



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, December 12, 2017

10:00 A.M. Session

HOLT, WARDEN V. EBINGER (S18A0052)

The Georgia Attorney General's office is appealing a lower court's order that set aside a man's conviction and prison sentence for aggravated assault based on the incompetence and ineffective legal counsel he received from both his trial and appeals attorneys.

FACTS: This case arose from an altercation that occurred in a Kroger parking lot in **Cherokee County**. On the evening of Jan. 18, 2013, **George Elliott Ebinger** and his son were driving home from a high school wrestling match when they came upon a vehicle driven by Logan Lord that was stopped, or moving slowly, in the middle of a two-lane road. The jury heard conflicting testimony from Ebinger and Lord. Lord testified that the Ebingers tailgated him, honked their horn and cursed at him for about two miles before they eventually reached a passing lane and passed him. Ebinger testified that after he flashed his lights and honked his horn at Lord, Lord accelerated a short distance then slammed on his brakes, repeating this action three times before Ebinger was able to pass Lord, who shouted obscenities and made obscene hand gestures. Lord claimed Ebinger followed him into a Kroger parking lot and drove to where Lord was standing. Ebinger claimed he had stopped at a gas station store in the shopping center lot to purchase a cigar, when Lord drove by hurling obscenities and making obscene hand gestures. Ebinger testified that as soon as he got out of his truck, Lord pulled out a pocket knife and started

attacking him with it. Fearing Lord was intoxicated, he said he asked his son to hand him his shovel from the bed of the pickup truck. Ebinger testified that he struck Lord with the shovel to defend himself against Lord's repeated knife attacks. Lord testified he held the knife by his side and had no plans to use it unless needed for protection. He said he did not raise the knife until after Ebinger swung a shovel at him, at which time he began to stab Ebinger to defend himself. Police arrived and arrested Ebinger and his son. A Kroger store surveillance camera captured much of the confrontation between the men, and that recording was played for the jury.

Ebinger's trial attorney, Drew Bishop, was aware there had been an eyewitness, Tammy Kitchen, who had suggested in her statement to law enforcement that Lord was the aggressor, but the attorney did not get her to testify at trial. During the trial, the attorney did attempt to ask one of the responding law enforcement officers about what Kitchen had told him, but prosecutors successfully objected, arguing his response would be hearsay. The jury convicted Ebinger, and he was sentenced to 15 years, with the first five to be spent behind bars. Ebinger's son was acquitted.

Ebinger appealed to the Georgia Court of Appeals. His attorney for the appeal raised a claim of "ineffective assistance of counsel" by his trial attorney, a violation of Ebinger's constitutional rights. The appeals attorney alleged that his trial attorney had been ineffective for failing to secure the testimony of Tammy Kitchen, and for eliciting testimony from Ebinger that he had a prior conviction for domestic violence. The appeals attorney issued a subpoena for Kitchen's testimony three days before the hearing on a motion for new trial that had been filed by Ebinger, but it was not delivered until four days after the hearing, so again Kitchen did not testify. The trial court denied the motion for new trial and the Court of Appeals upheld Ebinger's conviction. The appellate court said that the record "amply" showed that his trial attorney had made a diligent effort to locate Kitchen and that his decision to elicit Ebinger's testimony about his prior convictions was an acceptable trial tactic.

Ebinger, representing himself, subsequently filed a "petition for habeas corpus," which is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, which in this case was **Ahmed Holt**. At the habeas hearing, both Tammy Kitchen and her daughter Cheyenne Kitchen testified that Lord, not Ebinger, was the aggressor in the altercation, and they had called 911, fearing for Ebinger's safety. Both witnesses testified that Ebinger obtained a shovel to use in self-defense only after Lord attacked him with what appeared to be a knife. Kitchen testified that Ebinger's trial attorney had said her testimony would be "critical" to Ebinger's trial and he promised to contact her with the trial date. But Kitchen never heard from him again. The appeals attorney testified that he had directed a private investigator to find Kitchen, but the investigator failed to find her.

