No. S19A0554

In the
Supreme Court of Georgia

Robert Earl Mitchum,
Appellant,

v.

State of Georgia,
Appellee.

BRIEF OF APPELLEE BY THE ATTORNEY GENERAL

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INTRODUCTION

Extraordinary motions for new trial, which are filed outside the 30-day period for filing ordinary motions for new trial, are not favored, as they seek to overturn existing judgments in both civil and criminal cases and undermine the finality of those judgments. A stricter rule is applied to extraordinary motions for new trial based on newly discovered evidence, as both the statute and case law require a showing of good cause for the delay in filing the motion and require a showing that, despite exercising due diligence, the movant was not able to discover the basis for the current claim due to circumstances beyond his control.

The use of such motions to overturn judgments, both civil and criminal, should not become commonplace, but should be reserved for matters that are truly out of the ordinary. That is why such motions may not be based on matters that could have been discovered, through the exercise of due diligence, in time to have been raised in the original motion for new trial.

Such motions should not become a common means by which to challenge criminal convictions and to circumvent the successive petition rule for habeas corpus cases or the time limits for filing such

petitions. Those limits on habeas corpus may be why, seventeen years after he was convicted, Appellant filed an extraordinary motion for new trial in the convicting court, asserting he had "newly discovered" evidence of judicial and prosecutorial misconduct, or what he currently calls "juror contamination," based on alleged contact between the presiding judge (and others) and the jury as they ate in the same restaurant before and during the trial, that he contends would warrant a new trial. Contrary to Appellant's assertions, the basis for this claim could have been discovered through the exercise of due diligence and raised in the original motion for new trial.

The trial court properly denied Appellant's extraordinary motion for new trial, as the motion on its face did not set out sufficient facts for the grant of this extraordinary remedy, even if developed further at a hearing. The court properly determined that the motion was inadequate and denied it without a hearing.

STATEMENT OF THE CASE

In March 1999, Appellant Mitchum was indicted by a Bryan County grand jury for malice murder (count 1), felony murder (count 2) and aggravated assault (count 3) stemming from the beating death of Charles Howell in May 1998. (R. 36) [1] At a trial on October 26-27, 1999, where he was represented by William Cox, Appellant was found guilty of felony murder and aggravated assault and found not guilty of malice murder. (R.273; T. 398). Appellant was sentenced to life for felony murder, and the aggravated assault merged into it. (R. 276; T. 399).

Trial counsel Cox timely filed a motion for new trial and raised the general grounds. (R. 284). New counsel, Carol Miller, was appointed to represent Appellant, and she amended the motion for new trial to raise claims of ineffective assistance of trial counsel and challenges to rulings of the trial court. (R. 295, 300-12). Appellant testified at the August 2000 motion for new trial hearing as to what he knew about the victim's specific acts of or propensity towards violence.

[1] Citations to the clerk's record prepared for this appeal are "R" followed by the page number(s); citations to the two volumes of trial transcript are "T" followed by the page numbers; and citations to the motion for new trial hearing transcript are "MNT" followed by the page number(s).

(MNT 17-23). Trial counsel did not testify, as noted by the trial court in denying the motion for new trial. (R. 348, 350).

On direct appeal, this Court determined: (1) the evidence authorized the jury to find Appellant guilty under the reasonable doubt standard; (2) the trial counsel ineffective assistance claims lacked merit; (3) the trial court properly denied the motion for mistrial, made when the prosecutor's father, a senior superior court judge, entered the courtroom to observe the trial but left when Appellant objected; and (4) the trial court did not impermissibly limit Appellant's cross-examination of two witnesses or impermissibly comment on the relevancy of a third witness. *Mitchum v. State*, 274 Ga. 75, 548 S.E.2d 286 (2001). This Court affirmed the felony murder conviction on June 4, 2001, and denied reconsideration on July 16, 2001. *Id*. at 77.

