Appellate Practice and Procedure

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The period of this survey is from June 1, 1984, to May 31, 1986. This Article reviews those decisions of Georgia's appellate courts that have significantly changed or affected the law of appellate practice and procedure during this period. The authors have made no attempt to include cases that merely illustrate common mistakes resulting in dismissal of appeals since the principles inherent in those cases have been discussed in ample detail in several previous survey articles. Cases discussed are grouped under two major headings: appealability, which is subdivided into sections covering criminal appeals and civil appeals, and miscellany.

I. Appealability

Two questions confront the lawyer contemplating an appeal. First, is the case or issue one that may be appealed? If the answer is yes, the next question must be how may it be appealed—by direct appeal, discretionary appeal, or interlocutory appeal? This section sets out the most important cases of the survey period that provide answers to these questions. The section is subdivided for ease of reference into criminal appeals and civil appeals.

A. Criminal Appeals

In *Cannon v. State*,[1] the court of appeals discussed the test that determines when an out-of-time appeal in a criminal case is authorized. The

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1. 175 Ga. App. 741, 334 S.E.2d 342 (1985).

court also examined this test in light of the Supreme Court's recent holding in *Evitts v. Lucey*.[2] As stated by the court of appeals, the Court in *Evitts* "held that due process is violated if a criminal defendant's first appeal of right is dismissed for procedural deficiencies attributable to the ineffective assistance of his counsel."[3] While recognizing that the rule in *Evitts* was of "constitutional dimension,"[4] the court found that the rule did not require a departure from established Georgia law since out-of-time appeals already are allowed in criminal cases in which the failure to appeal resulted from ineffective assistance of counsel.[5]

The court noted, however, that not every instance in which counsel fails to follow proper procedure to secure appellate review will authorize an out-of-time appeal.[6] If the convicted party, through his own conduct or in concert with his counsel, purposefully delays the appeal to his own advantage, he will lose the right to appeal.[7] In order to apply the test, the trial court must make a specific finding, in its order denying the motion for an out-of-time appeal, on the issue of "whether the right to appeal was lost as the result of ineffective assistance of counsel or of appellant's own conduct."[8] Finding no such specific determination by the trial court in *Cannon*, the court of appeals vacated the judgment and remanded the case for a new hearing.[9]

In *Brown v. State*,[10] the court of appeals applied the test set out above to a situation in which the trial court granted the state's motion to dismiss the appeal for lack of prosecution. As in *Cannon*, the trial court's order failed to specify the grounds for granting the motion.[11] Rather than vacating the appeal and remanding the case to the trial court for those specific findings, the court in *Brown*, citing *Evitts*, gave appellant the benefit of the doubt and addressed the merits of the appeal.[12] In *DeBroux v. State*,[13] the court gave similar treatment to a *pro se* appellant. The court announced that "in light of recent federal decisions disapproving of the dismissal of a criminal defendant's first appeal as of right,"[14] it had

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2. 469 U.S. 387 (1985).
3. 175 Ga. App. at 741, 334 S.E.2d at 342 (citing *Evitts*).
4. *Id.*
5. *Id.* at 742, 334 S.E.2d at 343. *See generally* McAuliffe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974).
6. 175 Ga. App. at 742, 334 S.E.2d at 343.
7. *Id.* at 741-42, 334 S.E.2d at 342-43.
8. *Id.* at 743, 334 S.E.2d at 344.
9. *Id.*
10. 177 Ga. App. 146, 338 S.E.2d 718 (1985).
11. *Id.* at 148, 338 S.E.2d at 720.
12. *Id.*
13. 176 Ga. App. 81, 335 S.E.2d 170 (1985).
14. *Id.* at 81, 335 S.E.2d at 170. The court specifically cited *Evitts*.

amended its rules to state explicitly that noncompliance with court rules and orders to file enumerations of errors and a brief would not automatically result in dismissal of the appeal.[15] The dissent pointed out that the amendment to the court rules only made dismissal of appeals discretionary and that no reason existed in the case to take it out of the rule that appellant, by his own actions, could forfeit his right to appeal. Further, the dissent found nothing in *Evitts* that required the court to indulge appellants who blatantly ignore procedure.[16]

It appears from these cases that the court of appeals will be hesitant to dismiss any criminal appeal, except in the most egregious situations. The cases, however, also indicate that the court will be far less indulgent in those cases in which the appellant is represented by counsel.

