



Supreme Court of Georgia

Jane Hansen, Public Information Officer
244 Washington Street, Suite 572
Atlanta, Georgia 30334
404-651-9385
hansenj@gasupreme.us



CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, May 2, 2017

10:00 A.M. Session

THE STATE V. HAYES (S16G1723)

The **Fulton County** District Attorney is appealing a Georgia Court of Appeals ruling that reversed the convictions and sentence given to a man convicted a fourth time of burglary on the ground that the trial judge improperly participated in the man's guilty plea proceedings, rendering his plea "involuntary."

FACTS: The State indicted Marion S. Hayes for a 2010 burglary, charging him with burglary, possession of tools for the commission of a crime, and misdemeanor obstruction of a law enforcement officer. The State filed a notice of its intent to seek recidivist punishment under both Georgia Code § 17-10-7 (a) and (c). Georgia Code § 17-10-7 (a) states that for sentencing purposes, a person who has at least one prior felony conviction when he is convicted of a new felony must "be sentenced to undergo the longest period of time prescribed for the punishment" of the newly-convicted offense. When he was indicted for the 2010 burglary, Hayes had already been convicted of three prior burglaries. Georgia Code § 17-10-7 (c) requires that a person with at least three prior felony convictions "serve the maximum time provided in the sentence of the judge based upon" the newly-convicted offense and that such person would "not be eligible for parole until the maximum sentence has been served." However, as is relevant in this case, § 17-10-7 (a) also adds that "the trial judge may, in his or her discretion, probate or suspend the

maximum sentence prescribed for the offense.” And while subsection (c) prohibits parole, it does not dispense with the trial court’s discretion to probate or suspend part of a sentence.

On the eve of trial, Hayes entered a plea of guilty and was sentenced to 20 years, the first seven of which he was to serve in prison with the remaining 13 on probation. At the plea hearing, the judge said the following to Hayes: “I believe you’ve been recidivised by the State, which means if you’re sentenced – you are found guilty and you are sentenced, you could be facing up to 20 years. And by recidivised, because you have I think three priors, if you were sentenced to 20 years you will serve every day of that in prison.” The judge then informed Hayes he still had the opportunity to pursue a guilty plea, but that if he did not do so, “we are going to have a trial and you are facing 20 years and you would serve every day of it if you are found guilty...I want to be sure you understand what you are looking at.”

In August 2015, Hayes filed a motion, asking to appeal his plea and sentence, even though he had missed the deadline to do so. The trial court granted Hayes’ motion and he then appealed. In May 2016, the Court of Appeals ruled that the trial “court effectively advised Hayes that it had no intention of probating or suspending any portion of his sentence if he proceeded to trial” by stating that he would serve “every day of [the 20-year sentence] in prison.” And this “impermissible participation by the trial court in the plea-negotiation process ‘rendered the resulting guilty plea involuntary.’” The Court of Appeals reversed Hayes’ convictions and sentence and sent the case back to the trial court, stating that Hayes and the State could enter into new plea negotiations or Hayes could proceed to trial. The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The District Attorney’s office, representing the State, argues the Court of Appeals erred in determining that the trial court impermissibly participated in plea negotiations. “Here, the trial court did not inform Appellee [i.e. Hayes] that he *would* sentence Appellee to the maximum sentence should Appellee be convicted of burglary; instead, the trial court accurately informed Appellee of the maximum sentence he *could* receive should Appellee be convicted of burglary as a fourth-time felon,” the State argues in briefs. Uniform Superior Court Rule 33.8 (D) (3) “not only allows a trial court to inform a criminal defendant of the maximum sentence he could receive (inclusive of sentencing enhancements) – it *requires* a trial court to do so.” At the time of Hayes’ offense, burglary was punishable by imprisonment for up to 20 years. The State argues the Court of Appeals “clearly erred when it concluded the trial court ‘effectively advised Hayes that it had no intention of probating or suspending any portion of his sentence if he proceeded to a trial...’” “A judge telling a defendant he ‘*could be*’ sentenced ‘*up to 20 years*’ is qualitatively and categorically different from telling that defendant he *will be* sentenced *to 20 years*,” the State contends. “Again, the trial court was clear: Appellee would serve every day of the maximum sentence *if* he was found guilty *and if* that was the sentence which was imposed.” While Uniform Superior Court Rule 33.5 (A) states that, “The trial judge should not participate in plea discussions,” here the judge’s comments did not implicate plea negotiations. This case is completely different from cases in which an appellate court has found a violation of rule 33.5 (A). “The trial court here did not tell Appellee it would treat him differently should Appellee choose to go to trial,” the State contends. “The trial court ensured that, as required by Uniform Superior Court Rule 33.8 (D) (3), Appellee was informed of the maximum possible punishment he faced, inclusive of sentencing enhancements.” This Court

should reverse the decision by the appellate court and insure that Hayes' convictions and sentence are preserved, the State urges.

