

APPELLATE COURT OPINION SUMMARIES MARCH 22-MAY 6, 2005

United States Supreme Court

Pace v. DiGuglielmo, No. 03-9627, 2005 U.S. LEXIS 3705 (April 27, 2005).

Pace's state post-conviction petition was rejected for untimely filing and the Pennsylvania Supreme Court denied to review his case. The United States Supreme Court, considering the case on certiorari, held that because his lower petition was not timely filed, he was not entitled to statutory tolling under AEDPA. His was not "a properly filed application for State post-conviction or other collateral review"; "proper" filing encompasses a timely filing requirement. Neither was Pace entitled to equitable tolling under AEDPA; there were no extraordinary circumstances requiring equitable tolling. Therefore, the Third District Court correctly reversed a district court's decision to consider Pace's federal habeas petition. Since it was not filed in accordance with the statutory time limits, AEDPA's statute of limitations bars his federal petition.

* Small v. United States, No. 03-750, 2005 U.S. LEXIS 3700, (April 26, 2005).

This case concerned a federal rule (18 USC 922 (g)(1)) prohibiting anyone convicted "*in any court . . . of a crime punishable by imprisonment for a term exceeding one*" from possessing a firearm. Small was convicted in a Japanese court of attempting to smuggle firearms into the country. He served a prison term in Japan and after moving to the United States, pled guilty to firearm possession charges. The Supreme Court reversed his conviction. Finding no evidence that Congress intended to include foreign convictions in this law, the Court held that the phrase "*in any court*" encompassed only domestic, not foreign, convictions.

Johnson v. United States, 125 S. Ct. 1571, 2005 U.S. LEXIS 2934 (April 4, 2005).

Johnson was convicted of federal drug charges and received an enhanced sentence because of prior state court convictions (which he claimed had been obtained illegally). His appeals to the Eleventh Circuit and the US Supreme Court were not successful. Two years later, he filed a state habeas petition in Georgia to challenge his prior convictions, and all seven of these were vacated. Although the US Supreme Court held that the vacatur of the state court conviction enhancing his federal sentence was a "fact" which would otherwise extend the filing deadline under AEDPA by one year, it held that Johnson had not pursued this claim diligently, and affirmed the lower courts' dismissals of his petition as untimely.

Rhines v. Weber, 125 S. Ct. 1528, 2005 U.S. LEXIS 2930 (March 30, 2005).

Rhines was convicted of murder and burglary and sentenced to death. After his state post-conviction petitions were denied, he filed what a federal district court deemed a "mixed" petition for habeas corpus relief (his petition contained some claims that had been exhausted in state court and some that had not). The district court issued Rhines a "stay and abeyance" to allow him to return to state court to litigate these claims in order to fulfill AEDPA's exhaustion requirement, but the Eighth

Circuit reversed, holding that AEDPA prohibits the “stay and abeyance” practice. The US Supreme Court granted certiorari on the issue and reversed, holding that federal courts may grant a stay and abeyance under limited circumstances—when a district court determines there was good cause for the petitioner’s failure to exhaust his claims. The Court further suggested that it would likely be an abuse of discretion for a district court to deny a stay and abeyance and dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, if his unexhausted claims are potentially meritorious, and if there is no indication that he engaged in intentionally dilatory litigation tactics. The Court also pointed out that if a district court were to determine that a stay and abeyance is inappropriate, it should allow the petitioner to delete the unexhausted claims and proceed with the exhausted ones if dismissing the entire petition would unreasonably impair the petitioner’s right to obtain federal relief.

Muehler v. Mena, 125 S. Ct. 1465, 161 L. Ed. 2d 299, 2005 U.S. LEXIS 2755 (March 22, 2005).

During a search of Mena’s home, she was detained in handcuffs by police and questioned about her immigration status. She thereafter filed a Section 1983 lawsuit, claiming a violation of her Fourth Amendment rights. The Ninth Circuit found merit in her claim, but the US Supreme Court reversed, holding that the detention was reasonable under the circumstances. Under Michigan v. Summers, 452 US 692 (1981), police executing a valid search warrant have the authority to detain the occupants of the premises while the search is being carried out as long as they use force reasonable under the circumstances. The Supreme Court held that a handcuffed detention was reasonable given suspected gang activity at the house and the fact that there were several occupants detained during the search. Furthermore, the since Mena’s initial detention was lawful and the Ninth Circuit did not hold that the questioning prolonged it, no additional Fourth Amendment justification was necessary to justify the questioning. The Court did not address Mena’s additional claim that the questioning prolonged her detention because it was not addressed by the Ninth Circuit.

