

In the Supreme Court of Georgia

Decided: April 24, 2012

S12A0528. THOMAS v. THE STATE.

THOMPSON, Justice.

Appellant James Tyrone Thomas was convicted of malice murder following a bench trial in Mitchell County Superior Court and was sentenced to life in prison in April 2001. His conviction was affirmed on appeal in Thomas v. State, 274 Ga. 479 (554 SE2d 470) (2001). On August 12, 2011, Thomas filed an extraordinary motion in arrest of judgment in the Superior Court of Mitchell County, arguing his indictment was defective in that it failed to charge the critical element of venue, and additionally asserting that his conviction is void because the State failed to charge an underlying felony to support his murder conviction. The trial court denied Thomas' motion and he filed a direct appeal in this Court.

In order to challenge a conviction after it has been affirmed on direct appeal, criminal defendants are required to file an extraordinary motion for new trial, OCGA § 5-5-41, a motion in arrest of judgment, OCGA § 17-9-61, or a

petition for habeas corpus, OCGA § 9-14-40. See Harper v. State, 286 Ga. 216 (686 SE2d 786) (2009). Under Georgia law, motions in arrest of judgment must be filed within the same term of court as the judgment. OCGA § 17-9-61 (b). Accordingly, although Thomas' first claim would have been cognizable under OCGA § 17-9-61, his motion in arrest of judgment, filed over 11 years after his conviction, was untimely. See Lay v. State, 289 Ga. 210, 212 (710 SE2d 141) (2011).

Nor can this Court construe Thomas' claim as a petition for writ of habeas corpus. Although a petition for habeas corpus would not be untimely, such a petition is required to have been filed in Hancock County, the county in which Thomas is incarcerated, not Mitchell County, the county of the convicting court. OCGA § 9-14-43. See Wright v. State, 277 Ga. 810, 811 (596 SE2d 587) (2004). Finally, Thomas' claim is not preserved by construing it as an extraordinary motion for new trial as he failed to file an application for discretionary appeal. OCGA § 5-6-35 (a) (7). Accordingly, regardless of the nomenclature, Thomas' motion was improperly or untimely filed.

Judgment affirmed. All the Justices concur.