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IN THE COURT OF APPEALS OF GEORGIA

JEROME T. NESBITT,
APPELLANT,
VS.
State of Georgia,
APPELLEE

FILED IN OFFICE
JUN 10 2008
COURT CLERK
CLERK COURT OF APPEALS OF GA
APPEAL Case No. A08A1884
DOCKET DATE MAY, 28, 2008

Brief of Appellant

Jerome T. Nesbitt
Jerome T. Nesbitt
GDC # 342233
MACON STATE PRISON
P.O. Box 426 / H-1
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31068

2

IN THE COURT OF APPEALS OF GEORGIA

JEROME T. NESBITT,
APPELLANT,
VS.
STATE OF GEORGIA

APPEALS CASE NO.
A08A1884

BRIEF OF APPELLANT

Part I. (a) Statement of Proceedings

A Bill of Indictment was filed in this case (# 89-CR-1057) on August 11, 1989 (R-3). After a jury trial concluded on December 12, 1989, Appellant was sentenced to 15 years to serve 1 year confinement in prison. (R-7) Counsel never filed an appeal in this case although he informed defendant that he was going to appeal, and told defendant he would file a direct appeal. (R-10). On March 25, 2008 Appellant filed a Motion For Out of Time Appeal in the Superior Court of Bartow County (R-11-15).

Without holding an evidentiary hearing, the court denied the motion for out of time appeal, (R. 16) on April 4, 2008. Appellant filed a timely Notice of Appeal on April 25, 2008, (R. 1) and an affidavit of poverty is contained in the record on Appeal (R. 2), however a fresh affidavit of poverty is attached hereto for the courts convenience.

from the denial of his motion for out of time

appeal, Appellant brings this appeal.

(b) Statement OF FACTS

Appellant was convicted by a jury of possession with intent to distribute (R. 6) and sentenced to 15 years (serve one year (R. 7)). At that time Appellant was represented by Attorney Gene Green. (R-11). Attorney Green informed the petitioner (Appellant) that he was going to file a direct Appeal (R. 11). Appellant served 9 months on the 1-year sentence and was released (R. 12). Five years later Appellant was arrested for 2 more VGCSA charges (R. 12), and his 1989 conviction was used to enhance his sentence.

During post-conviction proceedings Appellant learned that counsel never filed the appeal he said he would file. (R. 12). In his motion for out of time Appeal, Appellant alleged that "Trial counsel was ineffective for failing to file a direct appeal..." (R. 12) and that "Trial Counsel's negligence [in failing] to file a direct appeal in behalf of" Appellant "denied him of Due process of law under the 6th and 14th Amendment of U.S. Constitution." (R. 13).

Without holding a hearing, the court issued a one sentence order denying the motion for out of time appeal (R. 16). The instant appeal follows. For reasons set forth below, this court should grant the out of time Appeal.

Part II: ENUMERATION OF ERROR(S)

(1) ENUMERATION OF ERROR: ONE

The trial court erred in denying the Motion for Out of Time Appeal without conducting an evidentiary hearing, thereby abusing its discretion.

PART III: Argument And Citation of Authorities

STANDARD OF REVIEW: SYMS V. STATE, 240 GA. APP. 440, 523 S.E.2d. 42 (1999) "denial of a motion for out of time appeal is a matter within the discretion of the trial court, and the trial court's decision will not be reversed absent an abuse of such discretion"...

ERROR # ONE: The trial court erred in denying the Motion For Out of Time Appeal without conducting an evidentiary hearing, thereby abusing its discretion.

The trial court's order denying the motion at issue simply stated: "... After review said motion and the entire file on this matter, it is hereby the order of this Court that Defendant's Motion is denied" (R.16)

However, because the record reflects the trial court did not conduct an evidentiary hearing, the court committed reversible error. Under prevailing Georgia state decisions "a criminal defendant has the absolute right to file a timely direct appeal from a judgment of conviction and sentence entered after a jury or bench trial." Hudson v. State, 278 Ga. 409, 410 (603 S.E.2d 242) (2004). When the defendant loses that Right as a result of the ineffective assistance of his counsel, he is entitled to an out of time appeal, which is the remedy for a frustrated right of appeal. *Id.* The mere passage of time does not preclude a defendant from pursuing an out of time appeal; -and- when a request is made for an out of time appeal, the determinative issue is whether the initial failure to pursue a timely direct appeal was attributable to trial counsel or to the defendant himself. *Id.* @ 411.

In the case sub judice the trial court did not make any attempts to reach this issue of who was at fault for failing to pursue the appeal. The State District Attorney for Bartow County did not oppose the motion nor respond to same - nor did the court require a response. Thus, under Simmons v. State, 276 Ga. 525, 579 S.E.2d 735 (2003) and other prevailing case law - when the movant alleges deprivation of the right to

direct appeal due to trial counsel's ineffective[ness] or assistance, judicial inquiry must be made whether appellant was responsible for failure to pursue a timely direct appeal, and a trial court abuses its discretion when it fails to make such a factual inquiry. Id. 527. see also Dykes v. State, 266 Ga. App. 635, 597 S.E.2d 468 (2004) "... 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"; "... generally, a trial court should conduct an evidentiary hearing before making the determination".

Accordingly, Because the court denied the motion for out of time appeal without a hearing, the court's order should be reversed and this case remanded to the trial court.