On February 8, 2016, Appellant filed a pro se extraordinary motion for new trial, alleging he had "newly discovered evidence exposing acts of embracery, judicial misconduct and fraud committed by state officials and officers of the court" who had been directly involved in his case. (R. 391). Appellant attached an "enumeration of errors" with five numbered paragraphs asserting: (1) the trial court "committed automatic reversible error" when it did not have voir dire

recorded and/or preserved; (2) the presiding judge committed "reversible error" when, on the evening that voir dire was completed on October 5, 1999, the judge joined a senior superior court judge, the senior judge's son who was the prosecuting attorney in this case, a detective/State's witness, all twelve selected jurors and the two alternates (who were all listed by name) at a local restaurant in Pembroke, Bryan County, Georgia, for dinner, which were acts of "embracery"; (3) the presiding judge and the same senior superior court judge sat with all twelve jurors and the two alternates during lunch at the same restaurant on October 27th, and the jury returned its verdict after lunch; (4) all twelve jurors and the two alternates breached "their lawful duty" through this unapproved contact during the two meals and in remaining silent; and (5) trial counsel Cox "created automatic reversible error" by failing to investigate, raise and preserve these issues of "embracery" and operated under a conflict of interest when he "became a party to the fraud" on the court and on Appellant. (R. 397-403). Appellant submitted his own "affidavit of truth" in support of his extraordinary motion, as well as affidavits, nearly identical in form and

substance, from Bobby Dean Collins and Judy Ann Collins that were executed in August 2015. (R. 394, 404, 409).[2]

On September 6, 2018, the trial court denied the extraordinary motion for new trial which sought a new trial due to alleged judicial and prosecutorial misconduct. (R. 430). Applying the long-established six-pronged test for such motions, the court reviewed the motion and the affidavits and concluded that Appellant had not made an adequate showing. (R. 430-31). The court denied the extraordinary motion without a hearing. *Id*.

Appellant timely filed a notice of appeal. (R. 1).

On November 1, 2018, this Court granted Appellant's application for discretionary appeal. (R. 438). The Court identified two issues with which it is concerned: (1) "Could Mitchum properly raise his claim in

[2] Judy Collins also asserted that this "practice" was "no secret" to locals and was the subject of an attorney's sworn testimony at a hearing in Ware County Superior Court. (R. 414). She could possibly be referring to Appellant's own habeas corpus case. Appellee asks the Court to take judicial notice of its own records in *Mitchum v. Howerton*, No. S04H1106, in which the Court denied Appellant's application for a certificate of probable cause to appeal the denial of habeas corpus relief in 2004. If Appellant raised issues of misconduct or jury contamination in his habeas corpus case or raised them in the context of ineffective assistance of counsel claims, that would undercut his assertions that the basis for his current claims was "newly discovered."

an extraordinary motion for new trial?" and (2) "If Mitchum's claims were properly raised, did the court err in denying the motion?" *Id*.

After the appeal was docketed on December 18, 2018 , counsel entered an appearance on Appellant's behalf. Appellant has requested oral argument and filed a brief on his behalf. This brief on behalf of the Appellee follows.

STATEMENT OF FACTS

Given the nature of the issues raised and the lack of a hearing on the extraordinary motion, there are no extensive findings of fact to be set forth as to the extraordinary motion.

Appellee does adopt and incorporate by reference herein the facts set forth by this Court in Appellant's direct appeal as to his crimes. *See Mitchum*, 274 Ga. at 75(1).

ARGUMENT AND CITATION OF AUTHORITY

I. Appellant's claim would not properly lie in an extraordinary motion for new trial, as it could have been discovered through the exercise of due diligence and raised in the original motion for new trial.

The Court first asked the parties to address whether Appellant could properly raise his claim in an extraordinary motion for new trial. Appellee acknowledges that, while claims of improper juror contact have been litigated in extraordinary motions for new trial, Appellant's claim would not properly lie in an extraordinary motion, as its factual basis could have been discovered through the exercise of due diligence and the claim could have been raised in the original motion for new trial. In addition, extraordinary motions should not become a common means by which to circumvent the successive petition rule and time limits for filing challenges to criminal convictions via habeas corpus.

Requirements for Extraordinary Motions

O.C.G.A. § 5-5-41 (a) and (b) set out the requirements as to extraordinary motions for new trial generally, and subsection (c) governs DNA testing in felony cases. This Code section provides in pertinent part:

> (a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment,

> some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.
>
> (b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

O.C.G.A. § 5-5-41.

Georgia law has long recognized that extraordinary motions for a new trial, in both criminal and civil cases, "are not favored, and a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly discovered evidence than to an ordinary motion on that ground." *Wallace v. State*, 205 Ga. 751(2), 55 S.E.2d 145 (1949). *See also Ford Motor Co. v. Conley*, 294 Ga. 530, 538(2), 757 S.E.2d 20 (2014).

