**BASIC OUTLINE FOR MNT PODCAST**

* 1. Hello everyone, welcome to another session of the Good Judge-ment podcast. I am Wade Padgett…
  2. and I am Tain Kell and together, we will be your hosts
  3. The Good Judge-Ment podcast is designed for judges, lawyers and others who are interested in judges, and the law and procedure that occurs in a courtroom. Our focus is on Georgia law and Georgia judges. We will focus on substantive law and procedure. Occasionally, we have other topics of interest for judges to consider. For those who have been listening to our podcasts, we want to thank you.
  4. Today’s podcast deals with Motions for New Trial. We frequently are asked to consider motions for new trial following criminal convictions and we will dedicate this podcast to criminal proceedings. We are also not focusing on death penalty cases as they have different rules and time limits. Today, we are looking at MNT in “basic” felony cases.
  5. We cannot predict all of the issues that might arise in a particular motion for new trial but we wanted to touch on topics that frequently arise and the issues judges are expected to address in most motions for new trial.
  6. We recognize that this podcast topic is another one that will probably not going to find itself on anyone’s list of top 10 most downloaded podcasts. But if a judge or lawyer finds themselves scheduled to participate in a motion for new trial hearing, we wanted to give everyone a quick reference guide that can help them maneuver the issue. Motions for new trial are seen frequently and you can rely on this podcast as a go-to guide.
  7. That’s very true. We are not trying to produce law review articles via podcasts. And we are not covering every contingency that might arise in this type of case. Instead, we are trying to give you a starting point and overview of the topic. Remember, we are posting an outline or similar reference guide on our website, **goodjudgepod.com**. You can find the outlines there if you did not catch a citation while you were driving or doing other things.
  8. One more preliminary note that we probably should address in each podcast. I have a case with a pending appeal involving a MNT. I will try my very best to avoid commentary on that issue, once we reach it. But both of us have cases involving all of these podcast topics and we are never trying to make a statement on any particular case. Instead, we are focused on the topic and the law relating to that topic. Enough with the disclaimers, let’s talk some MOTION FOR NEW TRIAL law.

**THE NEW U.S.C.R. IN LIGHT OF *OWENS***

1. Tain, let’s start with looking at the new U.S.C.R. 41.1, 41.2, 41.3 and 41.4 which were recently modified in light of the decision in *Owens v. State*, 303 Ga. 254 (2018).
2. [Tain-discuss *Owens* in general; how judges have a role in ensuring MNT get heard on a timely basis, etc.]
3. The new U.S.C.R. 41.1 THROUGH 4 all have been modified to reinforce that expectation addressed in *Owens*.
   1. As a practical matter, the court is expected to schedule a status conference with counsel no later than 120 days after sentencing. (U.S.C.R. 41.1)
      1. That assumes a MNT has been filed, I suppose. Not really clear from the Rule
   2. After that first status conference, the court is required to schedule additional status conferences every 180 days thereafter until the MNT is heard and decided. (U.S.C.R. 41.1)

**DEFENDANT’S PRESENCE AT MNT HEARING**

1. A defendant does not have the unqualified right to be present at a MNT hearing. *Mims v. State*, 304 Ga. 851, 861 (2019); *Bozzie v. State*, 302 Ga. 704, 713 (2017); *Rosser v. State*, 284 Ga. 335, 336 (2008).
   1. A defendant must be present where the defendant would have offered testimony that was relevant to the issues presented in his motion. *Bozzie*, at 713.
      1. This usually occurs in cases involving claims of ineffective assistance of counsel. And even in such cases, the right to be present at the hearing is not subject to remand unless the information could not be received by the court without the defendant’s presence. *Mims*, supra.
2. U.S.C.R. 41.1 sets forth who is required to have the defendant present for a MNT when “the defendant’s presence is required by law.”
3. We have the ability, under U.S.C.R. 9.2, to have the defendant appear via video-conferencing. The DOC has facilities to make arrangements for such an appearance by video.
   1. The DOC has taken the effort to install video-conferencing equipment at every Georgia prison. You will need to obtain the corresponding equipment at your courthouse.
      1. We will be doing an entire podcast on these video hearings and we made a presentation during the summer conference last year for superior court judges
      2. Regardless, understand that there are rules associated with using video conferencing that would probably prevent you from opening Skype or Facetime on a laptop and having a hearing.
      3. The beautiful part is that the DOC has worked through all of those rules and if you use their equipment, you can allow a defendant to “appear” from a facility owned and operated by the DOC.
         1. No threat of injury, time and expense to the Sheriff, etc. etc.
         2. Stay tuned for our podcast on video hearings.