Conclusion

An out of time appeal is permitted if the appellant was denied his right to appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of his appeal rights. Such is the case at bar (R. 11-15). Burroughs v. State 239 Ga. App. 600, 521 S.E.2d 652 (1999). This court is thus urged to reverse the trial court's order denying his Motion For out of time Appeal.

Respectfully Submitted
Jerome C. Neobitt

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing document (s) upon the party (s) listed below by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to below addresse (s).

(1) ~~Joseph Campbell, D.A.
Cherokee Circuit, Bartow
County Division, 135 W.
Cherokee Avenue, Suite 366
Cookeville, Ga. 31608~~

(2) ~~William L. Martin, Clerk
Court of Appeals
47 Trinity Ave. SW.
Suite 501
ATLANTA, GA. 30334~~

This the 2nd day of June 2008

Signature, Jarome R. Wald

RECEIVED IN OFFICE

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Will. R. Metzger
CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA.

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FILED IN OFFICE

JUL - 3 2008

COURT CLERK
CLERK COURT OF APPEALS OF GA

IN THE COURT OF APPEALS
STATE OF GEORGIA

JEROME T. NESBITT,
APPELLANT

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CASE NUMBER: A08A1884

VS.

THE STATE OF GEORGIA,
APPELLEE

BRIEF OF APPELLEE

T. JOSEPH CAMPBELL
DISTRICT ATTORNEY
CHEROKEE JUDICIAL CIRCUIT
STATE BAR NUMBER 106950

SUZANNE Z. BROOKSHIRE
ASSISTANT DISTRICT ATTORNEY
CHEROKEE JUDICIAL CIRCUIT
STATE BAR NUMBER 142544

OFFICE OF THE DISTRICT ATTORNEY
BARTOW COUNTY DIVISION
135 W. CHEROKEE AVENUE, SUITE 368
CARTERSVILLE, GEORGIA 30121

PART I
STATEMENT OF FACTS

The Appellant, Jerome Terreal Nesbitt, was indicted by the August 1989 Gordon County Grand Jury for possession of cocaine with the intent to distribute and obstruction of a law enforcement officer. (I. 3-5).¹ The Defendant was found guilty on both counts by a jury on November 16, 1989. (I. 6). The Defendant was sentenced by the Honorable Jere White to a term of fifteen years, to serve one year incarcerated. (I. 7-10). The Appellant filed a motion for an out of time appeal on March 25, 2008. (I. 11-15). The Honorable Shepard Howell denied the Appellant's motion for an out of time appeal in an order dated April 4, 2008. (I. 16-17). This appeal follows.

PART II
ARGUMENT AND CITATION TO AUTHORITY

I. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR OUT OF TIME APPEAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING

“The denial of a motion for an out-of-time appeal is a matter within the discretion of the trial court, and the trial court's decision will not be reversed

¹ All references to the clerk's index for this appeal are denoted as “I.,” all references to the clerk's supplemental index are denoted as “SI.,” and all references to the Appellant's motion for out-of-time appeal are denoted as “MTA.”

absent abuse of that discretion.” Ray v. State, 287 Ga. App. 492, 492 (2007) quoting Carroll v. State, 270 Ga. App. 569, 570 (2004). In addition, when a Defendant makes a motion for an out-of-time appeal, “the burden is on the movant to establish that the right to a direct appeal was frustrated by ineffective assistance of counsel. Where the evidence is sufficient to authorize the trial court to find that the movant’s conduct caused the loss of the right to direct appeal, the movant has no right to an out-of-time appeal.” Duncan v. State, 2008 Ga. App. LEXIS 570 (2008). However, if the movant’s right to an appeal was “frustrated” by the ineffective assistance of his counsel, the trial court must review all evidence and determine “responsibility for the failure to pursue a timely direct appeal.” Id.

Here, the Appellant contends that the trial court erred when it failed to conduct an evidentiary hearing regarding the Appellant’s claims that his attorney, Mr. Gene Greene, failed to file an appeal on his behalf. The Appellant even went so far as to adopt, verbatim, all the facts in the case of White v. State, 277 Ga. App. 647 (2004). In White, the facts established that White was sentenced to a term of twenty years in prison. White’s counsel did in fact file a motion for new trial. The motion for new trial was still pending after seven years when the Appellant motioned the trial court for an out-of-time appeal. The trial court denied the

motion for an out-of-time appeal and the Supreme Court of Georgia reversed on the grounds that the movant only had to show a procedural error by his counsel not the merits of the appeal. Id. at 648.

In his motion for an out-of-time appeal, the Appellant claims that his attorney Mr. Greene had “inform[ed] the defendant that he was going to file a direct appeal.” (MTA. 1). The Appellant went on to detail that he was later arrested for the crimes of sale of cocaine and possession of cocaine with the intent to distribute. The Appellant’s conviction for the case at bar was used as an enhancement for the two subsequent convictions. It was only at that time, over 4 years later, that the Appellant claimed he “found out that he had not receive[d] (sic) an (sic) appeal from his 1989 conviction due [to] counsel’s negligence (sic) to file a direct appeal.” (MTA. 1-2).

The Appellant’s statements are in direct contradiction to all facts and the record in this case. The Appellant has only contended in his motion that his former attorney Mr. Gene Greene was ineffective. The Appellant has submitted no evidence, other than accusations, to the trial court to prove Mr. Greene failed to pursue a timely appeal. Rather, the Appellant has conveniently adopted the facts in White in an effort to erroneously receive an out-of-time appeal.

