

*Hicks v. State of Alabama*

Alabama Court of Criminal Appeals

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The Alabama Court of Criminal Appeals will primarily consider three issues in *Hicks v. State of Alabama*. First, the court will determine whether state and federal laws were violated when the appellant-defendant underwent a court-ordered psychiatric examination without representation by counsel. Second, the court will decide whether the circuit court erred by permitting a State's witness, who was three years old at the time of Hicks' alleged offense, to testify against him at trial. Finally, the court will consider whether statements by the State's witnesses were inadmissible hearsay or whether they were admissible at trial as prior consistent statements.

Appellant Dennis Hicks was convicted of the murder of 23-year old Joshua Duncan, and of theft of property in the second degree.<sup>1</sup> On September 6, 2011, Duncan's grandmother filed a police report after he had been missing for five days.<sup>2</sup> Duncan, who had lived with his grandmother since he was young, suffered from depression and bipolar disorder and exhibited the mentality of a young teenager.<sup>3</sup> Duncan and Hicks became acquainted through their attendance at a local church where Hicks performed odd jobs.<sup>4</sup> Hicks purportedly became "something of a father figure" to Duncan, and Duncan's grandmother occasionally hired Hicks to perform small jobs around her house.<sup>5</sup>

At the same time the missing person report was filed, Duncan's grandmother filed a separate report claiming that a utility trailer was missing from her property and she indicated that she suspected Hicks was the thief.<sup>6</sup> Three days after the missing person report was filed, Hicks was stopped by police.<sup>7</sup> According to his statement to police, Hicks removed the trailer from the property because he purchased it from Duncan.<sup>8</sup> Furthermore, he claimed that he had been renting a room to Duncan, but that Duncan went missing after they got into an argument on September 5<sup>th</sup>.<sup>9</sup> Hicks was arrested the day of his statement on the theft charge, and was subsequently questioned by police regarding the missing person report.<sup>10</sup>

On October 24, 2011, human remains were discovered in a wooded area of Mobile.<sup>11</sup> The skeletal remains were missing a skull and the bones of both hands, but

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<sup>1</sup> Brief for Appellant at 1, *Hicks v. State of Ala.* No. CR-15-0747 (Dec. 7, 2016).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.*

<sup>4</sup> Brief for Appellee at 4, *Hicks v. State of Ala.* No. CR-15-0747 (Apr. 5, 2017).

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Brief for Appellant at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

DNA testing revealed the remains were those of Duncan.<sup>12</sup> On November 30, 2011, Hicks was arrested on capital murder charges, and in February 2013 he pled not guilty to both charges.<sup>13</sup>

Although Hicks did not enter a mental state plea, the State moved for a psychiatric evaluation of Hicks in November 2014, which the court granted, noting its own concerns about his mental stability.<sup>14</sup> In January 2015, the court granted a motion to withdraw filed by Hicks' attorneys, and Hicks remained without counsel for more than six weeks.<sup>15</sup> During this six-week period, Hicks underwent a psychiatric evaluation at the jail, intended to determine his competency to stand trial and his mental state at the time of the alleged offense.<sup>16</sup>

At trial, the State alleged that Hicks killed Duncan for access to Duncan's social security check and food stamps, and to conceal the fact that he had stolen the trailer.<sup>17</sup> According to the State, Hicks stabbed Duncan and then cut off his head and hands while at his stepsister's home.<sup>18</sup> She and her grandchildren were allegedly present at the time.<sup>19</sup> This theory was supported by out-of-court statements made to a police detective by two of the grandchildren, Jatton and Jonah "Chance" Norris, seven months after Duncan's disappearance.<sup>20</sup> Jatton provided affirmative responses that he had seen Hicks and Duncan fighting.<sup>21</sup> Chance informed the detective that he had witnessed Hicks cut off Duncan's head and hands and cut him across the stomach.<sup>22</sup> During trial, however, Jatton recanted his prior statements and testified that he "thought Hicks had stabbed Duncan in the stomach and killed him" but that "he could not remember seeing it happen at the time of his testimony."<sup>23</sup> Chance testified that he saw Duncan and Hicks fighting.<sup>24</sup> The defense introduced evidence that Chance was actually living in Illinois in September 2011 and could not have witnessed the alleged crime.<sup>25</sup> According to the State, however, numerous witnesses testified that Hicks made incriminating statements such as: "How can they use testimony of a child even if it's true?"<sup>26</sup>

On January 29, 2016, the jury convicted Hicks of both charges, and on February 2, 2016, the jury returned a non-unanimous verdict for death.<sup>27</sup> On April 4, 2016, the presiding judge sentenced Hicks to death.<sup>28</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> Brief for Appellant at 4.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> Brief for Appellant at 6.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 6-7.

<sup>23</sup> Brief for Appellee at 8.

<sup>24</sup> Brief for Appellant at 7.

<sup>25</sup> *Id.*

<sup>26</sup> Brief for Appellee at 9-10.