**KEEPING UP WITH MNT**

1. Tain, let’s take a minute and discuss how we keep up with pending MNT in our offices.
   1. [I keep an Excel spreadsheet with all convictions. My court reporter has access as does my assistant. The court reporter adds info when she has completed the transcript. My assistant notes the status conferences. I keep up with the other fields within the Excel.]
   2. [Tain--]
2. The status conferences are to be on the record OR the court should enter an order memorializing the conference. But the defendant does not have to be present. The rules also allow for the status conferences to be conducted by telephone.
3. The new U.S.C.R. 41.3 includes a provision that is worth noting. In my circuit, we frequently have cases where retained counsel tries the case and then files a bare bones motion for new trial. Then the retained lawyer promptly seeks to withdraw, thinking that the court will appoint appellate counsel.

41.3 specifically notes that the filing of a MNT makes the lawyer who files the motion personally responsible for the cost of the transcript. The Rule indicates that the filing of the MNT acts as a certificate from the lawyer who files the motion that he/she has requested that the transcript be prepared. The Rule also gives the court the ability to discipline an attorney who does not pay for the transcript preparation.

**BASIC ISSUES IN ALL MNT**

1. Virtually every MNT includes a couple of basic issues that the court will need to address.
   1. **Sufficiency of the evidence** under *Jackson v. Virginia*, 443 U.S. 307 (1979). Your order will need to include a finding as to whether there was sufficient evidence to support the verdict.
      1. I will occasionally reference some of the facts of the trial in the section of my MNT order which addresses sufficiency of the evidence. Tain, do you do the same? How much detail?
   2. The **general grounds or “13th juror”** under §§5-5-20 and 5-5-21. *Jones v. State*, 339 Ga. App. 95, 104-105 (2016).
      1. § 5-5-20 and § 5-5-21 “afford the trial court broad discretion to sit as a thirteenth juror and weigh the evidence on a motion for new trial alleging these general grounds.” *Gomillion v. State*, 296 Ga. 678, 680 (2015). Further, the Court’s review of the record requires greater analysis than is encompassed in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Gordon v. State*, 329 Ga. App. 2, 4-5 (2014). The Court is expected to follow the observations of *Walker v. State*, 292 Ga. 262, 264-265 (2013) in weighing the evidence, making a determination of the credibility of the witnesses and reviewing the case to determine if the verdict is contrary to the evidence, is contrary to the principles of justice and equity or if the verdict was decidedly and strongly against the weight of the evidence. See *Hargrave v. State*, 311 Ga. App. 852, 855 (2011).
         1. I recently learned that the court is expected to perform a 13th juror analysis, even in a bench trial. *Kea v. State*, 344 Ga. App. 251, 253 (2018). This is the area where I need to be quiet as the case remains on appeal.
      2. Failure to conduct a separate analysis under the “general grounds” or as the “13th juror” will result in the case being remanded for the court to conduct the required review. *Walker v. State*, 292 Ga. 262, 264-265 (2013).
2. After ruling on the sufficiency of the evidence (*Jackson v. Virginia*) and the general grounds or 13th juror analysis, I then turn to the specific factual or legal issues that were raised in the MNT.
   1. Tain, do you organize your orders in that same manner?

