



## Court of Appeals of Georgia

March 23, 2015

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Court of Appeals of Georgia.

# BUTTS v. THE STATE. MI-101C<sup>⊕</sup>

244 Ga. App. 366 (Ga. Ct. App. 2000)

**BUTTS v. THE STATE. MI-101C**

A99A2145.

Court of Appeals of Georgia.

DECIDED: JUNE 8, 2000

Out-of-time appeal. Ware Superior Court. Before Judge Blount.

*Larry Butts, pro se. Richard E. Currie, District Attorney, James D. Lamb, Assistant District Attorney, for appellee.*

MILLER, Judge.

In February 1996, a jury found Larry Butts guilty of three counts of selling cocaine. At the conclusion of the sentencing hearing on February 29, 1996, the trial court sentenced Butts to three concurrent life terms. No appeal followed.

More than three years later, acting pro se, Butts filed a verified request to proceed in forma pauperis. The court apparently did not rule on this request. Butts then filed a motion styled as "Out [sic] Time Motion For New Trial," in which he raised the general grounds and ineffective assistance and in which he also contended that he was denied the right to appeal his convictions despite having "requested an appeal from his counsel and was made to belief [sic] that an appeal was pending in the Georgia Court of Appeals." After conducting a hearing on the merits, the trial court denied the motion.

The order now being challenged denied Butts's "out-of-time motion for new trial." Butts submitted an application for discretionary appeal and also filed a direct appeal. In dismissing the discretionary application, this Court treated the case as involving a ruling<sup>367</sup> on an out-of-time appeal, which is directly appealable.<sup>1</sup>

1.

See Randolph v. State, 220 Ga. App. 769, 770 (470 S.E.2d 300 (/case/randolph-v-state-97) ) (1996) (denial of motion for out-of-time appeal subject to direct appeal); compare O.C.G.A. § 5-6-35 (7) (denial of extraordinary motion for new trial requires application).

The right to an appeal is not absolute and may be waived.<sup>2</sup>

[A] convicted party may, by his own conduct or in concert with his counsel, forfeit his right to appeal by sleeping on his rights. The disposition of a motion for out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal.<sup>3</sup>

3. (Citations omitted.) Haynes v. State, 227 Ga. App. 64,65 (488 S.E.2d 119) (1997).

2. Rowland v. State, 264 Ga. 872, 875 (2) (452 S.E.2d 756 (/case/rowland-v-state-47) ) (1995).

When the delay in attempting to appeal a conviction is attributable to the defendant's conduct, either alone or in concert with his trial attorney, a trial court properly denies the motion for an untimely appeal.<sup>4</sup> To secure leave to file an out-of-time appeal, Butts was required to demonstrate to the trial court that his failure to secure a timely direct appeal was not attributable to his own actions.<sup>5</sup> Butts bore the burden of establishing a good and sufficient reason that would entitle him to an out-of-time appeal.<sup>6</sup> It was incumbent upon Butts to show that his right to file a timely direct appeal "was frustrated by the ineffective assistance of his counsel."<sup>7</sup> Nevertheless,

4. Franz v. State, 208 Ga. App. 677, 678 (2) (432 S.E.2d 554 (/case/franz-v-state-5) ) (1993).

5. Dover v. State, 237 Ga. App. 797, 798 (516 S.E.2d 839 (/case/dover-v-state-20) ) (1999) (denial of motion for an out-of-time appeal is discretionary matter); Cannon v. State, 175 Ga. App. 741, 742 (334 S.E.2d 342 (/case/cannon-v-state-155) ) (1985).

6. Smith v. State, 266 Ga. 687 (470 S.E.2d 436) (1996).

7. Id.

[o]ur courts have long recognized the right to effective assistance of counsel on appeal from a criminal conviction, and have permitted out-of-time appeals if the appellant was denied his right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of his appeal rights. The right to appeal is violated when the appointed lawyer deliberately forgoes the direct appeal without first obtaining his client's consent. Such action constitutes ineffectiveness. A criminal defendant who has lost his right to appellate review of his conviction due to error of counsel is entitled to an out-of-time appeal. However, a convicted party may, by his own conduct or in concert with his counsel, forfeit his right to appeal by sleeping on his rights.<sup>8</sup>

8. (Citations and punctuation omitted) Haynes, supra, 227 Ga. App. at 65.

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We have carefully reviewed the transcript of the hearing on the motion for out-of-time appeal. Butts's trial counsel testified that although he did not have an independent recollection of informing Butts of his appeal rights, it was his customary practice to inform each convicted client of such (including that the client had 30 days to file the appeal), which practice he invariably followed. He expressly denied that Butts ever asked him to appeal the case and further denied that he led Butts to believe that an appeal was pending. Butts testified that counsel did not inform him that he had thirty days to appeal and that he did not learn of such until 1997.