Following the hearing, on May 2, 2016, the habeas judge entered a 50-page order detailing his findings of fact and conclusions of law. In it, the judge found that the Kitchens' testimony would have corroborated that of Ebinger and that the trial attorney had sent a subpoena to Tammy Kitchen's prior address even though she had provided him with her new address. And the judge found unjustifiable the trial attorney's failure to pursue a defense that Ebinger was immune from prosecution because he had been defending himself, and the attorney's decision to elicit Ebinger's testimony regarding his conviction for domestic violence. The habeas court also found that the appeals attorney had Kitchen's cell phone but had failed to

use it to contact her. In addition, the habeas court rejected the State's argument that Ebinger's claims were "procedurally defaulted." The habeas judge stated in the order setting aside Ebinger's conviction that, "Mr. Ebinger's Constitutional right to counsel was impinged by the ineffective assistance of both his trial counsel and his appellate counsel. Indeed gross errors of counsel permeated the entire procedural history of this case: from pretrial proceedings to trial, and from post-trial proceedings to the subsequent appeal... The deficient performance of trial counsel and appellate counsel had the effect of denying Mr. Ebinger the fundamental right to a fair trial." The warden and State, represented by the Attorney General's office, now appeal to the Georgia Supreme Court.

ARGUMENTS: The State argues that the habeas court improperly ruled on the merits of the claims that Ebinger received ineffective assistance from both his trial and appeals attorneys. The attorneys for the State argue the habeas court failed to analyze whether the claims were "procedurally defaulted" before ruling on them. The habeas court also erred when it found that Ebinger's case was damaged by the appeals attorney's failure to locate Tammy Kitchen and her daughter. Finally, the habeas corpus court erred in finding Ebinger's case was damaged by his appeals attorney's decision not to allege that the trial attorney had been incompetent for failing to pursue an immunity defense.

Ebinger's attorneys argue the habeas court properly found that Ebinger's claims of ineffective assistance of his trial attorney were not procedurally defaulted. The habeas court properly considered the merits of Ebinger's claim that his trial attorney was ineffective for failing to call critical eyewitnesses. And the habeas court was not "clearly erroneous" in finding that Ebinger's case was damaged by his appeals attorney's failure to secure testimony from Kitchen. The habeas court's Final Order should be upheld, Ebinger's attorneys argue.

Attorneys for Appellant (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Ashleigh Headrick, Asst. A.G.

Attorneys for Appellee (Ebinger): W. Randall Bassett, Philip Green

PUTNAL V. THE STATE (S18A0018)

In this **Polk County** death penalty case, a man facing trial for the sexual assault and murder of his girlfriend's 21-month-old daughter is appealing the trial judge's denial of his motion to seal matters related to experts' evaluation of his mental health.

FACTS: The State is seeking the death penalty against Dustin Drew Putnal, who was 27 years old when he was accused of murdering 21-month-old Ella Grayce Pointer while her mother was at work. Putnal is due to be tried for one count each of malice murder, aggravated battery, and aggravated sexual battery, and two counts each of felony murder and cruelty to children in the first degree. At trial, the State will attempt to prove that on Oct. 28 or 29, 2016, Putnal caused the toddler's death by inflicting blunt force trauma to her head after committing sexual battery against her by penetrating her vagina with an unknown foreign object. Because Putnal is indigent, he is represented by the capital defender division of the Georgia Public Defender Council. State law requires the State to fund the costs of obtaining expert witnesses for indigent capital defendants, so Putnal does not need to apply for county funds for expert assistance. However, he must obtain an order from the trial court to allow his expert consultants to gain access to him, as the Polk County sheriff requires a court order for outside parties to be allowed to examine inmates in the county detention center where Putnal is incarcerated. In June 2017,

Putnal's attorneys presented the court with "ex parte" requests for two mental health experts to be allowed access to Putnal at the detention center to examine him. (An "ex parte" request is a request made without notice to – or argument from – the other side, which in this case is the State. Similarly, an "ex parte" hearing is a hearing between a judge and the attorneys for one side, without the attorneys from the other side.) Each request included the expert's name, discipline, and the type of examination the expert would conduct. The defense attorneys proposed ex parte orders to the court that would seal both their motions and the judge's signed orders granting access, suggesting language that the order's language state it "shall be confidential and shall not be disclosed until such direction from the court." Three days after signing both proposed ex parte orders, the trial judge filed both motions and orders publicly with the clerk of court and had them served them upon the State. Additionally, the trial court forbade any future filings in the case from being delivered to the court in the judge's chambers and declared that no future filings related to Putnal's mental health consultants would be sealed. Putnal's attorneys now appeal the pre-trial ruling to the state Supreme Court, arguing that the ruling cripples Putnal's right to prepare his defense under the protection of attorney-client privilege. The Supreme Court has agreed to review the case, asking the parties to address whether the trial court erred in denying Putnal's motion to proceed ex parte and under seal with regard to matters pertaining to his expert mental health evaluation.

