Appellate Practice and Procedure

By Tommy Day Wilcox*

This article is a summary and analysis of significant decisions by the Georgia Supreme Court and the Georgia Court of Appeals rendered this past year in the area of appellate practice and procedure. The cases are discussed under the following headings: Certificate of Immediate Review; Notice of Appeal, Enumeration of Errors and Briefs; Transcript; and Miscellany.

I. Certificate of Immediate Review

In 1975 the Georgia legislature amended the Appellate Practice Act by completely rewriting the section concerning interlocutory appeals.[1] One of the new requirements for appellants seeking review of a ruling other than a final judgment is that the appellant seek the appropriate appellate court's permission within ten days of the trial court's grant of the certificate of immediate review. Citing this addition to the Appellate Practice Act, the higher courts dismissed four cases during the survey period because the appellant failed to obtain the appellate court's permission to appeal following approval of the appeal by the trial court.[2]

However, the primary factor causing the dismissal of cases on appeal this year continued to be the appellant's failure to obtain a certificate of immediate review from the trial court first. As in years past one must review the appellate courts' year's work to keep abreast of what is considered a final appealable judgment by the higher courts as distinguished from what they consider an interlocutory ruling requiring a certificate of immediate review. The following cases were dismissed, in headnote fashion, for lack of a certificate of immediate review from the trial court: *Carr v. Carr*[3] (divorce granted on judgment on the pleadings but issues of property settlement and alimony reserved for subsequent determination); *W. L. Pettus Construction Co. v. Commercial Union Insurance Co.*[4] (counter-

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1. Ga. Code Ann. §6-701(a)(2) (Supp. 1977).

2. Moore v. State, 141 Ga. App. 647, 234 S.E.2d 186 (1977); Dan Austin Properties, Inc. v. Glen Pines, Inc., 238 Ga. 416, 233 S.E.2d 195 (1977); Dempsey v. Bradley Center, Inc., 139 Ga. App. 615, 229 S.E.2d 104 (1976); and Richert v. Hill Aircraft & Leasing Corp., 138 Ga. App. 638, 227 S.E.2d 83 (1976).

3. 238 Ga. 197, 232 S.E.2d 69 (1977).

4. 138 Ga. App. 281, 226 S.E.2d 77 (1976).

claim dismissed but plaintiff's complaint still pending); *Partain v. State*[5] (defendant's pleas in bar and pleas of former jeopardy overruled but trial on indictment still pending); *Clary v. Brown*[6] (complaint dismissed as to one of two plaintiffs); *Cox v. Wielder*[7] (judgment holding nugatory an action by an illegally constituted board of tax equalization but ordering further consideration of the matter by a newly constituted board, and a judgment denying a restraining order but directing other action by plaintiff); *Paris v. Citizens & Southern National Bank*[8] (counterclaim still pending); *Guthrie v. Monumental Properties, Inc.*[9] (order denying plaintiffs' motion to add various parties defendant and dismissing the complaint as to them); *Kristensen v. Kristensen*[10] (order denying pleas to jurisdiction seeking to dismiss plaintiff's complaint on the ground of lack of jurisdiction); *Wall v. T.J.B. Services, Inc.*[11] (order of trial court directing defendant to pay the amount of rent alleged to be due into the registry of the court while dispossessory warrant pending); *Trust Co. of Columbus v. Ferrior*[12] (order setting aside a judgment against the garnishee but not terminating the garnishment proceeding); *Shuford v. Jackson,*[13] *Davis v. Davis,*[14] *First National Bank of Atlanta v. Hudson,*[15] *Associated Architects, Inc. v. Holland,*[16] and *Thigpen v. Futura Construction, Inc.*[17] (order granting motion to set aside a judgment and open a default leaving the case pending in the trial court).

