

COURT OF APPEALS OF THE STATE OF GEORGIA

Michael D. Dyer v. The State

Dyer v. State · No. A21D0061 · Decided October 1, 2020

SUMMARY

The Court of Appeals of Georgia dismissed Michael D. Dyer’s discretionary-review application as untimely because it was filed 46 days after the trial court orders he sought to appeal, exceeding the 30-day period under OCGA § 5-6-35 (d). The court also held that a motion to set aside a criminal conviction is not an authorized procedure for collaterally attacking a criminal judgment.

CASE DETAILS

COURT	Court of Appeals of the State of Georgia
JURISDICTION	Georgia
DECIDED	October 1, 2020
DOCKET	A21D0061
DISPOSITION	dismissed
PROCEDURAL POSTURE	Pro se application for discretionary review of trial-court orders denying a motion for an out-of-time appeal and dismissing a motion to set aside a criminal judgment under OCGA § 9-11-60.
STANDARD OF REVIEW	The court reviewed whether it had jurisdiction over the discretionary-review application and whether the challenged motion presented an authorized basis for appellate review.
PRECEDENTIAL VALUE	published
PARTIES	Michael D. Dyer v. The State

TOPICS

- appellate procedure
- appellate jurisdiction
- post-conviction relief
- criminal procedure

PRACTICE AREAS

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

QUESTIONS PRESENTED

- Whether the application for discretionary review was timely under OCGA § 5-6-35(d).

2. Whether the Court of Appeals had jurisdiction to review the denial of the motion for an out-of-time appeal when the application was filed 46 days after the challenged orders.
3. Whether a motion to set aside under OCGA § 9-11-60 is an authorized procedure for collaterally attacking a criminal judgment of conviction.

HOLDINGS

1. An application for discretionary review must be filed within 30 days after entry of the order to be appealed; an application filed 46 days after entry is untimely and must be dismissed.
2. A motion to set aside is not an authorized procedure for collaterally attacking the validity of a criminal judgment; an application or direct appeal presenting only such a motion is subject to dismissal.

KEY QUOTATIONS

“The requirements of OCGA § 5-6-35 are jurisdictional and this [C]ourt cannot accept an appeal not made in compliance therewith.”

“Regardless of how it is styled, a motion seeking to challenge an allegedly invalid or void judgment of conviction “is not one of the established procedures for challenging the validity of a judgment in a criminal case.””

FACTUAL BACKGROUND

Dyer pleaded guilty to two counts of aggravated child molestation in 2007. In 2020, he sought review of orders denying his motion for an out-of-time appeal and dismissing his motion to set aside the conviction under OCGA § 9-11-60; he filed the application 46 days after entry of the orders.

PROCEDURAL HISTORY

Dyer pleaded guilty to two counts of aggravated child molestation in 2007 and had previously filed multiple applications in the Court of Appeals seeking to overturn his convictions. He filed the present application for discretionary review on September 1, 2020, seeking review of two orders entered July 17, 2020. The Court of Appeals dismissed the application as untimely and further held that the motion to set aside was not an authorized procedure for collaterally challenging a criminal conviction.

DISPOSITION

dismissed

CASES CITED

- Crosson v. Conway, 291 Ga. 220, 220(1), 728 S.E.2d 617 (2012)
- Boyle v. State, 190 Ga. App. 734, 734, 380 S.E.2d 57 (1989)
- English v. State, 307 Ga. App. 544, 545 n.4, 705 S.E.2d 667 (2011)
- Lunsford v. State, 237 Ga. 696, 696, 515 S.E.2d 198 (1999)

- Hill v. State, 204 Ga. App. 582, 582, 420 S.E.2d 393 (1992)
- Lacey v. State, 253 Ga. 711, 711, 324 S.E.2d 471 (1985)
- Roberts v. State, 286 Ga. 532, 532, 690 S.E.2d 150 (2010)

OPINION

PER CURIAM.

Court of Appeals of the State of Georgia ATLANTA, _____ September 21, 2020
The Court of Appeals hereby passes the following order: A21D0061. MICHAEL D. DYER v. THE STATE. Michael D. Dyer has filed numerous applications in this Court based on his guilty plea to two counts of aggravated child molestation in 2007.¹ In his latest attempt to overturn his convictions, Dyer filed this pro se application for discretionary review on September 1, 2020, seeking to appeal from two orders entered on July 17, 2020: one denied his pro se motion for an out-of-time appeal, and the other dismissed his pro se motion to set aside based on OCGA § 9-11-60.

We lack jurisdiction. First, we lack jurisdiction because, pretermitted whether Dyer has a right to directly appeal the trial court's order denying his motion for an out-of-time appeal,² his application is untimely.

To be timely, an application must be filed within 30 days of entry of the order to be appealed. See OCGA § 5-6-35 (d). Here, Dyer filed his application 46 days after entry of the orders he seeks to appeal. His application is therefore untimely and subject to dismissal. See *Crosson v. Conway*, 291 Ga. 220, 1 See Case Nos. A14D0474 (dismissed Aug. 19, 2014); A16D0422 (denied July 14, 2016); and A19D0054 (denied Sept.

6, 2018). ² The denial of a motion for an out-of-time appeal is directly appealable when the conviction at issue has not been the subject of a direct appeal. See *English v. State*, 307 Ga. App. 544, 545 n.4 (705 SE2d 667) (2010); *Lunsford v. State*, 237 Ga. App. 696, 696 (515 SE2d 198) (1999). Generally, if a party applies for discretionary review of a directly appealable order, this Court grants the application under OCGA § 5-6-35 (j).

To fall within this general rule, however, the application must be filed within 30 days of entry of the order to be appealed. See OCGA § 5-6-35 (d); *Hill v. State*, 204 Ga. App. 582, 582 (420 SE2d 393) (1992). 220 (1) (728 SE2d 617) (2012); see also *Boyle v. State*, 190 Ga. App. 734, 734 (380 SE2d 57) (1989) (“The requirements of OCGA § 5-6-35 are jurisdictional and this [C]ourt cannot accept an appeal not made in compliance therewith.”).

Second, “[i]t has been held many times that a motion to set aside a judgment is inappropriate in a criminal case.” *Lacey v. State*, 253 Ga. 711, 711 (324 SE2d 471) (1985). Regardless of how it is styled, a motion seeking to challenge an allegedly invalid or void judgment of conviction “is not

one of the established procedures for challenging the validity of a judgment in a criminal case.”
Roberts v. State, 286 Ga. 532, 532 (690 SE2d 150) (2010).

Because Dyer is not authorized to collaterally attack his conviction in this manner, there is nothing for this Court to review and an application or direct appeal is subject to dismissal. See *id.* For these reasons, this application is hereby DISMISSED. Court of Appeals of the State of Georgia Clerk’s Office, Atlanta, _____ 09/21/2020 I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.,
Clerk.