Where the motion for new trial is made after expiration of the 30-day period, O.C.G.A. § 5-5-41(a) requires the movant to show, and the trial court must find, "good reason" for why the motion was not made within the 30-day period, regardless of whether the extraordinary motion is based on a claim of newly discovered evidence or other grounds. *Bharadia v. State*, 297 Ga. 567, 569-70, 774 S.E.2d 90 (2015).

"Good reason exists only where the moving party exercised due diligence but, due to circumstances beyond [his] control, was unable previously to discover the basis for the claim [he] now asserts." *Ford Motor Co.*, 294 Ga. at 541. "Thus, both statutory and case law require a showing of due diligence to authorize the trial court's exercise of discretion to grant an extraordinary motion for new trial on the ground of newly discovered evidence." *Bharadia*, 297 Ga. at 570.

This reference to "case law" reflects the origins of the six requirements that a movant must meet to be entitled to the grant of an extraordinary motion for new trial, as these requirements come from case law, not statute. *See Ford Motor Co.*, 294 Ga. at 540; *Drane v. State*, 291 Ga. 298, 300, 728 S.E.2d 679 (2012); *Dick v. State*, 248 Ga. 898, 899 (2), 287 S.E.2d 11 (1982).

These six requirements for the grant of a new trial on the basis of newly discovered evidence are "well established." *Timberlake v. State*, 246 Ga. 488, 491, 271 S.E.2d 792 (1980). The party seeking a new trial on newly discovered evidence must show: "'(1) that the evidence has come to his knowledge since the trial; (2) that is was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is

not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.'" *Timberlake*, 246 Ga. at 491 (citation omitted). "Implicit in these requirements is that the newly discovered evidence must be admissible as evidence." *Timberlake*, 246 Ga. at 491. "Failure to show one requirement is sufficient to deny a motion for new trial." *Humphrey v. State*, 252 Ga. 525, 528, 314 S.E.2d 436 (1984).

"The grant of an extraordinary motion for new trial on the ground of newly discovered evidence is reserved for cases in which the facts at issue in the motion were previously impossible to ascertain by the exercise of proper diligence." *Bharadia v. State*, 297 Ga. at 573. *See also King v. State*, 174 Ga. 432, 436(1), 163 S.E. 168 (1932) ("The extraordinary motions for new trial contemplated by our statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder and it afterwards appears that the supposed deceased is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character.").

If the extraordinary motion and its accompanying affidavits "do not contain a statement of facts sufficient to authorize that motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion." *Dick*, 248 Ga. at 899. *See also Davis v. State*, 283 Ga. 438, 440(2), 660 S.E.2d 354 (2008) (trial court properly denied extraordinary motion without a hearing where the movant did not satisfy the materiality requirement nor present sufficient facts in the affidavits to authorize the grant of the motion).

Finally, a trial court's findings of fact are reviewed under a clearly erroneous standard, while the trial court's dispositive ruling on the motion itself is reviewed for an abuse of discretion. *See Jackson v. State*, 304 Ga. 827, 830 (3), 822 S.E.2d 198 (2018)*; Ford Motor Co.*, 294 Ga. at 538*; Young v. State*, 269 Ga. 490, 491-92(2), 500 S.E.2d 583 (1998).

Provisions of the Habeas Corpus Statute

Habeas corpus is one of the traditional means by which to challenge a conviction after it has been affirmed on direct appeal, the other two being an extraordinary motion for new trial and a motion in arrest of judgment. *See Harper v. State*, 286 Ga. 216, 217, 6867 s.E.2d 786 (2009). However,

habeas corpus traditionally did not lie to determine questions of guilt or innocence, and such issues were to be raised in an extraordinary motion for new trial to be filed in the court of conviction. *See Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128 (1969).

In 1967, the General Assembly enacted Article 2, O.C.G.A. § 9-14-40 et seq., as the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is restrained by a sentence imposed on them by a state court of record. The successive petition in O.C.G.A. § 9-14-51 was part of this enactment and requires a habeas corpus petitioner to raise all grounds for relief in his original or amended petition, and any grounds not so raised "are waived" unless the presiding judge in considering a successive petition finds grounds "which could not reasonably have been raised in the original or amended petition." *See, e.g., Bruce v. Smith*, 274 Ga. 432, 553 S.E.2d 808 (2001) (discussion of successive petition rule); *Smith v. Zant*, 250 Ga. 645, 301 S.E.32 (1983) (discussion of entitlement to a hearing on a successive petition).

