

SUPREME COURT OF GEORGIA

Chester v. State, 284 Ga. 162

664 S.E.2d 220 (2008) · No. S08A0113 · Decided July 11, 2008

SUMMARY

The Supreme Court of Georgia affirmed the denial of Anthony Chester’s motion to vacate or void his sentences and convictions. The court held that the firearm-possession convictions did not merge into the malice-murder conviction or into each other, so the sentences were not void. The court also addressed the availability of direct appeal from a motion challenging a conviction as void under OCGA § 17-9-4; three justices concurred specially regarding the propriety of that procedural mechanism.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Benham, Justice; Benham; Carley; Hines; Thompson
JURISDICTION	Georgia
DECIDED	July 11, 2008
DOCKET	S08A0113
DISPOSITION	affirmed
PROCEDURAL POSTURE	After the trial court denied Chester's motion to vacate or void an illegal sentence and to declare his firearm-possession convictions void, Chester appealed as of right to the Supreme Court of Georgia.
STANDARD OF REVIEW	De novo review of whether the sentences or convictions were void and whether the motion was directly appealable.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Anthony Chester v. The State

TOPICS

- post-conviction relief
- sentence modification
- criminal procedure
- appellate procedure
- sentencing

PRACTICE AREAS

- criminal procedure
- post-conviction relief
- appellate procedure
- sentencing

QUESTIONS PRESENTED

1. Whether the consecutive sentences for possession of a firearm by a convicted felon and possession of a firearm during the commission of a crime were void.
2. Whether the firearm-possession convictions merged into the malice-murder conviction or into each other.
3. Whether Chester's motion to vacate the convictions under OCGA § 17-9-4 was directly appealable because it alleged a ground that could render the convictions void.

HOLDINGS

1. A trial court may correct a sentence at any time only when the sentence is void, meaning that the punishment imposed is not authorized by law.
2. The convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon did not merge into the malice-murder conviction or into each other.
3. A convicted defendant has a right of direct appeal from the denial of a motion treated under OCGA § 17-9-4 when the motion alleges a ground that could render the conviction void.

KEY QUOTATIONS

“The only ground for authorizing a trial court to correct a sentence at any time is that the sentence is void.”
(at 162)

“Since Chester alleged a ground that could void a conviction, he has a right of direct appeal from the trial court’s denial of his motion.” (at 163)

FACTUAL BACKGROUND

Chester was convicted of malice murder and two firearm-possession offenses. He received a life sentence for murder and consecutive five-year sentences for each firearm offense. He later argued that the firearm convictions should have merged into the murder conviction under OCGA § 16-1-7(a), making the sentences and convictions void.

PROCEDURAL HISTORY

Chester was convicted in 1994 of malice murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. The convictions were affirmed in an earlier appeal. In 2007, he moved to vacate or void his sentences and convictions, arguing that the firearm offenses merged into the murder conviction and that the consecutive firearm sentences were void. The trial court denied the motion, and the Supreme Court of Georgia affirmed.

DISPOSITION

affirmed

CASES CITED

- Chester v. State, 267 Ga. 9, 471 S.E.2d 836 (1996)
- Williams v. State, 271 Ga. 686, 523 S.E.2d 857 (1999)
- Curtis v. State, 275 Ga. 576, 571 S.E.2d 376 (2002)
- Jackson v. State, 267 Ga. 130, 475 S.E.2d 637 (1996)
- Malcolm v. State, 263 Ga. 369, 434 S.E.2d 479 (1993)
- Scott v. State, 190 Ga. App. 492, 379 S.E.2d 199 (1989)
- Collins v. State, 277 Ga. 586, 591 S.E.2d 820 (2004)
- Jones v. State, 282 Ga. 568, 651 S.E.2d 728 (2007)
- Williams v. State, 283 Ga. 94, 656 S.E.2d 144 (2008)
- Shields v. State, 276 Ga. 669, 581 S.E.2d 536 (2003)
- Wright v. State, 277 Ga. 810, 596 S.E.2d 587 (2004)
- Lacey v. State, 253 Ga. 711, 324 S.E.2d 471 (1985)
- Crane v. State, 249 Ga. 501, 292 S.E.2d 67 (1982)
- Waye v. State, 239 Ga. 871, 238 S.E.2d 923 (1977)
- Waits v. State, 204 Ga. 295, 49 S.E.2d 492 (1948)
- Claughton v. State, 179 Ga. 157, 175 S.E. 470 (1934)
- Gravitt v. State, 165 Ga. 779, 142 S.E. 100 (1928)
- Hughes v. State, 159 Ga. 818, 127 S.E. 109 (1925)
- McDonald v. State, 126 Ga. 536, 55 S.E. 235 (1906)

