

SUPREME COURT OF GEORGIA

Collier v. State

290 Ga. 456 (2012) · Decided February 6, 2012

SUMMARY

The Georgia Supreme Court held that the habeas court properly rejected most of Collier’s claims as procedurally barred or waived and was not required to hold a hearing on those claims. However, the court held that the ineffective-assistance-of-appellate-counsel claim could not be resolved solely from the petition and that the habeas court could not deny it on the merits based only on Collier’s failure to prosecute. The judgment was affirmed in part and reversed in part.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Melton, Justice; All the Justices
JURISDICTION	Georgia
DECIDED	February 6, 2012
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from the denial of a state habeas petition after the Supreme Court of Georgia granted Collier’s application for a certificate of probable cause.
STANDARD OF REVIEW	Review of the habeas court’s application of procedural bars and statutory hearing requirements; whether the habeas court was authorized to deny an ineffective-assistance-of-appellate-counsel claim on the merits without a hearing.
PRECEDENTIAL VALUE	Published and precedential decision of the Supreme Court of Georgia
PARTIES	Kelvin Collier v. State

TOPICS

state post-conviction relief

habeas corpus

ineffective assistance

default

appellate procedure

PRACTICE AREAS

state habeas corpus

post-conviction relief

criminal appellate procedure

QUESTIONS PRESENTED

1. Whether the habeas court was required to hold a hearing on claims that were procedurally barred, waived, or could have been raised on direct appeal.
2. Whether an ineffective-assistance-of-appellate-counsel claim could be resolved solely from the face of the habeas petition.
3. Whether the habeas court could deny the ineffective-assistance-of-appellate-counsel claim on the merits based solely on Collier's failure to prosecute rather than dismissing it without prejudice.

HOLDINGS

1. A habeas court need not hold a hearing when it can determine from the face of the petition that the claims are procedurally barred or otherwise without merit. Because Collier's claims other than ineffective assistance of appellate counsel had been adjudicated or could have been raised on direct appeal, the habeas court properly resolved them without a hearing.
2. An ineffective-assistance-of-appellate-counsel claim alleging failure to raise an error on appeal cannot be resolved solely from the face of the habeas petition when resolution requires determining counsel's tactical reasonableness and whether the alleged error probably affected the appeal's outcome. The habeas court therefore was required to conduct a hearing on Collier's claim.
3. The habeas court could either deny the ineffective-assistance claim on the merits after conducting a hearing or dismiss the claim without prejudice for failure to prosecute, but it could not deny the claim on the merits solely because Collier failed to prosecute it.

KEY QUOTATIONS

“The habeas court’s obligation to schedule such a hearing is mandatory unless the court “is able to determine from the face of the petition that it is without merit.”” (290 Ga. at 457)

“While the habeas court was authorized to either deny the claim on the merits following a hearing or dismiss it without prejudice based on Collier’s failure to prosecute it, it was not authorized to deny Collier’s claim on the merits based on his failure to prosecute it.” (290 Ga. at 458)

FACTUAL BACKGROUND

On May 10, 2005, Kelvin Collier pleaded guilty to trafficking in cocaine, possession of marijuana with intent to distribute, and tampering with evidence. He received a thirty-year sentence, ten years to serve and twenty years on probation. In his later habeas petition, he asserted that his plea was involuntary or deficient and that he had received ineffective assistance of trial and appellate counsel. The habeas court scheduled a hearing, but Collier did not appear; it treated most claims as procedurally barred or waived and denied the appellate-counsel claim for failure to prosecute.

PROCEDURAL HISTORY

Collier pleaded guilty in 2005 and received a thirty-year sentence, with ten years to serve and the balance on probation. After the Court of Appeals affirmed the denial of his motion to withdraw his plea, Collier filed a

habeas petition raising multiple claims. The habeas court denied most claims as barred or waived and denied the ineffective-assistance-of-appellate-counsel claim for failure to prosecute without holding a hearing. The Supreme Court of Georgia affirmed in part and reversed in part.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The denial of the ineffective-assistance-of-appellate-counsel claim on the merits is reversed. The habeas court may conduct a hearing and decide the claim on the merits, or dismiss it without prejudice for failure to prosecute.

CASES CITED

- Rickett v. State, 276 Ga. 609, 610-611 (2) (581 S.E.2d 32) (2003)
- Schofield v. Meders, 280 Ga. 865 (1) (632 S.E.2d 369) (2006)
- Hall v. Lewis, 286 Ga. 767, 769 (II) (A) (692 S.E.2d 580) (2010)
- General Elec. Capital Corp. v. Browning Mulch Co., Inc., 303 Ga. App. 795 (694 S.E.2d 380) (2010)
- Collier v. State, 281 Ga. App. 646 (637 S.E.2d 72) (2006)

OPINION

MELTON, J.