Hayes' attorney argues the Court of Appeals correctly ruled that the trial court impermissibly participated in the plea negotiation process. "This Court has already established that participation by a trial court in ongoing plea negotiations is impermissible," the attorney argues in briefs. In its 1999 decision in *McDaniel v. State*, the Georgia Supreme Court stated that the "majesty of the judiciary...may skew the defendant's decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court's stated inclination as to sentence." Two things factor into the analysis of whether a trial court has overreached its role by participating in plea negotiations: the timing of the court's interjections and their substance. Here the timing was not proper for judicial interference because plea negotiations were ongoing and Hayes had a lot of questions. While a judge is permitted to discuss proposed sentencing when a proposed plea is presented to the court, "it is well established that trial courts should not participate in plea negotiations before the parties have reached an agreement," Hayes' attorney argues. At the time the judge engaged with Hayes about his choice of whether to plead guilty or proceed to trial, Hayes was not intending to enter a plea, saying he was there only to "pay a special visitation" and in fact had "a lot of questions." It was the judge who raised the discussion of a possible plea. "The trial court effectively counseled Mr. Hayes against proceeding to trial, creating a substantial likelihood of undue influence in the plea negotiation process," the attorney argues. And the "'majesty and power of the court renders most trial court interference impermissibly coercive.'" The trial judge's warnings to Hayes "exceeded permissible participation by the trial court."

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Kevin Armstrong, Sr. Asst. D.A.

Attorney for Appellee (Hayes): Sarah Gerwig-Moore

KAMMERER REAL ESTATE HOLDINGS, LLC V. FORSYTH COUNTY ET AL.
(S17A0924) and
FORSYTH COUNTY ET AL. V. KAMMERER REAL ESTATE HOLDINGS, LLC
(S17X0925)

A developer who purchased land with plans to construct on it an auto body repair facility, is appealing a **Forsyth County** court ruling that dismissed its constitutional challenge of a zoning restriction, effectively requiring that 70 percent of the property remain "open space."

FACTS: Kammerer Real Estate Holdings, LLC, a Georgia Limited Liability Company, owns a 4.15 acre parcel of land located at the northwest corner of the intersection of Peachtree Parkway and Stoney Point Road in Forsyth County. The property is zoned as a Commercial Business District under the Forsyth County Unified Development Code's classification system which includes zoning conditions. Kammerer sought to use the property to construct an auto body repair facility, and prior to purchasing the land, obtained written confirmation from the Forsyth County Planning Department that the property was zoned as a Commercial Business District and that an automobile body repair facility was a permitted use in that zoning category. On March 24, 2014, after purchasing the property, Kammerer applied for a site development permit to develop the property. Thomas Brown, director of the county's planning department notified Kammerer that its development plans, which were included in the site development

permit application, did not comply with two of the zoning conditions that applied to the property: Zoning Condition # 1, which requires preservation of an “open-space area,” i.e. an undeveloped area, on the property that is adjacent to Stoney Point Road, as depicted on a site plan approved by the Board of Commissioners in 2008 and presented to the prior owner of the property before Kammerer purchased it; and Zoning Condition # 9, which requires a “5-foot graded buffer” along Stoney Point Road and landscaping that hides any chain link fencing.

In response, Kammerer filed a Zoning Condition Amendment Application and a revised site plan with the Planning Department, asking the County to amend Zoning Condition #1 and clarify what portions of the property were to be deemed “open space” so it could proceed with construction of the auto body repair facility. Kammerer ultimately withdrew its request to amend condition #9, agreeing to maintain a 5-foot buffer along Stoney Point Road. Shortly after, Brown issued an administrative determination to Kammerer’s attorney stating that the open space that had to be preserved on its property, based on Zoning Condition #1, included all of the area on the site plan that did not contain a building, access drive or parking area. According to Kammerer, that would leave about 70 percent of its property undevelopable and restrict the buildable area to a narrow strip of land.