The record in this case supports the trial court's denial of the Appellant's motion. The Appellant, not his former attorney Mr. Greene, is at fault for failing to file a notice of appeal. The record supports and proves the Appellant's lack of due diligence in handling his case post conviction. The Appellant, in a letter dated March 5, 1990, made a request for an appointed lawyer to appeal his conviction. (SI. 1). Deborah Southern, a Deputy Clerk with the Bartow County Superior Court Clerk's Office, responded to the Appellant's inquiry. Ms. Southern detailed the numerous letters she had received from the Appellant in regards to his appeal and his representation during the appeal. In her letter dated March 20, 1990, Ms. Southern wrote:

As you said in one of your letters, you asked Mr. Greene to do one [appeal] for you but once he told you of the court cost and his cost for doing the Appeal to the Ga. Court of Appeals, you could not afford it.
(Emphasis added) (SI. 2).

The letter from Ms. Southern explained the Appellant was granted the assistance of an appointed lawyer to represent him throughout the appellate phase of this case. (SI. 2). Before receiving a response from the trial court and the clerk's office, the Appellant made a petition for copy of records in his motion dated March 19, 1990. (SI. 3-5). Since that time, the Appellant has made no motions for appeal except for

his motion, which is the subject of this appeal, dated February 2, 2008, a motion made almost 20 years after his conviction for this crime.

Prior to filing his current motion for an out-of-time appeal, the Appellant never made any prior motions for an out of time appeal and never filed a direct appeal with this Court. The Appellant did not request a court appointed attorney in a timely fashion. Instead, the Appellant waited several months to take action on his case after determining he could not pay Mr. Greene to finish his case. At the point the Appellant was granted appointed counsel, any motions filed by an attorney on behalf of the Appellant would have been considered untimely.

The trial court therefore did not err when it did not conduct an evidentiary hearing to determine if the Appellant's former attorney Gene Greene failed to exercise due diligence in filing an appeal on his behalf. Through all of the Appellant's current motions and briefs, he has misrepresented himself to this Court. The record clearly establishes the Appellant did not hire Mr. Gene Greene for his appeal because the Appellant could not afford his services. The only person who failed to exercise due diligence is the Appellant. He did not hire an attorney in the appropriate time to file an appeal. The Appellant never filed any pro se motions or notices of appeal on his own behalf to preserve his appellate rights nor

did he request an appointed attorney in the appropriate time to preserve any appellate rights. Upon reviewing the entire record, including the Appellant's motion of false accusations, the trial court did not need to conduct an evidentiary hearing to determine the Appellant's claims in this case. The record is clear. The record establishes, as set forth in case law, the Appellant's very own actions caused him to lose any right to appeal. The Appellant therefore has no right to appeal and the trial court made the correct determination when it denied the Appellant's motion for an out-of-time appeal.

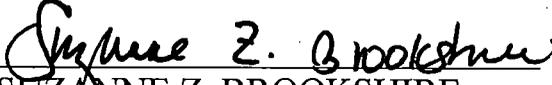
PART III

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Appellee prays that this Court affirm the trial court's denial of the Appellant's motion for out of time appeal and uphold the Appellant's conviction.

RESPECTFULLY SUBMITTED,

T. JOSEPH CAMPBELL
DISTRICT ATTORNEY
CHEROKEE JUDICIAL CIRCUIT
STATE BAR NUMBER 106950


SUZANNE Z. BROOKSHIRE
ASSISTANT DISTRICT ATTORNEY
CHEROKEE JUDICIAL CIRCUIT
STATE BAR NUMBER 142544

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IN THE COURT OF APPEALS

STATE OF GEORGIA

JEROME T. NESBITT,
APPELLANT

*

*

CASE NUMBER: A08A1884

*

VS.

*

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THE STATE OF GEORGIA,
APPELLEE

*

*

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Brief of the State upon Jerome Nesbitt by depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon, addressed as follows:

Mr. Jerome Nesbitt
GDC # 342233 H1-119
Macon State Prison
P.O. Box 426
Oglethorpe, Georgia 31068

This the 3rd day of July, 2008.


SUZANNE Z. BROOKSHIRE
ASSISTANT DISTRICT ATTORNEY
CHEROKEE JUDICIAL CIRCUIT
STATE BAR NUMBER 142544

70-071
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IN THE COURT OF APPEALS
STATE OF GEORGIA

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JEROME T. NESBITT
APPELLANT

VS.

THE STATE OF GEORGIA
APPELLEE

CASE NUMBER: A08A1884

APPEARANCES

FOR THE APPELLANT

JEROME T. NESBITT, PRO -SE
MACON STATE PRISON
GDC # 342233 HI-211
P.O. BOX 426
OGLETHOPE, GA, 31068

FOR THE APPELLEE

SUZANNE BROOKESHIRE, ESQ.
DISTRICT ATTORNEY BARTOW CO.
135 W. CHEROKEE AVE # 368
CARTERSVILLE, GA. 30120

REPLY BRIEF

PART I

STATEMENT OF FACTS

THE APPELLANT, JEROME TERREAL NESBITT, WAS INDICTED BY THE AUGUST 1989. BARTOW COUNTY GRAND JURY FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND OBSTRUCTION OF A LAW ENFORCEMENT OFFICER. THE DEFENDANT WAS FOUND GUILTY ON BOTH COUNTS BY A JURY ON NOVEMBER 16, 1989. THE DEFENDANT WAS SENTENCED BY THE HONORABLE JERE WHITE ON DECEMBER 12, 1989. TO A TERM OF FIFTEEN YEARS; TO SERVE ONE YEAR INCARCERATED. THE APPELLANT FILED A MOTION FOR AN OUT OF TIME APPEAL ON MARCH 25, 2008. THE HONORABLE SHEPARD HOWELL DENIED THE APPELLANT'S MOTION FOR AN OUT OF TIME APPEAL IN AN ORDER DATED APRIL 4, 2008.