Melton, Justice. On May 10, 2005, Kelvin Collier pled guilty to trafficking in cocaine, possession of marijuana with intent to distribute, and tampering with evidence. He was sentenced to thirty years, ten to serve, with the remaining twenty on probation.¹ Collier filed a *457petition for habeas relief on May 6, 2009, asserting that: (1) his plea was made under duress; (2) his plea was not knowingly and voluntarily entered; (3) the trial court failed to establish an adequate factual basis for the plea; (4) the conviction was obtained by use of evidence gained pursuant to an illegal search and seizure; (5) the indictment was fatally defective; (6) the evidence was insufficient to support his conviction; (7) he was denied effective assistance of trial counsel; and (8) he was denied effective assistance of appellate counsel.

The habeas court scheduled a hearing for May 12, 2010, per Collier's request. On that date, the habeas court entered an order stating that Collier did not appear at the call of the case and did not contact the court to explain his absence.

The court's order denied relief, finding that all grounds except for ineffective assistance of appellate counsel were barred by res judicata or waived through entry of the plea. The habeas court denied relief on the claim for ineffective assistance of appellate counsel for failure to

prosecute. This Court granted Collier's application for a certificate of probable cause to assess the propriety of the habeas court's ruling.

For the reasons that follow, we affirm in part and reverse in part. As an initial matter, pursuant to OCGA § 9-14-47, a habeas "court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings." The habeas court's obligation to schedule such a hearing is mandatory unless the court "is able to determine from the face of the petition that it is without merit." (Citations and punctuation omitted.)

Rickett v. State, 276 Ga. 609, 610 (2) (581 SE2d 32) (2003). With respect to all of Collier's claims besides his ineffective assistance of appellate counsel claim, the habeas court properly determined from the face of the petition that these claims were procedurally barred or defaulted, as they were all previously adjudicated in his direct appeal to the Court of Appeals or could have been raised in that initial appeal.

See *Schofield v. Meders*, 280 Ga. 865 (1) (632 SE2d 369) (2006). Accordingly, the habeas court was not required to hold a hearing to resolve these claims, and Collier's argument that he was entitled to a hearing on these claims is without merit. Regarding the ineffective assistance of appellate counsel claim, however, this claim could not be resolved by looking solely at the face of the petition.

See, e.g., *Hall v. Lewis*, 286 Ga. 767, 769 (II) (A) (692 SE2d 580) (2010) (when defendant claims ineffective assistance of appellate counsel for failure to assert an error on appeal, habeas court must determine "whether appellate counsel's decision was a *458reasonable tactical move which any competent attorney in the same situation would have made" and whether there was a reasonable probability that, but for appellate counsel's errors, the outcome of the appeal would have been different) (citations and punctuation omitted).

Thus, the habeas court was required to conduct a hearing to resolve this claim. OCGA § 9-14-47. Decided February 6, 2012. J. Scott Key, Sarah L. Gerwig-Moore, for appellant. Patrick H. Head, District Attorney, John R. Edwards, Assistant District Attorney, for appellee.

Although it was not necessary for Collier to be at this hearing, "[h]is failure to arrange to be present at the hearing set by the habeas court [made him] subject... to the same sanctions that could be imposed against any other petitioner for civil relief, including a dismissal for failure to prosecute under OCGA § 9-11-41 (b)." (Emphasis supplied.) *Rickett*, supra, 276 Ga. at 610-611 (2).

Pursuant to OCGA § 9-11-41 (b), although an action may be dismissed "[f]or failure of the plaintiff to prosecute" his or her action, the statute makes clear that "[a] dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits." (Emphasis supplied.) *Id.* Here, however, rather than deny Collier's ineffective assistance of appellate counsel claim

based on evidence presented at a hearing, the habeas court purported to deny the claim solely based on Collier's failure to prosecute it.

While the habeas court was authorized to either deny the claim on the merits following a hearing or dismiss it without prejudice based on Collier's failure to prosecute it, it was not authorized to deny Collier's claim on the merits based on his failure to prosecute it. See *id.* See also *General Elec. Capital Corp. v. Browning Mulch Co., Inc.*, 303 Ga. App. 795 (694 SE2d 380) (2010) (dismissal for failure to appear and prosecute claim does not operate as adjudication on the merits).

We therefore reverse the decision of the habeas court to the extent that it denies Collier's ineffective assistance of appellate counsel claim on the merits. Judgment affirmed in part and reversed in part. All the Justices concur. Collier previously filed a motion to withdraw the plea, which the trial court denied. Collier then filed a motion for out-of-time appeal to challenge the trial court's denial of his motion to withdraw.

The trial court granted Collier's motion for out-of-time appeal. The Court *457of Appeals affirmed the trial court's denial of Collier's motion to withdraw the plea. *Collier v. State*, 281 Ga. App. 646 (637 SE2d 72) (2006).