In July 2014, the Forsyth County Board of Commissioners denied Kammerer’s Zoning Condition Amendment Application. Kammerer then sued the County, the Board of Commissioners and Brown, seeking reversal of the denial of its request to amend the zoning condition that affected its property. In the suit, Kammerer raised a number of claims, including that Brown erroneously interpreted Zoning Condition #1, making it “unconstitutionally vague, unenforceable and void” under the Georgia Constitution and the Fourteenth Amendment to the U.S. Constitution. Among other complaints, Kammerer also claimed that Brown’s interpretation of Zoning Condition #1 constitutes an unconstitutional “taking” of its property without first paying “fair, adequate and just compensation.” The County filed a motion to dismiss Kammerer’s lawsuit, and the trial court dismissed most of its constitutional challenges, however the trial court refused to dismiss Kammerer’s “writ of certiorari,” which sought the trial court’s reversal of the Board’s denial of Kammerer’s application to amend Zoning Condition #1, and the court’s reversal of the Planning Director’s interpretation of Zoning Condition #1. The trial court also left Kammerer’s request for legal expenses intact. Kammerer now appeals the court’s denial of its constitutional challenges, and in a cross-appeal, the County appeals the trial court’s failure to dismiss Kammerer’s writ of certiorari and its claim for attorney fees.

ARGUMENTS (S17A0924): Kammerer’s attorneys argue the trial court erred by dismissing its claim of Brown’s decision regarding the open space requirement because it used the improper standard for dismissal. The trial court based its decision on the argument that Kammerer “did not specifically challenge Tom Brown’s administrative determination.” But in its petition, Kammerer specifically enumerated its challenge against Brown, stating that “the Planning Director erred in denying [the Zoning Condition Amendment Application] and in interpreting and enforcing Zoning Condition #1 in violation of Georgia law.” The trial court also erred in dismissing Kammerer’s “declaratory judgment” claims on the ground they are barred by sovereign immunity or by Kammerer’s prior knowledge of the zoning conditions. “Sovereign immunity does not and should not bar Kammerer’s declaratory judgment claims against Appellees [i.e. the County] for public policy reasons.” In dismissing the claims on sovereign immunity grounds, the trial court misapplied the Georgia Supreme Court’s 2014 decision in

Center for a Sustainable Coast, Inc. v. Georgia Dept. of Natural Resources and its 2016 decision in *Olvera v. University System of Georgia's Board of Regents*. The high court made clear in both those rulings that it “differentiates between declaratory judgment claims based upon statutes and those based upon constitutional challenges, such as Kammerer’s claims in this case,” the attorneys argue. (A declaratory judgment is the court’s declaration of the rights or legal obligations of a party. A party seeking declaratory judgment will not receive a monetary award, even if it prevails at the hearing.) And the trial court erred in dismissing Kammerer’s claims on the ground that Kammerer purchased the property knowing it was encumbered by Zoning Condition #1, the attorneys argue. The trial court also erred in determining what constitutes “open space” without first holding a hearing on the evidence, Kammerer’s attorneys argue.

The County’s attorney argues the trial court appropriately dismissed Kammerer’s claim pertaining to Brown’s administrative decision, finding that the zoning condition was neither vague nor ambiguous. Brown “interpreted the zoning condition precisely as the Unified Development Code required him to interpret it,” the attorney argues in briefs. The trial court also properly dismissed Kammerer’s claim for declaratory judgment due to its prior knowledge of the zoning condition. “Declaratory judgment is not available to redress past actions,” the attorney argues. Furthermore, declaratory judgment is barred by sovereign immunity, which is the legal doctrine that bars lawsuits against the government. The trial court also did not err in interpreting the zoning condition and no hearing on the evidence was required.

ARGUMENTS (S17X0925): The trial court erred when it failed to dismiss Kammerer’s petition for writ of certiorari related to the Board’s denial of Kammerer’s proposed amendment to Zoning Condition #1. As Kammerer acknowledges, a petition for writ of certiorari is an appropriate mechanism for court review of the administrative decisions of zoning boards. But it is not appropriate for legislative decisions by a Board of Commissioners, the County argues. When a Board of Commissioners denies an application for re-zoning, and that decision is challenged, the superior court must conduct its own independent review of the evidence that “is not limited to examination of the evidence presented to the zoning authority.” The trial court also erred in failing to dismiss Kammerer’s claim for attorney’s fees. The Georgia statute does not provide a stand-alone cause of action, so the claim for attorney fees should be dismissed because Kammerer will have no other claims left once the petition for certiorari is dismissed. Also, costs, but not attorney fees, are available under the statute in connection with a claim for a writ of certiorari. And Kammerer’s claim for attorney’s fees is also barred by sovereign immunity, the County’s attorney argues.