PART II

ARGUMENT AND CITATION TO AUTHORITY

I. THE TRIAL COURT ERR IN DENYING THE MOTION FOR OUT OF TIME APPEAL WITHOUT CONDUCTIDN OF AN EVIDENTIARY HEARING.

THE DENIAL OF A MOTION FOR AN OUT-OF-TIME APPEAL IS A MATTER WITHIN THE DISCRETION OF THE TRIAL COURT, AND THE TRIAL COURTS DECISION IN WILL NOT BE REVERSED ABSENT ABUSE OF THAT DISCRETION."

RAY V. STATE, 287 GA. APP. 492, (2007).

HOWEVER, IF THE MOVANT'S RIGHT TO AN APPEAL WAS "FRUSTRATED" BY THE INEFFECTIVE ASSISTANCE OF HIS APPOINTED COUNSEL, THE TRIAL COURT MUST REVIEW ALL EVIDENCE AND DETERMINE RESPONSIBILITY FOR THE FAILURE TO PURSUE A TIMELY DIRECT APPEAL." ID.

SEE: DUNCAN V. STATE, 2008.GA. APP. LEXIS 570, 2008.

ALL REFERENCES TO THE "LATE SUPPLIED" DOCUMENT(S) DELIVERED TO THE APPELLANT, BY U.S. MAIL, STAMPED JULY 7, 2008, ARE REFERENCED TO THE BARTOW COUNTY CLERK'S INDEX FOR THIS REPLY BRIEF, TO THE STATES APPELLEE BRIEF AND ARE DENOTED AS "I." ALL REFERENCES TO THE CLERK'S SUPPLEMENTAL INDEX ARE DENOTED AS "SI.", AND ALL REFERENCES TO THE APPELLANT'S MOTION FOR OUT-OF-TIME APPEAL ARE DENOTED AS "MTA.", AND ALL REFERENCES TO THE BRIEF OF APPELLEE ARE DENOTED AS "BOA.",

CLAIM THAT PETITIONER WAS DENIED A DIRECT APPEAL BECAUSE HE WAS NOT INFORMED BY HIS ATTORNEY OR THE COURT, THAT HE WAS ENTITLED TO APPEAL, AND BECAUSE HE REQUESTED HIS ATTORNEY TO FILE A DIRECT APPEAL, AND THE ATTORNEY TOOK NO ACTION.

SEE: MURPHY V. BALKCOM, 262 SE2d 784 (1980).

HOWEVER, AFTER THE APPELLANT, WAS GRANTED COURT APPOINTED COUNSEL, THIS FACT WAS NOT MADE KNOWN TO THE APPELLANT, BY THAT COUNSEL, AND FROM THE RECORDS NO, SUCH APPEAL WAS FILED, OR JUSTIFICATION OF FAILURE,

WHEN THE MOVANT ALLEGES DEPRIVATION OF THE RIGHT TO DIRECT APPEAL DUE TO COUNSEL'S INEFFECTIVE ASSISTANCE, JUDICIAL INQUIRY MUST BE MADE, WHETHER APPELLANT WAS RESPONSIBLE FOR THE FAILURE TO PURSUE A TIMELY DIRECT APPEAL. A TRIAL COURT ABUSES ITS DISCRETION WHEN IT FAILS TO MAKE SUCH A FACTUAL INQUIRY.

SIMMONS V. STATE, 579 SE2d, 735 (2003).

AS IN THIS CASE, HAD THE TRIAL COURT CONDUCTED THE REQUIRED HEARING, AND "REVIEWED ALL" THE APPELLANTS LETTERS, AND REQUESTS WHICH THE CLERK OF THE COURT, REFERRED TO IN HER LETTER DATED 03-05-90 SEE. ("SI.") IT COULD BE DETERMINED FROM THE RECORD, THAT THE APPELLANT FILED A TIMELY REQUEST FOR AN APPOINTMENT OF COUNSEL TO FILE A DIRECT APPEAL ON THE APPELLANTS BEHALF, AND THAT, BECAUSE THE HONORABLE JERE WHITE'S DELAY IN GRANTING APPOINTED APPELLANT COUNSEL, THE RECORDS CLEARLY REFLECT, APPELLANT COUNSEL, TOOK NO! ACTIONS ON THE MATTER, SEE. ("BOA.") PG.5, LINES 14-15, ALSO ("SI..").

PART III

QUESTIONS OF FACTS

I. DID THE APPELLANT PROPERLY NOTIFY THE TRIAL COURT, IN A TIMELY MANNER OF HIS INDIGENT STATUS, AND REQUEST APPOINTMENT OF COUNSEL, TO FILE A DIRECT APPEAL?

ANSWER, YES!

SUPPORTING FACT(S).

SEE, STATE ADMITTED, ("SI.") SUPPLEMENTAL INDEX.

WHICH REFERENCES TO "MISSING" LETTERS IN POSSESSION OF THE CLERK OF COURT, BEING WITHHELD FROM PROPER REVIEW OF THIS APPEALS COURT, ALSO SEE, DEFENDANT'S LETTER DATED,

03-05-90.

