

Court of Appeals of the State of Georgia

ATLANTA, November 18, 2009

The Court of Appeals hereby passes the following order:

A10A0517. HAMMOCK v. THE STATE.

Michael Lavell Hammock has filed a motion requesting that this case be remanded to the trial court to allow him to raise the issue of ineffective assistance of appointed trial counsel in an evidentiary hearing, and to allow the trial court to consider appointment of new post-conviction counsel to pursue allegations that appointed trial counsel was ineffective. For the following reasons, the motion is granted, and the case is remanded to the trial court for these purposes.

The motion and the appellate record show that, after Hammock was convicted and sentenced on February 3, 2009, appointed trial counsel filed on behalf of Hammock a motion for new trial on February 6, 2009, and an amended motion for new trial on August 10, 2009. The trial court denied the amended motion for new trial on September 23, 2009. On October 13, 2009, the trial court appointed trial counsel to also represent Hammock as appellate counsel, and on the same day appellate counsel filed a notice of appeal to this Court.

Hammock did not claim in the trial court that his trial counsel was ineffective, nor did he ask the trial court to appoint new post-conviction counsel for the purpose of investigating and pursuing a claim of ineffective trial counsel. A claim of ineffective trial counsel is waived if it is not raised at the earliest practicable moment – meaning that it “must be raised before appeal if the opportunity to do so is available.” *Garland v. State*, 283 Ga. 201, 202 (657 SE2d 842) (2008) (punctuation and citation omitted). Even though Hammock did not raise the ineffectiveness claim in the trial court before appeal, we find there was no waiver. After his conviction, Hammock continued to be represented through appeal by his appointed trial counsel.

Because of a conflict of interest, Hammock's appointed trial counsel could not pursue a post-conviction claim on behalf of Hammock that the same trial counsel provided ineffective assistance during the trial. *Id.* at 203. It follows that, in the absence of assistance from conflict-free counsel after his conviction, Hammock did not have a fair opportunity to raise the ineffectiveness issue in the trial court before appeal.

If on remand the trial court finds that Hammock did not receive effective assistance of counsel, a new trial is required. If the trial court finds that Hammock received effective assistance of counsel, Hammock shall have 30 days to appeal that ruling along with any other claims of trial error.

*Court of Appeals of the State of Georgia
Clerk's Office, Atlanta*

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*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.*

Will: Z. Mat; [Signature]

, Clerk.