ARGUMENTS: "Confidential sealed ex parte communications with the trial court about matters affecting the preparation of Putnal's defense are constitutionally required in his death-penalty case," Putnal's attorneys argue in briefs. "Although ex parte communications are generally disfavored, they are authorized in appropriate circumstances. The Uniform Superior Court Rules and the Code of Judicial Conduct both expressly permit ex parte communications in circumstances authorized by law." Putnal's ex parte communications were authorized by law. In its 1989 decision in *Brooks v. State*, the Georgia Supreme Court ruled that an indigent criminal defendant has the "right to obtain expert assistance to assist him in preparing his defense without losing the opportunity to prepare a defense in secret. Otherwise, the defendant's 'fair opportunity to present his defense'... will be impaired." The identity of the mental health experts is "privileged and confidential" because disclosure of their identities violates Putnal's constitutional rights to a fair trial and due process of law. "Mr. Putnal is constitutionally entitled to 'maintain the secret preparation of his defense' and 'cannot be placed in a position of revealing his theory of the case,'" the attorneys argue. Putnal's ex parte request for his mental health consultants to enter the jail to examine him "revealed the significant steps he is taking in his defense investigation and mitigation preparations that could severely damage his case." The requests "reveal new information about his contemplation and development of a mental health defense." Putnal's attorneys ask the state's high court to reverse the order of the trial court and rule that issues related to his mental health investigation and his consultants must be addressed ex parte and be sealed as per the *Brooks* decision.

The District Attorney, representing the State, argues there was no error in the superior court's failure to seal the ex parte orders giving two mental health experts access to Putnal in jail and disclosing their names in the process. The ex parte communication with the judge was improper, and the disclosure of the names in no way harmed Putnal's case or disclosed any trial strategy. The trial court "was not authorized by law to conduct an ex parte hearing in the instant case because no trial strategy was revealed and no privileged information was divulged," the

State argues in briefs. “Additionally, there is no need to establish precedent as the law is clear and well settled that ex parte communication is strongly disfavored by law.” It is also well settled that communications between experts and defendants and their attorneys is privileged and private, and that the defense is entitled to an ex parte hearing when they are required to reveal trial strategy. Unlike in the *Brooks* case, however, no trial strategy was divulged in these orders. “Because there was no error, and nothing remotely detrimental to the defense was disclosed in the order,” the Georgia Supreme Court should exercise its discretion in denying Putnal’s petition to appeal this matter. The State does not dispute Putnal’s right to be evaluated by experts regarding his psychological condition. “However, the State does dispute defense counsel’s assertion that ex parte communication was appropriate, much less required, in this case.”

Attorneys for Appellant (Putnal): Gerald Word, Crystal Bice, Office of the Georgia Capital Defender

Attorneys for Appellee (State): Oliver Browning, Jr., District Attorney, Jordan Stover, Asst. D.A.

SIMPKINS V. THE STATE (S18A0063)

A man convicted of murder in what the State calls a gang-related killing is appealing his conviction and life prison sentence, arguing his trial attorney was incompetent and ineffective.

FACTS: The night of June 16, 2013, Kenneth Quarterman, Jr., was murdered, and Charles Lewis Brown, III was wounded during a drive-by shooting at a block party outside Club Apollo in **Jefferson County**. Both men were shot in the head. The shots were fired from the rear driver’s side (and probably the rear passenger’s side as well) of a black Dodge Charger driven by Rajonte McGruder. The investigation led police to interview several people, including McGruder. He told Agent Sarah Lue of the Georgia Bureau of Investigation (GBI) that **Damien Simpkins** was the man who fired the shots and was sitting behind him in the car. A Jefferson County Grand Jury indicted 12 men, including Simpkins and McGruder, for a number of crimes, including malice murder, aggravated assault, and violating the Street Gang Terrorism and Prevention Act. Prior to trial, the State withdrew two counts of firearm possession and one count of violating the racketeering statute. At a joint trial with five of his co-defendants, Simpkins was convicted of all remaining counts and sentenced to life imprisonment plus 50 years.