Another decision that turned in part on the presence or lack of a certificate of immediate review was *Georgia Heart Ass'n Inc. v. State Farm Mutual Automobile Insurance Co.*[18] In this case both parties filed motions for summary judgment. The court granted the defendant's motion and denied the plaintiff's motion. The plaintiff appealed both decisions. The court of appeals refused to consider the trial court's denial of the plaintiff's motion for summary judgment without a certificate of immediate review even though there was a proper appeal from the granting of the defendant's motion.[19]

Appellate practitioners were reminded during the year that the failure

5. 138 Ga. App. 171, 225 S.E.2d 736 (1976).
6. 139 Ga. App. 799, 229 S.E.2d 680 (1976).
7. 237 Ga. 131, 227 S.E.2d 40 (1976).
8. 140 Ga. App. 417, 231 S.E.2d 357 (1976).
9. 141 Ga. App. 25, 232 S.E.2d 372 (1977).
10. 238 Ga. 294, 232 S.E.2d 564 (1977).
11. 141 Ga. App. 437, 233 S.E.2d 810 (1977).
12. 141 Ga. App. 328, 233 S.E.2d 280 (1977).
13. 139 Ga. App. 469, 228 S.E.2d 605 (1976).
14. 139 Ga. App. 599, 229 S.E.2d 81 (1976).
15. 139 Ga. App. 629, 229 S.E.2d 109 (1976).
16. 139 Ga. App. 793, 229 S.E.2d 674 (1976).
17. 140 Ga. App. 65, 230 S.E.2d 92 (1976).
18. 140 Ga. App. 860, 232 S.E.2d 271 (1976).
19. *See* Marietta Yamaha v. Thomas, 237 Ga. 840, 229 S.E.2d 753 (1976).

to obtain a certificate of immediate review from the trial court and to seek the appellate court's permission to appeal within the time frame set out in the Appellate Practice Act cannot be cured by amendment offered as an application for immediate review when filed three months after the expiration of the filing time for such requests.[20]

II. Notice of Appeal, Enumeration of Errors and Briefs

A timely-filed notice of appeal, a well reasoned enumeration of errors, and a brief in support of these enumerations are prerequisites to insure adjudication of an appealable final judgment by the appellate courts. These prerequisites are standard fare under the Appellate Practice Act; in particular the notice of appeal must be timely filed. Yet, more than a few appeals are dismissed by the appellate courts in Georgia every session because the notice of appeal is filed more than thirty days after the appealed judgment is entered in the trial court. This year was no exception.[21] In two separate cases the judgment appealed from was entered on December 2, 1975, and the notice of appeal was filed on January 5, 1976. One of these cases originated in Cobb County[22] and the other in Fulton County.[23] The appellants argued that January 1, 1976, the last day for filing, was a legal holiday, and the clerks' offices were either closed or operating only on a limited basis on January 2, 1976. January 3 and 4 fell on a weekend. The courts dismissed these cases as late filed because January 2, 1976 was not a legal holiday. This rather harsh result shows that the appellate courts require strict adherence to the time schedules of the Appellate Practice Act.

One enterprising practitioner sought to avoid the fate of his just-mentioned colleagues by phrasing the notice of appeal in this manner: "This notice of appeal is filed within thirty days of the date counsel for appellant first learned of the final judgment having been filed by the clerk."[24]

The notice of appeal was filed on the ninth day of September, 1976, from a judgment entered May 3, 1976. Needless to say, the appeal was dis-

20. Summer Tree Club Apartments Assoc. v. Graves Constr. Co., 140 Ga. App. 214, 230 S.E.2d 503 (1976).

21. Smith v. Firemen's Fund Ins. Co., 141 Ga. App. 578, 234 S.E.2d 156 (1977) (one day late); Venable v. Block, 141 Ga. App. 523, 233 S.E.2d 878 (1977) (one day late); McEver v. State, 141 Ga. App. 429, 233 S.E.2d 504 (1977) (seven days late); Patterson v. Professional Resources, Inc., 140 Ga. App. 315, 231 S.E.2d 88 (1976) (three days late); Beatty v. Underground Atlanta, 237 Ga. 844, 229 S.E.2d 615 (1976) (one day late); Smith v. State, 140 Ga. App. 492, 231 S.E.2d 493 (1976) (one day late); and May v. May, 139 Ga. App. 672, 229 S.E.2d 145 (1976) (nine days late).

