

COURT OF APPEALS OF GEORGIA

RETURN NOTICE

September 1, 2015

To: Mr. Frederick Dwight Green, GDC1272771, Baldwin State Prison, Post Office Box 218,
Hardwick, Georgia 31034

Case Number: _____ Lower Court: _____ County Superior Court

Court of Appeals Case Number and Style: _____

Your document(s) is (are) being returned for the following reason(s).

- ☒ **There is no case pending in the Court of Appeals of Georgia under the name of Frederick Dwight Green. I have enclosed a copy of the Rules of the Court of Appeals of Georgia for your review.**
- ☐ **A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37.** Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.
- ☐ **The Notice of Appeal must include a proper Certificate of Service.** A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.
- ☐ **An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained.** An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.
- ☐ **An Application for Writ of Mandamus should be filed in the superior court of the county official whose conduct you intend to mandate.** An appeal from a denial of an Application for Writ of Mandamus is to the Supreme Court and not the Court of Appeals. The mailing address for the Supreme Court of Georgia is: 244 Washington Street, S.W., Suite 572, Atlanta, Georgia 30334.
- ☐ **Your appeal was disposed by opinion (order) on _____.** The Court of Appeals _____
_____ The remittitur issued on _____
divesting this Court of jurisdiction. The case decision is therefore final.
- ☐ **Your mailing/documents indicate that you intended to file your papers in another court rather than the Court of Appeals of Georgia.** The address of the Clerk of the _____ is:
- ☐ **If an attorney has been appointed for you and you are concerned with the representation provided by that attorney, you should address that issue to the trial court.** As long as you are represented by an attorney, you cannot file pleadings on your own behalf. Your attorney must file a Motion to Withdraw as Counsel and it must be granted, before you can file your own pleadings in this Court.
- ☐ **A request for an out-of-time appeal should be made to the trial court from which you are appealing.** If your motion is denied by the trial court, you can file an appeal of that decision by filing a Notice of Appeal with the clerk of the superior court.

Note to Clerk

Date: August 19, 2015

From: Frederick Green

RE: Exhibits

Dear Clerk,

Will you please make copies of the exhibits and send them back to me? These are my only copies of the indictments and portions of the transcript. The prison doesn't allow us to use copy machines nor, will they make copies for us.

Thanks in Advance

Sincerely,

FLK 

RECEIVED IN OF 10-
2015 AUG 21 PM 4:17
COURT OF APPEALS
10-1100

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Frederick Green

RECEIVED
2015 AUG 21 PM 4:17
U.S. DEPT. OF JUSTICE
FBI
COMMUNICATIONS SECTION

IN THE COURT OF APPEALS OF THE STATE OF
GEORGIA

Frederick Dwight Green
Defendant

2007 CR 1428N
Appeal From
Rockdale Superior Court
Case No:

v.
State of Georgia

2007-CR-1428N

MOTION TO VACATE, SET ASIDE, MODIFY OR CORRECT
NULL & VOID SENTENCE

COMES NOW, Defendant, Frederick D. Green and moves
this Court to consider and grant the above-named
motion. As just cause for this action, Defendant shows
and states as follows:

Brief Case History

Case # 2007CR1428N went to trial on or about February
27th 2008 and defendant was convicted Armed Robbery
(count one) and Aggravated Assault (count Two). Count
One was a separate victim and separate location than Count
Two.

Defendant was found Not Guilty of two Possession of a
Firearm During the Commission of a Crime (count 5 & 6
respectively) with respect to count One & Count Two.

Defendant was sentenced to twenty years with no parole on Count 1 and twenty years on probation on Count 2. This appeal comes as a result of the denial of a motion with the same title to Rockdale Superior Court, denied August 6th, 2015.

Argument And Citations Of Authority

The sentence on Count 2 (Aggravated Assault) should be vacated because as a matter of facts and law, Count 2 merges with Count 6 (Possession of a Firearm During the Commission of a Crime) and cannot stand alone.

