

COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR BRIEFS OR MOTIONS

March 13, 2015

To: Mr. Neal Howard, GDC977727 G-2-139B, Dooly State Prison, Post Office Box 750, Unadilla, Georgia 31091

Docket Number: A15A1135 **Style:** Neal Howard v. The State

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

1. Your Appellant's Brief, was not accompanied by the statutory filing fee (\$300.00 civil; \$80.00 criminal *Effective July 1, 2009) or a sufficient pauper's affidavit. OCGA§5-6-4 and Rule 5 **Please be advised that your pauper's affidavit should be notarized by a notary public.**
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COURT OF APPEALS OF GEORGIA

NEAL HOWARD 977722 RECEIVED IN OFFICE

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APPEAL CASE No. A15A1135

THE STATE

CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA

APPELLANT'S RESPONSE AND BRIEF

Comes now, the above-named appellant in the above-styled case submits this Response and Brief as follow(s):

September 6, 2011, the court imposed a sentence contrary to the statute governing repeat offenders. Page 17, line 2-15 of the guilty plea transcript show the appellant objecting to a plea that he is not in agreement with informing the court of his not receiving recidivist notice.

Had the court inquired into the defendant objecting to a plea he is not in agreement with while informing the court of his not receiving recidivist notice the defendant would not have received a recidivist sentence; when to impose a recidivist sentence notice to the defendant is required. O.C.G.A. § 17-10-7; Richard v. State, 256 Ga. App. at 30 (2002) Judge Miller [1] [2]; O.C.G.A. § 17-7-93; Bonds v. State, 203 Ga. App. at 51; and Armstrong v. State, 209 Ga. App. at 76.

The appellant ascerts that not receiving notice of intent of state to prosecute as a recidivist that his plea did not represent an informed choice and his objections to a plea that he is not in agreement with shows that his plea was not voluntary and therefore unconstitutional. Boykin v. Alabama, 395 U.S. at 238; and Bowers v. Moore, 266 Ga. at 893

The Supreme Court has established in State v. Hendrixson, 251 Ga. at 873, "the trial court at sentencing cannot consider prior offenses unless the same was made known to the defendant prior to trial. Favors v. State, 182 Ga. App. at 179.

Page 17, line 2-15 of the guilty plea transcript show that the plea is not a intelligent, voluntary, and valid plea. The appellant ascerts that his plea is not valid. After a prisoner raises the question of the validity of his guilty plea, the burden is on the state to show that the plea was intelligently and voluntary entered. Cook v. State, 153 Ga. App. at 362; and O.C.G.A. § 17-7-93

SWORN AFFIDAVIT

The appellant, Neal Howard, ascerts that he is without power to properly present his case because Dooly State Prisons lawlibrary was closed Febuary 23 to Febuary 27, 2015 and again March 2, 2015. The appellant do not know if the statue governing unauthorized appearances are O.C.G.A. § 15-9-7; and O.C.G.A. § 15-9-8 or O.C.G.A. § 15-19-7; and O.C.G.A. § 15-19-8. The appellant is not accessible to whiteout to correct his mistakes because the lawlibrary is closed which again is beyond his control. Also no staples.

The appellant apologizes for these circumstances which are beyond his control and pray that this Honorable Court take into consideration he has no control over operation of the Georgia Department of Corrections.

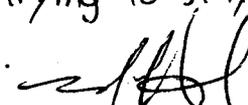
The appellant submits this affidavit under penalty of perjury and swears that it is true and correct.

The appellant is mailing this correspondences out so that it will be in a timely manner prescribed.

Respectfully submitted this 5 day of March 2015.


pro se appellant

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G-2-139 B
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Further, the appellant has filed a grievance. I do not know when the library will open back up, but I am trying to stay in compliance with prescribed time to respond.  March 5, 2015

Had the court not ignored the defendant's objections to a plea that he was not in agreement with and inquired into the defendant's claim of not receiving recidivist notice the court could not have imposed a recidivist sentence. Griffin v. State, 12 Ga. App. at 615; and Calloway v. State, 115 Ga. App. at 115 provide "pleas should be carefully scanned and cautiously received. It is clear this is not the case.

Uniform Superior Court Rules are designed to assist trial judges in producing a record to show pleas represent intelligent and voluntary decisions. In reference to Uniform Superior Court Rule 33.7; Rule 33.8; and Rule 33.9 and in accordance with Fed. R. Crim. P. 11 "it is clear that the trial court has the same duty as a federal judge. When a guilty plea is offered, the trial court is required to ascertain if any agreement was reached by the state and the defendant. Strickland v. State, 199 Ga. at 792; Weathers v. State, 149 Ga. App. at 617; and Anderson v. State, 194 Ga. App. at 395.