22. Blumenau v. Citizens & Southern National Bank, 139 Ga. App. 188, 228 S.E.2d 302 (1976).

23. Camp v. Hamrick, 139 Ga. App. 61, 228 S.E.2d 288 (1976).

24. Rogers v. Rogers, 238 Ga. 576, 234 S.E.2d 495 (1977).

missed, but *a la* Morgan Thomas, counsel must be awarded a "nice try of the year" citation.

The appeal was also dismissed in *Moody v. Moody*[25] even though a notice of appeal was filed on January 6, 1976, from an order entered December 8, 1975. The problem in this case was that the appellant also filed a motion for new trial along with his notice of appeal. The motion for new trial was denied on February 23, 1976, after which no new notice of appeal was filed. Because the notice was filed while a motion for new trial was pending, the filing was premature and of no validity.

Note, however, that while the appellate courts remain strict in requiring civil litigants to comply with the rules, applicants for *habeas corpus* relief who did not perfect a timely direct appeal after their convictions may still be granted some relief. In both *Cromer v. Allen*[26] and *Hardin v. Hopper*[27] the appellants were allowed out-of-time appeals on showings that they did not voluntarily and intelligently waive their right to an appeal.

Georgia Code Ann. §6-803 (1975), which sets the thirty day time limit for filing a notice of appeal, also provides in part:

> when a motion for new trial, or a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

Filing one of these motions extends the time for the filing of a notice of appeal. However, as various appellants have discovered to their misfortune, the time for filing is not extended by the filing of either a motion for reconsideration[28] or a motion for new trial following the granting of a motion for summary judgment.[29] Nor is the time extended because the trial court modified an early appealable order[30] or withdrew and re-entered findings of fact and conclusions of law.[31] In each of these cases counsel should have invoked the protection of §6-804, which allows for extensions of time to file notices of appeal.

Although not included in §6-803, a motion to vacate may protect the appellant, as the appellee learned in *Johnson v. Barnes*.[32] The appellant appealed the overruling of his motion to vacate an order dismissing his case. It had been on the inactive file for more than two years in the lower court and was dismissed on February 12, 1975. In February 1976, the appel-

25. 141 Ga. App. 185, 233 S.E.2d 385 (1977).
26. 237 Ga. 384, 228 S.E.2d 795 (1976).
27. 237 Ga. 139, 227 S.E.2d 43 (1976).
28. Ellis v. Continental Ins. Co., 141 Ga. App. 809, 234 S.E.2d 377 (1977); Presley v. Green, 137 Ga. App. 788, 225 S.E.2d 60 (1976).
29. Shine v. Sportservice Corp., 140 Ga. App. 355, 231 S.E.2d 130 (1976).
30. Wilson v. Coite Somers Co., 138 Ga. App. 455, 226 S.E.2d 277 (1976).
31. W.T.A. Assoc., Inc. v. Beamon, 141 Ga. App. 25, 232 S.E.2d 373 (1977).
32. 237 Ga. 502, 229 S.E.2d 70 (1976).

lant filed a motion to vacate the dismissal which was denied on April 22, 1976. Notice of appeal was filed on May 21, 1976. The appellee, citing §6-803(a), moved to have the appeal dismissed as untimely. In an interesting opinion the supreme court refused to dismiss the appeal and held that the motion to vacate was predicated upon a nonamendable defect which appeared on the face of the record. It would, therefore, be treated as a motion to set aside under Ga. Code Ann. §81A-160(d) (Supp. 1977) of the Civil Practice Act, meaning that the notice of appeal was timely filed as to this appealable order. At best this reasoning should be limited to the peculiar factual make-up of the procedural history of this case and future appellants in similar situations would do well to file within thirty days of the original judgment.