O.C.G.A. § 16-1-6(1)

The test for determining whether one crime is included in another, and therefore merges as a matter of fact, is the "required evidence" test - whether conviction for one of the offenses is established by proof of the same, or less than all the facts required to establish the other crime pursuant to O.C.G.A. § 16-1-6(1) (Drinkard v. Walker, 281 Ga. 211 (636 S.E.2d 530) (2006)); (Grissom v. The State 296 Ga. 406, 411 (2015))

Count Two (aggravated assault), charged that defendant did assault Keith Wilson with a firearm, an instrument, which when used offensively, against a person is likely to result in serious bodily injury, by committing an act which placed the said Keith Wilson in reasonable apprehension of immediately receiving a violent injury, to wit: said accused did threaten Keith Wilson with a Taurus 9mm handgun. O.C.G.A. § 16-5-21(a)(2) See Exhibit A.

Count Six (Possession of a Firearm During the Commission of a Crime), charged that defendant did unlawfully then and there have on and within arm's reach of his person a firearm, to-wit: a Taurus 9mm handgun, a firearm, during the commission of a crime, to wit: Aggravated Assault, (See Exhibit B)

Without the firearm element of aggravated assault being proven as charged in the indictment then, the "required evidence" test has not been satisfied. The state was required to prove that the defendant actually did possess a weapon as charged. (Thomas v. The State 292 Ga. 429; 738 S.E. 2d 571 (2013))

The jury had reasonable doubt concerning evidence presented during trial to establish all the facts needed to prove every essential element of aggravated assault as charged in Count Two of the indictment for the following reasons:

The evidence presented during trial concerning the aggravated assault and possession of a firearm during the commission of the aggravated assault is as follows: (Please take notice that the victim of the armed robbery & aggravated assault are two separate individuals and two separate locations)

The victim, Mr. Keith Wilson, testified that defendant stepped out of defendant's vehicle, pulled a black gun out of his waist and was walking towards the victim's truck pulling the gun up. (Trial Transcript "Tr" pp. 79-80; see Exhibits C-1 & C-2)

To impeach Mr. Wilson's testimony, the defense re-cross-examined Mr. Wilson concerning a statement he'd made to police detective Sergeant Harper that contradicted his

trial testimony. The defense attorney played a recording of Mr. Wilson's statement to Mr. Wilson during lunch break to refresh his memory. Mr. Wilson got back on the stand and contradicted his previous testimony, stating: defendant never raised the gun up at him and that he didn't know where the gun was pulled from. (TT pp. 186-187; See Exhibit D-1; D-2)

If Mr. Wilson was willing to fabricate the events concerning the gun he claims he saw being pointed at him and being pulled from defendant's waist, then, what else wouldn't he make up? According to all the testimony, Mr. Wilson was the only person who claims to have actually seen defendant with a gun but, according to the verdict, that testimony was proven not to be reliable. Mr. Wilson's in-court testimony and statement to the police was contradictory, therefore, his impeachment can be seen as successful.

The robbery victim testified that he couldn't verify if defendant actually had a gun but that he was convinced defendant had a weapon based on defendant's gestures and threatening manner. The trier of facts returned a Not Guilty verdict on Count Five, the Possession of a Firearm During the Commission of a Crime in connection with the armed robbery. Subsequently, the armed robbery Guilty verdict was handed down based on the fact that under Georgia law, an individual can be convicted of armed robbery without a firearm, if the victim departs with their property based on the apprehension of the perpetrator being armed, which is a total departure from how the crime was charged in Count One and Count Five of the state's indictment. (See Exhibits J-1 thru J-4)

On impeachment, the court charged the jury: To impeach a witness is to prove the witness is unworthy of belief. A witness may be impeached under Georgia law by disproving the facts to which the witness testified or by proof of contradictory statements previously made by the witness as to matters relevant to the witness' testimony and to the case.