The court was entitled to believe the testimony of Butts's counsel, which was sufficient to authorize the court to find that Butts had been informed of his appeal rights and had voluntarily waived same, and to find that Butts's right to a timely appeal was not frustrated through ineffective assistance of counsel.<sup>9</sup> Since we apply the "any evidence" standard to findings of the trial court when it is acting as the trier of fact,<sup>10</sup> we hold the trial court did not abuse its discretion in denying the motion for out-of-time appeal.<sup>11</sup> Judgment affirmed. Pope, P.J., and Smith, P.J., concur.

9. Jackson v. Hopper, 243 Ga. 41, 42 (252 S.E.2d 467 (/case/jackson-v-hopper-6)) (1979); accord Murphy v. Balkom, 245 Ga. 13, 14 (262 S.E.2d 784 (/case/murphy-v-balkcom)) (1980).

10. Tate v. State, 264 Ga. 53, 54 (1) (440 S.E.2d 646) (1994).

11. See Penrod v. State, 233 Ga. App. 532, 533 (504 S.E.2d 757 (/case/penrod-v-state-6)) (1998) (abuse of discretion standard applies).

DECIDED JUNE 8, 2000 — CERT. APPLIED FOR.

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**BARNES v. THE STATE.**  
A00A1137.  
(243 Ga. App. 703)  
(534 SE2d 440)  
(2000)

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**BARNES, Judge.**  
**Out-of-time appeal. Clayton Superior Court. Before Judge Benefield.**

Norman Lee Barnes appeals the dismissal of his motion for an out-of-time appeal. He contends that his constitutional and statutory rights to appeal his convictions were violated by his trial attorney's failure to file a motion for new trial and to file a notice of appeal. Because we find the record does not show a determination by the trial court that Barnes forfeited his rights to appeal his convictions, we remand this case for that adjudication.

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On November 10, 1993, a jury convicted Barnes of two counts of aggravated assault with a deadly weapon, a pistol. The trial court then imposed a recidivist sentence upon Barnes, a repeat offender. For reasons not adequately explained by the record, no appeal followed. More than six years after the verdict and sentencing, Barnes filed a pro se motion for an out-of-time appeal. In this motion, Barnes asserted that his defense counsel failed "to perfect and pursue a direct appeal."

Without providing an explanation, the trial court dismissed the motion for an out-of-time appeal. Although the trial court's order does not reflect that a hearing was held on Barnes' motion, and there is no transcript of a hearing, in an earlier order the court directed that Barnes be brought to the courthouse "to appear for his motion for out-of-time appeal." Barnes appeals the dismissal of his motion for out-of-time appeal.

Although the State argues that Barnes' motion for an out-of-time appeal was actually an extraordinary motion for new trial requiring a discretionary application, we disagree. See *Lunsford v. State*, 237 Ga. App. 696 (515 SE2d 198) (1999) (order denying a motion for an out-of-time appeal is directly appealable). The State's position that this appeal is procedurally foreclosed lacks merit. See *Bohannon v. State*, 262 Ga. 697 (425 SE2d 653) (1993).

As a fundamental principle of law,

[o]ur courts have long recognized the right to effective assistance of counsel on appeal from a criminal conviction, and have permitted out of time appeals if the appellant was denied his right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of his appeal rights.

(Citations and punctuation omitted.) *Hasty v. State*, 213 Ga. App. 731-732 (445 SE2d 836) (1994). If a timely direct appeal was not taken as the result of ineffective assistance of counsel, then an out-of-time appeal is appropriate. *Gibbs v. State*, 239 Ga. App. 249 (519 SE2d 511) (1999). When a criminal defendant has lost his right to appellate review of his conviction due to error of Counsel, he is entitled to an out-of-time appeal. *Rowland v. State*, 264 Ga. 872, 875 (2) (452 SE2d 756) (1995). But when a convicted party by his own conduct or in concert with his counsel has slept on his rights, he forfeits his right to appeal. *Cannon v. State*, 175 Ga. App. 741, 742 (334 SE2d 342) (1985).

In this case, we cannot determine from the record before us whether the trial court conducted the requisite inquiry concerning who ultimately bore the responsibility for the failure to file a timely appeal. *Randolph v. State*, 220 Ga. App. 769, 771 (1) (470 SE2d 300) (1996); *Hasty*, supra, 213 Ga. App. at 732. We vacate the order dismissing the motion for out-of-time appeal and direct the trial court to (1) hold a hearing on Barnes' motion for an out-of-time appeal, if one was not already held; and (2) make findings on the record in accordance with this opinion. *Eisele v. State*, 238 Ga. App. 289, 290 (519 SE2d 9) (1999). An out-of-time appeal will not be authorized if the delay was attributable to the conduct or actions of Barnes, either alone or in concert with counsel. *Evans v. State*, 198 Ga. App. 537, 538 (402 SE2d 131) (1991).

Robert E. Keller, District Attorney, Jack S. Jennings, Assistant District Attorney, for appellee.

*Norman L. Barnes, pro se.*

DECIDED APRIL 25, 2000.

**Citing Cases:**

BRENNAN v. THE STATE. (247 Ga. App. 515) (544 SE2d 210) (2001)

JORDAN v. THE STATE. (247 Ga. App. 551) (544 SE2d 731) (2001)

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