II. DID TRIAL COURT, AFTER REQUEST, APPOINT INDIGENT APPELLANT COUNSEL, TO FILE A DIRECT APPEAL?

ANSWER, YES!

SUPPORTING FACT(S).

SEE, STATE ADMITTED, ("SI.") SUPPLEMENTAL INDEX.

REVIEW, REFERENCE TO ATTACHED CLERK RESPONSE LETTER DATED, 03-20-1990.

ALSO, AS INDICATED IN THE ("BOA") BRIEF OF APPELLEE,
PG. 5, 2ND, PHRA, LINES 1-2. (STATES)

THE LETTER FROM CLERK, MS. SOUTHERN, EXPLAINED,
THE APPELLANT (WAS) GRANTED THE ASSISTANCE OF AN
APPOINTED LAWYER TO REPRESENT HIM THROUGHOUT THE
THE APPELLATE PHASE OF (THIS CASE).

FUTHERMORE, THE APPELLEE, HAS ILLUSTRATED THAT THE STATE
HAS IN ITS POSSESSION, NUMEROUS LETTERS AND REQUEST,
WRITTEN BY THE APPELLANT DATING BACK WITHIN THE
TIMELY 30 DAY, RANGE OF MAKING A PROPER, TIMELY
REQUEST FOR A DIRECT APPEAL, AND REQUEST FOR APPOINT-
MENT OF INDIGENT COUNSEL,

THE APPELLEE, AT A DISADVANTAGE TO THE APPELLANT
HAS CHOSEN TO ADMIT AS EVIDENCE, ONLY THE LETTERS OF
THE APPELLANT, SHE FEELS, COULD BE USE TO MISREPRESENT
THE FACT(S) OF THIS ISSUE AND CASE,

THE TRIAL COURT IS APPLYING STRICT CONSTRUCTION OF A PRO SE CASE. THE COURT IGNORED THE APPELLANTS EARLIEST LETTERS REQUESTING APPOINTMENT OF COUNSEL FOR APPELLATE PURPOSES EXPECTING THE APPELLANT, WHO IS AND WAS UNTRAINED IN LAW, TO PERFORM SOME OTHER FORMAL PROCEDURE. THE STATES OWN MOTION, BEFORE THE COURT AT THIS TIME, ADMITS, THAT COUNSEL WAS APPOINTED, BUT WELL AFTER THE STATUTORY TIME ALLOTTED FOR DIRECT APPEAL AND THAT SAID APPOINTED COUNSEL, THAT APPELLANT HAS JUST BECOME AWARE OF, NEVER FILED ANY MOTION FOR APPEAL OR AN OUT-OF-TIME APPEAL. SEE. ("BOA".) BRIEF OF APPELLEE BEFORE THIS COURT AT PG. 5, LINE 14-18.

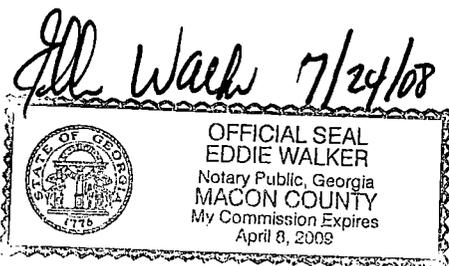
INHEREFORE, IT IS CLEAR IN THE RECORDS BEFORE THIS COURT THAT DEFAULT, SHOULD BE IMPUTED TO THE TRIAL COURT AND THE APPOINTED COUNSEL, AND OF NO! FAULT OF THE APPELLANT.

PART IV
CONCLUSION

INHEREFORE, FOR ALL OF THE ABOVE AND FOREGOING REASONS, APPELLANT PRAYS THAT THIS COURT REVERSE, THE TRIAL COURTS DENIAL OF THE APPELLANTS MOTION FOR OUT-OF-TIME APPEAL, AND ALLOW THE APPELLANT, TO FILE AN OUT-OF-TIME APPEAL ENTITLED BY LAW.

RESPECTFULLY, SUBMITTED,
JEROME T. NESBITT
342233, HI-211 % BOX 426,
MACON STATE PRISON
OGLETHOPE, GA, 31068

THIS THE 24TH DAY OF JULY 2008



SIGNATURE, Jerome C. Nesbitt

CERTIFICATE OF SERVICE

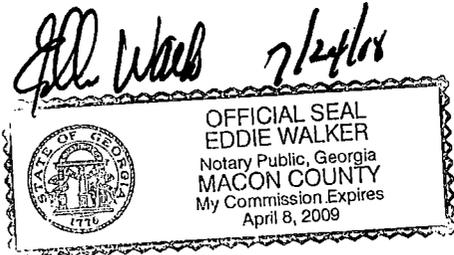
This is to certify that I have this day served a true and correct copy of the within and foregoing document (s) upon the party (s) listed below by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to below addresse (s).

COURT OF APPEALS OF GEORGIA,
SUITE 501
47 TRINITY AVENUE
ATLANTA, GA, 30334

MS. SUZANNA BROOKSHIRE, ESQ.
DISTRICT ATTORNEY BARTOW CO
135 W. CHEROKEE AVE. #368
CARTERSVILLE, GA, 30120

This the 24TH day of JULY 20 08

Signature, Jerome P. Nesbitt



IN THE GEORGIA COURT OF APPEALS
FROM
BARTOW COUNTY SUPERIOR COURT

NESBITT JEROME T
APPELLANT

VS.