<sup>27</sup> *Id.*

Hicks' argument on appeal is primarily three-fold. First, Hicks argues that the absence of counsel during his pretrial psychiatric examination, a critical stage of the criminal proceeding, constitutes reversible error.<sup>29</sup> Without counsel, Hicks claims that he was unable to prevent the court from exceeding its authority, and that he was unable to ensure that the question of his competency received a proper hearing.<sup>30</sup> As a result of the trial court's failure to provide counsel during a critical stage, Hicks alleges that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution were violated.<sup>31</sup>

In response, the State argues that Hicks was represented by counsel when the trial court discussed conducting the evaluation, distinguishing this case from the authorities cited by Hicks.<sup>32</sup> Additionally, Hicks did not object when the court ordered it, nor when the examiner was called to testify during the penalty phase of trial.<sup>33</sup> Moreover, the State asserts that Hicks had no right to have an attorney present during the psychiatric evaluation, and states that "a mental examination is not the type of critical stage of the proceeding that requires the participation of the accused's counsel."<sup>34</sup>

Next, Hicks argues that the trial court reversibly erred by allowing Chance to testify without a showing that it was possible for him to have personal knowledge of the events required by Alabama Rules of Evidence 403 and 602, and without obtaining an affirmation that he understood the duty to tell the truth as required by Rule 603.<sup>35</sup> Hicks asserts that without Chance's testimony and out-of-court statements, "no rational juror could conclude beyond a reasonable doubt that Mr. Hicks killed Mr. Duncan."<sup>36</sup> Therefore, Hicks maintains that the admission of this unsworn testimony, in spite of Chance's incompetency and lack of personal knowledge, violated Hicks' rights to due process, a fair trial, a reasonable sentence, and to confront witnesses against him under the U.S. Constitution and laws of Alabama.<sup>37</sup>

The State rebuts this argument on multiple grounds. First, the State points to evidence in the record that Chance was a competent witness and that the trial court properly considered the voir dire of Chance to determine that he knew it was wrong to tell a lie.<sup>38</sup> Second, the State rebuts the allegation that Chance lacked personal knowledge of the murder by noting that defense witnesses were thoroughly impeached, and witness testimony suggesting that Chance was in Illinois at the time of the murder

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<sup>28</sup> *Id.* at 10.

<sup>29</sup> Brief for Appellant at 12. (citing *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981)).

<sup>30</sup> *Id.* at 19.

<sup>31</sup> *Id.* at 21.

<sup>32</sup> Brief for Appellee at 17-18.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at 19 (quoting *Ex parte Wilson*, 571 So. 2d 1251, 1258 (Ala. 1990)).

<sup>35</sup> Brief for Appellant at 23.

<sup>36</sup> *Id.* at 35.

<sup>37</sup> *Id.*

<sup>38</sup> Brief for Appellee at 23-25.

was simply not credible.<sup>39</sup> Third, the State argues that Chance was not disqualified because of his age. Specifically, the State points to knowledge that Duncan had been decapitated, a fact that was not disclosed to the public by investigators, and to statements purportedly made by Hicks himself corroborating the fact that Chance was present for the murder.<sup>40</sup> For all of these reasons, the State contends that Chance's testimony was proper.

Finally, Hicks contends that the State's presentation of Chance and Jatton's out-of-court statements for their substantive truth, rather than solely for impeachment evidence, constitutes the admission and use of inadmissible hearsay evidence.<sup>41</sup> Although the defense stipulated to the admission of the children's out-of-court statements for impeachment purposes, Hicks argues that the trial court failed to give a proper limiting instruction to the jury, and that the State used these statements for the truth of the matter asserted in its case-in-chief.<sup>42</sup> Consequently, according to Hicks, the actions of the court and the State violated his rights to due process, to confront the witnesses against him, and to a fair trial as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.<sup>43</sup>

The State counters this argument by positing that the trial court correctly admitted prior consistent statements since the defense suggested that the witnesses were unreliable and that their testimony had been manipulated.<sup>44</sup> Alabama Rule of Evidence 801(d)(1)(B) provides for admissibility of the statements as prior consistent statements.<sup>45</sup> Moreover, the State argues that "this type of evidence is admissible not only to support the credibility of the witness against a charge of fabrication, but also to prove the truth of the matter asserted."<sup>46</sup> Therefore, according to the State, Hicks is due no relief on appeal.

Oral arguments in the case of *Hicks v. State of Alabama* will be held before the Alabama Court of Criminal Appeals on Wednesday, November 1, 2017. The event will take place at the Leslie S. Wright Center on the campus of Samford University. Oral arguments will begin at 9:00 a.m. and last until 12 p.m. The event, hosted by Cumberland School of Law, the Birmingham Bar Foundation, and Appellate Courts of Alabama, is

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<sup>39</sup> *Id.* at 26-27.

<sup>40</sup> *Id.* at 28-29.

<sup>41</sup> Brief for Appellant at 36.

<sup>42</sup> *Id.* at 38-43.

<sup>43</sup> *Id.* at 47-48.

<sup>44</sup> Brief for Appellee at 33.

<sup>45</sup> *Id.* at 34. Rule 801(d)(1)(B) allows for the admission of a prior statement by a witness when it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication of recent fabrication or improper influence or motive." Ala. R. Evid. 801(d)(1)(B).

<sup>46</sup> *Id.* at 34. The Advisory Committee Notes for Rule 801(d)(1)(B) state:

Even if such consistent statements are admitted, however, traditional case law admits them only for the nonsubstantive purpose of bolstering the credibility of the witness. E. Cleary, MCCORMICK ON EVIDENCE § 251 (3d ed. 1984). The present rule, however, admits such statements as substantive evidence of the truth of the matters contained therein.

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