs. A creditor who holds a security interest in real property has two available remedies in the event of a default: The creditor may choose either to 1) sue directly on the note and guaranty, and pursue a judgment for the entire amount of the debt, or 2) foreclose on the real property, confirm the sale, and then sue for the remaining deficiency. “Should the creditor elect to foreclose on the real property, Georgia’s Foreclosure Confirmation Statute makes clear that the creditor cannot pursue a deficiency action unless the creditor first confirms the foreclosure sale in accordance with the statute’s requirements, the attorneys argue. “In other words, the Foreclosure Confirmation Statute creates a condition precedent to the pursuit of a deficiency judgment following a non-judicial foreclosure.” (A non-judicial foreclosure is generally based on a deed of trust that authorizes the lender to foreclose outside of court on property for which the borrower defaulted.) Regardless of any language in the guaranties at issue in this case that might be construed as an implied waiver of the Foreclosure Confirmation Statute, “such a waiver is not permissible under Georgia law,” the attorneys argue. “Indeed, the Foreclosure Confirmation Statute provides that once Appellant [bank] elected to conduct a non-judicial foreclosure on the subject property, Appellant was statutorily required to obtain confirmation of the foreclosure in order to pursue *any* deficiency resulting from the foreclosure sale. Because Appellant failed to comply with the statute, opting instead to dismiss its fatally flawed Application for Confirmation, Appellant [PNC Bank] was and is jurisdictionally barred from pursuing a deficiency against Appellees [guarantors].”

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Attorneys for Appellees (Smith): R. Matthew Reeves, Elizabeth Clack-Freeman, Robert Thomas

POST V. THE STATE (S15A1189)

FRIPP V. THE STATE (S15A1190)

BROWN V. THE STATE (S15A1193)

Two men and a woman are appealing their murder convictions and life prison sentences for their roles in the shooting deaths of two men in **Cobb County**.

FACTS: According to the facts at trial, on Dec. 9, 2009, Desmond Omar Post, Rolaunda Fripp, and Joseph Brown, along with Darchelle R. Arnold and Jarvis A. Butts, decided to “hit a lick,” which is street slang for committing a robbery. Their plan was to lure victims with money from a nightclub to a vacant apartment in the Las Colinas Apartments in Marietta, where they all lived. Acting on the plan, the two women – Arnold and Fripp – went to the Sportsline Bar on Windy Hill Road where they met, danced and drank with Christopher Jackson, Mark Jones, and Josh McCarter. Arnold had noticed all three men were flashing a lot of money. At some point, Arnold invited the men to her apartment. As the bar closed, Fripp, Arnold, and the three men left the bar in two cars. On the way to the apartment, Arnold called Butts from her cell phone to let him know she and Fripp were coming back with three men. At the complex, Fripp led the three unarmed victims – Jackson, Jones and McCarter – into a dark, abandoned, graffiti-ridden apartment where she knew that Butts, Post and Brown would be waiting. As soon as they walked

into Apartment 21-3, Butts, Post and Brown rushed into the room and yelled at the victims to get their hands up and get down on the floor. All three victims put their hands up. But in the chaos, Brown began shooting, hitting Jackson and Jones. The gunman then held the pistol to McCarter's head and demanded everything he had. McCarter gave up his wallet and cigarettes and begged for his life until the assailants ran from the apartment. When Fripp and Arnold had first entered the vacant apartment with the victims, they immediately headed toward the back and escaped out a window. They heard the gunshots behind them as they made their way to Arnold's apartment. Five minutes later, Brown, Post and Butts joined them. Brown had a gun, and he told the women he had shot the victims. Meanwhile, still at the abandoned apartment, McCarter told Jackson he was going to find help. By then Jones was unresponsive, but Jackson was conscious, though unable to talk. McCarter ran to a nearby QuikTrip store and called 911. By the time police arrived at the apartment, they found Jackson and Jones lying on the floor. Jones had no pulse, and while Jackson was still alive, he later died at a hospital. With McCarter's help, police were able to quickly identify and arrest the suspects. Post, Butts, and Brown eventually admitted to police they'd been hiding in the apartment awaiting the victims' arrival.