Brown v. Payton, 125 S. Ct. 1432, 161 L. Ed. 2d 334, 2005 U.S. LEXIS 2753 (March 22, 2005).

Payton was convicted in a California court of murder and rape. During the sentencing phase, Payton’s counsel presented extensive mitigation evidence, including evidence of a post-crime religious conversion. The prosecutor, however, made comments that could have misled the jury into believing that it could not consider any post-mitigation. Payton was sentenced to death.

On review, the state supreme court affirmed the conviction and sentence, but the district court granted post-conviction relief and the Ninth Circuit affirmed. The federal courts first determined that AEDPA was not applicable to this case, but on a later remand determined that AEDPA did apply, but that the jury instructions still unconstitutionally implied to the jury that it could not consider evidence concerning Payton’s post-crime religious conversion and the prosecutor was erroneously allowed to urge this erroneous interpretation.

The Supreme Court reversed. It held that even if it assumed that the California Supreme Court was wrong to find that the prosecutor’s argument did not mislead the jury into believing it could not consider Payton’s post-crime mitigation evidence, the state court’s conclusion was not unreasonable given Broyde v. California, 292 US 370, which had considered the constitutionality of an identical jury instruction and held that there was no reasonable likelihood that the jury believed it was

required to disregard Payton's mitigating evidence. The California Supreme Court's decision was thus shielded by AEDPA on habeas review; AEDPA prohibits federal courts from granting relief on any issue litigated on the merits in state court unless the resulting decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Supreme Court of Georgia

Carr v. State, S05A0393, 2005 Ga. LEXIS 289 (April 26, 2005).

Carr was convicted of malice murder, armed robbery, and possession of a firearm and claimed on appeal that the trial court erred by refusing to allow him to introduce evidence that one of his co-defendants had recently shot a resident of the same housing complex in which the victim's murder occurred. The Supreme Court affirmed his conviction and sentencing, pointing to case law requiring that such evidence must tend to show the defendant's innocence, must show that the evidence must show that another had recently actually committed a similar crime, and this must do more than cast a shadow of suspicion on another. Since Carr's evidence did none of these things, his enumeration of error was rejected.

State v. Collier, S04G1409, 2005 Ga. LEXIS 294 (April 26, 2005).

The evidence at trial showed that Collier ran a red light in his truck and collided with another car; both passengers in the other vehicle were killed. The passenger in Collier's car told law enforcement that she had been the one driving, and though she refused blood and urine tests, police procured a search warrant and took blood and urine samples from her at a local hospital. Police also requested blood and urine samples from Collier, who also refused initially, but consented when police threatened to obtain a warrant and take a urine sample with a catheter. The results of Collier's tests showed methamphetamine and amphetamine. Collier was convicted of the charges against him and claimed on appeal that his attorney had been ineffective for failing to move to suppress the test results.

The Court of Appeals reversed Collier's convictions on that basis, and the Georgia Supreme Court granted certiorari to determine whether police have the authority to seek a search warrant to compel a person to submit blood and urine samples for drug testing when that person has invoked her right to refuse testing (under the implied consent rule). Although Georgia's constitution does not prohibit law enforcement from obtaining blood or urine samples using a search warrant, OCGA § 40-5-55, Georgia's implied consent statute, by its plain meaning, gives the right to refuse state-administered tests. "If a person under arrest or a person who was involved in any traffic accident resulting in serious injuries or fatalities refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the law enforcement officer as provided in subsection (a) of this Code section, *no test shall be given*; but the law enforcement officer shall report the refusal to the department. . ." The Supreme Court affirmed the Court of Appeals' decision.

McKenzie v. State, S05A0298, 2005 Ga. LEXIS 295 (April 26, 2005).

