Government Appeals in Criminal Cases in Georgia

Donald E. Wilkes Jr.

University of Georgia School of Law, wilkes@uga.edu
GOVERNMENT APPEALS IN CRIMINAL CASES IN GEORGIA

Published in The Georgia Defender, p. 1 (May 2002). There is a statutory and caselaw update at the end of the article.

Introduction

At common law the government was not permitted to appeal in criminal cases unless government criminal appeals were expressly authorized by statute. Traditionally, Georgia has adhered to this common law rule. Prior to 1973 Georgia had no statute explicitly allowing government appeals in criminal cases, and government criminal appeals were therefore forbidden in this state. A writ of error did not lie to the Georgia Supreme Court or the Georgia Court of Appeals at the instance of the state in a criminal case; a writ of error did not lie to the Georgia Supreme Court or the Georgia Court of Appeals in behalf of a municipal corporation to review a decision involving a person prosecuted in a municipal court for violating a municipal ordinance; a writ of certiorari did not lie to the superior court in behalf of a municipality seeking review of the decision of a municipal court in favor of a person prosecuted for violating a municipal ordinance; and the state was not permitted to file a certiorari petition in the Georgia Supreme Court seeking review of a decision of the Georgia Court of Appeals in favor of the defendant in a criminal case.

In 1973 the General Assembly enacted a statute which for the first time gave “the state a limited right to appeal certain ... decisions ... in criminal cases to the court of appeals or supreme court, and ... extend[ed] the same right to the state in proceedings by certiorari.” That statute, as amended, is now codified in Chapter 7 of Title 5 of the Official Code of Georgia Annotated (OCGA §§ 5-7-1 through 5-7-5), and is the focus of this article.

Government Criminal Appeals From Trial Courts Under Chapter 7

OCGA § 5-7-1(a) authorizes the state to appeal in criminal cases and adjudication
of delinquency cases from the superior courts, state courts, City Court of Atlanta, juvenile courts, and such other courts from which a direct appeal is authorized to the Georgia Supreme Court or Georgia Court of Appeals, in six specified instances. Under OCGA § 5-7-4, state appeals under Chapter 7 are governed by the same time provisions as those applicable to appeals by criminal defendants; therefore, in accordance with OCGA § 5-6-38(a), the state’s notice of appeal must be filed within 30 days after entry of the appealable decision. Under OCGA § 5-7-2, except for appeals from the suppression of illegally seized evidence, any government appeal under Chapter 7 not involving a final order must be certified by the trial judge within 10 days of entry thereof to be of such importance that an immediate review should be had. OCGA § 5-7-5 provides that in the event the state files an appeal under Chapter 7 the defendant is entitled to release on reasonable bail, except in death penalty cases.

What are the six enumerated circumstances in which OCGA § 5-7-1(a) authorizes government criminal appeals?

Under § 5-7-1(a)(1), the state may appeal a decision dismissing an indictment or accusation, or a petition alleging a child has committed a delinquent act, or any count thereof. Under this provision, an appeal is permitted even if the dismissal occurs during the course of the trial. An appeal under § 5-7-1(a)(1) is permitted from the granting of a general demurrer, or of a special demurrer striking material allegations in the indictment or accusation, but not from the granting of a special demurrer which strikes an immaterial allegation in an indictment or accusation. An appeal is not permitted if the prosecutor requested the dismissal sought to be reviewed. An order placing a criminal case on the dead docket is not a dismissal and hence is not appealable.

Under § 5-7-1(a)(2), the state may appeal a decision arresting a judgment of conviction or an adjudication of delinquency. An arrest of judgment is the staying of a judgment after its entry, especially a court’s refusal to render or enforce a judgment because of a defect in the record; the record to be considered on a motion to arrest judgment is limited to the indictment or accusation, plea, verdict, and judgment.
Under § 5-7-1(a)(3), the state may appeal a decision sustaining a plea or motion in bar, when the defendant has not been put in jeopardy. This provision has been construed to permit appeal of: the granting of a motion for discharge and acquittal filed under the state’s speedy trial statute; the sustaining of a plea in bar filed under the speedy trial clause of the Sixth Amendment or premised on a plea of autrefois acquit or statutory double jeopardy; and the granting of a plea based on the statute of limitations.