In *State v. Strickman*,[17] the Georgia Supreme Court, in answer to a certified question from the court of appeals, held that the state had a right to direct appeal in any case in which a court granted a defendant's motion to exclude evidence on the ground that it was obtained in violation of law, no matter how the motion was named.[18] In *Strickman*, the trial court granted defendant's pretrial motion *in limine* to exclude evidence of a breath test allegedly made in violation of Official Code of Georgia Annotated section 40-6-392.[19] The state appealed directly and Strickman moved to dismiss the appeal on the ground that the law[20] allowed direct appeals by the state only from grants of motions to suppress.[21] The court refused to read the statute so narrowly and dismissed defendant's argument as an attempt to supplant "reason and substance" with "runes and sigils."[22]

In *Smith v. State*,[23] the supreme court held that a timely filed direct appeal could be taken from a judgment of conviction to challenge a guilty plea, provided that the question on appeal is one that may be resolved by facts in the record. The court disapproved of the statement to the contrary in *Conlogue v. State*.[24]

The question presented in *Hubbard v. State*[25] was whether a criminal defendant had to follow the procedure for an interlocutory appeal[26] when

15. *Id. See also* GA. CT. APP. R. 14.
16. 176 Ga. App. at 82, 335 S.E.2d at 171 (Beasley, J., dissenting).
17. 253 Ga. 287, 319 S.E.2d 864 (1984).
18. *Id.* at 288, 319 S.E.2d at 865.
19. O.C.G.A. § 40-6-392 (1985).
20. *Id.* § 5-7-1(4) (1982).
21. 253 Ga. at 288, 319 S.E.2d at 864.
22. *Id.* (quoting Tuggle v. Tuggle, 251 Ga. 845, 310 S.E.2d 224 (1984)).
23. 253 Ga. 169, 316 S.E.2d 757 (1984).
24. 243 Ga. 141, 253 S.E.2d 168 (1979).
25. 254 Ga. 694, 333 S.E.2d 827 (1985).
26. *See* O.C.G.A. § 5-6-34(b) (Supp. 1986).

appealing from an order denying a motion to dismiss for violation of defendant's right to speedy trial.[27] The issue came to the supreme court by way of a certified question from the court of appeals, which had found a conflict between *State v. Crapse*[28] and *Smith v. State*.[29] In *Crapse*, the court of appeals dismissed the appeal from the order denying the motion to dismiss for failure to follow proper procedure to file an interlocutory appeal.[30] In *Smith*, the court allowed a direct appeal in the same situation by drawing an analogy between double jeopardy requirements, in which direct appeal is proper,[31] and the speedy trial requirements.[32] In *Hubbard* the supreme court approved the reasoning in *Smith* and held that a criminal defendant is afforded a direct appeal from the denial of a plea in bar based upon the speedy trial provision, if the defendant appeals before the conclusion of the trial on the merits.[33] The court noted that direct appeal is afforded in double jeopardy situations because the right to protection includes not only protection from double conviction, but also protection from the ordeal of the trial itself.[34] In the same manner, the court reasoned that the speedy trial provision protects the accused from the "uncertainty, emotional distress, and the economic strain" of anticipating prosecution indefinitely.[35] The court found these values of a magnitude similar to those at stake in double jeopardy claims.[36]

The reader should note *Crapse* for an additional reason. Crapse actually attempted two appeals. In the second, he designated a cross-appeal to the state's main appeal. The court dismissed this cross-appeal by finding that the statute[37] provided for cross-appeals only in civil cases.[38] Even though the court recognized that judicial economy and justice would be served by allowing such appeals, it refused to create such a right judicially and deferred to the judgment of the legislature.[39] The court also refused to judicially create a right to cross-appeal in a criminal case in *State v. Cook*.[40]