STATE OF GEORGIA
APPELLEE

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NESBITT JERMONE T
APPELLANT

VS

CASE NO: 1989-1057

STATE OF GEORGIA
APPELLEE

APPEARANCES

FOR THE APPELLANT

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MACON STATE PRISON

GDC # 342233 H1- 119

P.O. BOX 426

OGLETHORPE GA 31068

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135 W CHEROKEE AVE # 368

CARTERSVILLE GA 30120

SUPPLEMENTMENTAL INDEX

DEFENDANT LETTER 03-05-90 WITH ATTACHED CLERKS 1 - 2
RESPONSE LETTER DATED 03-20-1990

PETITION FOR COPY OF RECORDS 3 - 5

INMATE'S NAME: _____

DATE: _____

INSTITUTION: _____

STATE SERIAL NUMBER: _____

CITY: _____

File

3-5-90

JEROME T. NESBITT

ROGER C.I.

P.O. Box 53000

REDSVILLE, GA. 30453

CASE NO: CR-89-1057

12-12-89

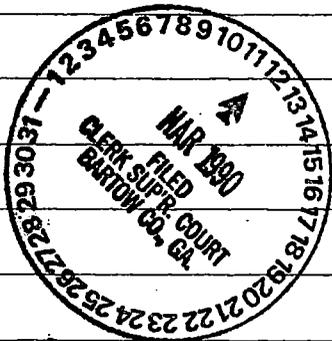
BARTOW SUPERIOR COURT

CLERK OF SUPERIOR COURT OF
BARTOW COUNTY, GEORGIA.

Sir.

ON DECEMBER 23, 1989 I REQUESTED AN APPEAL,
WITH RESPONSE FROM YOU; BUT AS YOU RECEIVE THIS LETTER, I AM ASKING
THAT YOU MOVE THE HONORABLE COURT TO APPOINT ME AN ATTORNEY
TO ACT ON MY BEHALF AND APPEAL MY CASE UNDER THE INDIGENT
STATUE, ALSO I REQUEST A COPY OF THIS LETTER RETURNED FOR MY
PERSONAL FILE.

THANK YOU FOR YOUR TIME AND PLEASE!
CONSIDER A QUICK RESPOND.



Respectfully submitted

JEROME T. NESBITT

CR-89-1057

MARCH 5, 1990

OFFICE OF GRADY JEFFERSON
CLERK SUPERIOR COURT
BARTOW COUNTY
P.O. BOX 1047, CARTERSVILLE, GEORGIA 30120

March 20, 1990

Dear Mr. Nesbitt,

I was in receipt of your 3/5/90 letter requesting an appointed attorney and I think I have written you in the past and informed you I cannot give you an attorney unless the Judge authorizes one. Also, you keep saying you have filed an Appeal with our office, but all I have done is an Application for Sentence Review as you requested, but a Notice of Appeal has to come by an attorney or you can do one pro'se, but you have to have someone such as a Legal Aid Society to assist you in all the motions and paperwork involved in filing an appeal. As you said in one of your letters, you asked Mr. Greene to do one for you but once he told you of the court cost and his cost for doing that Appeal to the Ga. Court of Appeals, you could not afford it. There again, you would have to have the Judge appoint you a lawyer, which I understand from Judge White he has mailed you a letter yesterday, 3/19/90, and informed you what he is willing to do.

I'm sorry, but this office cannot forward anything to the Ga. Court of Appeals without the proper paperwork and money it cost for an appeal and it is very complicated to proceed on it, and we are not allowed to advise you on the procedure. This office has done all it can do unless you have legal counsel file further motions in your behalf.

Sincerely,

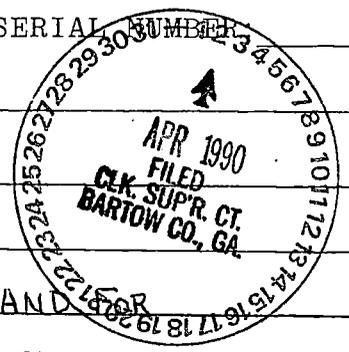


Deborah Southern,
Deputy Clerk

cc/Judge White
cc/file

OK

DATE: _____
INMATE'S NAME: _____ STATE SERIAL NUMBER: _____
INSTITUTION: _____ CITY: _____



IN THE SUPERIOR COURT IN AND FOR
BARTOW COUNTY, GEORGIA

JEROME T. NESBITT

PETITIONER-DEFENDANT

VS

CLERK OF SUPERIOR COURT

RESPONDENT.

CRIMINAL CASE NO. CR-89-1057

VGCSA CT.1

CHARGE OBSTRUCTION OF OFFICER, CT.2

SENTENCE (15) YEARS SERVE (1)

DATE OF CONVICTION 12-12-89

PETITION FOR COPY OF RECORDS

COME NOW THE PETITIONER-DEFENDANT IN THE ABOVE STYLED CAUSE,
AND MOVE THIS HONORABLE COURT TO ISSUE AN ORDER, DIRECTED TO
THE ABOVE NAMED RESPONDENT, AND COMMANDING THAT THE RESPONDENT
SUPPLY THE PETITIONER-DEFENDANT WITH CERTAIN DOCUMENTS WHICH
HAVE HERETOFORE BEEN FILED BY HIM IN HIS OFFICIAL CAPACITY AS
CLERK OF THIS COURT AND WHICH ARE REQUIRED BY THE PETITIONER-
DEFENDANT FOR THE PURPOSE OF FILING A APPLICATION FOR WRIT
OF HABEAS CORPUS. AS GOOD CAUSE FOR ISSUING SUCH ORDER HE SUB-
MITS AS FOLLOWS, TO-WIT:

1) THE DEFENDANT, NOW PETITIONER, IS AN INDIGENT PERSON AND
IS UNABLE TO PAY THE RESPONDENT'S FEES FOR SUCH DOCUMENTS.