Again this is not the case. Page 17, line 2-15 of the guilty plea transcript show that there was no agreement reached by the state and the defendant when the defendant is objecting to a plea that he is not in agreement with.

Had the court inquired into the defendant's objection and claims of not receiving notice of states intent to seek enhanced punishment the court would have discovered that the defendant did not receive the required notice to be sentenced as a recidivist and the defendant would not be subjected to the recidivist charge and imposition.

Again, the burden is on the state to show a valid, intelligent, and voluntary plea. Cook v. State, 153 Ga. App. at 362; and O.C.G.A. § 17-7-93.

The appellant ascertains that he did not receive recidivist notice prior to trial and the petitioner ascertains that he was not admonished of the recidivist charge. Page 10, line 14-15 shows where the defendant signed the indictment and entered upon the plea and page 11, line 9-12 of the guilty plea transcript show where after the defendant signed the indictment, the state admonishes him of the recidivist charge. The law is clear that once a person has entered upon the execution of his sentence, that the court is without power to change it by increasing punishment which is considered a violation of the prohibition against double jeopardy. Hamilton v. State, 127 Ga. App. at 873.

The appellant contests that it was evident by the face of the record that he would not receive a fair trial and only entered a plea because he was ignored and excluded

throughout the entirety of his criminal case.

February and March of 2011 after making numerous pleas to counsel for assistance in his defense in January of 2011, submitted letters to the court (see criminal docket report and letters to counsel) to show as evidence, rather than counsel comply with the defendant's request did counsel abandon the defendant without notice.

There is no record that counsel in accordance with Uniform Superior Court Rule 4.3 notified the defendant that she would withdraw from his case or substitute other counsel. The criminal docket report contrary to the final disposition and indictment will show counsel as Laronda Martin rather than Jonathan Oden.

Had counsel complied with the court rules the defendant could have received other assistance during the critical stages of pretrial proceedings and may have received notice of state's intent to seek enhanced punishment.

After grieving counsel to the state bar and not receiving assistance did counsel abandon the defendant without notice. The defendant notified the court in a letter to the judge of a potential conflict. The court failed to perform its obligatory duty and inquire into a potential conflict.

The federal constitution provides under Barker v. Doggett, 284 Ga. at 58n; and Koste v. Dormire, 260 F.3d at 872, "the state is required to provide conflict free counsel where ~~the~~^{the} failure of the state to do so in a timely manner cannot be laid at the defendant's doorstep.

It cannot be said when counsel abandoned the defendant in this case since the court failed to inquire into a potential conflict claim. The defendant ascertains that he was without counsel during the pretrial stage when the state obtained convictions where convictions obtained during the violation of the defendant's right to counsel cannot be used to impose recidivist punishment.

Blaylock v. Hopper, 253 Ga. at 504.

Had the court inquired into a potential conflict claim and appointed conflict free counsel to assist the defendant during critical stages of pretrial proceedings the defendant not only would have had assistance in a defense the defendant would have received recidivist notice and his plea would represent an informed and voluntary choice and these formalities would not be necessary.

The court's failure to inquire into a potential conflict claim and appoint other counsel

during the critical pretrial stages, but waiting until the day of trial, show that counsel was not appointed to assist the defendant in a defense but rather induce the defendant into entering a plea when the defendant has made it evident his need of assistance in a defense by submitting numerous correspondence to the court on his behalf.

The court excluded the defendant from his case and ignored him throughout the entirety of his case. The court ignored all demurrers, injunctions, motions pursuant to or in accordance with O.C.G.A. § 15-6-21 or at the least appoint counsel to properly submit motions.

Counsel appointed at trial did not provide the record any evidence that he was in fact an attorney licensed to practice law nor any evidence of his authority to appear before the court in any capacity pursuant to and in accordance with O.C.G.A. § 15-9-7; and O.C.G.A. § 15-9-8. Counsel also failed to provide the record, the court, and the defendant any contact information such as his telephone number, bar number, and address for any reason in accordance with and pursuant to Uniform Superior Court Rule 4.2; and Rule 4.6.