Kammerer’s attorneys argue the trial court did not err in refusing to dismiss Kammerer’s petition for writ of certiorari. The County’s development code specifically provides that a party “aggrieved by a final decision of the Board of Commissioners...may make an appeal by writ of certiorari to the Superior Court.” The trial court also correctly refused to dismiss the claim for attorney’s fees. The Georgia Supreme Court has authorized attorney’s fees under the law where a trial court has found that a party has acted in bad faith. The County is aware that its development code causes parties to believe they must file a petition for writ of certiorari to contest a decision of the Board, and the County acts in bad faith when it uses its code as a litigation tactic to entice parties to file petitions that it will later seek to be dismissed. Also, because Kammerer’s claims for declaratory judgment are not barred by sovereign immunity, an award of attorney’s fees is available, Kammerer’s attorneys argue.

Attorneys for Appellant (Kammerer): J. Ethan Underwood, Joshua Scoggins, Jennifer Ray
Attorney for Appellee (County): Ken Jarrard

2:00 P.M. Session

WILLIAMS V. THE STATE (S17A0954)

A man is appealing his conviction in **Cobb County** for murdering his girlfriend by beating her to death with a hammer.

FACTS: Decarla Lomax and Deron Williams had a volatile, on-again, off-again relationship marked by violence. According to State prosecutors, Williams was a drug addict who was violent toward Lomax and hostile toward her three children. According to Williams' attorney, Lomax was also violent and was arrested in May 2007 after she cut Williams with a butcher knife. It was shortly after the two had begun living together and Lomax had found a crack pipe in Williams' pants pocket while looking for car keys. According to the State, Williams pushed Lomax, held a knife to her throat and threatened to kill her and her children if she did not mind her own business. Lomax then grabbed the butcher knife, cut him and ran him out of the apartment. Ultimately charges against her were dismissed. Other violent episodes followed. Williams at time left marks on Lomax and pulled her hair. Lomax once cut Williams' face with scissors. Williams would take Lomax's money and once pawned her car to buy drugs. In July 2008, Williams hit Lomax on the top of her head with a hammer during an argument over money. He hit her so hard, the hammer broke. She went to a hospital emergency room, and hospital staff called police. Williams was charged with assault, and in 2009, he pleaded guilty under the First Offender Act. Eventually Lomax moved to the Village Mobile Home Park in Cobb County to get away from Williams, found another boyfriend, and did not see Williams until the beginning of 2011. On May 12, 2011, Lomax was in the process of moving from her trailer into an apartment in Clayton County. That morning, after dropping her son off at high school, Lomax returned to her trailer to pick up some remaining items she had not yet moved into her new place. Williams was with her as she had told him she would give him a ride to his apartment in DeKalb County. One of the items Lomax had remaining in her trailer was a hammer she had brought to remove the nails that had held her pictures. According to Williams' attorney, Williams and Lomax began arguing when Lomax asked him about his texting his child's mother. She dug her nails into his arm, came at him with a metal comb and told him she was having sex with other men. He later said he was so upset that he squeezed her neck, grabbed the hammer and hit her on the top of her head, striking four times and killing her. He wrapped her head in a jacket, then took her car and fled. As he drove out of the mobile home park, he discarded the hammer. Moments later, he called his mother in Washington, D.C., crying hysterically and saying, "She's dead." Williams' mother then flew to Atlanta, met Williams at a McDonald's restaurant and rented a motel room. Concerned about her mother's safety, Williams' sister told police they could find her brother and mother at the Red Roof Inn on Panola Road.

Following a November 2012 jury trial, Williams was found guilty of malice murder and sentenced to life in prison with no chance of parole. He now appeals to the state Supreme Court.