Prior to trial, Arnold pleaded guilty to murder, armed robbery and aggravated assault and agreed to testify for the State. She was given two life sentences and 20 years on probation. The remaining four co-defendants were tried together and found guilty of murder, armed robbery and aggravated assault. Post, Fripp, and Brown now appeal to the state Supreme Court. Butts' appeal is also pending before this court, but his attorney did not request oral arguments. Arnold subsequently attempted to withdraw her guilty plea, but her motion was denied, and in November 2012, this Court upheld the denial.

ARGUMENTS (Post): Post's attorney argued the trial court made five errors in his case. Among them, the court was wrong to deny Post's motion asking the judge to recuse himself. The Cobb district attorney – the state prosecutor – had served as the judge's campaign treasurer when he ran for state court. Furthermore, prior to winning a seat on the bench, the judge had worked in the Cobb County District Attorney's Office as an assistant district attorney during the preparation of this case. The trial court erred in ruling this was insufficient to reasonably question the impartiality of the court, the attorney argues. The trial court also erred by denying Post's motions to strike a number of different jurors based on racial bias against African Americans and other reasons. Among jurors who should have been struck was a man who said he attended Sunday school with the judge and prayed with him, Post's attorney argued.

The State argues the trial court did not err when it denied Post's motion to recuse. The trial court correctly ruled that if the judge recused himself from every case where someone helped with his campaign, he would have very few cases. Also the motion and accompanying affidavit were legally insufficient and therefore transfer to another judge to hear the recusal motion was not required, the State contends. "It is also important to note that Appellant [i.e. Post] waited until right before the trial was set to go forward to bring the motion to recuse for hearing, so that it was not possible to have another judge hear the merits of the motion to recuse without delaying and postponing the trial. This fact alone would suggest that the motion was a dilatory tactic employed to delay trial, which is in direct opposition to the requirements of Uniform Superior Court Rule 25.1." The trial court also did not err by denying Post's motion to strike a number of jurors for cause, including three who said they believed that African Americans were more violent than others. The trial court is not wrong in refusing to strike a juror

for cause unless that juror “holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court’s charge upon the evidence.” Here, no “potential juror responded to having formed and expressed an opinion regarding the guilt or innocence of the accused, or to having any prejudice or bias resting on his or her mind either for or against the accused.”

ARGUMENTS (Fripp): Fripp’s attorneys’ sole enumeration of error is that the trial court was wrong to deny the defendants’ motion asking the judge to recuse himself. They also contend that the trial judge’s conduct during the recusal motion hearing created an appearance of impropriety. They are asking the high court to reverse Fripp’s convictions and remand the case for retrial before a new trial judge.

Again, the State points out that a motion to recuse must satisfy specific requirements, and this one failed to do so.

ARGUMENTS (Brown): Brown’s attorney argues the trial court made five errors, including the failure to grant the motion asking the judge to recuse himself and the failure to excuse two jurors for cause, including the man who attended Sunday school with the judge. Among other arguments, the attorney contends the trial court erred by denying Brown’s request that jurors be instructed about the crime of voluntary manslaughter, which is a related but less serious crime than murder.

The State makes the same arguments about the recusal motion and the motion to remove jurors for cause. In addition, the State contends the trial court properly declined to instruct the jury on voluntary manslaughter because the facts of the case didn’t warrant it. “A written request to charge a lesser-included offense is warranted and must be given if there is any evidence the defendant is guilty of the lesser-included offense,” the State argues. “But if the evidence establishes all the elements of an offense and there is no evidence supporting the lesser offense, the trial court is not required to charge the jury on the lesser offense.”

Attorneys for Appellants (Post, Fripp, Brown): Ashleigh Merchant, Christopher Geel, Kenneth Croy, Mitch Durham

Attorneys for Appellees (State): D. Victor Reynolds, District Attorney, Jason Samuels, Asst. D.A., John Pursley, Asst. D.A., John Edwards, Asst. D.A.