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27. *See* O.C.G.A. § 17-7-170 (1982). This is the statutory expression of the fundamental right to a speedy trial found in the Georgia Bill of Rights, GA. CONST. art. I, § 1, para. 11(a).
28. 173 Ga. App. 100, 325 S.E.2d 620 (1984).
29. 169 Ga. App. 251, 312 S.E.2d 375 (1983).
30. 173 Ga. App. at 100, 325 S.E.2d at 620.
31. *See* Patterson v. State, 248 Ga. 875, 287 S.E.2d 7 (1982).
32. 169 Ga. App. at 251, 312 S.E.2d at 375.
33. 254 Ga. at 695, 333 S.E.2d at 828.
34. *Id.*
35. *Id.*
36. *Id.*
37. O.C.G.A. § 5-6-38(a) (1982).
38. 173 Ga. App. at 103, 325 S.E.2d at 620.
39. *Id.*
40. 172 Ga. App. 433, 323 S.E.2d 634 (1984).

Discretionary appeals were designated the proper method to appeal orders denying extraordinary motions for new trial in criminal cases in *Pitts v. State*,[41] and to appeal revocation of 'first-offender' probation in *Dean v. State*.[42] In *Pitts*, the majority found that the 1984 amendment to the Official Code of Georgia Annotated[43] requiring an application to appeal be applied equally to civil and criminal cases.[44] The dissent argued that the metamorphosis of the amendment in the legislature clearly indicated that the legislature did not intend to apply the amendment to criminal cases.[45] In *Dean*, the court of appeals, by an eight-to-one vote, found no distinction between 'first-offender' probation[46] and probation in other criminal cases.[47] The court found that the plain language of the 1984 amendment[48] dictated this result.[49] The dissent argued that appeal from revocation of 'first-offender' probation is an appeal from the judgment of guilt as well as the revocation and, thus, should be appealable directly.[50]

B. Civil Appeals

In the appeal of civil matters, two areas stood out as problems for practitioners throughout the survey period. Each concerns whether it is necessary to follow discretionary appeal procedure or whether direct appeal will lie.

The first problem area may be classed generally under the inexact heading of 'domestic relations and child custody.' Before the 1984 amendments,[51] the pertinent statute[52] required application to appeal "judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders."[53] The cases make clear the intent of the courts, especially the supreme court, to require application in most, if not all, cases

41. 254 Ga. 298, 328 S.E.2d 732 (1985).
42. 177 Ga. App. 123, 338 S.E.2d 711 (1985).
43. O.C.G.A. § 5-6-35(a)(7) (Supp. 1986). This amendment became effective July 1, 1984. For a general discussion of the 1984 amendments, which greatly expanded the types of cases subject to application for appeal, see Pope & Kimmey, *Appellate Practice and Procedure, Annual Survey of Georgia Law*, 36 MERCER L. REV. 79, 79-81 (1984).
44. 254 Ga. at 298, 328 S.E.2d at 733.
45. *Id.* at 299, 328 S.E.2d at 733 (Smith, J., dissenting).
46. *See* O.C.G.A. §§ 42-8-60 to -65 (1982 & Supp. 1986).
47. 177 Ga. App. at 124, 338 S.E.2d at 712; *see* O.C.G.A. § 42-8-34 (1982).
48. O.C.G.A. § 5-6-35(a)(5) (Supp. 1986).
49. 177 Ga. App. at 124, 338 S.E.2d at 712.
50. *Id.* at 128, 338 S.E.2d at 715 (Beasley, J., dissenting).
51. *See supra* note 43.
52. O.C.G.A. § 5-6-35(a)(2) (1982).
53. *Id.*

in which, as stated by the court in *Russo v. Manning*,[54] "the issues [sic] sought to be appealed, clearly arises from or is ancillary to divorce proceedings, or is derived from a marital relationship and divorce . . . ."[55]

In July 1984 the statute was amended to reflect the courts' desire to have discretion to hear appeals in all types of domestic relations cases.[56] This fact was recognized and emphasized by the supreme court in *Leonard v. Benjamin*.[57] In *Leonard*, the court held that under the revised statute, appeals in child custody habeas actions were discretionary.[58] The court noted that although such actions were not mentioned expressly in the amended statute, they were included because the term " 'child custody, and other domestic relations cases' is facially broad,"[59] and the language following that term specifically states that it is not limited to the types of domestic relations actions mentioned in the statute. Thus, the practitioner would serve his client well to assume, in all cases concerning domestic relations, that a discretionary appeal is in order. If in doubt, the practitioner should file both an application to appeal and a direct appeal to ensure his client's interests.