INMATE'S NAME: _____

DATE: _____

STATE SERIAL NUMBER: _____

INSTITUTION: _____

CITY: _____

2) AS THE DEFENDANT IN A CRIMINAL CASE, PETITIONER IS ENTITLED TO CERTIFIED COPIES OF DOCUMENTS BELOW LISTED, AS A MATTER OF LAW.

3) PETITIONER SHOULD HAVE BEEN, BUT HAS NOT BEEN SERVED WITH A COPY OF:

(A.) THE WARRANT IN THIS CAUSE.

(B.) THE INDICTMENT IN THIS CAUSE.

(C.) THE SENTENCE, AS IMPOSED FROM THE BENCH AND RECORDED BY THE CLERK.

(D.) ANY TRANSCRIPT OF ANY PROCEEDINGS HAD IN RELATION TO THE CAUSE IN WHICH PETITIONER WAS A DEFENDANT.

(E.) ARREST PHOTO'S.

(F.) FINGER PRINTS.

(G.) SCIENTIFIC REPORT.

WHEREAS, THE DEFENDANT-PETITIONER IS ENTITLED TO THE FOREGOING DESCRIBED DOCUMENTS AS A MATTER OF LAW. AND;

WHEREAS, THE COST OF SUCH DOCUMENTS MAY BE TAXED AGAINST THE STATE.

DATE: _____

INMATE'S NAME: _____

STATE SERIAL NUMBER: _____

INSTITUTION: _____

CITY: _____

WHEREFORE, THE DEFENDANT, NOW PETITIONER, PRAYS THAT AN ORDER ISSUE AS IS HEREINABOVE PRAYED, THIS HE WILL EVERY PRAY.

RESPECTFULLY SUBMITTED,

George L. Hestitt

DEFENDANT - PETITIONER

P.O. BOX

REIDSVILLE, GEORGIA.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 19 DAY OF March, 19 90.

Donald L. Greig

NOTARY PUBLIC

My COMMISSION EXPIRES: _____

My Commission Expires Nov. 7, 1993

SECOND DIVISION
BARNES, C. J.,
JOHNSON, P. J., PHIPPS, J.

NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>

December 29, 2008

In the Court of Appeals of Georgia

A08A1884. NESBITT v. THE STATE.

PHIPPS, Judge.

Jerome Nesbitt appeals the denial of his motion for an out-of-time appeal. Because the trial court abused its discretion in denying Nesbitt's motion without having held an evidentiary hearing on the issue of who ultimately bore the responsibility for the failure to file a timely appeal, we reverse the ruling and remand the case for proceedings not inconsistent with this opinion.

After a jury trial, Nesbitt was convicted in December 1989 for violating the Georgia Controlled Substances Act and for obstructing an officer. In March 2008, Nesbitt filed a pro se motion for an out-of-time appeal, asserting that his trial attorney had told him that he would file a direct appeal, but neither filed an appeal nor

informed him of his right to a direct appeal.¹ Nesbitt claimed that he had lost the right to file a timely direct appeal as a result of the ineffective assistance of his trial counsel. Nesbitt sought an evidentiary hearing on his motion. Without conducting a hearing, however, the trial court denied the motion. Nesbitt contends on appeal that the trial court erred by denying his motion without having conducted an evidentiary hearing.

“A criminal defendant has the absolute right to file a timely direct appeal from a judgment of conviction and sentence entered after a jury or bench trial. When the defendant loses that right as a result of the ineffective assistance of his counsel, he is entitled to an out-of-time appeal. It is the remedy for a frustrated right of appeal.”²

Moreover,

the defendant’s right to effective assistance of counsel includes the right to be informed of the right to appeal and the right to counsel on appeal, including the right to appointed counsel for indigent defendants. Defendants in criminal cases have both a federal and a state

¹ The record also indicates that Nesbitt was indigent and sought the appointment of appellate counsel in March 1990.

² *Hudson v. State*, 278 Ga. 409 (1) (603 SE2d 242) (2004) (citations and punctuation omitted).

constitutional right to be represented by counsel. This right extends to every indigent accused who indicates his desire to appeal.³

“However, an out-of-time appeal is not authorized if the loss of the right to appeal is not attributable to ineffective assistance of counsel but to the fact that the defendant himself slept on his rights.”⁴

“When the movant alleges deprivation of the right to direct appeal due to trial counsel’s ineffective assistance, judicial inquiry must be made whether appellant was responsible for the failure to pursue a timely direct appeal. A trial court abuses its discretion when it fails to make such a factual inquiry.”⁵ In the case at bar, there is nothing to show that any factual determination was made concerning the cause of Nesbitt’s failure to pursue a direct appeal despite his assertion that trial counsel had been ineffective. Moreover, the record before us does not “show that, before seeking the out-of-time appeal . . . , [Nesbitt] ever undertook any post-conviction action which

³ *Floyd v. State*, 279 Ga. App. 21, 23 (630 SE2d 168) (2006) (footnotes and punctuation omitted).

⁴ *Ray v. State*, 287 Ga. App. 492 (652 SE2d 165) (2007) (citation omitted).