OPINION

PER CURIAM.

664 S.E.2d 220 (2008) CHESTER v. The STATE. No. S08A0113. Supreme Court of Georgia. July 11, 2008. *221 Anthony Chester, pro se. Stephen D. Kelley, District Attorney, for appellee. BENHAM, Justice. Appellant Anthony Chester was convicted in 1994 of malice murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime, and his convictions were affirmed by this Court in Chester v. State, 267 Ga. 9, 471 S.E.2d 836 (1996).

Appellant was sentenced to life imprisonment for the murder conviction and received for each of the firearm possession convictions a five-year term of imprisonment to be served consecutively. In July 2007, Chester filed a motion to vacate or void an illegal sentence, contending the consecutive sentences were void and the firearm possession convictions were illegal because they should have merged into his murder conviction pursuant to OCGA § 16-1-7(a).

The trial court denied the motion and Chester appealed to this Court. 1. "[T]he denial of a petition to correct a sentence on the ground that the original sentence was void is appealable as a matter of right." Williams v. State, 271 Ga. 686(1), 523 S.E.2d 857 (1999).

The only ground for authorizing a trial court to correct a sentence at any time is that the sentence is void. *Id.* at 689, 523 S.E.2d 857. A sentence is void if the court imposes punishment that the law does not allow. *Curtis v. State*, 275 Ga. 576(1), 571 S.E.2d 376 (2002). A judgment of conviction and a sentence imposed on that conviction are void if the offense is included as a matter of law or fact in another crime for which the defendant was convicted and sentenced.

Id. That is not the situation presented by the case at bar since possession of a firearm during the commission of a felony does not merge into a conviction for malice murder (*Jackson v. State*, 267 Ga. 130(2), 475 S.E.2d 637 (1996)); possession of a firearm by a convicted felon does not merge into a conviction for malice murder (*Malcolm v. State*, 263 Ga. 369(5), 434 S.E.2d 479 (1993)); and neither possession conviction merges into a conviction for the other.

Scott v. State, 190 Ga.App. 492(3), 379 S.E.2d 199 (1989). Since the sentences imposed by the trial court are punishment the law allows, the sentences are not void. 2. We next examine Chester's motion to the extent it seeks to have judgments of conviction declared void pursuant to OCGA § 17-9-4. OCGA § 17-9-4 provides: "The judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court where it becomes material to the interest of the parties to consider it."

To qualify for consideration as a motion filed pursuant to OCGA § 17-9-4, a motion to vacate a conviction as void must allege a ground upon which the judgment of conviction entered against a criminal defendant can be declared void. *Collins v. State*, 277 Ga. 586, 591 S.E.2d 820 (2004).

The denial of the motion is directly appealable if the convicted defendant raised in his motion allegations which would render his conviction void. *Id.*; *Jones v. State*, 282 Ga. 568, 651 S.E.2d 728 (2007) (where defendant convicted of murder alleged conviction was entered on the record prior to indictment, an allegation that could void the conviction). If the ground raised is not one which would void the conviction, the motion does not qualify as an OCGA § 17-9-4 motion.

Collins v. State, *supra*, 277 Ga. at 587, 591 S.E.2d 820. In the latter circumstance, a convicted defendant must raise the issue in a direct appeal from the judgment of conviction, an extraordinary motion for new trial, a petition for writ of habeas corpus, or a motion in arrest of judgment. See *Williams v. State*, 283 Ga. 94, 95, n. 1, 656 S.E.2d 144 (2008).