Under § 5-7-1(a)(4), the state may appeal a decision suppressing or excluding evidence illegally seized, or excluding the results of a test for alcohol or drugs, in the case of motions made and ruled upon prior to the impaneling of the jury or the defendant being put in jeopardy, whichever is first. With respect to evidence illegally seized, the statute is not limited to evidence seized in violation of the Fourth Amendment; if the evidence was suppressed for any reason on the ground that it was illegally obtained, the suppression order is appealable. Therefore the following are appealable: a decision suppressing evidence on Fourth Amendment grounds; a decision suppressing a confession or a lineup identification because it was unlawfully obtained; and a decision suppressing evidence because it was otherwise unlawfully obtained. The portion of § 5-7-1(a)(4) specifically governing the exclusion of alcohol or drug test results was enacted in 2000 and permits appeal of an exclusion of such results, without regard to the reason for the exclusion; prior to 2000, government appeals of suppression of such test results were allowed only when the suppression was based on an illegal seizure.

Under § 5-7-1(a)(5), the state may appeal a decision of a court which was without jurisdiction or where the order is otherwise void. This provision was enacted in 2000 and simply codifies pre-existing caselaw dating back to 1976 under which void judgments, orders, and sentences in criminal cases were deemed appealable by the state (despite the absence of statutory authorization for such appeals at the time).

Under § 5-7-1(a)(6), which was enacted in 2000, the state may appeal superior court decisions which transfer a case to juvenile court pursuant to OCGA § 15-11-28(b)(2)(B). Government appeals of such decisions are also explicitly authorized by § 15-11-28(b)(2)(B) itself.
Under OCGA § 5-7-1(b), which was enacted in 2000, in any instance in which the state files an appeal under OCGA § 5-7-1(a), the defendant shall have the right to file a cross appeal. Prior to the enactment of OCGA § 5-7-1(b), a defendant had no right to cross appeal a government appeal in a criminal case.\textsuperscript{32}

OCGA § 5-7-1 is strictly construed against the state,\textsuperscript{33} and it is a basic principle that § 5-7-1 does not authorize a government criminal appeal unless the case falls within one of the six “statutorily enumerated circumstances [in § 5-7-1(a)] in which the State may challenge a judgment in a criminal case.”\textsuperscript{34} The following decisions of trial courts in criminal cases are therefore not appealable under § 5-7-1: an acquittal\textsuperscript{35} or a direct verdict of acquittal;\textsuperscript{36} a denial of the state’s motion for recusal;\textsuperscript{37} a disqualifying of a district attorney’s office from prosecuting a case;\textsuperscript{38} the granting of a new trial motion\textsuperscript{39} or an extraordinary motion for a new trial;\textsuperscript{40} the granting of a coram nobis petition,\textsuperscript{41} a motion to withdraw a guilty plea,\textsuperscript{42} a motion for return of property,\textsuperscript{43} or a motion to disclose the identity of a confidential informer;\textsuperscript{44} or the granting of any of the following: a motion to suppress made and ruled upon during the trial,\textsuperscript{45} a motion to suppress on general evidentiary grounds rather than on illegal seizure grounds (except, under a 2000 amendment to § 5-7-1, where alcohol or drug test results are suppressed),\textsuperscript{46} or a motion to suppress in a probation revocation proceeding.\textsuperscript{47} In deciding whether a trial court decision falls within the categories of decisions made appealable by § 5-7-1, the appellate court must look not at nomenclature but at the substance of the decision.\textsuperscript{48}