The appellate courts do not apply the same strict requirement for timely filing of enumeration of errors and briefs. Of course, the filing of the notice of appeal is jurisdictional in nature; the enumeration of errors and briefs are not. For instance, in *Clark v. State*,[33] the appellant filed his brief 12 days after the expiration of a ten-day extension and the court of appeals considered his enumerated errors "notwithstanding our rules to the contrary."[34] However, when no brief and enumeration of errors is filed, the appeal will be dismissed.[35] As was done last year,[36] one counsel who failed to file his enumeration of errors and a brief after being ordered to do so was held in contempt of court and had his name stricken from the roll of attorneys authorized to practice before the court of appeals.[37]

When the appellant seeks the reversal of the trial court's judgment with directions that findings of fact and conclusions of law be entered, he should enumerate as error the trial court's failure to do so. Otherwise, the appellate court will not reverse the judgment of the trial court upon such ground.[38] Further, when the trial court dismisses the appellant's notice of appeal and this result is not included in his enumeration of errors, the lower court's ruling will be affirmed regardless of the merits of the appellant's appeal.[39] The middle bench held, however, that the appellant need not list in his enumerations the denial of his motion for new trial by the trial court or the jury's verdict in favor of the appellee.[40] The court also decided, in *Hulsey v. Sears, Roebuck & Co.*,[41] that an appellant is entitled to argue all enumerations of error properly raised in the lower court even

33. 138 Ga. App. 266, 226 S.E.2d 89 (1976).
34. *Id.* at 267, 226 S.E.2d at 91.
35. Barfield v. State, 141 Ga. App. 421, 233 S.E.2d 887 (1977); Grant v. State, 139 Ga. App. 793, 229 S.E.2d 674 (1976).
36. Pettiford v. State, 235 Ga. 622, 221 S.E.2d 43 (1975).
37. Bailey v. State, 139 Ga. App. 321, 228 S.E.2d 357 (1976).
38. Cunnane v. Cunnane, 237 Ga. 650, 229 S.E.2d 431 (1976).
39. Davis v. Davis, 238 Ga. 143, 231 S.E.2d 753 (1977).
40. Hudson v. Columbus, Georgia, 139 Ga. App. 789, 229 S.E.2d 671 (1976).
41. 138 Ga. App. 523, 226 S.E.2d 791 (1976).

though not included as a ground in a new trial motion. The appellee contended that such a ruling permits "sandbagging" the trial judge. The court of appeals disagreed and concluded that in *Hulsey* the record showed that the trial judge was not "bushwhacked" at the appellate level.

The court of appeals decision in *Johnson v. Heifler*[42] raises the subject of the proper construction of the appellant's brief. The appellant's brief was timely filed but he argued only two of five listed enumerations of error. One week before oral argument was to be presented he filed a brief arguing his remaining enumerations of error. The court decided to consider all of the appellant's enumerations, but in some rather strong language it noted that such practice would not be tolerated in the future. Enumerations of error so handled shall be considered waived under rules 16(a)[43] and 18(c)(2)[44] of the court of appeals' rules. Supplemental briefs are encouraged, reasoned the court, but there must be something present in the appellant's original brief which can be supplemented. Good rule and fair warning.

III. TRANSCRIPT

Georgia Code Ann. §6-809(b) (1975) governs dismissal of appeals for failure to cause the transcript to be filed and grants the trial judge discretion on the question of ordering dismissal where it is shown that any delay is inexcusable and unreasonable. This rule applies to the transmittal of the record as well. With this rule in mind, the court of appeals disposed of several cases this past year in little more than summary fashion. In one, *Almond v. Robertson,*[45] the transcript was due June 27, 1975. On June 30, 1975, the trial court granted an application to extend the time for filing until July 30, 1975. When the transcript was not filed until August 27, 1975, the trial court granted appellee's motion to dismiss. The court of appeals, in affirming, held the order of June 30, 1975 nugatory and void because it was made after June 27, 1975.

Not all late filers met the same fate. Emphasizing that motions to dismiss for late filing of the transcript must be made and ruled upon in the trial court prior to transmittal, the court of appeals denied appellee's motion made in that court in *Hodges v. Doctors Hospital.*[46] Tardy appellants also found relief in three other appellate decisions. In *Young v. Climatrol Southeast Distributing Corp.,*[47] the supreme court reasoned that the question of unreasonable delay should be considered in light of the fact that the time provided for filing the transcript or record is not jurisdictional.

