

SUPREME COURT OF GEORGIA

Hung v. State, 282 Ga. 684

653 S.E.2d 48 (2007) · No. S07A1679 · Decided November 5, 2007

SUMMARY

The Supreme Court of Georgia affirmed Mac The Hung's convictions for malice murder and three counts of aggravated assault, holding that the evidence was sufficient to support the verdicts. The court remanded the case for an evidentiary hearing on Hung's claims of ineffective assistance of trial counsel because the issue was raised at the first practicable opportunity. The court held that the alleged ineffectiveness of counsel who handled the motion for new trial was moot and that counsel was not deficient for failing to challenge another attorney from the same public defender's office.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Carley, Justice; All the Justices
JURISDICTION	Georgia
DECIDED	November 5, 2007
DOCKET	S07A1679
DISPOSITION	other
PROCEDURAL POSTURE	Appellant appealed judgments of conviction for malice murder and three counts of aggravated assault and moved to remand for an evidentiary hearing on ineffective assistance of trial counsel.
STANDARD OF REVIEW	The sufficiency of the evidence is reviewed under whether, viewing the evidence in the light most favorable to the verdict, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. The ineffective-assistance issue required remand for an evidentiary hearing because it had not previously been raised at the first practicable opportunity.
PRECEDENTIAL VALUE	Published opinion; binding precedent of the Supreme Court of Georgia.
PARTIES	Mac The Hung v. The State

TOPICS

ineffective assistance

preservation of error

appellate procedure

post-conviction relief

criminal procedure

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

post-conviction relief

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support Hung's convictions for malice murder and three counts of aggravated assault.
2. Whether Hung's ineffective-assistance-of-trial-counsel claims were procedurally preserved when the attorney who handled the motion for new trial was from the same public defender's office as trial counsel.
3. Whether counsel who handled the motion for new trial rendered ineffective assistance by failing to raise ineffective assistance of trial counsel.

HOLDINGS

1. The evidence was sufficient to authorize a rational trier of fact to find Hung guilty beyond a reasonable doubt of malice murder and three counts of aggravated assault.
2. A defendant's ineffective-assistance claims are not barred when the attorney who handled the motion for new trial was from the same public defender's office as trial counsel; the claims are raised at the first practicable moment when presented on appeal after the motion for new trial.
3. The question whether motion-for-new-trial counsel was ineffective for failing to raise ineffective assistance of trial counsel was moot, and the failure could not constitute deficient performance under the circumstances.

KEY QUOTATIONS

"Because this appeal was [Appellant's] first opportunity to raise the issue of ineffective assistance of trial counsel, we will remand the case for an evidentiary hearing on that claim." (49)

"Moreover, such failure cannot be deemed a deficient performance, as 'it would not be reasonable to expect one member of a [public defender's office] to assert the ineffectiveness of another member, where one represented a defendant at trial and the other represented him on motion for new trial. . . .'" (50)

FACTUAL BACKGROUND

Four victims drove into an apartment complex to pick up a friend. Two men shot into the vehicle, striking three occupants and killing one. Two victims positively identified Hung and his co-defendant Thach Le as the shooters.

PROCEDURAL HISTORY

Hung was tried jointly with co-defendant Thach Le, and the jury found him guilty of malice murder and three aggravated assaults. The trial court entered convictions and sentences, and denied Hung's motion for new trial.

After a notice of appeal was filed, current appellate counsel moved to remand the case for consideration of ineffective-assistance claims. The Supreme Court of Georgia affirmed the judgments but remanded for an evidentiary hearing on trial counsel's alleged ineffectiveness.

DISPOSITION

other

REMAND INSTRUCTIONS

Remand for an evidentiary hearing on Hung's claims of ineffective assistance of trial counsel. The judgments of conviction were affirmed.

CASES CITED

- Le v. State, 276 Ga. 321, 577 S.E.2d 786 (2003)
- Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)
- Shadron v. State, 275 Ga. 767, 769(2), 573 S.E.2d 73 (2002)
- Ryan v. Thomas, 261 Ga. 661, 662, 409 S.E.2d 507 (1991)
- Kirkland v. State, 271 Ga. 217, 220(4), 518 S.E.2d 687 (1999)
- Chatman v. Mancill, 280 Ga. 253, 255(1), 626 S.E.2d 102 (2006)

OPINION

CARLEY, J.