**Certiorari in Behalf of the Government in Criminal Cases**

OCGA § 5-7-3, which remains unchanged since its enactment in 1973, provides that a proceeding by certiorari may be taken by the state from one court to another where the right of certiorari is provided as an appellate procedure, in the specified situations set forth in OCGA §§ 5-7-1 and 5-7-2. Under OCGA § 5-7-3 there are numerous reported cases since 1973 where, based on a petition for writ of certiorari filed in behalf of the state, the Georgia Supreme Court has reviewed a decision of the Georgia Court of Appeals in favor of a criminal defendant.\textsuperscript{49} Since 2001, however, the right of the state to seek certiorari in the Georgia Supreme Court to review a Georgia Court of Appeals decision in a criminal case has no longer been limited to the six categories of cases specified in OCGA § 5-7-1(a). In State v.
Tyson\textsuperscript{50} the Georgia Supreme Court, overruling prior caselaw, held that its certiorari authority to review decisions of the Georgia Court of Appeals comes not only from statutory law but also from the Georgia Constitution and that “under our state constitution the State of Georgia may seek discretionary review in the Supreme Court of \textit{any} decision by the court of appeals in the defendant’s favor in a criminal case.”\textsuperscript{51} When the state seeks certiorari review in the Georgia Supreme Court of a decision of the Georgia Court of Appeals the certiorari petition must, under the joint operation of OCGA § 5-7-4 and Supreme Court Rule 38(2), be filed within 20 days of entry of the judgment of the Georgia Court of Appeals, or of the date of the disposition of a motion for reconsideration if such a motion is filed in the Georgia Court of Appeals.

Additionally, under OCGA § 5-7-3, the state, in the instances enumerated in OCGA § 5-7-1(a), may file a certiorari petition in a superior court to review a decision of a lower court in favor of the defendant in a criminal case.\textsuperscript{52} Under OCGA § 5-7-4, the state’s certiorari petition must, pursuant to OCGA § 5-4-6(a), be filed in the superior court within 30 days after the final determination of the case by the lower court.

\textbf{Footnotes}

S. E. 2d 120 (1976) (notwithstanding absence of enabling statute authorizing such an appeal, state may appeal void judgment in criminal case).


14. Another statute now authorizing certain government appeals in criminal cases, OCGA § 17-10-35.1(a), which permits a prosecutor to interlocutorily appeal certain pretrial orders in death penalty cases, is beyond the scope of this article. The state has no right to appeal under the Appellate Practice Act (OCGA § 5-6-30 through 5-6-51) in criminal cases. State v. Smith, 268 Ga. 75, 485 S. E. 2d 491 (1997); Johnson v. DeKalb County, 214 Ga. App. 756, 449 S. E. 2d 311 (1994); State v. McKenna, 199 Ga. App. 206, 404 S. E. 2d 278 (1991).


51. Id. at 690, 544 S. E. 2d at 445 (emphasis supplied).

**STATUTORY AND CASELAW UPDATE**

**Through April 1, 2008**

**STATUTORY LAW UPDATE**

1. Act of May 27, 2003, § 2, 2003 Ga. Laws 37, amended OCGA § 5-7-1(a) by adding paragraph (a)(7). This added provision now allows the state to take an appeal in criminal cases from an “order, decision, or judgment of a superior court granting an extraordinary motion for new trial.”

2. Act of Apr. 5, 2005, § 3, 2005 Ga. Laws 8, (also known as the “Criminal Justice Act of 2005”) made two changes to OCGA § 5-7-1 which broadened the state’s right of appeal in criminal cases. Firstly, it amended OCGA § 5-7-1(a)(7) to allow the state to appeal an “order, decision, or judgment of a superior court granting a
motion for new trial or an extraordinary motion for new trial.” This change in phraseology means the state is no longer restricted to appealing only the granting of extraordinary motions for new trial but may now appeal the granting of any motion for new trial by a superior court in a criminal case. Secondly, the act added to § 5-7-1(a) a new paragraph, (a)(8). OCGA § 5-7-1(a)(8) now allows the state to appeal an order, decision, or judgment “denying a motion by the state to recuse or disqualify a judge made and ruled upon prior to the defendant being put in jeopardy.”