(TT pp. 331-332; See Exhibit E-1 & E-2)

Therefore, the jury was authorized to disregard Mr. Wilson's testimony and only rely on defendant's version of the encounter.

The defendant testified that when he got out of his vehicle, he had the detachable face of his CD player in his hand which is what Mr. Wilson may have mistaken for a gun. There was no evidence presented to contradict defendant's testimony. (TT pp. 231; Exhibit F)

To show their doubts as to if an aggravated assault had occurred as charged in the indictment, the jury sent a note to the court during deliberations asking: What are our options for Indictment Number Two? Do we have the option of assault? (TT p. 363; see Exhibit G)

The trial court actually refused to give defendant's requested lesser included of assault. (Sentencing Hearing Transcript pp. 11-12; see Exhibits H-1 & H-2)

The trial court judge stated: I think it's either aggravated assault or nothing. If the jury believes [defendant] and doesn't think he had a gun, then it's out the door. (TT p. 271; see Exhibit I-3) see also Exhibits I-1 & I-2)

The trial court judge went on to state: If they believe he had a gun, then it would be unlawful, in my view, for the jury to say well, even if he had a gun, we ain't going to convict him. That is just outright abandonment of their oath. (TF p. 272; see Exhibit I-4)

Thus, wouldn't it be unlawful and an abandonment of the juror's oath to believe defendant didn't have a gun, as shown by two Not Guilty verdicts on Possession of Firearm counts, and still convict on count two?; And is it not unlawful and an abandonment of the court to not correct this unlawful conviction and sentence?

The jury came back with a Not Guilty on Count Six, possession of the Firearm in connection with Count Two, aggravated assault, but a Guilty on the Aggravated Assault.

The verdict on Count Six reflects a positive finding by the jury that the evidence did not prove that the defendant possessed a Taurus 9mm handgun while in the commission of the crime of Aggravated Assault, as alleged in the indictment.

Count Two is based upon the possession of the Taurus 9mm handgun as charged. Therefore, there can be no aggravated assault because the two merge as a matter of law and fact.

For AUTHORITY CITATIONS see Georgia Supreme Court rulings in the following cases:

Grissom v. The State 296 Ga. 406, 410-411; 2015 Ga LEXIS 55141431
Favors v. State 2015 Ga LEXIS 196; March 27, 2015
Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014)

Hulett v. State, 296 Ga. 49; 766 S.E. 2d 1, 2014 WL 5313977
Thomas v. The State, 292 Ga. 429; 738 S.E. 2d 571 (2013)
Drinkard v. Walker, 281 Ga. 211; 636 S.E. 2d 530 (2006)

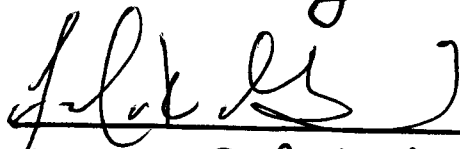
CONCLUSION

Aggravated Assault as charged in Count Two of the indictment in this case, could have only been established by proof/evidence of possession of a Taurus 9mm handgun as charged in Count Six of the indictment in this case pursuant to O.C.G. A § 16-1-6(1), and 16-5-21(a)(2) also requires the State to prove the use of the weapon charged.

The two counts merge as a matter of law. Therefore, The Not Guilty verdict on Count Six authorized the trial court to treat the Guilty verdict on Count Two as surplusage and vacate the conviction for sentencing purposes.

WHEREFORE, Defendant prays this Honorable Court grants this Motion To Vacate, Set Aside, Modify Or Correct Null & Void Sentence and at the same time be modified

Respectfully submitted


Pro Se, Defendant

August 19, 2015
Date

Certificate of Service

This is to certify that I have, this day, served
a true and correct copy of the foregoing motion to:

Office of the District Attorney
Rockdale Judicial Circuit
922 Court Street, Suite 201
P.O. Box 289
Conyers, Georgia 30012

This 19th day of August 2015