Had counsel submitted an entry of appearance and produce a record of his authority to appear before the court and provided any contact information the defendant could have contacted counsel to request ~~an~~^{NH} assistance to withdraw his guilty plea and assistance in an appeal.

It is evident that the court obstructed and impeded the defendant's appeal and liberty for more than three years. The defendant submitted his notice of appeal October 4, 2011 and the court did not address it until October 24, 2014. Also the court had to obstruct the case while ~~attorney~~^{NH} unauthorized counsel "Jonathan Oden" had been on suspension.

Had the court not ~~obs~~ unjustly obstructed the defendant's case the defendant could have made parole March 12, 2014, but remains in the custody of the Georgia Department of Corrections under a void and/or invalid sentence according to Honorable Judge T. Christopher Hughes.

CONCLUSION

The appellant ascert the only reason for entering a plea of guilty is because he was excluded and ignored throughout the entirety of his criminal case and therefore he could not have received a fair trial. The appellant ascert that his plea did not receive recidivist notice and that his plea could not have represented an informed, voluntary, and valid choice.

There is no record that the defendant was notified or admonished of the recidivist charge prior to the signing of the indictment. There is no record the court inquired into a

potential conflict claim. There is no record that counsel properly withdrew from the defendant's case or substituted counsel; there is no record of counsel who signed the indictment submitted an entry of appearance, or had authority to appear before the court in any capacity; there is no record that the court admonished the defendant of the recidivist charge until after the defendant signed the plea.

PRAYER

In conclusion, the above-named appellant pray that this Honorable Court grant relief in accordance with the law; the court rules of criminal procedure; the federal constitution; and the statute governing repeat offenders; and relieve the recidivist imposition from his sentence.

Respectfully submitted this 5th day of March 2015.



pro se appellant

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FACT FINDING, EXHIBITS, AND EVIDENCE REFERRAL LIST.

The appellant has comprised evidence to show plain error on the face of the record utilizing structural defects which affect the framework essential in insuring trials serve the proper functioning of determine guilt or innocence. U.S. v Curbelo, 353 F.3d at 273.

1. The criminal docket report will show that the prosecutor did notify the court clerk, May 9, 2011 of the states intent to seek enhanced punishment rather than notifying the defendant and admonish the defendant of the consequences of the recidivist charge.
2. Contrary to the final disposition and the indictment, the criminal docket report shows counsel of record as Laronda Martin rather than Jonathan Oden. There is no record of Laronda Martin withdrawing or substituting counsel and there is no record to show Jonathan Oden's authority to appear before the court in any capacity nor sign the indictment. Jonathan Oden did not provide, nor was he required to show, that he was/is in fact an attorney.
3. The criminal docket report will show the defendant's request for assistance from counsel and also included are the letters to counsel February and March of 2011. There will be no record to show that counsel complied.
4. The criminal docket report and letter to judge May 26, 2011 show the defendant grieving counsel he believed to have a potential conflict with requesting counsel be dismissed. There is no record to show that the court honored its obligatory duty and address the potential conflict claim.
5. The criminal docket report will show April 14, 2011, June 30, 2011, July 6, 2011, and July 19, 2011 the defendants intent in preparing a defense for trial.
6. October 4, 2011, within the prescribed time provided, the defendant according to the criminal docket report and notice of appeal, filed a notice of appeal. The court clerk response on October 23, 2014 show the court delayed the defendants appeal for approximately three (3) years before transcribing the record to the court of appeals.
7. Correspondence from the State Board of Pardons and Paroles show that the defendant would not be considered for parole due to the recidivist imposition which controls the sentence.
8. The Georgia Department of Corrections Sentence Computation Report will show the court violated the double jeopardy clause of the constitution by failing to merge the lesser included offense of theft by taking with the burglary. The sentence computation report will show excessive sentence when the court sentenced the defendant to 15 years for theft taking which carries up to 10 years and 15 years for criminal damage to property in the second degree which only carries up to 5 years.
9. Pages 10-11 of the guilty plea transcript (HIGHLIGHTED-INCLUDED) will show, that the prosecutor waited until after the defendant entered upon his plea to inform him of the likely consequences of the recidivist charge and page 17, line 2-15 of the guilty plea transcript will show the defendant objecting to a plea that he is not in agreement with while informing the court of his not receiving notice of states intent to seek enhanced punishment, which is a requirement.
10. There is no record that the defendant personally received recidivist notice prior to trial nor is there a record that will show prior to signing the indictment that the defendant receive notice or was admonished of the likely consequences of the recidivist charge.