An interesting exception to the broad interpretation of the 1984 amendment is found in *Department of Human Resources v. Johnson*.[60] In *Johnson*, the state sought to recover public assistance payments made on behalf of the minor child from the noncustodial parent, Johnson. The divorce decree did not require child support payments from Johnson.[61] The trial court denied the State's petition for failure to give proper notice and the State appealed directly.[62] The majority rejected the dissent's argument[63] that the case was one that came within the revised discretionary

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54. 252 Ga. 155, 312 S.E.2d 319 (1984).

55. *Id.* at 155, 312 S.E.2d at 320. *See also* Strickland v. Strickland, 252 Ga. 218, 312 S.E.2d 606 (1984); Sprague v. Sprague, 253 Ga. 485, 321 S.E.2d 742 (1984).

56. *See* O.C.G.A. § 5-6-35(a)(2) (Supp. 1986). The amendment expanded the necessity to apply for discretionary appeal to

> [a]ppeals from judgments or orders in divorce, alimony, child custody, *and other domestic relations cases including, but not limited to*, granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders.

Id. (emphasis added).

57. 253 Ga. 718, 324 S.E.2d 185 (1985).

58. *Id.* at 718, 324 S.E.2d at 186.

59. *Id.* at 719, 324 S.E.2d at 186. The court noted that to the extent that they conflicted with the holding in *Leonard*, the cases of Bryant v. Wigley, 246 Ga. 155, 269 S.E.2d 418 (1980), and Wright v. Hanson, 248 Ga. 523, 283 S.E.2d 882 (1981) would not be followed.

60. 175 Ga. App. 610, 333 S.E.2d 845 (1985).

61. *Id.* at 610, 333 S.E.2d at 845.

62. *Id.* at 611, 333 S.E.2d at 846.

63. *Id.* at 612-15, 333 S.E.2d at 847-48 (Beasley, J., dissenting).

appeal requirements as set out in *Leonard*.[64] Rather, the majority classified the case as one seeking collection of a debt, in which case direct appeal was proper.[65]

The majority opinion in *Johnson* touched upon the second problem involving civil discretionary appeals that was evident in the survey period. In *Johnson*, the court noted the provision in the 1984 amendments to the discretionary appeal procedure requiring application for "[a]ppeals in all actions for damages in which the judgment is $2,500.00 or less."[66] This provision seems straightforward, but in *Brown v. Associates Financial Services Corp. (Brown I)*,[67] a majority of the court of appeals found that this provision meant that the necessity for application was to be determined by the amount placed in controversy by the claimant.[68] The majority reasoned that the intent of the legislature was to alleviate the caseload pressure upon the appellate courts by eliminating direct appeal from cases when a relatively insubstantial amount of money was at stake, and that the amount of $2,500 was the yardstick against which the relative importance of a case would be measured.[69] The majority asserted that "not all judgments involve monetary sums against which the $2,500 'yardstick' . . . can be measured."[70] In a well-written discussion too complex to summarize briefly, the majority adduced several problems and seemingly inconsistent results that would flow from a straightforward interpretation of the statute.[71] Although one of the dissents characterized the approach favored by the majority as "very practical, profound, pragmatic and positive,"[72] it found the approach to be inconsistent with the statute.