**INEFFECTIVE ASSISTANCE OF COUNSEL**

1. A claim for ineffective assistance of counsel requires a finding by the court that trial counsel’s performance was deficient ***and*** that such deficiency substantially prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984).
   1. The prejudice that must be shown by the defendant, however, is a prejudice that rises to the level that but for such error by trial counsel, there would have been a different result at the trial. *Strickland*, at 691-696.
   2. Counsel’s errors must be so serious that they deprive the defendant of a fair trial. *See Lockhart v. Fretwell*, 506 U.S. 364 (1993). This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment. Anything short of such a showing is not ineffective assistance of counsel sufficient to warrant a new trial. *See Goodwin v. Cruz-Padillo*, 265 Ga. 614 (1995).
   3. The Court must analyze any claimed deficiency in counsel’s performance from counsel’s perspective at the time of trial, as opposed to trial by hindsight. *Grier v. State*, 273 Ga. 363 (2001); *Belton v. State*, 270 Ga. 671 (1998). The Court must “indulge a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. “Trial tactics and strategy, no matter how mistaken in hindsight, are almost never adequate grounds for finding trial counsel ineffective unless they are so patently unreasonable that no competent attorney would have chosen them.” *Gray v. State*, 291 Ga.App. 573 (2008). These presumptions must be overcome by clear and convincing evidence if the defendant is to prevail on a claim of ineffective assistance. *See Flanigan v. State*, 269 Ga. 160 (1998).
2. Obviously, an Ineffective Assistance claim will be fact-dependent on what went on during the trial.
3. And issues of **trial strategy** are not generally the types of issues that would result in a finding of ineffective assistance.
   1. “Failure to make a meritless objection cannot sustain a claim of ineffective assistance of counsel.” *McAllister v. State*, 2019 WL 2619357, A19A0613 (Ga. App. 6/5/2019);
   2. Deciding which jury charges to request is a matter of trial strategy and cannot support a finding of ineffective assistance unless that strategy was patently unreasonable. *Bannister v. State*, 2019 WL 2570966, S19A0418 (Ga. 6.24.2019);
   3. The decision as to which defense witnesses to call or what questions to ask on cross-examination are matters of trial strategy and tactics; tactical errors in that regard will not constitute ineffective assistance of counsel **unless no competent attorney would have made the same choice under the circumstances**. *Patterson v. State*, 2019 WL 2510830, A19A0085 (Ga. App. 6/18/2019); *Davis v. State*, 2019 WL 2413425, S19A0164 (GA. 6/10/2019).
   4. Electing to forego an objection during the state’s closing argument is not ineffective. *Anderson v. State*, 2019 WL 2427974, A19A0118 (Ga. App. 6/11/2019)
4. In short, when addressing an issue of ineffective assistance, the judge should look at the thought processes of trial counsel, as made clear during the time that trial counsel is on the stand during the MNT hearing. The judge should decide whether the alleged error falls within that wide range of decisions that fall within the umbrella of “tactical decisions” and, if so, deny the motion.
   1. However, if the error/decision was one that no competent attorney would have made AND the outcome of the trial would have been different had that decision/error not been made, the court should look closely at the claim. If, upon reflection, the court is convinced that the *Strickland* standard has been met, the court should grant the motion for new trial based upon ineffective assistance of counsel

**ADDRESSING THE “CASE-SPECIFIC” ISSUES RAISED**

1. It would be impossible for us to predict other issues that might arise in the context of a MNT.
2. These will usually be those issues where a trial objection was made or where a pre-trial motion was heard and decided.
3. I would strongly suggest that you do the research work to determine whether your rulings were correct. And I would specifically cite the most relevant cases in your written order.

**PREPARING THE ORDER**

1. When I am drafting an order on a MNT, I usually start by reciting the facts about the MNT hearing itself; who was present, the date of the hearing, etc. Then I go through the dates of trial, the charges, the convictions and the date the MNT was filed.
2. [Tain—do you do the same?]
3. I try to expedite the hearing and the order. The Rules require you to promptly get those things done.
   1. “Just rule!” -*Judge Lamar Sizemore*

[ending script]