ARGUMENTS: Williams' attorney argues that he deserves a new trial based on four errors made during his trial. First, the trial court erred in allowing the State to present evidence of Williams' first offender plea. Under the First Offender Act, a first offender's guilty plea does not

constitute a “conviction.” Rather, the case is suspended during a period of probation until the probation is either revoked or completed. If it is completed, the offender’s record is wiped clean and no conviction is recorded. The purpose is to give a first-time offender a second chance at avoiding a criminal record. If it is revoked due to another offense or failure to abide by the conditions of probation, a conviction is entered. “The law is very plain, if the person has been given first offender treatment and there had not been an adjudication of guilt entered, then the first offender’s record should not be used,” the attorney argues in briefs. For the same reason, the trial court incorrectly sentenced Williams as a recidivist, counting his first offender plea as a conviction. “No conviction exists,” the attorney argues. The prosecutor even admitted to the judge that the sentencing statute says there must be an adjudication before the first offender act becomes a conviction, but he asked for “public policy” considerations in arguing that the court should sentence Williams to life without parole because he was a recidivist. In doing so, “the court is imposing a sentence the law will not allow.” Also, Williams’ constitutional rights were violated during the trial because his attorney rendered “ineffective assistance of counsel,” his attorney argues. The trial attorney’s defense theory was that Williams and Lomax had been in a “fight gone bad” and that Lomax had come at Williams with a metal comb. However, during trial, the medical examiner’s testimony of how the wounds occurred directly contradicted the defense argument. But Williams’ trial attorney failed to respond by requesting a postponement in the trial, getting an expert to refute the medical examiner’s testimony or requesting a mistrial. The trial court also erred in allowing the medical examiner to give his opinion in testimony based on blood spatter patterns that was not shared with the defense attorney prior to trial, as the discovery rules require.

The State, represented by the District Attorney’s and Attorney General’s offices, argues the trial court correctly admitted as evidence Williams’ first offender guilty plea. In that prior case, Williams had pleaded guilty to an aggravated assault for hitting Lomax in the head with a hammer. But at the time he pleaded in that case, he was not entitled to first offender treatment because he had a prior 2000 felony conviction in Maryland for stealing \$2,900 from a bank, as well as a second first offender plea in DeKalb County for theft by taking. Under Georgia’s First Offender Act, a court may only grant the special status to “a defendant who has not been previously convicted of a felony.” The trial court properly allowed in the evidence of Williams’ 2009 assault on Lomax with a hammer as a “prior difficulty,” even though his guilty plea to that assault was under the First Offender Act, because at the time he entered it, he was already a convicted felon and not eligible for first offender treatment. Even if it was error to admit Williams’ first offender guilty plea into evidence, it was a harmless error because “the evidence of Williams’ guilt is overwhelming.” Williams himself “took the stand and admitted killing the victim by hitting her in the head four times with a hammer.” The trial court also correctly sentenced Williams as a recidivist, again because the trial court found that Williams was not eligible for first offender treatment. While the state Supreme Court has held that a recidivist sentence cannot be based on an unrevoked first offender probation, here the trial court specifically found that Williams’ first offender treatment was improperly given in two prior convictions due to his earlier conviction in Maryland. Williams’ trial attorney provided effective assistance of counsel, and Williams has failed to carry his burden by proving otherwise, the State contends. Finally, Williams failed to demonstrate that a violation of the discovery process had

occurred as a result of the State's failure to disclose in advance of trial that the medical examiner would make an oral report of his opinions concerning blood spatter interpretations.

Attorney for Appellant (Williams): Raina Nadler

Attorneys for Appellee (State): D. Victor Reynolds, District Attorney, John Edwards, Sr. Asst. D.A., Michael Carlson, Dep. Chief Asst, D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.

JOHNSON V. THE STATE (S17A1105)

A man convicted of stabbing a woman to death is asking that his convictions be reversed and he be granted a new trial because a fire destroyed all the trial recordings taken by the court recorder and he could not adequately appeal his conviction.

FACTS: On Feb. 29, 2008, Nicole Judge was found stabbed to death in her apartment after her father went to her home and saw blood on the porch outside her door. He immediately called police without entering. The first **Lee County** Sheriff's deputy to arrive entered the apartment and followed a trail of blood from the front door to the bedroom. He found Judge's body with a knife stuck in her neck on the floor of her children's play room. Two broken knife handles and knife blades were recovered from the room. Judge had suffered 36 separate stab wounds, including 10 to her head, three to her neck, six to her liver, and 14 to her back. Blood was found outside and inside the apartment, including blood stains on the driveway and porch, projected blood stains in the hallway and play room, bloody footprints in the kitchen and bathroom, and blood spots in the cutlery drawer in the kitchen. Bloody fingerprints on the door of the apartment and on a toy in the apartment later matched the fingerprints of **Craig Johnson**. When agents with the Georgia Bureau of Investigation (GBI) searched Johnson's house a few days later, they found socks and a shirt with Judge's blood on them. Additionally, a bank ATM video showed Johnson trying to use Judge's ATM card on the night of her death, and Judge's driver's license and social security card were found in the bank parking lot.