In *City of Brunswick v. Todd*[73] and in *Brown v. Associates Financial Services Corp. (Brown II)*,[74] the supreme court rejected the approach of the court of appeals in *Brown I*. In *Todd*, the supreme court read the statute literally. It took 'judgment' to mean just that, and not relief sought in a complaint or counterclaim. The court found that the word 'judgment' in the statute was modified by the phrase "$2,500 or less" and held that it applies to actions in which the money judgment is "one cent through $2,500."[75] In *Brown II*, the supreme court went on to state that

64. *Id.* at 611-12, 333 S.E.2d at 847.
65. *Id.* at 612, 333 S.E.2d at 847.
66. O.C.G.A. § 5-6-35(a)(6) (Supp. 1986).
67. 175 Ga. App. 553, 333 S.E.2d 888 (1985), *rev'd*, 255 Ga. 457, 339 S.E.2d 590 (1986).
68. 175 Ga. App. at 553, 333 S.E.2d at 889.
69. *Id.* at 554, 333 S.E.2d at 890.
70. *Id.*
71. *Id.* at 554-55, 333 S.E.2d at 890.
72. *Id.* at 556, 333 S.E.2d at 891 (Deen, J., dissenting).
73. 255 Ga. 448, 339 S.E.2d 589 (1986).
74. 255 Ga. 457, 339 S.E.2d 590 (1986) (*Brown I* on certiorari).
75. *Id.* at 448, 339 S.E.2d at 589.

the statute would apply whether the case was decided by a jury or a judge.[76] According to the supreme court, the intent of the legislature in passing the amendment was "to remove the right of direct appeal when a claimant prevails but a fact finder has determined that the damage suffered is not substantial."[77] In *Barikos v. Vanderslice*[78] and *Nazerian v. City of McCaysville*,[79] the court of appeals followed the rule in *Todd* and dismissed appeals from judgments involving $2,500 or less.[80]

II. MISCELLANY

The supreme court asserted its inherent power in *Shore v. Shore*,[81] holding that the court had inherent power to establish rules necessary to determine cases which come before the court and, when necessary, to suspend the rules.[82] At issue in *Shore* was an expedited decision in a child custody case decided during the last two weeks of the court's term. By law, the court is prohibited from deciding cases during this period.[83] The implications of this decision, while intriguing, are best left for others, and are certainly beyond the scope of this survey.

The supreme court in *State v. Pike*[84] explicated the time and manner in which a trial court and an appellate court may take action to supplement the record after trial in order to enable an appellate court to fully decide issues on appeal.[85] In *Huguley v. State*,[86] the supreme court an-

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76. *Id.* at 457, 339 S.E.2d at 590.

77. *Id.*, 339 S.E.2d at 590-91.

78. 177 Ga. App. 884, 341 S.E.2d 513 (1986).

79. 178 Ga. App. 27, 342 S.E.2d 11 (1986). It should be noted here that prior to the court of appeals' decision in *Brown I*, a panel decision of the court dismissed an appeal for failure to comply with the amendment procedure. *See* Gardner v. Villa Monte Homes, Inc., 173 Ga. App. 896, 328 S.E.2d 565 (1985). This decision essentially reached the same conclusion later reached by the supreme court in *Todd*. No mention of this decision is made in *Brown I* or in the later supreme court decisions.

80. 177 Ga. App. at 885, 341 S.E.2d at 513; 178 Ga. App. at 28, 342 S.E.2d at 11.

81. 253 Ga. 183, 318 S.E.2d 57 (1984) (per curiam).

82. *Id.* at 184, 318 S.E.2d at 59. The court noted that the principle that it had power to determine cases under rules set by the court was announced in Fuller v. State, 232 Ga. 581, 208 S.E.2d 85 (1974), and was based upon a provision in the 1945 Georgia constitution. *See* GA. CONST. of 1945, art. VI, § 2 para. 7. This constitutional provision is not present in the current constitution.

83. *See* O.C.G.A. § 15-2-4 (1982).

84. 253 Ga. 304, 320 S.E.2d 355 (1984). The decision offers an excellent comparison of the provisions of O.C.G.A. § 5-6-41(f) (1982) (procedure by which trial court can cause record to be supplemented) and O.C.G.A. § 5-6-48(d) (1982) (procedure by which appellate court can cause record to be supplemented).

85. 253 Ga. at 307, 320 S.E.2d at 358.