3. Act of Apr. 26, 2006, § 3, 2006 Ga. Laws 571, further amended OCGA § 5-7-1 by adding paragraph (a)(9). Under § 5-7-1(a)(9), the state may appeal an order, decision, or judgment “issued pursuant to subsection (c) of Code § 17-10-6.2.” OCGA § 17-10-6.2 was created by the same legislation as enacted § 5-7-1(a)(9). This new code section addresses the punishment of sexual offenders in Georgia. OCGA § 17-10-6.2(b) provides that any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the code section applicable to the offense plus an additional probated sentence of at least one year. OCGA § 17-10-6.2(b) further provides that “no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court” except as provided in § 17-10-6.2(c). OCGA § 17-10-6.2(c) allows a court, in certain enumerated circumstances and at its discretion, to deviate from the mandatory minimum sentence as set forth in § 17-10-6.2(b). If a court pursuant to § 17-10-6.2(c) deviates in sentencing from the mandatory minimum sentence, the judge must issue a written order setting forth the judge’s reasons for so doing. Thus, OCGA § 5-7-1(a)(9) authorizes the state to take an appeal of any such written order issued under § 17-10-6.2(c).

CASELAW UPDATE

State v. Glover, 281 Ga. 633, 641 S.E.2d 543 (2007) (holding that an order dismissing an appeal is not an order that the State has a right to appeal under OCGA § 5-7-1; although the State has a right to appeal from void orders, the order
dismissing the State’s appeal, even if erroneous, is not void; a judgment is not void so long as it was entered by a court of competent jurisdiction)

State v. Morrell, 281 Ga. 152, 635 S.E.2d 716 (2006) (finding that given that the State cannot appeal after an acquittal and thus can never seek to rectify an incorrect suppression order if a defendant is acquitted, a trial court’s refusal to put an order suppressing evidence into writing defeats the heart of the legislature’s intent of granting the State a limited right of appeal and has the potential to exact grave injustices; in order to effectuate the legislative intent expressed in OCGA § 5-7-1, the court concluded that the State must have a right of appeal when a trial court orally grants a motion to suppress evidence yet refuses to put that order in writing; however, the court found that the State has the right to appeal oral orders only when the transcript affirmatively shows that the State requested the trial court to put the oral order in written form and that the trial court refused to do so)

State v. Davison, 280 Ga. 84, 623 S.E.2d 500 (2005) (under OCGA § 5-7-1(a)(4), the state appealed directly from the trial court’s order to suppress statements that were found to be “the result of coercive government activity”)

State v. Glass, 279 Ga. 696, 620 S.E.2d 371 (2005) (under OCGA § 5-7-1, the state appealed the trial court’s granting of a motion to exclude certain evidence)

State v. Nash, 279 Ga. 646, 619 S.E.2d 684 (2005) (under OCGA § 5-7-1(a)(4), the state appealed from the granting of a motion to suppress statements made by defendant after he invoked his right to remain silent)

Cody v. State, 278 Ga. 779, 609 S.E.2d 320 (2004) (the state is not authorized to appeal an order granting a motion for new trial under OCGA § 5-7-1 [case was decided prior to 2005 enactment of the current version of OCGA § 5-7-1(a)(7), which authorizes government appeals from grants of a new trial motion])

Jenkins v. State, 278 Ga. 598, 604 S.E.2d 789 (2004) (under OCGA § 5-7-1(a)(1) and (3), the state is authorized to appeal a trial court’s order sustaining defendant’s pretrial plea in bar that statute of limitations bars his prosecution)
Height v. State, 278 Ga. 592, 604 S.E.2d 796 (2004) (under OCGA § 5-7-1, the state is not authorized to appeal a trial court’s ruling as to an anticipated jury charge)

State v. Martin, 278 Ga. 418, 603 S.E.2d 249 (2004) (under OCGA § 5-7-1, the state is not authorized to appeal the denial of its motion to recuse a trial judge [case was decided prior to 2005 enactment of OCGA § 5-7-1(a)(8), which authorizes such appeals])

State v. Carr, 278 Ga. 124, 598 S.E.2d 468 (2004) (under § 5-7-1(a)(1), the state appealed the granting of defendant’s motion to dismiss for violation of the right to a speedy trial under the Sixth Amendment)