⁵ *Simmons v. State*, 276 Ga. 525, 526 (579 SE2d 735) (2003); *Ray*, supra at 493.

could be construed as a waiver of his right to seek that remedy.”⁶ And notably, “the mere passage of time does not preclude a defendant from pursuing an out-of-time appeal.”⁷ Under these circumstances, we conclude that the trial court erred in denying Nesbitt’s motion for an out-of-time appeal without resolving the determinative issue of whether the failure to pursue a timely direct appeal was attributable to trial counsel or to Nesbitt himself.⁸

Therefore, the judgment is reversed and the case is remanded with direction that the trial court conduct the requisite inquiry as to who ultimately bore the responsibility for the failure to file a timely appeal. If, after conducting the hearing, the trial court finds that [Nesbitt] lost

⁶ See *Hudson*, supra at 410, distinguishing *Dykes v. State*, 266 Ga. App. 635, 636 (597 SE2d 468) (2004) (defendant sought restoration of civil and political rights); *Smith v. State*, 263 Ga. App. 414, 415 (1) (587 SE2d 787) (2003) (defendant made strategic election to pursue motion in arrest of judgment rather than direct appeal); *Bryant v. State*, 257 Ga. App. 141 (570 SE2d 422) (2002) (defendant not entitled to seek second grant of out-of-time appeal when he failed to pursue the grant of his first motion diligently).

⁷ *Hudson*, supra (citation and punctuation omitted).

⁸ *Id.*; *Simmons*, supra; see also *Porter v. State*, 271 Ga. 498, 500 (521 SE2d 566) (1999) (hearing required where the question is in dispute); *Ray*, supra; *Hasty v. State*, 213 Ga. App. 731 (445 SE2d 836) (1994) (hearing required where petitioner “asserted” that he was not advised of his appellate rights despite affidavit from trial counsel averring that he had been advised of at least some of those rights).

his right to a direct appeal as the result of the ineffectiveness of his trial counsel, it should grant the motion for an out-of-time appeal.⁹

Judgment reversed and case remanded. Barnes, C. J., and Johnson, P. J.,

concur.

⁹ *Hudson*, supra (citation and punctuation omitted).

REMITTITUR

Court of Appeals of the State of Georgia

ATLANTA, DECEMBER 29, 2008

The Court of Appeals having met, the following judgment was rendered:

**COURT OF APPEALS CASE NO. A08A1884
JEROME T. NESBITT V. THE STATE**

This case came before this court on appeal from the SUPERIOR Court of BARTOW County; it is considered and adjudged that

**THE JUDGMENT OF THE COURT BELOW BE REVERSED AND CASE REMANDED.
BARNES, C.J., JOHNSON, P.J., AND PHIPPS, J., CONCUR.**

LC NUMBERS: CR891057

Court of Appeals of the State of Georgia

*Clerk's Office, Atlanta, **JAN 14, 2009***

*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.*

Clerk.

Willi L. Mat: [Signature]

*Court of Appeals Cost \$80.00. O.C.G.A. Sec. 5-6-10.
No costs are payable to the Court of Appeals.*

COURT OF APPEALS OF GEORGIA
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CLASSIFICATION: VGCSA

CASE NUMBER: A08A1884 DATE OF DOCKETING: MAY 28, 2008

STYLE: JEROME T. NESBITT V. THE STATE

LOWER COURT SUMMARY INFORMATION:

BARTOW County SUPERIOR COURT CR891057

TRIAL JUDGE: HON SHEPHERD LEE HOWELL

RECORDS	DESCRIPTION:	PARTS:
2008-05-28	LOWERCOURT RECORDS.	01
2008-05-28	TRANSCRIPTS.	

DATE OF JUDGMENT: 2008-04-04 NOTICE OF APPEAL DATE: 2008-04-21

COURT OF APPEALS CODE: 70-071 C
TERM: Sep. Cal. Mo.: SEP/08

DIVISION 2 PANEL CIR PATH: 96, 93, 70.
DIVISION 2 PANEL CIR PATH: 96, 93, 70, 98, 71, 91, 90.

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CASE NUMBER: A08A1884 DATE OF DOCKETING: MAY 28, 2008

STYLE: JEROME T. NESBITT V. THE STATE

ATTORNEY REGISTER:

FOR APPELLANT:

Mr. Jerome T. Nesbitt
PRO SE GDC #342233
MSP H-A
P.O. BOX 426
OGLETHORPE GA 31068

FOR APPELLEE:

Mr. Thomas Joseph Campbell
DISTRICT ATTORNEY
135 W. CHEROKEE AVE.
SUITE 368
CARTERSVILLE GA 30120

FOR OTHER:

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

NOTICE OF DOCKETING

Mr. Jerome T. Nesbitt
PRO SE GDC #342233
MSP H-A
P.O. BOX 426
OGLETHORPE GA 31068

APPEAL CASE NUMBER: A08A1884 DATE OF DOCKETING: MAY 28, 2008

STYLE: JEROME T. NESBITT V. THE STATE

IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief, including as Part II an Enumeration of Errors, shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the \$80.00 filing fee or sufficient pauper's affidavit.

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

Failure to timely file briefs or to follow any Court rules or orders may cause the appeal to be dismissed or may cause non-consideration of the brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on SEP 10, 2008. before the SECOND Division: Johnson, P.J., Barnes, C.J., Phipps, J. A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

**FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.
IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.**

WILLIAM L. MARTIN, III, CLERK

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

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Mr. Thomas Joseph Campbell
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135 W. CHEROKEE AVE.
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CARTERSVILLE GA 30120

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