

CASE NO. 19-6836 ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

THERIAN WIMBUSH
Petitioner

v.

BRIAN P. KEMP, Governor
TIMOTHY C. WARD, Corrections Commissioner
WILLIE SUE MICKENS, Warden
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

RELATED CASES: 19-5209, 19-5210, 19-6134

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QUESTIONS PRESENTED

1. Can the challenge of a VOID ~~to~~ JUDGMENT OR CONVICTION ever be premature?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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challenging the Glwinett Superior Court's
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of
Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review
the merits appears ~~at~~ in Application No. 19A480
and is unpublished.

JURISDICTION

The date on which the highest state court decided
my case was August 19, 2019. A copy of that decision
appears in Application No. 19A480

An extension of time to file the petition for a writ
of certiorari was granted to and including January
16, 2020 in Application No. 19A480

The jurisdiction of this Court is invoked under
28 USC § 1257(a).

STATEMENT OF THE CASE

On January 30, 2017, petitioner filed a timely and
legally sufficient Notice of Appeal challenging
the Gwinnett County Superior Court's January 6, 2017
directly appealable order denying her statutory
speedy trial motion for discharge and acquittal,
thereby conferring jurisdiction on the Court of Appeals
of Georgia. See Appendix "A"

Two days AFTER the filing of the Notice of Appeal, on February 1, 2017, the Gwinnett County Superior Court filed its judgment of conviction and sentence. App. "B"

Two days AFTER the filing of the judgment of conviction and sentence, on February 3, 2017, the Gwinnett County Superior Court executed the consequently VOID judgment of conviction and sentence by transferring petitioner to the custody of the Georgia Department of Corrections.

On this same day, February 3, 2017, petitioner filed a Notice of Appeal challenging the judgment of conviction and sentence.

The Court of Appeals docketed the Notice of Appeal filed January 30, 2017 on June 16, 2017. Said appeal bore case no. A17A1901 and was assigned to judges Sarah Doyle, Clyde L. Reese, and M. Yvette Miller of the Court of Appeals of Georgia.

After obtaining an extension of time to file the appellant's brief, petitioner filed her appellant's brief on August 9, 2017. However, on August 11, 2017, the Court of Appeals of Georgia dismissed appeal A17A1901 alleging that as of August 11, 2017, no appellant's brief had been filed.

The Court of Appeals docketed the Notice of Appeal filed February 3, 2017 on July 3, 2017. Said appeal bore case no. A17A2056 and was ALSO assigned to judges Sarah Doyle, Clyde L. Reese, and M. Yvette Miller of the Court of Appeals of Georgia.

On March 8, 2018, the Court of Appeals of Georgia rendered an opinion affirming the VOID judgment of conviction.

On May 15, 2018, the Court of Appeals of Georgia issued remittitur in both appeal no's A17A1901 and A17A2056. However, the Gwinnett County Superior Court ONLY filed the remittitur stemming from appeal no. A17A2056 and on May 15, 2018.

On May 18, 2018, said remittitur was entered on the minutes of the Gwinnett County Superior Court.

To date, the remittitur stemming from appeal no. A17A1901 has not been filed in the clerk's office of the Gwinnett Superior Court and consequently has not been entered on the minutes of the Court for resumption of jurisdiction of petitioner's criminal case.

Hence, to date, petitioner's criminal case remains PENDING APPEAL.

Petitioner filed her first instant habeas corpus in the Pulaski County Superior Court on March 13, 2017 citing a UO10 judgment of conviction as her primary ground.

On April 11, 2017, the Pulaski County Superior Court denied, on the merits, and dismissed petitioner's petition without a hearing. The Court held:

"Petitioner contends that the filing of her Notice of Appeal of the trial court's order denying her [statutory speedy trial] motion for discharge and acquittal operated as a supersedeas of her case and stripped the trial court of the necessary jurisdiction to enter a final order in her case or justify the imposition of a sentence following her [jury verdict]... This ground provides no basis for relief."

Petitioner filed a timely and legally sufficient Notice of Appeal in the Pulaski County Superior Court on May 5, 2017 and simultaneously filed an Application for Certificate of Probable Cause in the Supreme Court of Georgia on April 30, 2017, in strict compliance with OCGA § 9-14-52.

On June 18, 2018, the fourth term after its docketing, the Supreme Court of Georgia granted the Certificate of Probable Cause and, in the same order, vacated the habeas court's ruling on the merits, remanded the case back to the habeas court with instructions to dismiss the habeas petition as PREMATURE, in case no. S17H1568.

On June 30, 2017, petitioner filed her second instant habeas corpus petition in the Pulaski County Superior Court, raising, once again, the ground of a void judgment of conviction for want of jurisdiction.

Said petition was heard in an evidentiary only hearing on October 21, 2018, and was later denied on the merits on December 2, 2018. The Court held:

"Petitioner contends that the trial court lacked the jurisdiction to convict and sentence her because she filed a notice of appeal prior to sentencing... Petitioner filed a Notice of Appeal from the January 6, 2017 denial of her Motion for Discharge and Acquittal on January 30, 2017. The denial of a motion for acquittal on statutory speedy trial grounds is immediately appealable. See Hubbard v. State, 254 Ga. 694 (1995)... Petitioner did not file a notice of appeal until after the jury had returned a verdict. Petitioner's premise that the trial court was then divested of jurisdiction to [convict and] sentence her lacks merit. Following a conviction, a criminal defendant may appeal the conviction, sentence, and pretrial issues such as the denial of a motion for acquittal in a single

action... As petitioner had been convicted and sentenced, there was no error, in remitting her into the custody of the Department of Corrections pending appeal."

