



# Court of Appeals

## Memorandum

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**To:** Presiding Judge Smith and Judge Bernes

**From:** Judge Phipps (Derrico)

**Subject:** A09A1144. *Smith v. The State*.  
Motion for Reconsideration

**Date:** December 15, 2009

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In *Smith v. State*, Case No. A09A1144 (decided November 6, 2009), we affirmed Donald Frank Smith's multiple convictions. Smith's attorney filed a motion for reconsideration of our decision, which we agreed to deny. Before the order denying the motion for reconsideration was issued, Smith filed a pro se petition for certiorari in the Supreme Court. In light of the pending petition for certiorari, Bill Martin prepared an order to dismiss the motion for reconsideration on the ground that the certiorari petition deprived us of jurisdiction. I believe that we still have jurisdiction to resolve the motion for reconsideration.

The Georgia Constitution grants the Supreme Court the right to review our cases by certiorari.<sup>1</sup> That constitutional provision is implemented in OCGA § 5-6-15, which simply

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<sup>1</sup>Ga. Const. Art. VI, § VI, Para. V.

provides that, “[t]he writ of certiorari shall lie from the Supreme Court to the Court of Appeals as provided by Article VI, Section VI, Paragraph V of the Constitution of this state.” Neither the constitution nor case law nor statute describes the supersedeas effect of petitioning the Georgia Supreme Court for certiorari in order to review one of our decisions.<sup>2</sup>

There is a statute, however, concerning the supersedeas effect of petitioning the superior court for review by certiorari of a decision of a lower court. That statute, OCGA § 5-4-19, provides that, “[t]he writ of certiorari, when granted in civil cases, shall operate as a supersedeas of the judgment until the final hearing in the superior court.” Additionally, numerous cases involving superior court review of a lower court decision have held that the sanction or grant of the writ acts as supersedeas until the final hearing in superior court.<sup>3</sup> This principle comes from the common law which provides that “[w]here the writ of certiorari has been applied for and has been granted, *the sanctioning of the writ operates as a stay of the*

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<sup>2</sup>There are, however, statutes regarding the supersedeas effect of appealing to our court or the Supreme Court from a lower court. OCGA §§ 5-6-35 (h); 5-6-45 through 5-6-47.

<sup>3</sup>See, e.g., *Equitable Life Assurance Soc. v. Culp*, 159 Ga. 874 (127 SE 225) (1925); *Dixon v. Sable*, 147 Ga. 623, 625 (95 SE 240) (1918); *Loeb v. Mangum*, 134 Ga. 335 (67 SE 882) (1910). The cases do not expressly limit this rule to civil proceedings.

Sanctioning the writ is an act of the judge that must take place before the clerk of court may file the petition for writ of certiorari. See *Fleming v. Bainbridge*, 84 Ga. 622 (10 SE 1098) (1890). Sanctioning is the act required to allow the petition to be filed so that the court can consider its merits; sanctioning itself is not a consideration of the merits. See *Cobb County v. Herren*, 230 Ga. App. 482 (496 SE2d 558) (1998).

*proceedings*, and the powers of the inferior tribunal as to that case are suspended until the final determination of the case in the superior court.”<sup>4</sup> In other words, only when the certiorari petition has been sanctioned does it have supersedeas effect. The common law rule “seems to prevail universally except where it has been abrogated or modified by statute.”<sup>5</sup>

In the absence of any directly applicable constitutional provision or statute, it is appropriate to look to the common law to answer the question presented here. Applying the common law rule to this case, I have concluded that the filing of the petition for certiorari in the Supreme Court does not act as supersedeas. Should the Supreme Court grant (or “sanction”) the petition, thereby allowing the case to proceed for review of the merits, that grant will act as supersedeas. Until then, we have jurisdiction and may rule on the motion for reconsideration.

According to Bill Martin, in practice, we have treated petitions for certiorari filed in the Supreme Court as divesting us of jurisdiction. But we are not required to do so. I suggest the better practice is to resolve pending motions on the merits rather than dismiss them on the ground of a questionable conclusion about jurisdiction. For these reasons, I recommend that, instead of issuing the proposed order to dismiss the motion for reconsideration, we issue a standard order denying the motion for reconsideration.

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<sup>4</sup>*Loeb*, supra, at 625.

<sup>5</sup>*Id.*