According to the evidence at trial, a month before the drive-by shooting, Brown, who survived the shooting, and several of his associates got into a gang “beef” with an associate and co-defendant of Simpkins that resulted in two shootings but no injuries. Quarterman, who was killed in the drive-by shooting, was also an associate of Brown’s, and the night of the shooting the men were all together at the block party outside of Club Apollo. Meanwhile, Simpkins, McGruder and their associates, who prosecutors said were members of the MFG gang, congregated in a nearby open lot plotting the attack. One MFG member was giving the others instructions, telling McGruder he would have to drive, and telling Simpkins he would “have to do it.” Another MFG member testified he saw McGruder get in the driver’s seat and Simpkins get in the seat behind McGruder with a gun. Subsequently, the drive-by shooting occurred, with multiple witnesses confirming that shots came from the back driver’s side seat of the Charger. The State presented evidence that MFG was a street gang. Simpkins admitted “rapping” with the group. Agent Lue testified about her interview with McGruder in which he identified Simpkins as the shooter. However, because McGruder was a co-defendant, he was unavailable to be cross-

examined, so the State “redacted” his statements by having the agent testify that McGruder told her that another associate had instructed him and “another individual” to “do it,” and that the “other individual got in the back of the vehicle, who was also to do it.” She did not refer to Simpkins by name. Simpkins’ attorney now appeals to the state Supreme Court.

ARGUMENTS: “The State’s case against Damien Simpkins was circumstantial,” Simpkins’ attorney contends in briefs. “He told police that he collaborated with members of a rap group called ‘MFG;’ an accomplice saw him get into a black car, and that same black car was involved in a drive-by shooting a few minutes later. The only direct evidence of Simpkins’ involvement came through the statements of a codefendant, Rajonte McGruder, who told police that Simpkins shot the victim, Kenneth Quarterman. Because as a codefendant McGruder was unavailable for cross-examination, the State ‘redacted’ his statements to say only that an ‘individual’ had fired the shots. But, because these statements referred directly to Simpkins’ existence and, when linked to other evidence were inculpatory, the redaction was insufficient,” the attorney argues. (“Inculpatory” evidence tends to point to one’s guilt.) “Even worse, the State simply *told* the jury in both opening and closing that McGruder’s statements referred to Simpkins. In the absence of any objection from counsel, or any instruction from the judge that McGruder’s statements couldn’t be held against Simpkins, Simpkins was convicted on the basis of testimony he never had a chance to confront.” And that’s a violation of Simpkins’ constitutional rights. By failing to object, his trial attorney provided “ineffective assistance of counsel.” Under *Bruton v. United States*, the U.S. Supreme Court ruled in 1968 that in a joint trial, a defendant’s Sixth Amendment right of confrontation is violated by admitting the confession of a non-testifying codefendant that implicates the defendant. “Trial counsel was ineffective, and a new trial is required,” Simpkins’ attorney argues.

The State, represented by the Attorney General’s office, argues that Simpkins received effective assistance of counsel at trial. Simpkins has failed to meet his burden under the U.S. Supreme Court’s 1984 decision in *Strickland v. Washington* that his trial attorney performed deficiently and but for that deficient performance, there is a reasonable probability that the outcome of Simpkins’ trial would have been different. The State argues the trial attorney correctly believed there was no *Bruton* violation by the trial court’s admission of the “redacted” statement of co-defendant McGruder. “*Bruton* excludes only the statement of a non-testifying codefendant that *standing alone* directly inculpatates the defendant,” the State argues. Another codefendant gave “extensive testimony” regarding Simpkins’ involvement in the crime, and that testimony was corroborated by numerous witnesses. Simpkins’ “sole enumeration of error lacks merit,” the State contends.

Attorney for Appellant (Simpkins): Andrew Fleischman

Attorneys for Appellee (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Aimee Sobhani, Asst. A.G.