



SUPREME COURT OF GEORGIA  
Case No. S18C1298

Atlanta, November 15, 2018

The Honorable Supreme Court met pursuant to adjournment.  
The following order was passed.

**JOHN FERREIRA v. THE STATE**

**The Supreme Court today denied the petition for certiorari in this case. All the Justices concur, except Bethel, J., disqualified.**

Court of Appeals Case No. A18A0441

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

A handwritten signature in cursive script, reading "Thine S. Barnes".

, Clerk

Appendix C

# Court of Appeals of the State of Georgia

ATLANTA, May 10, 2018

*The Court of Appeals hereby passes the following order:*

**A18A0441. JOHN FERREIRA v. THE STATE**

This matter is before the court on the Appellant's untimely **MOTION FOR RECONSIDERATION**. The Appellant urges the court to accept his motion due to the inefficiencies of postal delivery within the corrections system and has offered evidence indicating that he did not receive the opinion of the court until one week after the opinion issued. In the interest of justice, we will accept the motion. However, because the motion restates arguments the Appellant made in his initial brief and does not point to any overlooked material fact, statute, or controlling decision or point to a misconstruction of controlling law, the motion is **DENIED**.



*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta, 05/10/2018*

*I certify that the above is a true extract from  
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court  
hereto affixed the day and year last above written.*

*Stephen E. Castle*

*, Clerk.*

**THIRD DIVISION  
ELLINGTON, P. J.,  
BETHEL, J., and SENIOR APPELLATE JUDGE PHIPPS**

NOTICE: Motions for reconsideration must be  
*physically received* in our clerk's office within ten  
days of the date of decision to be deemed timely filed.  
<http://www.gaappeals.us/rules>

April 24, 2018

**NOT TO BE OFFICIALLY  
REPORTED**

In the Court of Appeals of Georgia

A18A0441. FERREIRA v. THE STATE.

BETHEL, Judge.

John Ferreira brings this pro se appeal from the trial court's denial of his motion for out-of-time appeal. On June 15, 2006, Ferreira was indicted for murder, felony murder predicated on aggravated assault, aggravated assault, and possession of a controlled substance. On November 13, 2006, he entered a negotiated guilty plea to one charge of voluntary manslaughter and was sentenced to 20 years imprisonment. He filed his pro se motion for out-of-time appeal on June 14, 2016, which the trial court denied on June 27, 2016. Ferreira filed an application for discretionary appeal with this Court, which we granted because the denial of a motion

for out-of-time appeal is directly appealable under OCGA § 5-6-35 (j).<sup>1</sup> This appeal followed.

“When a defendant pleads guilty and then seeks an out-of-time appeal from that plea, he must make the threshold showing that he would have been entitled to file a timely direct appeal from the plea because the issues he is raising can be decided from facts appearing in the record.” *Moore v. State*, 285 Ga. 855, 855 (1) (684 SE2d 605) (2009) (citation omitted). “The denial of a motion for an out-of-time appeal is a matter within the discretion of the trial court and the court’s decision will not be reversed absent an abuse of that discretion.” *Id.*

Out-of-time appeals are designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because the counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice.

*Grace v. State*, 295 Ga. 657, 658 (2) (a) (763 SE2d 461) (2014) (citation and punctuation omitted). Where the appellant does not allege that ineffective assistance of counsel was the cause of his failure to file a timely direct appeal from the judgment

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<sup>1</sup> See *Stephens v. State*, 291 Ga. 837, 837 (1) (733 SE2d 266) (2012) (“The denial of a motion for out-of-time appeal is directly appealable when the criminal conviction at issue has not been the subject of direct appeal.” (citation omitted)).

entered on his guilty plea, a motion for out-of-time appeal is properly denied. *Id.* Assuming such an allegation is stated in the motion, the appellant must also demonstrate based on the case record that his enumerations of error would have merit. *Id.* at 658-59 (2) (b).

