

SUPREME COURT OF GEORGIA

Adamson v. Sanders, 279 Ga. 187

611 S.E.2d 44 (2005) · No. S05A0544 · Decided March 28, 2005

SUMMARY

The Supreme Court of Georgia affirmed the grant of Milford Lee Sanders's habeas corpus petition following his convictions for failure to stop at a stop sign and first-degree vehicular homicide by reckless driving. The court held that the judgment had to stand because the appellant failed to challenge one independent basis for habeas relief: ineffective assistance based on counsel's failure to timely request a lesser-included-offense instruction. The court also noted that the appellant relied on a transcript that was not included in the appellate record.

OPINION

THOMPSON, J.

611 S.E.2d 44 (2005) 279 Ga. 187 ADAMSON v. SANDERS. No. S05A0544. Supreme Court of Georgia. March 28, 2005. John Gray Conger, Dist. Atty., Robert Hal Sandwich, Jr., Asst. Dist. Atty., for Appellant. Wystan Brennan Getz, for Oakhurst Law Group, LLC, Decatur, for Appellee. THOMPSON, Justice. This appeal arises from the grant of Milford Lee Sanders' petition for habeas corpus.

We affirm the judgment of the habeas corpus court. Milford Lee Sanders ran a stop sign on a rainy night, crossed four lanes of highway, and collided with another car. Karen Cain, the passenger in the other car, died as a result of her injuries. A jury found Sanders guilty of failure to stop at a stop sign and first degree vehicular homicide by reckless driving.

He was sentenced to ten years in prison and five years probation. The habeas corpus court granted Sanders' petition on a number of grounds, any one of which would have been sufficient to warrant relief. The habeas corpus court first held that relief was appropriate because Sanders lacked a full and fair opportunity to litigate his federal and state constitutional claims with regard to a breathalyzer test obtained in violation of his constitutional rights.[1] The habeas court also held that Sanders' Sixth Amendment right to effective assistance of *45 counsel was violated in four different ways.

In this regard, the habeas corpus court found that Sanders' counsel at trial was ineffective because he (1) failed to submit the proper jury charge on the accident defense, leaving the jury confused about who had the burden of proof on that defense, (2) failed to timely submit a charge, in writing, on the lesser included offense of second degree vehicular homicide, (3) failed to object when the

trial judge erroneously charged the jury on the element of intent, and (4) failed to file a special demurrer to a faulty indictment.

In its enumeration of errors and brief, appellant seeks to reverse the judgment below by attacking most, but not all of the habeas corpus court's conclusions. One of the bases of the habeas corpus court's judgment that Sanders' Sixth Amendment right to counsel was violated when his attorney failed to timely move to instruct the jury on a lesser included offense was not attacked at all.

Inasmuch as appellant utterly failed to challenge this ruling as error, the judgment must stand. Matters not enumerated as error will not be considered on appeal. See *Lee v. State*, 265 Ga. 112(8), 454 S.E.2d 761 (1995); *Rider v. State*, 226 Ga. 14(2), 172 S.E.2d 318 (1970).

Although it is therefore unnecessary to reach the errors appellant did enumerate, we point out that appellant's support for those enumerated errors relied heavily upon citations to the transcript, which was not made a part of the record on appeal. "It is well established that the burden is on the party alleging error to show it by the record and that where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm."

Enchanted Valley RV Park Resort v. Weese, 241 Ga.App. 415, 417(1), 526 S.E.2d 124 (1999) (quoting *Bennett v. Exec. Benefits, Inc.*, 210 Ga.App. 429, 436 S.E.2d 544 (1993)). Judgment affirmed. All the Justices concur. NOTES [1] See generally *Cooper v. State*, 277 Ga. 282, 291, 587 S.E.2d 605 (2003).