Petitioner filed her Notice of Appeal in the Pulaski County Superior Court on December 16, 2018 and docketed her application for Certificate of Probable Cause in the Supreme Court of Georgia on December 28, 2018, in strict compliance with OCGA § 9-14-52.

On August 19, 2019, the Supreme Court of Georgia, once again, granted the Certificate of Probable Cause and, in the same order, vacated the habeas court's denial on the merits and remanded the case back with instructions to dismiss the habeas petition as premature.

It is this decision of the Supreme Court of Georgia that petitioner seeks this Court's review.

It must be noted that until and unless the Gwinnett County Superior Court files the remittitur issued by the Court of Appeals of Georgia on May 15, 2018, and enters said remittitur on the minutes, it intends to resume jurisdiction of petitioner's criminal case, ~~enter~~ habeas the files will continue to be deemed premature for a VOID judgment of conviction, thereby rendering petitioner without a remedy for relief.

REASONS FOR GRANTING THE WRIT

Petitioner has been subjected to FORCED SLAVERY under a VOID judgment of conviction for almost 3 years and has sought relief in every court possible, to no avail.

While the Supreme Court of Georgia has repeatedly

granted petitioner's application for probable cause, and yet concluded that her request for relief was premature, it must be noted that the Supreme Court of Georgia held in Tolbert v. Tule, 296 Ga. 357, that:

"a petitioner raising a VOID CONVICTION claim is ENTITLED to raise it for the first time in his first, timely filed, habeas corpus action and to have it decided on the merits." (2014)

Petitioner has not only raised this in her first and second state habeas petitions and had it denied on the merits, but petitioner raised in both appeals no. A17A1901 and A17A2056 and the Court of Appeals of Georgia ignored the argument in her Due Process enumeration, failing to respond to it altogether.

Moreover, the Supreme Court of Georgia has held that when a trial court enters a judgment where it does NOT have jurisdiction, such judgment is a mere NULLITY, and an appeal from such an illegal judgment, will not be dismissed but instead, the VOID judgment will be REVERSED. Wetherington v. State, 295 Ga. 172 (2014)

This Court has held that a VOID judgment or opinion, rendered WITHOUT jurisdiction can NEVER be made valid by a subsequent expression of opinion by the same or any other court. Estate v. Brown, 235 US 342 (1914). A void judgment is a legal NULLITY. Although the term VOID describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even AFTER the judgment becomes final. United Student Aid Funds v. Espinoza, 559 US 260 (2010). Petitioner's detention and sentence pursuant to the VOID judgment is in violation of the Constitution of the United States

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and he is therefore ENTITLED to be FREED." Innis v. Dowd, 366 US 717 (1961)

In regards to the effect of a Notice of Appeal, this Court has asserted that the filing of a Notice of Appeal is an event of jurisdictional significance in that it confers jurisdiction on the Court of Appeals and divests the trial court of jurisdiction of the case. Griggs v. Provident Consumer Discount Co., 459 US 56 (1982)

The US Court of Appeals for the Eleventh Circuit concludes that the timely and legally sufficient filing of a Notice of Appeal acts to divest the trial court of jurisdiction over the matters ~~on~~ at issue in the appeal, except to the extent that the trial court must act in aid of the appeal. More specifically, the trial court is WITHOUT AUTHORITY during the pendency of an appeal. Shewchun v. US, 797 F.2d 941 (1986 11th Cir.) The notice of appeal of virtually any sort acts to freeze all proceedings in the trial court pending resolution of the appeal. (Id.)

In Chambers v. State, 262 Ga 200 (1992), the Supreme Court of Georgia held that an appellate court's jurisdiction over a case is at an end AFTER the remittitur therefrom has been filed in the office of the court below and the resumption of jurisdiction by a trial court follows immediately. The Supreme Court of Georgia's precedents indicate that a jurisdictional defect due to a supersedeas from the filing of a Notice of Appeal CANNOT be waived. Any proceeding so conducted in the trial court is COERCE NOT JUSTICE, and the resulting want of jurisdiction CANNOT be waived, so as to give effect to the void judgment. (Id.)

The Supreme Court of Georgia has recently applied and reaffirmed Chambers in Massey v. Massey: "An appellate court maintains jurisdiction over a case

until it has issued the remittitur and the remittitur has been received and FILED in the clerk's office of the court below. Comar v. Warden, GA D146. 2014 US DIST LEXIS 177582 (citing Thaler v. Gonzalez v. Thaler, 565 US 134 (2012))

Petitioner again notes that although the Court of Appeals of Georgia issued remittitur in petitioners three appeals, A17A1379, A17A1901, A17A2056, on the same day, May 15, 2018, the trial court has failed and refused to FILE the remittitur in appeal no. A17A1901 in order to resume jurisdiction of petitioner's criminal case.

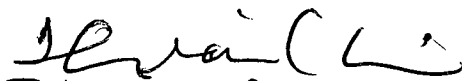
Said refusal leaves petitioner WITHOUT a legal remedy in state and federal courts due to the fact that the conviction is not and cannot be made final.

Thus, petitioner not only seeks that this Court grant her certiorari to review the lower court's judgment, but also that this Court exercise its sua sponte authority declaring that petitioner's detention and sentence pursuant to the VOID Judgment is in violation of the Constitution of the US and she is therefore ENTITLED to be FREED.

CONCLUSION

The petition for a writ of certiorari should be GRANTED.

Respectfully submitted,


THERMAN C. WIMSAATT

DATE: November 24, 2019