

In the Supreme Court of Georgia

Decided: October 17, 2011

S11A1070. GABLE v. THE STATE.

NAHMIAS, Justice.

We granted certiorari in this case to consider whether a trial court has the authority to grant an out-of-time discretionary appeal in a criminal case as a remedy for counsel's failure to timely file a discretionary application. We conclude that Georgia courts do not have such authority where, as here, that remedy is not required by a violation of the appellant's constitutional rights.

1. In 1995, a jury found Appellant Homer Gable guilty of rape, aggravated sodomy, aggravated child molestation, and six counts of child molestation. The Court of Appeals affirmed on direct appeal. See Gable v. State, 222 Ga. App. 768 (476 SE2d 66) (1996). Appellant was represented by counsel at trial and on appeal. In October 2008, Appellant filed a pro se extraordinary motion for new trial under OCGA § 5-5-41 based on the alleged recantation of one of the victims. In November 2008, the trial court appointed a public defender to represent him. The court denied the extraordinary motion for new trial on July 30, 2009. Appellant's counsel filed a notice of appeal.

The Court of Appeals dismissed Appellant's direct appeal due to failure

to follow the discretionary appeal procedure required by OCGA § 5-6-35. That statute says that appeals in certain types of cases, including “[a]ppeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial” § 5-6-35 (a) (7), must be taken by filing an application for discretionary appeal with the appropriate appellate court “within 30 days of the entry of the order, decision, or judgment complained of,” § 5-6-35 (d).

On December 10, 2009, Appellant filed a motion for an out-of-time discretionary appeal with the trial court, which the court granted the next day on the ground that Appellant’s counsel was ineffective in failing to file a timely application for discretionary appeal. Appellant then filed an application for discretionary appeal with the Court of Appeals. The Court of Appeals ruled that the trial court did not have the authority to grant an out-of-time discretionary application and dismissed Appellant’s application because he did not file it within 30 days of the original, July 30, 2009, trial court order denying his extraordinary motion for new trial. This Court granted certiorari.

2. (a) The Court of Appeals has held that the failure to comply with the 30-day time limit for filing a discretionary application to appeal under OCGA § 5-6-35 is a jurisdictional defect. See Wilson v. Carver, 252 Ga. App. 174, 174

(555 SE2d 848) (2001). See also Spurlock v. Dept. of Human Resources, 286 Ga. 512, 525 (690 SE2d 378) (2010) (Nahmias, J., concurring specially) (citing Wilson v. Carver for the proposition that “[o]ur appellate courts have no jurisdiction over an untimely application”). That holding is consistent with this Court’s cases holding that compliance with the 30-day time limit for filing a notice of appeal under OCGA § 5-6-38 (a) is an “absolute requirement” to confer jurisdiction on an appellate court. See, e.g., Cody v. State, 277 Ga. 553, 553 (592 SE2d 419) (2004); Gulledge v. State, 276 Ga. 740, 741 (583 SE2d 862) (2003); Rowland v. State, 264 Ga. 872, 872 (452 SE2d 756) (1995).

Indeed, unlike the statutory deadline for filing a notice of direct appeal, which trial and appellate courts are authorized to extend once for up to 30 days (so long as the extension request is filed within the original 30 days), see OCGA § 5-6-39, the discretionary appeal statute does not authorize any extensions of its 30-day deadline. See Rosenstein v. Jenkins, 166 Ga. App. 385, 385 (304 SE2d 740) (1983). Accordingly, we hold that the filing of a discretionary application to appeal within the statutory 30-day deadline is required to confer jurisdiction on an appellate court.

(b) Relying on cases like Henry v. State, 278 Ga. 617, 620 (604 SE2d

826) (2004), in which courts have excused a party's failure to comply with court rules and other non-jurisdictional procedural requirements, Appellant contends that trial and appellate courts have the inherent, equitable power to excuse the late filing of a discretionary appeal. However, courts have "no authority to create equitable exceptions to jurisdictional requirements" imposed by statute. Bowles v. Russell, 551 U.S. 205, 214 (127 SC 2360, 168 LE2d 96) (2007).

Instead, Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal. For example, in Rowland, our Court explained that, because a criminal defendant has a constitutional right to the effective assistance of counsel for his first appeal of right, a trial court has the authority to excuse the untimely filing of a notice of appeal caused by defense counsel's ineffective representation by granting an out-of-time direct appeal. See 264 Ga. at 874-876. This procedure avoids the constitutional violation that would otherwise arise if deficient representation caused the defendant to lose his first appeal of right. See *id.* Accord Evitts v. Lucey, 469 U.S. 387, 395-397 (105 SC 830, 83 LE2d 821) (1985) (holding that due process required the granting of a new appeal to the defendant when his counsel's ineffectiveness in failing to

comply with state appellate court rules led to the dismissal of his first appeal of right); Shirley v. State, 188 Ga. App. 357, 360 (373 SE2d 257) (1988) (explaining that “the basis for permitting an out-of-time appeal must have rested upon an issue of constitutional dimension concerning the appeal itself, such as ineffective assistance of counsel resulting from failure to file a timely appeal or counsel’s abandoning an appeal desired by defendant, or failure to advise defendant of his right to appeal”). To the extent that Johnson v. State, 182 Ga. App. 477, 477-478 (356 SE2d 101) (1987), and Mitchell v. State, 157 Ga. App. 181, 182 (276 SE2d 864) (1981), may be read to allow an out-of-time appeal for reasons of non-constitutional significance, those decisions are overruled.

(c) Appellant argues that he was entitled to the effective assistance of counsel to pursue his discretionary appeal and that the violation of this constitutional right requires the granting of an out-of-time appeal. But his premise is incorrect. There is no constitutional right to counsel, much less the effective assistance of counsel, in filing or litigating a post-conviction extraordinary motion for new trial or a discretionary application to appeal the ruling on such a motion. See Murrell v. Young, 285 Ga. 182, 183 (674 SE2d 890) (2009) (holding that a defendant has no constitutional right to counsel to

pursue a post-conviction extraordinary motion for new trial); Richards v. State, 275 Ga. 190, 191 (563 SE2d 856) (2002) (holding that “an out-of-time appeal is not available to one whose conviction has been affirmed on direct appeal”); Gibson v. Turpin, 270 Ga. 855, 859-860 (513 SE2d 186) (1999) (holding that a defendant has a right to counsel at trial and on direct appeal of right “but no further”). See also Ross v. Moffitt, 417 U.S. 600, 609-618 (94 SC 2437, 41 LE2d 341) (1974) (holding that, following a direct appeal of right, a criminal defendant has no constitutional right to counsel to pursue further discretionary state appeals or applications for review by the United States Supreme Court); Coleman v. Thompson, 501 U.S. 722, 753-754 (111 SC 2546, 115 LE2d 640) (1991) (explaining that, under agency principles, a client bears the risk of attorney error for such matters as filing deadlines unless the error amounts to ineffective assistance in violation of the client’s constitutional right to counsel).

For these reasons, the trial court had no authority to grant Appellant an out-of-time discretionary application from the denial of his extraordinary motion for new trial, and the Court of Appeals therefore properly dismissed Appellant’s application as untimely.

Judgment affirmed. All the Justices concur.