Johnson was arrested and interviewed by GBI agents for almost four hours. He was advised of his *Miranda* rights under the U.S. Supreme Court's 1966 decision in *Miranda v. Arizona*, and he voluntarily waived his rights orally and in writing. Initially Johnson denied in the recorded interview that he had been at Judge's apartment at all. He then admitted that he had been there but said she had begun stabbing herself, and he tried to stop her before running away. After an agent told Johnson that Judge's stab wounds were not self-inflicted, he again changed his story, saying that while the victim was stabbing herself, her boyfriend arrived, and he and Judge started fighting. Johnson said he ran to the kitchen to get a knife to defend himself, heard Judge scream, fought with the boyfriend, then ran away with the boyfriend following him. Johnson said the boyfriend then forced him to use Judge's ATM card.

After being told that the physical evidence did not match this account either, Johnson admitted that there was no boyfriend and told the following story: After he and Judge had sex, she told him she wanted him to leave his wife for her and threatened she would otherwise tell his wife about the affair. He said Judge then pulled out a knife and tried to stab him. While they were fighting over the knife, Judge was stabbed and Johnson cut his hand. He then went to the kitchen to get a knife, and when he returned, Judge rushed at him and he stabbed her, after which she grabbed the knife. He returned to the kitchen for another knife, and they continued to fight. After he stabbed her in the back, she eventually fell to the floor, and he stabbed her again. He

said he left her lying on the floor, went to the bathroom, cleaned up, and then fled. He said he tried to use her ATM card because he wanted to get money for her children.

Following a September 2009 trial, the jury found Johnson guilty of malice murder and other charges, including aggravated assault, aggravated battery, and financial transaction card theft. He was sentenced to life in prison. As is common, in October 2009, his attorney filed a motion for new trial. In March 2011, Johnson obtained a new attorney for his appeal. Neither his trial attorney nor his appeals attorney requested a copy of the trial transcript.

At the initial hearing on his motion for new trial, his attorney argued that Johnson was entitled to a new trial because the transcript was unavailable. The State replied that the court should either deny the motion because Johnson had been dilatory in requesting the transcript, or use the procedures of Georgia Code § 5-6-41 (f) and (g), to recreate a transcript, using the recollections of the judge, trial attorneys and one of the State's investigators who was present for the entire trial. In November 2012, the court ordered the State to produce a recreated transcript and the defense to offer alterations or additions. After the State produced the recreated transcript, Johnson's attorney still objected but in July 2014, filed 12 rather minor suggestions for changes.

On July 26, 2016, Appellant filed an amended motion for new trial, raising five enumerations of error, including a contention that the destruction of the trial transcript denied Johnson the ability to "present an appeal." The court ultimately ruled that the recreated transcript "is sufficient to be made the transcript of this trial along with the evidence...." Johnson now appeals to the Georgia Supreme Court.

ARGUMENTS: Johnson's attorney argues that by failing to meet its burden to provide a trial transcript that is true and correct, the State has deprived Johnson of his right to appeal, entitling him to a new trial. Here, neither Johnson's attorney nor the State's attorney is the original trial counselor. "All information about the trial comes from second-hand sources," the attorney argues in briefs. "And the certification of the recreated 'dummy' transcript occurred more than seven years after the trial." In similar circumstances, the Georgia Supreme Court decided in 2016 in *Sheard v. State* that because portions of the trial transcript were missing, the defendant was entitled to a new trial. "There is no dispute here that Appellant [i.e. Johnson] has a right to appeal his case, and that he is entitled to a transcript of the proceeding." Also, the evidence was insufficient to convict Johnson of murder beyond a reasonable doubt. "Because the recreated 'dummy' transcript is insufficient for consideration of the evidence presented at trial, the Court should find that no evidence was properly presented in the case, and Appellant's conviction should be reversed," Johnson's attorney contends.