42. 141 Ga. App. 460, 233 S.E.2d 853 (1977).
43. GA. CODE ANN. §24-3616(a) (1971).
44. GA. CODE ANN. §24-3618(c)(2) (1971).
45. 138 Ga. App. 22, 225 S.E.2d 486 (1976).
46. 141 Ga. App. 649, 234 S.E.2d 116 (1977).
47. 237 Ga. 53, 226 S.E.2d 737 (1976).

Rather, time requirements are merely a means of avoiding unreasonable delay so that the case can be presented on the earliest possible calendar in the appellate courts.

Following the *Young* logic the court of appeals excused two more late filers,[48] and in one of these opinions, it repeated the words from a portion of an early decision of that court which all tardy appellate practitioners should keep handy for ready use.

> Punctuality is a virtue of high order, but truth and justice are even more exhalted; hence the demand for punctuality in pleading should not be so strict as to prevent inquiry into truth and to deny justice where the delinquency is reasonably excusable. Therefore, while the law makes requirements of punctuality in pleading, it also usually makes provision for relieving against the penalties imposed for a lack of this virtue, when the interests of truth and justice require it. This may be said to be the general policy of the law.[49]

The flexibility demonstrated by the courts regarding the requirement for timely filing of the transcript and record did not extend to benefit the appellants who filed no transcript or something less than what the appellate court considered a complete record. As in years past, the appellate benches affirmed the judgments of the lower courts in these instances.[50]

Sometimes getting a proper transcript prepared for consideration on appeal is not a simple matter. The supreme court made it clear, in *Albea v. Jackson*,[51] that the appellant had better correct any problems in transcript preparation before proceeding to the appellate level. In *Albea* the counsel for the appellant experienced difficulty with the court reporter who, after being cited for contempt by the trial judge, produced a partial transcript some 20 months after the trial. The appellant asked the supreme court to reverse the trial court's judgment because of the deficient transcript. This request was denied. The appellant should have sought relief at the trial level under the provisions of Ga. Code Ann. §6-805 (1975). Sections 6-805(f) and (g) provide that the transcript may be prepared in narrative form if no transcript is available and that the trial court will resolve the matter after a hearing if the parties cannot agree on what transpired.

On the criminal side of the docket the supreme court affirmed a trial

48. Gilland v. Leathers, 141 Ga. App. 680, 234 S.E.2d 338 (1977); I.T.T. Indus. Credit Co. v. Carpet Factory, Inc., 140 Ga. App. 204, 230 S.E.2d 354 (1976).

49. Gilland v. Leathers, 141 Ga. App. 680, 681, 234 S.E.2d 338, 339 (1977), *quoting from* Bass v. Doughty, 5 Ga. App. 458, 460, 63 S.E. 516, 517 (1909).

50. Perry v. Dudley, 141 Ga. App. 455, 233 S.E.2d 849 (1977); Brown v. Donahoo, 141 Ga. App. 309, 233 S.E.2d 269 (1977); Butler v. Butler, 238 Ga. 198, 232 S.E.2d 246 (1977); Turner v. Watson, 139 Ga. App. 648, 229 S.E.2d 126 (1976); Lee v. Tollerson, 139 Ga. App. 446, 228 S.E.2d 595 (1976).

51. 236 Ga. 690, 225 S.E.2d 46 (1976).

court's denial of an indigent prisoner's request for a copy of his transcript "for the purposes of continuing litigation."[52] The appellant did not show any need or purpose for which he requested the transcript, and he did not assert that he was pursuing post-conviction relief. Presumably, the prisoner had failed to seek direct appeal of his conviction. The ruling appears to conflict with the U.S. Supreme Court's landmark pronouncement in *Griffin v. Illinois*[53] that indigent persons must be afforded as adequate an appellate review as persons who have money to buy transcripts. However, that Court's more recent holding in *United States v. MacCollom*[54] supports the conclusion our state's highest court reached. In *MacCollom* a federal *habeas corpus* petitioner was denied a copy of his transcript by a lower court. The Supreme Court held that the right to a free transcript is not a necessary concomitant of the writ without a direct showing of need and nonfrivolousness.