McKenzie was charged with two counts of violating OCGA § 46-5-21(a)(1) by making two phone calls he made in June/July 2003, and after his special demurrers were rejected, he stipulated to the evidence and was convicted in a bench trial. Both counts alleged he “did make a phone call ... with conversations containing obscene, lewd, lascivious, filth[y], and indecent comments, requests, suggestions and/or proposals.” On appeal, McKenzie claimed that OCGA § 46-5-21(a)(1) impermissibly infringed upon his First Amendment right to free speech. The Supreme Court of Georgia agreed the statute is an overbroad infringement on the right to free speech and reversed his convictions. While a state may constitutionally limit obscene communication, “expression which is indecent but not obscene is protected by the First Amendment,” and therefore must be so narrowly drawn as to further any “compelling state interest” by the “least restrictive means.” Because the statute at issue was broad enough to restrict all “indecent” speech, whether or not it is spoken with an intent to harass and regardless of its audience, it could not stand.

Roberts v. Burgess, S05A0095, 2005 Ga. LEXIS 297 (April 26, 2005).

Found to be a habitual DUI offender, Roberts lost his Georgia driver’s license in the mid-1980’s and later moved to Florida, where he obtained a driver’s license and lost it because of DUI convictions. He moved back to Georgia and was issued a driver’s license, but was convicted of DUI in 1991 and 1997, and in 2001, DMVS refused to renew his license. Roberts challenged the constitutionality of OCGA 50-5-22 (c) (2) and (7), which provide that the Department of Motor Vehicle Safety “shall not issue any driver's license to nor renew the driver’s license of any person: . . .(2) Whose license is currently under suspension or revocation in any other jurisdiction upon grounds which would authorize the suspension or revocation of a license under this chapter; . . .(7) Whose license issued by any other jurisdiction is suspended or revoked by such other jurisdiction during the period such license is suspended or revoked by such other jurisdiction.”

The Supreme Court of Georgia rejected Roberts’ claim that the statute’s subsections violated his equal protection rights by treating him differently from other Georgia residents seeking a driver’s license who have been convicted four or more times in a lifetime for DUI. Noting the error in issuing Roberts a Georgia license when he returned to Georgia in the first place, the Court accepted that the Georgia legislature has a legitimate state interest in protecting the public from habitual DUI violators and preventing “license shopping” among those who have lost licenses in other states. The Court also found that these purposes were directly related to class it created of driver’s license applicants whose out-of-state licenses were suspended or revoked. The lower court decisions upholding the statute were affirmed.

Petty v. Smith, S05A0395, 2005 Ga. LEXIS 303 (April 26, 2005).

This was an appeal from the denial of Petty’s habeas corpus petition. Petty was charged with murder (“by shooting [the victim] with a shotgun”), felony murder (“while in the commission of the offense of Aggravated Assault, [Petty] did cause the death of [the victim] by shooting him”), and aggravated assault (by making an “assault upon the person of [the victim] with a shotgun, a deadly weapon”). Petty’s trial counsel urged him to plea to felony murder and the underlying aggravated assault (life plus 20 years to run concurrently). Petty pleaded guilty on her advice, and at the plea

hearing, the State recounted the underlying facts of the crime and included that Petty's co-defendant had also beaten the victim before his death.

However, whatever the State might have proven at trial, as indicted, Petty's charges of felony murder and aggravated assault would have merged as a matter of law, vacating the aggravated assault conviction altogether. The Supreme Court found Petty's trial counsel ineffective, as her advice was unreasonable and Petty would not have pleaded guilty but for her erroneous advice (the maximum penalty he could have received after a trial was one life sentence). Petty's plea was not knowing and voluntary, and his plea was vacated.

Glenn v. State, S05A0514, 2005 Ga. LEXIS 304 (April 26, 2005).

Glenn was convicted of malice murder and possession of a firearm during the commission of a felony and appealed from the denial of his motion for a new trial. On appeal, the state supreme court found that the evidence was sufficient to support defendant's convictions on both charges despite defendant's claim that the shooting was accidental (he exclaimed to bystanders right after shooting the victim three times that he had "just shot that damn boy," making no mention of an accident). It also found that defendant had not shown that he received ineffective assistance of counsel, since all attorney decisions were strategic. (His attorney's decision not to test Glenn's clothing to determine the relative distance between Glenn and the victim was because such test results would likely not have been exculpatory, and counsel did not move for a severance because one would be granted as the co-defendants' defenses were not antagonistic.) Glenn did not show that the delay in preparing his trial transcript prejudiced his case. Glenn's convictions and sentence were affirmed.