1. *Allegation of Ineffective Assistance in Failing to File Appeal.* The primary substance of Ferreira's motion alleges that there were defects in the grand jury process that led to his indictment as well as the indictment itself. In his motion, however, Ferreira wrote the following:

[Ferreira] is asserting several claims . . . to show that [Ferreira] was not properly, fully, or fundamentally, thus fairly, informed that [Ferreira] had a right to appeal asserted non-waivable issues, pertaining to, but not limited to . . . a substantively void indictment; merger of law claims; ineffective assistance of counsel to be raised at the earliest practicable time; jurisdictional defect claims; self-incrimination, [etc.] . . . Appointment of appellate counsel for the appellate process is necessary and requested so that new appointed counsel can professionally raise and assert the claims required for appellate review, which trial counsel failed to timely challenge or file.

Ferreira's motion went on to suggest through citation of case law that his rights had been violated because his trial counsel had been ineffective in failing to pursue an appeal after the entry of his guilty plea.

Although vague and lacking in any supporting detail, we nevertheless hold that Ferreira's motion did allege that his failure to file a timely appeal was based on the ineffectiveness of his trial counsel. We must therefore consider whether the errors he enumerated to the trial court below can be resolved on the record before us.

*2. Merits of Enumerations of Error.* "A direct appeal from a judgment of conviction and sentence entered on a guilty plea is only available if the issue on appeal can be resolved by reference to facts on the record. The ability to decide the appeal based on the existing record thus becomes the deciding factor in determining the availability of an out-of-time appeal when the defendant has pled guilty."

*Grantham v. State*, 267 Ga. 635, 635 (481 SE2d 219) (1997) (citation omitted).

Appellant must establish a good and sufficient reason which entitles him to an out-of-time appeal. To meet this burden, Appellant is required to set forth the questions he would raise should the appeal be granted and show that these questions could be answered by facts in the record. He cannot merely allege that he was not informed of his right to appeal. If the appellate questions Appellant proposes could not be resolved exclusively on the basis of the existing record, then Appellant would have had no right to file a timely direct appeal and therefore no right to an out-of-time appeal.

*Wetherington v. State*, 296 Ga. 451, 453-54 (1) (769 SE2d 53) (2015) (citations and punctuation omitted).

In this case, Ferreira argued to the trial court (and argues more fully on appeal) that the count of his indictment charging him with aggravated assault was deficient because it failed to include and allege the element of intent. This argument is without merit.

Count three of the indictment alleged, in part, that Ferreira “did unlawfully make an assault upon the person of [the victim] with a handgun, a deadly weapon, by pointing and firing at him[.]” As this Court has previously held, the offense of aggravated assault, particularly under OCGA § 16-5-21 (a) (2), is a crime requiring general, rather than specific, intent. *See State v. Austin*, 297 Ga. App. 478, 479 (677 SE2d 706) (2009). General intent need not be expressly alleged in an indictment. *See Adams v. State*, 293 Ga. App. 377, 381 (3) (667 SE2d 186) (2008) (when aggravated assault charge only requires proof of general criminal intent, an indictment is not void for failing to expressly allege such intent). As the State was not required to make any special allegation of intent in charging Ferreira, Ferreira cannot demonstrate any deficiency in this count of the indictment.

In his brief, Ferreira also raises a number of other issues, namely: that the Georgia aggravated assault statute is unconstitutional; that his rights under the Confrontation Clause were violated because the victim was not available to be cross-examined at trial even though his testimony would have been necessary to establish elements of the crime of assault; that the rule of lenity should have been applied; and that there was improper merger. These issues are raised, apparently for the first time, in rapid succession in Ferreira's brief before this Court. In addition to not affording the trial court an opportunity to consider these potential grounds for appeal, Ferreira's brief lacks a clear statement explaining the alleged deficiencies and fails to point to the portions of the record that would allow such enumerations of error to be considered and resolved. Therefore, because we cannot say that the record before us discloses any error for which this Court can grant relief to Ferreira, the trial court did not abuse its discretion by denying Ferreira's motion for out-of-time appeal.

*Judgment affirmed. Ellington, P. J., and Senior Appellate Judge Herbert E. Phipps, concur.*