Taylor v. State, 277 Ga. 764, 596 S.E.2d 138 (2004) (reaffirming its decision in State v. Tyson, 273 Ga. 690, 544 S. E. 2d 444 (2001), the Supreme Court of Georgia held that it has jurisdiction to review any decision of the Court of Appeals by certiorari so long as the criteria of the writ are satisfied)

State v. Poppell, 277 Ga. 595, 592 S.E.2d 838 (2004) (under OCGA § 5-7-1(a)(4), the state appealed an order granting a motion to suppress blood test results)

Howard v. Lane, 276 Ga. 688, 581 S.E.2d 1 (2003) (the state cannot appeal a trial court’s ruling which grants a defendant his choice to proceed without a jury, as that type of ruling is not statutorily appealable by the state; the state is not authorized to appeal the denial of its petition for a writ of prohibition to compel a trial by jury)

State v. Smith, 276 Ga. 14, 573 S.E.2d 64 (2002) (although under OCGA § 5-7-1 the state may not appeal the grant of an extraordinary motion for new trial [case was decided before § 5-7-1(a)(7) was enacted in 2003 to authorize such appeals], the denomination of the trial court’s order as the grant of an extraordinary motion for new trial does not control and the substance of the order will determine whether it is one which the state is authorized to appeal)
State v. Beck, 275 Ga. 688, 572 S.E.2d 626 (2002) (under OCGA § 5-7-1(a)(1), the state appealed from the granting of a general demurrer challenging the constitutionality of OCGA § 40-6-391(a)(2))

State v. Pittmon, 275 Ga. 139, 562 S.E.2d 185 (2002) (under OCGA § 5-7-1(a)(1), the state appealed the granting of a general demurrer that claimed violation of equal protection grounds)

State v. Kachwalla, 274 Ga. 886, 561 S.E.2d 403 (2002) (under OCGA § 5-7-1(a)(1), the state appealed the trial court’s granting of a demurrer)

State v. Redding, 274 Ga. 831, 561 S.E.2d 79 (2002) (under OCGA § 5-7-1(a)(1), the state appealed from the granting of a motion to dismiss for violation of the constitutional right to a speedy trial)

State v. Grant, 274 Ga. 826, 561 S.E.2d 94 (2002) (under OCGA § 5-7-1(a)(2), the state appealed from the trial court’s granting of a motion in arrest of judgment)

State v. Swint, 284 Ga. App. 343, 643 S.E.2d 840 (2007) (holding that under OCGA § 5-7-1(a), the government may not appeal a trial court's grant to a criminal defendant of a directed verdict of acquittal based on the insufficiency of the evidence, even if it is erroneously granted; but the state may appeal if the court is “in substance” issuing a dismissal of the indictment, even if the order is entered during the course of the trial)

State v. Henderson, 283 Ga. App. 111, 640 S.E.2d 686 (2006) (rejecting defendant’s argument that the trial court’s ruling was tantamount to an acquittal following a bench trial and thus not directly appealable under OCGA § 5-7-1, where the trial court had not heard any evidence at the hearing, only argument by counsel)


State v. Stafford, 277 Ga. App. 852, 627 S.E.2d 802 (2006) (trial court’s ruling in favor of defendant’s motion to suppress DNA evidence, on the ground that state’s alleged violation of statutory rules governing execution of search warrant rendered search unlawful, is directly appealable by the state under OCGA § 5-7-1(a)(4); if defendant moves before trial to exclude evidence on the ground that it was obtained in violation of law, the grant of such a motion by the trial court is subject to direct appeal by the state regardless of whether the alleged illegal seizure resulted from constitutional or statutory violation)

State v. Barker, 277 Ga. App. 84, 625 S.E.2d 500 (2005) (trial court’s granting of defendant’s motion for a directed verdict on statute of limitations grounds is in substance a dismissal of defendant’s indictment and is thus appealable by the state under OCGA § 5-7-1(a); under OCGA § 5-7-1(a)(1), the state may appeal an order dismissing an indictment even if the order is entered during the course of a trial; although the double jeopardy clause bars the state from appealing the granting of a directed verdict of acquittal, an appeal and new trial are not barred by the double jeopardy clause “when a criminal defendant obtains a termination of the trial in his favor before any determination of factual guilt or innocence;” the state, without subjecting the defendant to double jeopardy, is authorized to appeal an order granting a motion for directed verdict based on the expiration of the statute of limitations)

