

SUPREME COURT OF GEORGIA

Rolland v. Martin, 281 Ga. 190

637 S.E.2d 23 (2006) · No. No. S06A1632 · Decided October 30, 2006

SUMMARY

The Supreme Court of Georgia held that a verified habeas corpus petition may serve as both a pleading and evidence in a pro se habeas proceeding. Because Rolland's petition sufficiently alleged that trial counsel failed to file a motion for new trial or notice of appeal after being instructed to do so, the court reversed the denial of habeas relief and remanded for a full consideration of the merits.

OPINION

CARLEY, J.

637 S.E.2d 23 (2006) ROLLAND v. MARTIN, Warden. No. S06A1632. Supreme Court of Georgia. October 30, 2006. *24 James Rolland, Rome, pro se. Thurbert E. Baker, Atty. Gen., Paula Khristian Smith, Asst. Atty. Gen., for appellant. Sarah L. Gerwig-Moore, Director, Criminal Appeals Clinic, Mercer Law School, Laura W. Harper, Mercer Criminal Appeals Clinic, Mercer University School of Law, Macon, amicus appellant.

CARLEY, Justice. After being convicted of several counts of burglary and other charges in 2003, James Rolland filed a verified petition for writ of habeas corpus in 2005. The sole ground of the petition reads as follows: "The petitioner asserts that his trial counsel... rendered ineffective assistance... by abandoning the case, without filing a motion for new trial and notice of appeal after being informed by petitioner."

Rolland subsequently filed a brief with an attached letter from the clerk of the trial court stating that Rolland's trial attorney did not file a motion for new trial or notice of appeal. At the habeas hearing, Rolland indicated that he would rely on his brief and exhibits and that he would conduct cross-examination "at the end."

The habeas court found that he "declined to present any evidence at this time and is going to go with the petition as is filed." The Warden did not produce any evidence, but rather asked the habeas court to deny the petition based upon Rolland's failure to produce evidence in support thereof.

The habeas court denied relief and immediately returned Rolland to the custody of a deputy. The habeas court subsequently entered a written order, finding that there was not any evidence that trial counsel abandoned the case, that Rolland ever requested him to pursue an appeal, or that the failure to pursue an appeal was the result of any action or inaction of counsel.

Rolland appeals pursuant to our grant of his application for certificate of probable cause. "The Civil Practice Act [CPA], OCGA § 9-11-1 et seq., applies in habeas corpus proceedings with regard to questions of pleading and practice. [Cit.]" *State v. Jaramillo*, 279 Ga. 691, 693(2), 620 S.E.2d 798 (2005).

Thus, especially where the petitioner appears pro se, "the notice pleading prescribed by the CPA is appropriate." *Mitchell v. Forrester*, 247 Ga. 622, 623, 278 S.E.2d 368 (1981). Furthermore, regardless of the precise procedural context, a "verified complaint serves as both pleading and evidence. [Cits.]" *BEA Systems v. WebMethods*, 265 Ga.App. 503, 504, 595 S.E.2d 87 (2004) (interlocutory injunction).

"A verified pleading may serve as the functional equivalent of an affidavit and suffice to create an issue of fact. [Cit.]" *Mountain Bound v. Alliant FoodService*, 242 Ga.App. 557, 560(3), 530 S.E.2d 272 (2000) (summary judgment). Rolland sufficiently verified his habeas petition by completing the required form. *Heaton v. Lemacks*, 266 Ga. 189(2), 466 S.E.2d 7 (1996).

The only logical construction of the petition is that trial counsel failed to file a motion for new trial or notice of appeal after Rolland had informed him to *25 proceed with an appeal. Otherwise the failure to do so would not constitute an abandonment of the case. This allegation of abandonment was not merely a conclusion, but was a specific factual averment within Rolland's personal knowledge.

See *Spires v. Relco*, 165 Ga.App. 4, 5(2), 299 S.E.2d 58 (1983); *Accredited Assoc. v. Shottenfeld*, 162 Ga.App. 575, 576(1), 292 S.E.2d 417 (1982); *Foskey v. Smith*, 159 Ga.App. 163, 164, 283 S.E.2d 33 (1981). "[T]he sworn petition, setting forth the factual and legal bases for plaintiff's case, was before the court, and this constituted evidence." [Cit.]" *Harvard v. Walton*, 243 Ga. 860, 862(2), 257 S.E.2d 280 (1979). "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.

[Cits.]" *Roe v. Flores-Ortega*, 528 U.S. 470, 477(II)(A), 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Therefore, the allegations of the verified habeas petition served as evidence supporting the claim of ineffective assistance.

Accordingly, we reverse the denial of habeas corpus relief and remand this case with direction that the habeas court consider the verified petition as evidence, hear the case fully, and determine its merits in accordance with applicable law. See *Scott v. Wright*, 276 Ga. 12, 13(1), 573 S.E.2d 49 (2002); *Nash v. State*, 271 Ga. 281, 286, 519 S.E.2d 893 (1999); *Gaither v. Gibby*, 267 Ga. 96, 97(1), 475 S.E.2d 603 (1996).

If the habeas court were to find that Rolland was denied his right to an appeal, the appropriate remedy would be the grant of an out-of-time appeal. *Ponder v. State*, 260 Ga. 840, 842(1), 400 S.E.2d 922 (1991). Judgment reversed and case remanded with direction. All the Justices concur.