O.C.G.A. § 9-14-42(c), enacted by Ga. L. 2004, p. 917, created a four-year limitations period for filing challenges to felony and misdemeanor convictions, other than cases in which a sentence was imposed. A habeas corpus petition to challenge a felony conviction must be filed within four

years of one of four triggering events: (1) the date on which the convictions became final by the conclusion of direct review or the time for seeking such review; (2) the date on which an impediment to filing which was created by state action is removed; (3) the date on which the right asserted was initially recognized by the United States Supreme Court or this Court; or (4) the date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence. *Id*. *See, e.g., Abrams v. Laughlin*, 304 Ga. 34, 816 S.E.2d 26 (2018) (discussion of subsections (c)(3) and (c)(4)).

Appellant's Claim

Appellant contends that his claim of "jury contamination" is one that traditionally has been heard in the context of an extraordinary motion for new trial, where the information about the purported "contamination" has come to his attention outside the time for filing the ordinary motion for new trial within 30 days after judgment is entered. In *King*, for example, this Court held, "A new trial may be granted on an extraordinary motion based upon the ground of improper communication with the jury." 174 Ga. at 436.

But Appellant's arguments also ignore the existence and the availability of habeas corpus as a means by which a defendant may challenge his convictions. A claim of improper contact with jurors is an

issue that has traditionally been raised in habeas corpus cases as well. *See, e.g., Turpin v. Todd*, 268 Ga. 820, 483 S.E.2d 900 (1997). Ostensibly, he could have raised his "jury contamination" claim in a habeas corpus petition and, as with an extraordinary motion for new trial, sought to show as a threshold matter why the claim could not have been raised previously.

The Court's question of whether Appellant could properly raise his claim in an extraordinary motion is broad enough to allow Appellee to voice the concern that extraordinary motions for new trial should not become commonplace vehicles by which defendants seek to circumvent potential applications of the successive petition rule and/or the time limits for filing habeas cases. As this Court noted in *Bharadia*, at some point, "'litigation must come to an end.'" 297 Ga. at 574 (quoting *Llewellyn v. State*, 252 Ga. 426, 429(2), 314 S.E.2d 227 (1984)).

Finally, it is clear, from a cursory review of the two affidavits submitted with Appellant's extraordinary motion, that the basis for his "jury contamination" claim could have been discovered through the exercise of due diligence and raised in the original motion for new trial. Taking the affidavits on their face but without conceding the truth thereof, both affiants asserted they accompanied trial counsel Cox to a particular restaurant for dinner on October 5th, where they sat by the front door

and witnessed the judges, the prosecuting attorney, the witness and all twelve jurors and the two alternates enter the restaurant and sit together. (R. 404, 409). Both affiants asserted they also saw the presiding judge and the senior judge sit down at lunch and converse with jurors on October 27th, the day the verdict was returned. (R. 406, 411). Judy Collins also asserted that this "practice" was "no secret" to locals and was the subject of an attorney's sworn testimony at a hearing in Ware County Superior Court. (R. 414). Though both affiants attributed their silence of fifteen years to their own fears of reprisal, nothing in the affidavits suggest why they came forward after more than a decade or why they did not tell trial counsel Cox about what they saw on both occasions or why they did not tell Appellant at the time about what they purported saw. Nothing in their affidavits suggest that the basis for the jury contamination claim could not have been ascertained with due diligence and timely raised in the original motion for new trial.

For these reasons, Appellee submits that the trial court properly denied the extraordinary motion for new trial.

II. The trial court did not abuse its discretion in denying Appellant's extraordinary motion for new trial.

Appellant also asserts that the trial court abused its discretion in denying his extraordinary motion and in not having a hearing. For the reasons set forth above in Section II, Appellee submits this argument lacks merit.

The court properly found that the motion was inadequate on its face and did not satisfy the six requirements for the grant of this extraordinary remedy. From the outset it is clear that the basis for this claim could have been discovered through the exercise of due diligence and raised in the original motion for new trial. Failure to meet even one requirement is sufficient to deny the motion. *Humphrey*, 252 Ga. at 528. No hearing was required, as sufficient "facts" were not alleged which, if developed at a hearing, would have warranted the grant of a new trial. Appellee submits this second issue lacks merit.

CONCLUSION

Wherefore, Appellee prays that the Court affirm the trial court's denial of Appellant's extraordinary motion for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing BRIEF, prior to filing the same, by depositing a copy thereof, postage paid, in the United States Mail, properly addressed, upon:

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This 18th day of February, 2019.

/s/ *Paula K. Smith*
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