The State, represented by the District Attorney's and Attorney General's offices, argues that the trial court properly reconstructed the trial transcript according to Georgia Code § 5-6-41 (g), and the court's decision is therefore not subject to review on appeal. "Georgia law sets forth an express remedy for circumstances where a verbatim trial transcript cannot be produced, and if that procedure is followed, the trial court's findings are not subject to review," the State argues in briefs. "In the instant case, the trial court followed the statutory process in full." Furthermore, the evidence in this case "was not merely sufficient to support a conviction; it was overwhelming," the State contends. "Appellant – by his own admission – stabbed Nicole Judge repeatedly. He used three knives and stabbed her dozens of times, cutting her jugular vein, liver, and lung, among other wounds. He left blood stains and spatter in virtually every room of the apartment. His clothes were soaked in her blood. His bloody fingerprints were on the bedroom door and on

a child's toy in the room where he left the victim. He was recorded on video attempting to use her ATM card after he killed her." "Given the undisputed facts of this case, one can fairly conclude that not only would 'any rational trier of fact' have found Appellant guilty, but in reality *every* rational factfinder who considered the case would have reached the same verdict."

Attorney for Appellant (Johnson): Kevin Kwashnak

Attorneys for Appellee (State): Plez Hardin, District Attorney, Lewis Lamb, Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

RICHARDSON-BETHEA V. THE STATE (S17A1104)

A caregiver is appealing a **Newton County** jury's verdict finding her guilty of murder and abuse of a disabled adult by punching and kicking to death a woman who was in her care.

FACTS: Susan Walter was a 48-year-old woman who suffered from mental retardation and physical disabilities and was unable to care for herself. Her mother had cared for her until she died in 2003, and eventually Walter was placed in a personal care home funded by the state. In 2011, shortly after Cornelius Richardson-Bethea received her training to operate a personal care home, Lutheran Services, which matched adults needing care with caregivers, placed Walter in Richardson's home in Newton County. Walter was Richardson's first and only in-home client and Walter lived there from September 2011 until her death in March 2013. Walter's case manager from Lutheran Services spoke with Walter by phone and visited her in person at least once a month. The State also monitored her care on a monthly basis by visits from an organization called Creative Consulting.

On March 2, 2013, Richardson called 911 and reported that she had found Walter dead. When a Newton County Sheriff's Deputy arrived on the scene, he found Walter sitting in a reclining chair in her room and noticed she was bruised about her face, neck, arms and legs. She was cold to the touch and not breathing. He spoke to Richardson, observing that while she was loud and acted emotional, she was not crying. The coroner arrived and made similar observations about Walter's bruising, saying she had a "grab-type bruise" on her chin and that he had rarely seen the level of bruising he saw on Walter. Richardson told law enforcement officers and the coroner that Walter had suffered a seizure the day before while sitting in the chair in her bedroom, causing her to fall out of the chair onto her face. Richardson said she had immediately notified the case manager, the state coordinator and Walter's brother about the seizure. Richardson said Walter ate dinner that evening but later threw up in her bed. She said she assisted moving Walter to the recliner, then changed the linens on her bed. She left her in the recliner so she would not choke if she again vomited. Richardson said she gave Walter her anti-seizure medicine and later checked on her at around midnight, observing that Walter seemed fine. When she checked again at 2 a.m., Walter was dead.

Dr. Kris Sperry, at the time Georgia's Chief Medical Examiner, performed the autopsy. He found extensive bruising to Walter's face, head, chest, arms, legs, feet and abdomen. He noted that she had bruising consistent with grab marks around her chin and what appeared to be defensive wounds in the form of large bruises on the inside of her right upper arm and lower left leg. He noted bruising on her right cheek and around her eye that he said came from multiple impacts to her face. He noted extensive and severe abdominal bruising indicative of a high velocity impact, such as one would get from a car wreck, a fall from great heights or a severe

beating. Within the large abdominal bruise, he noted 15 distinct areas of impact indicating at least 15 blows. He noticed additional multiple bruises, inconsistent with falling. Sperry found severe bleeding and swelling of her brain consistent with blows to her head. He concluded Walter had died from blunt force head trauma and the manner of death was homicide. He later testified the trauma to Walter's head was consistent with being punched or kicked repeatedly by a person wearing soft shoes, and he believed she had been lying on the ground when she was struck repeatedly. He also concluded that the severe abdominal bruising was not consistent with Walter having fallen on the shower bar about a week prior to her death, as Richardson had said she had done. Sperry testified Walter had no trace of the anti-seizure medication, Keppra, in her body, and it appeared she had not eaten for 10-to-12 hours prior to her death as her small intestine was empty.