IV. MISCELLANY

Perhaps the most important decision in the area of appellate practice and procedure this past survey period was the supreme court's reversal of the court of appeals ruling[55] in *Smith v. Telecable of Columbus, Inc.*[56] In reversing the middle bench the supreme court overruled *Weinkle v. Brunswick Ry. Co.*,[57] an 1898 supreme court decision. Citing *Weinkle*, the court of appeals had held that, while in its opinion the trial judge erroneously granted the defendant's motion for new trial on a special ground related to the charge, the appellate court was without authority to review the ruling. The supreme court in *Weinkle* had held:

> [T]his court will not, under any circumstances, reverse a judgment granting a first new trial, whether the grant be general upon all the grounds of the motion or special upon one or more grounds only, or whether it be upon a ground which involves questions of evidence or upon a ground which involves purely questions of law, unless it is made to appear that no other verdict than the one rendered could possibly have been returned under the law and facts of the case.[58]

With *Weinkle* overruled, the present rule is that the first grant of a new trial on special grounds involving a question of law is reviewable on a proper appeal. This means that a certificate of immediate review is required.

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52. Bynum v. State, 238 Ga. 68, 69, 231 S.E.2d 62 (1976).
53. 351 U.S. 12 (1956).
54. 426 U.S. 317 (1976).
55. Smith v. Telecable of Columbus, Inc., 140 Ga. App. 755, 232 S.E.2d 100 (1976).
56. 238 Ga. 559, 234 S.E.2d 24 (1976).
57. 107 Ga. 367, 33 S.E. 471 (1898).
58. *Id.* at 368-69, 33 S.E. at 471-72.

Young v. Climatrol Southeast Distributing Corp.[59] was the keystone case in three other appellate court decisions which concerned the payment of costs rather than the timely filing of the transcript. In *McKissie v. S. S. Kresge,*[60] *Pickett v. Paine,*[61] and *Little v. Thompson Co.*[62] the appellants' cases were dismissed by the trial court because of a delay in the payment of costs. Under *Young* and §6-809(b),[63] if the delay is both inexcusable and unreasonable, the appellate court will affirm the dismissal.

Finally, the mootness doctrine in criminal matters received the attention of the appellate courts this past year. First, in *Carmichael v. State,*[64] there was an appeal from a contempt judgment after the appellant had served his three day sentence. The court of appeals refused to consider the case on the ground that the case had become moot. Later, the court of appeals decided to hear two other cases that had become moot. The defendant had served his sentence[65] in one case and paid his fine[66] in another. Overruling all prior decisions to the contrary, the court followed recent holdings[67] of both the U.S. Supreme Court and the Georgia Supreme Court which provided that a person who has completed service of his sentence "may seek to redress legal grievances flowing from allegedly void convictions and thereby hope to escape lifelong adverse collateral consequences."

59. 237 Ga. 53, 226 S.E.2d 737 (1976). This case was also highlighted in the transcript portion of this article. See text accompanying note 47, *supra.*

60. 141 Ga. App. 604, 234 S.E.2d 96 (1977).

61. 139 Ga. App. 508, 229 S.E.2d 90 (1976).

62. 140 Ga. App. 238, 230 S.E.2d 316 (1976).

63. GA. CODE ANN. §6-809(b) (1975).

64. 138 Ga. App. 624, 227 S.E.2d 89 (1976).

65. Chaplin v. State, 141 Ga. App. 788, 234 S.E.2d 330 (1977).

66. Jefferson v. State, 141 Ga. App. 712, 234 S.E.2d 333 (1977).

67. 141 Ga. App. 788, 790, 234 S.E.2d 330, 332; and *see* Carafas v. LaValle, 391 U.S. 234 (1948); Sibron v. New York, 392 U.S. 40 (1968); Nix v. State, 233 Ga. 73, 75, 209 S.E.2d 597, 598 (1974); Parris v. State, 232 Ga. 687, 691, 208 S.E.2d 493, 496 (1974).