Court of Appeals of Georgia (all are reversals or especially pertinent)

State v. Brown, A05A0138, 2005 Ga. App. LEXIS 433 (May 3, 2005).

Charged with possession of cocaine, Brown filed a motion to suppress law enforcement searches, which were granted by the trial court. The State appealed and Brown moved to dismiss the appeal, claiming that no grounds existed for an interlocutory appeal. However, under 5-7-1 (a)(4) the State is entitled to directly appeal a granted motion to suppress. The Court of Appeals reversed. Brown and the police had several interactions in two days and all searches took place with Brown's consent and without threats or coercion. The search of Brown's person that yielded a large amount of cash was not during a Terry stop and so did not require an articulable suspicion; rather, the police offered Brown a ride, which he accepted, and patted him down for weapons before he got into the car. He was never under arrest. Under these circumstances, since no illegal detentions took place and Brown freely offered his consent, all searches were legal and the trial court erred in granting the motion to suppress.

State v. Sutton, A05A0927, 2005 Ga. App. LEXIS 416 (April 21, 2005).

Sutton, charged with armed robbery, moved the Superior Court of Fulton County to dismiss the seven-year-old indictment against him on the grounds that his right to a speedy trial had been violated. The trial court granted his motion and the Court of Appeals affirmed. Applying the four-

prong Barker v. Wingo test, the Court of Appeals found the State's delay "egregious" and unexplained, and though Sutton took years to assert his right to a speedy trial, the Court presumed prejudice from such delay and affirmed the trial court's dismissal of the indictment against Sutton.

Johnson v. State, A05A0354, 2005 Ga. App. LEXIS 400 (April 19, 2005).

Johnson appealed from the denial of his *pro se* motion to withdraw his guilty plea. The State conceded that Johnson was entitled to the representation of counsel and a hearing on his motion to withdraw the plea, and the Court of Appeals reversed the trial court's denial of Johnson's motion to withdraw his guilty plea and remanded the case for an evidentiary hearing.

Williams v. State, A05A0617, 2005 Ga. App. LEXIS 399 (April 19, 2005).

Immanuel Williams' conviction for voluntary manslaughter was affirmed. The Court of Appeals rejected his claim that the SB 440 statute under which he was convicted is unconstitutional and that his videotaped statements were illegal. Williams also claimed that the jury instructions given on voluntary manslaughter and self-defense were confusing in their order and sequence, but the court held that the charge, if an accurate statement of the law, would stand. However, the Court of Appeals vacated Williams' sentence, which had been modified by the trial court from 15-serve-12 to 20-serve-9. Because the illegality of increasing a defendant's sentence once he has begun serving it applies to probation, the Court of Appeals remanded the case for re-sentencing.

Blackmon v. State, A05A0578, 2005 Ga. App. LEXIS 385 (April 14, 2005).

This case was before the court on interlocutory review. Blackmon was indicted for two counts of rape and two counts of child molestation. The indictment alleged the dates of the crimes as follows: "between the dates of January 1, 1994 and December 31, 1998, the exact date(s) not being known to the Grand Jury and said date not being alleged to be a material allegation of this Indictment." Blackmon filed a timely special demurrer to have the indictment quashed and dismissed, claiming that the indictment was imperfect because it did not allege the exact dates of the crimes and the state failed to carry its burden of showing the specific date is unavailable. The trial court denied the special demurrer and the Court of Appeals reversed, holding that "a defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and substance" and an indictment is perfect in form if it does not specify the date on which the crime was committed, unless, of course, the state has produced evidence showing that it cannot identify the date."

State v. Kinsey, A05A0135, 2005 Ga. App. LEXIS 371, April 12, 2005.

Kinsey filed a motion to suppress a search of his person (which yielded a bag of cocaine) and the trial court granted it because Kinsey had not been informed of his right to refuse the search. The Court of Appeals reversed, holding that police are not required to inform a suspect of his right to refuse a search, and in light of other circumstances (Kinsey was not otherwise coerced, his mother was present), the search was legal.