653 S.E.2d 48 (2007) HUNG v. The STATE. No. S07A1679. Supreme Court of Georgia. November 5, 2007. Brian Steel, The Steel Law Firm, P.C., Atlanta, for Appellant. *49 Paul L. Howard, Jr., Dist. Atty., Bettieanne C. Hart, Marc A. Mallon, Asst. Dist. Attys.; Thurbert E. Baker, Atty. Gen., Mary N. Kimmey, Asst. Atty. Gen., Department of Law, Atlanta, for Appellee.

CARLEY, Justice. Appellant Mac The Hung was tried jointly with co-defendant Thach Le, and a jury found each of them guilty of malice murder and three counts of aggravated assault. The trial court entered judgments of conviction on those verdicts and sentenced Appellant to life imprisonment for murder and consecutive terms of years for the three aggravated assaults.

Appellant's motion for new trial was denied. He appealed and subsequently filed a motion for remand on the issue of ineffective assistance of counsel.[*] 1. When construed most strongly in support of the guilty verdicts, the evidence shows the following: The four victims drove into an apartment complex intending to pick up a friend. Two men began shooting into the vehicle.

Three of the four occupants were hit, and one of them died. Two of the victims positively identified Le and [Appellant] as the shooters. Le v. State, 276 Ga. 321, 577 S.E.2d 786 (2003) (affirming convictions of Appellant's co-defendant). This evidence was sufficient to authorize a

rational trier of fact to find Appellant guilty beyond a reasonable doubt of the crimes for which he was convicted.

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Le v. State, supra. 2. In all seven of Appellant's enumerations, he contends that trial counsel rendered ineffective assistance and that Appellant's attorney on motion for new trial was ineffective in failing to preserve the issue. Current appellate counsel was not appointed until after the motion for new trial was denied and a notice of appeal was filed.

The attorney who filed "the motion for new trial... was from the same public defender's office as trial counsel." Shadron v. State, 275 Ga. 767, 769(2), fn. 2, 573 S.E.2d 73 (2002). "[D]ifferent attorneys from the same public defender's office are not to be considered 'new' counsel for the purpose of raising ineffective assistance claims...." Ryan v. Thomas, 261 Ga. 661, 662, 409 S.E.2d 507 (1991).

See also Shadron v. State, supra. "Thus, it must be concluded that this issue is being raised at the first practicable moment. [Cit.]" Kirkland v. State, 271 Ga. 217, 220(4), 518 S.E.2d 687 (1999). Although the Attorney General concedes that a remand is appropriate, the District Attorney asserts, in his response to the motion for remand, that trial counsel was no longer employed by the public defender's office when the motion for new trial was heard and denied.

However, the record does not contain any support for that assertion. Moreover, the District Attorney acknowledges that trial counsel continued to work in the public defender's office after the motion for new trial was filed in 2001 until early 2007. Compare Chatman v. Mancill, 280 Ga. 253, 255(1), 626 S.E.2d 102 (2006). A defendant's right to raise claims of ineffective assistance "may not be barred by the failure of a succession of attorneys from the same public defender's office to raise it."

Ryan v. Thomas, supra. "Because this appeal was [Appellant's] first opportunity to raise the issue of ineffective assistance of trial counsel, we will remand the case for an evidentiary hearing on that claim. [Cit.]" Shadron v. State, supra at 769(2), 573 S.E.2d 73. Since the issue of trial counsel's alleged ineffectiveness has not been waived, the question of whether Appellant's attorney on motion for new trial was ineffective for failing to raise that issue is moot.

Moreover, such failure cannot be deemed a deficient performance, as "it would not be reasonable to expect one member of a [public defender's *50 office] to assert the ineffectiveness of another member, where one represented a defendant at trial and the other represented him on motion for new trial...." Ryan v. Thomas, supra. Judgments affirmed and case remanded with direction.

All the Justices concur. NOTES [*] The crimes occurred on December 17, 2000, and the grand jury returned an indictment on February 13, 2001. The jury found Appellant guilty on November 6, 2001, and the trial court entered judgment on November 9, 2001.

The motion for new trial was filed on November 29, 2001 and denied on April 25, 2007. A notice of appeal was filed on April 27, 2007 and amended on May 16, 2007. The case was docketed in this Court on July 20, 2007, and orally argued on October 9, 2007.

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