Shields v. State, 276 Ga. 669, 581 S.E.2d 536 (2003) should be read as requiring dismissal of an appeal from the denial of an OCGA § 17-9-4 motion where a convicted defendant raises *222 sufficiency of the evidence as an issue.

However, where the convicted defendant raises in an OCGA § 17-9-4 motion an issue that would void a conviction (e.g., lack of venue), the denial of the motion is affirmed where venue was, in fact, proved. As stated earlier, a judgment of conviction for a crime included in another crime as a matter of law or fact is void. *Curtis v. State*, *supra*, 275 Ga. 576(1), 571 S.E.2d 376.

Since Chester alleged a ground that could void a conviction, he has a right of direct appeal from the trial court's denial of his motion. *Jones v. State*, supra, 282 Ga. 568, 651 S.E.2d 728. Compare *Collins v. State*, supra, 277 Ga. 586, 591 S.E.2d 820.

As stated earlier, the convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon do not merge into each other or into malice murder. Accordingly, none of Chester's convictions is void and the trial court did not err when it denied appellant's motion. Judgment affirmed. All the Justices concur, except CARLEY, THOMPSON, and HINES, JJ., who concur specially.

THOMPSON, Justice, concurring specially. I agree with the majority decision which affirms the trial court's denial of appellant's motion to vacate his convictions because I believe appellant's motion was unauthorized. I cannot agree, however, with the conclusion of the majority that a criminal defendant may challenge his conviction by filing a motion to vacate and thereby obtain a right of direct appeal in this Court.

Accordingly, I specially concur. For more than a century this Court has followed the well-established legal rule that a motion to set aside or vacate a verdict is not an appropriate remedy in a criminal case. See *Williams v. State*, 283 Ga. 94, 656 S.E.2d 144 (2008); *Wright v. State*, 277 Ga. 810, 811, 596 S.E.2d 587 (2004); *Shields v. State*, 276 Ga. 669, 671, 581 S.E.2d 536 (2003); *Lacey v. State*, 253 Ga. 711, 324 S.E.2d 471 (1985); *Crane v. State*, 249 Ga. 501, 292 S.E.2d 67 (1982); *Waye v. State*, 239 Ga. 871, 874, 238 S.E.2d 923 (1977); *Waits v. State*, 204 Ga. 295(10), 49 S.E.2d 492 (1948); *Claughton v. State*, 179 Ga. 157(1), 175 S.E.

470 (1934); *Gravitt v. State*, 165 Ga. 779(3), 142 S.E. 100 (1928); *Hughes v. State*, 159 Ga. 818(5), 127 S.E. 109 (1925); *McDonald v. State*, 126 Ga. 536, 55 S.E. 235 (1906). Without any justification, the majority opinion tacitly overrules this precedent by holding that OCGA § 17-9-4 provides criminal defendants authority to challenge their convictions at any time by filing in the trial courts of this State a motion to vacate or any other motion alleging their conviction is void.

I find nothing in the language of OCGA § 17-9-4 authorizing a criminal defendant to challenge a conviction by filing a motion to vacate or establishing a separate "§ 17-9-4 motion" by which criminal defendants may raise such a challenge. Instead, I believe OCGA § 17-9-4 as properly interpreted is a statute providing a criminal defendant the right to challenge a void conviction.

Consistent with this interpretation, until today our cases have held that the proper remedy for challenging a void criminal conviction was by filing an extraordinary motion for new trial, OCGA § 5-5-41, a motion in arrest of judgment, OCGA § 17-9-61, or a petition for habeas corpus. OCGA § 9-14-40. See *Williams*, supra, 283 Ga. at 95, n. 1, 656 S.E.2d 144. See generally OCGA § 9-2-3 ("For every right there shall be a remedy.").