State v. Williams, 275 Ga. App. 612, 621 S.E.2d 581 (2005) (under OCGA § 5-7-1(a)(4), the state appealed an order granting a motion to suppress)

State v. Brown, 273 Ga. App. 148, 614 S.E.2d 250 (2005) (under OCGA § 5-7-1(a)(4), the state was authorized to appeal the granting of a motion to suppress evidence illegally obtained where motion was ruled on before jeopardy attached)

State v. Tousley, 271 Ga. App. 874, 611 S.E.2d 139 (2005) (under OCGA § 5-7-1(a)(4), the state appealed the granting of a motion to suppress alcohol test results)

State v. Mauerberger, 270 Ga. App. 794, 608 S.E.2d 234 (2004) (under OCGA § 5-7-1(a)(4), the state appealed an order granting a motion to suppress drug evidence found in a consent search)
State v. Jones, 265 Ga. App. 493, 594 S.E.2d 706 (2004) (under OCGA § 5-7-1(a)(5), the state is authorized to appeal a void sentence; the state has 30 days from the judgment or from the denial of its motion to amend the sentence to file its notice of appeal)

State v. Rackoff, 264 Ga. App. 506, 591 S.E.2d 379 (2003) (under OCGA § 5-7-1(a)(4), the state appealed an order granting a motion to suppress breath alcohol test results)

State v. Lowe, 263 Ga. App. 1, 587 S.E.2d 169 (2003) (under OCGA § 5-7-1(a)(4), the state appealed the trial court’s granting of a motion to suppress evidence)

State v. Allen, 262 Ga. App. 724, 586 S.E.2d 378 (2003) (although the state is authorized under OCGA § 5-7-1(a)(1) to appeal a defendant’s motion to quash an indictment, when the state elected not to challenge the trial court’s ruling on the motion that ruling was rendered conclusive)

Easley v. State, 262 Ga. App. 144, 584 S.E.2d 629 (2003) (on appeal by defendant, the Court of Appeals refused to consider the state’s argument that the trial court improperly held that the first of three verdicts handed in by the jury contained mutually exclusive findings, as this is not a matter which the state is authorized to appeal under OCGA § 5-7-1)


State v. Kramer, 260 Ga. App. 546, 580 S.E.2d 314 (2003) (although the state may not appeal from an order excluding evidence on the basis only of some general rule of evidence, the state may appeal under OCGA § 5-7-1(a)(4) from an order, decision, or judgment suppressing or excluding evidence illegally seized, including orders that suppress evidence based both upon general rules of evidence and a determination that the evidence was illegally obtained)
State v. Naik, 259 Ga. App. 603, 577 S.E.2d 812 (2003) (under OCGA § 5-7-1(a)(4), the state appealed an order granting a motion to suppress alcohol test results)

State v. Huckeba, 258 Ga. App. 627, 574 S.E.2d 856 (2002) (trial court’s order denying the state’s petition to revoke probation, premised on the erroneous belief that the court lacked jurisdiction, is an appealable order under OCGA § 5-7-1(a)(5))

State v. Ware, 258 Ga. App. 564, 574 S.E.2d 632 (2002) (under OCGA § 5-7-1(a)(6), the state appealed from an order granting a motion to transfer a case to juvenile court pursuant to OCGA § 15-11-28(b)(2)(B))

State v. Johnson, 257 Ga. App. 162, 570 S.E.2d 627 (2002) (under OCGA § 5-7-1(a)(1), the state appealed from the trial court’s implicit granting of a motion to dismiss state court accusation)

State v. Perkins, 256 Ga. App. 855, 569 S.E.2d 910 (2002) (under OCGA § 5-7-1(a)(3), the state appealed the trial court’s sustaining of a plea in bar based on former jeopardy grounds)