In May 2013 a Newton County grand jury indicted Richardson for malice murder, felony murder, aggravated battery, aggravated assault, and abuse of a disabled adult. At trial, her attorney called a number of character witnesses on her behalf who testified to the loving relationship she shared with Walter. No complaints ever had been filed against her. Following a May 2014 jury trial, Richardson was convicted on all counts and sentenced to life in prison without parole. Her new attorney filed a motion for new trial, claiming her trial attorney had given her "ineffective assistance of counsel," in violation of her constitutional rights, for failing to call an independent medical expert to challenge Sperry's findings. At the hearing on the motion for new trial, Dr. Joseph Burton – also an experienced medical examiner – testified that while he agreed with most of Sperry's findings, he believed the massive bleeding and swelling of Walter's brain occurred from the injury to her cheek and could have occurred when her face hit the floor following the seizure. He also testified, however, that the multiple impacts to the top of her head, as well as the injury to her abdomen, were consistent with being punched or kicked. He testified that he believed a majority of pathologists would have found that Walter was beaten to death. Thomas Clegg, Richardson's trial attorney and also experienced, having tried more than 90 murder cases, said that after consulting with another attorney, he had decided against bringing in a medical expert for the defense because he didn't feel it would be helpful to Richardson's case as he was building the defense around her good relationship with Walter and Walter's history of falls. The trial judge found Clegg had provided reasonable and effective counsel and that Richardson's case was not prejudiced by Clegg's decision not to bring in an independent expert. Richardson now appeals to the state Supreme Court.

ARGUMENTS: Richardson's attorney argues that she was denied effective assistance of counsel during the preparation of her case for trial, and during the trial, by her trial attorney's failure to retain expert testimony to refute the State's medical testimony. The defense's theory that Walter's death was natural and not at all attributable to Richardson, "was totally and utterly undermined by Dr. Sperry's testimony," the attorney argues in briefs. "A defense expert in forensic pathology was an absolute necessity to try to refute the State's theory of the case, and such testimony would very likely have affected the ultimate outcome against Richardson." "Dr. Burton's testimony, if presented at trial, would have shown the jury not only that Dr. Sperry's opinions *were* open to question, but also that Richardson's version of events was realistic, entirely possible, and would account for all of Walter's injuries." "The fact that Dr. Sperry was so certain of his opinion, which was that Richardson had brutally beaten Walter to death, only serves to heighten the need for a second opinion." Outside the expert medical testimony, the

State had no case, the attorney contends. “There had been absolutely no signs of problems between Richardson or Walton, no complaints made against Richardson, and no indication that Richardson could act violently toward her charge.” Expert testimony for the defense “would have leveled the playing field and allowed the jury to find reasonable doubt that Richardson had beaten Walter to death,” her attorney argues.

The State, defended by the District Attorney’s and Attorney General’s offices, argues that Richardson’s trial attorney, Clegg, pursued a reasonable and well-supported defense strategy and provided effective legal counsel. Furthermore, Richardson was not harmed by his decision not to pursue expert counsel “as it is unlikely that the outcome of the trial would have been different,” the State contends. “An attorney’s decisions about which defense to present and whether to call an expert witness are matters of trial strategy within the broad range of professional conduct afforded to a trial attorney.” Although Richardson chose not to testify in her own defense, the jury heard her account of what happened to Walter that led to her death, “and about the warmth of their relationship in her own words,” the State argues. Furthermore, Richardson’s ineffective assistance claim grows even weaker when Dr. Burton’s testimony is considered in its totality. “According to Dr. Burton, a majority of pathologists would agree to a medical certainty with Dr. Sperry’s findings that Walter was beaten to death,” the State argues. Richardson “received a fair trial and was found guilty by a jury of her peers because the overwhelming evidence against her showed that she was guilty of murder in the killing of Susan Walter in March of 2013.”

Attorney for Appellant (Richardson-Bethea): Teresa Doepke

Attorneys for Appellee (State): Layla Zon, District Attorney, Randy McGinley, Chief Asst. D.A., Jillian Hall, Dep. Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.