Unlike the majority opinion, I would follow this precedent and refuse to read into the right provided in OCGA § 17-9-4 a previously unrecognized remedy. I am authorized to state that Justice Carley and Justice Hines join in this special concurrence.

BENHAM, J.

BENHAM, Justice. Appellant Anthony Chester was convicted in 1994 of malice murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime, and his convictions were affirmed by this Court in *Chester v. State*, 267 Ga. 9 (471 SE2d 836) (1996). Appellant was sentenced to life imprisonment for the murder conviction and received for each of the firearm possession convictions a five-year term of imprisonment to be served consecutively.

In July 2007, Chester filed a motion to vacate or void an illegal sentence, contending the consecutive sentences were void and the firearm possession convictions were illegal because they should have merged into his murder conviction pursuant to OCGA § 16-1-7 (a).

The trial court denied the motion and Chester appealed to this Court. 1. “[T]he denial of a petition to correct a sentence on the ground that the original sentence was void is appealable as a matter of right.” *Williams v. State*, 271 Ga. 686 (1) (523 SE2d 857) (1999).

The only ground for authorizing a trial court to correct a sentence at any time is that the sentence is void. *Id.* at 689. A sentence is void if the court imposes punishment that the law does not allow. *Curtis v. State*, 275 Ga. 576 (1) (571 SE2d 376) (2002). A judgment of conviction and a sentence imposed on that conviction are void if the offense is included as a matter of law or fact in another crime for which the defendant was convicted and sentenced.

Id. That is not the situation presented by the case at bar since possession of a firearm during the commission of a felony does not merge into a conviction for malice murder (*Jackson v. State*, 267 Ga. 130 (2) (475 SE2d 637) (1996)); possession of a firearm by a convicted felon does not merge into a conviction for malice murder (*Malcolm v. State*, 263 Ga. 369 (5) (434 SE2d 479) (1993)); and neither possession conviction merges into a conviction for the other.

Scott v. State, 190 Ga. App. 492 (3) (379 SE2d 199) (1989). Since the sentences imposed by the trial court are punishment the law allows, the sentences are not void. 2. We next examine Chester’s motion to the extent it seeks to *163have judgments of conviction declared void pursuant to OCGA § 17-9-4. OCGA § 17-9-4 provides: “The judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court where it becomes material to the interest of the parties to consider it.” To qualify for consideration as a motion filed pursuant to OCGA § 17-9-4, a motion to vacate a conviction as void must allege a ground upon which the judgment of conviction entered against a criminal defendant can be declared void.

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If the ground raised is not one which would void the conviction, the motion does not qualify as an OCGA § 17-9-4 motion. Collins v. State, *supra*, 277 Ga. at 587. In the latter circumstance, a convicted defendant must raise the issue in a direct appeal from the judgment of conviction, an extraordinary motion for new trial, a petition for writ of habeas corpus, or a motion in arrest of judgment.

See Williams v. State, 283 Ga. 94, 95, n. 1 (656 SE2d 144) (2008). Shields v. State, 276 Ga. 669 (581 SE2d 536) (2003) should be read as requiring dismissal of an appeal from the denial of an OCGA § 17-9-4 motion where a convicted defendant raises sufficiency of the evidence as an issue.

However, where the convicted defendant raises in an OCGA § 17-9-4 motion an issue that would void a conviction (e.g., lack of venue), the denial of the motion is affirmed where venue was, in fact, proved. As stated earlier, a judgment of conviction for a crime included in another crime as a matter of law or fact is void. Curtis v. State, *supra*, 275 Ga. 576 (1).

Since Chester alleged a ground that could void a conviction, he has a right of direct appeal from the trial court's denial of his motion. Jones v. State, *supra*, 282 Ga. 568. Compare Collins v. State, *supra*, 277 Ga. 586.

As stated earlier, the convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon do not merge into each other or into malice murder. Accordingly, none of Chester's convictions is void and the trial court did not err when it denied appellant's motion. Judgment affirmed. All the Justices concur, except Carley, Thompson, and Hines, JJ, who concur specially.