86. 253 Ga. 709, 324 S.E.2d 729 (1985).

nounced that it would no longer grant *Anders*[87] motions. In *Kariuki v. DeKalb County*,[88] the supreme court held that it had exclusive appellate jurisdiction of cases in which the constitutionality of a law or ordinance is drawn into question, regardless of the court from which appeal is taken.[89] This holding is premised upon a change contained in the 1983 constitution.[90]

In the case of *In re Irvin*,[91] the standard of appellate review of a criminal contempt conviction was changed from an 'any evidence' test to the *Jackson v. Virginia*[92] 'beyond reasonable doubt' test. An appellant's contentions regarding derogatory or prejudicial actions by a trial judge expressed in his vocal emphasis, facial expressions, or bodily demeanor are now reviewable on appeal if the appellant provides the appellate court a record that will enable it to review the contentions. This is a result of the decision in *Milhouse v. State*.[93] In order to secure such review, the appellant must demonstrate by the record the conduct of the judge in question, a timely objection to the conduct, and prejudice to the complaining party's rights. The court suggests that such a record could be fashioned by calling as witnesses people who were present in court and observed the conduct in question.[94] The decision in *Norris v. Atlanta & West Point R.R. Co.*[95] ended the obscure life of the doctrine of binding precedent.[96] Procedures to challenge a trial court's rules for media coverage in a trial are discussed in the case of *In re Plan For News Media Coverage*.[97]

Finally, practitioners should be aware that during the survey period the courts showed an increased willingness to deem appeals frivolous and to assess damages against the offending party.[98]

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87. *See generally* Anders v. California, 386 U.S. 738 (1967). In contrast to the supreme court, the court of appeals continues to grant *Anders* motions. *See, e.g.*, Bones v. State, 177 Ga. App. 790, 341 S.E.2d 310 (1986).

88. 253 Ga. 713, 324 S.E.2d 450 (1985).

89. *Id.* at 715, 324 S.E.2d at 452.

90. *Id.* at 714-15, 324 S.E.2d at 451-52 (construing GA. CONST. art. I, § 6, para. II).

91. 254 Ga. 251, 328 S.E.2d 215 (1985).

92. 443 U.S. 307 (1979).

93. 254 Ga. 357, 329 S.E.2d 490 (1985).

94. *Id.* at 359, 329 S.E.2d at 492.

95. 254 Ga. 684, 333 S.E.2d 835 (1985).

96. Born in the opinion of the court of appeals in Bray v. Westinghouse Elec. Corp., 103 Ga. App. 783, 120 S.E.2d 628 (1961), the doctrine claimed to be a cousin to the concept of res judicata, as explained in Lowe Eng'rs v. Royal Indemn. Co., 164 Ga. App. 255, 259, 297 S.E.2d 41, 45 (1982). The doctrine showed little life in its last years; it was never able to leave home, and, as noted by the court in *Norris*, 254 Ga. at 685, 333 S.E.2d at 837, it was never accepted by any other court in the land.

97. 253 Ga. 753, 325 S.E.2d 159 (1985).

98. *See, e.g.*, Chatham Co. Comm'rs. v. Rumary, 253 Ga. 60, 315 S.E.2d 881 (1985); Blount v. Moore, 175 Ga. App. 288, 333 S.E.2d 167 (1985); Adams v. Cato, 175 Ga. App. 28,

332 S.E.2d 355 (1985); Bradbury v. Mead Corp., 174 Ga. App. 601, 330 S.E.2d 801 (1985); Peek v. Duffy, 172 Ga. App. 834, 324 S.E.2d 795 (1984); Power v. Mobley, 172 Ga. App. 637, 324 S.E.2d 512 (1984); Brown v. WTA/CHC, Inc., 172 Ga. App. 636, 324 S.E.2d 205 (1984); Khoury v. Skidaway Island Eng'g, Inc., 172 Ga. App. 503, 323 S.E.2d 692 (1984); J.E.E.H. Enters., Inc. v. Montgomery Ward & Co., 172 Ga. App. 58, 321 S.E.2d 800 (1984). *Compare* Department of Transp. v. Clark, 176 Ga. App. 743, 337 S.E.2d 461 (1985) (majority declines to designate appeal frivolous over detailed and vigorous dissent).