

The Odds of Success in Appealing Criminal Verdicts in Georgia

In Georgia, between 4 and 5 percent of criminal appellants significantly improve their case outcome in the appellate courts and the resulting remand proceedings.

In my last post, I estimated that approximately 3% of defendants who appeal their criminal convictions significantly improve their case outcome by appealing. This was basically a back of the envelop calculation. For instance, I estimated that “about half” of decisions reversing or vacating (ROV) the trial court’s ruling significantly help the criminal defendant. If a doctor told me that the odds my cancer would go into remission were 12% and, if that happened, the odds it would stay in remission were “about half,” I’d start googling for about articles about palliative care and better statistics. In that spirit, I refined my calculations.

Before I go further, I should point out the limitations of my work. I am a practicing attorney, not an academic. My principal responsibility is handling paid cases, and I can’t spend 50 hours on a single blog post. The main difficulty in compiling Court of Appeals statistics is that many decisions are unpublished. Published opinions are easily searchable on legal research databases (I use Lexis), and searches can include such useful things as party name and case outcome. This lets you call up all the ROVs for a given period in seconds. While you can’t search by whether a case is criminal or civil, you can get a good proxy by searching for cases in which “State” appears in the parties’ names. This isn’t a perfect proxy because it would also return a case where “The State Bank of Hard Money” was a party. For 2014 decisions vacating or reversing trial courts, the above search yielded 80 criminal versus 6 civil cases. By excluding cases where “bank,” “inc.,” or “LLC” appeared in the party names, I refined this result to 80 criminal versus 3 civil cases. The three civil cases might cause a little noise as ROVs are somewhat more common in civil than criminal cases. This work could be greatly improved by reading the roughly 723 unpublished Court of Appeals cases from 2014 and tallying them by hand. (Without the benefit of head notes or case overviews, this would take roughly 70 hours even if you skimmed past the facts of each case). A Ph.D. candidate who wants her ideas to matter would do better to publish a monograph on the behavior of the Georgia Court of Appeals than to add to the pile on unread tomes on critical gender theory.

My Lexis search yields a solid estimate of the proportion of published decisions each year vacating or reversing the trial court.

Year	Published Criminal Cases	# Vacating or Reversing	Proportion
2010	598	106	17.8%
2011	599	83	13.9%
2012	529	104	19.7%
2013	494	119	24.9%

2014 376 83 22.1%

These numbers make appealing look promising. However, they are only the visible portion of the iceberg. Almost two-thirds of criminal appeals are now unpublished. These cases do not set precedent, but are just as important as published decisions to estimating the prospects of criminal appellants. We can extrapolate the Court of Appeals' behavior in unpublished decisions from its own 2013 statistics, which indicate that it decided 1104 criminal cases and vacated or reversed in 135 of these. Simple arithmetic tells us:

2013 Court of Appeals Outcomes

	Cases	Reversed or Vacated	%
Published	494	119	24.9%
Unpublished	610	52	8.5%
Total	1104	135	12.3%

I suspect a large number of ROVs in unpublished decisions were merger issues. There are so many merger cases that publishing on this issue is pointless and the reported decisions with merger issues almost always address other, more publication-worthy matters. But this is only a surmise.

We also need to know how many of the ROVs significantly help criminal appellants. Getting a concurrent sentence vacated is pretty useless. To sharpen our portrait of the Court of Appeals' behavior, I categorized the published 2014 reversals by holding. This is not entirely objective -- I welcome attempts at replication -- but most post-conviction attorneys will probably agree with my classification of the vast majority of cases.

In 2014, the 83 ROVs returned by my search broke down as follows:

Appeals by the State	16
Civil Cases (excluded from further analysis)	3
Reversals of Companion Charges	14
Merger Issues	7
Evidence Should Have Been Suppressed	7
Non-merger sentencing issues	7
Evidence Insufficient for Main Charge	5
Procedural Error During Motion	
For New Trial or Sentencing	3

Ineffective Assistance of Counsel	3
Evidentiary Ruling/Witness Issue	4
Improper Judicial Comment	2
Flawed Jury Instructions	2
Miscellaneous	10

Few of these rulings hurt the criminal appellant, but many did little to improve his situation. Most of the merger issues make little difference to the sentence the appellant will serve before being paroled. Ditto for the reversal of convictions on companion charges. Other sentencing issues were a mixed bag. One case held that a life without parole sentence for rape was illegal and reduced it to life with the possibility of parole. But many of these rulings merely changed 20 year prison sentences for simple child molestation into 20 year sentences with 19 years to serve in prison. For most prisoners, this will only convert a year of parole into a year of probation and subject them to greater fees. One case held that the trial court lacked jurisdiction to deny the appellant's motion to reduce sentence and should instead have dismissed it. That holding is useless to the appellant even though it counts as a vacated ruling.

The five appellants who convinced the Court of Appeals that the evidence was insufficient to support the most serious conviction hit the jackpot. The appellate process has resolved the main allegation against them in their favor and they cannot be retried. Similarly, most of the defendants who won on suppression issues have beaten the rap. These are mainly drug cases where a conviction becomes practically impossible when the drugs are suppressed. One of the two defendants who prevailed on speedy trial grounds also appears to have won his case, the other faces a remand because the trial court applied the wrong standard.

Most of the remaining defendants who had their cases vacated or reversed face a new trial. My best estimate of the prospects the 64 defendants in the published ROV appeals is:

Clear Victory or Major Sentence Reduction	13
Situation Not Significantly Improved	16
Remanded for New Trial	32
Trial Court Opinion Reinstated by Supreme Court	3

We still don't know how many of the defendants who get new trials ultimately receive good outcomes. Let's assume that half or 16 go on to achieve a material improvement over their original sentence and 16 do not (this may be optimistic). This suggests the following breakdown of outcomes among cases where the defendant appeals and gets the trial court vacated or reversed:

Significant Improvement for appellant	29	(45.3%)
No Significant Improvement	35	(54.7%)

Now we need to estimate what happened in the unpublished opinions. We know from the Court's 2013 statistics that the VOR rate was 24.9% in published cases versus 8.5% in unpublished cases. We also know there were 1099 criminal appeals filed in 2013, and that the number of filings has been steady for years. This suggests there were roughly 1099 dispositions in 2014, which squares nicely with the 1104 dispositions in 2013.

Finally, we must estimate the number of appeals that were filed by the state. The state prevailed in 15 out of 28 published opinions. Its appeals accounted for 18.8% all published VORs and 7.4% of all published decisions. If the state got 18.8% of the unpublished 2014 VORs this would equate to 12. Similarly, if the state had 7.4% of the unpublished affirmances in 2014, this would be 49 cases. The 12.3% overall VOR rate for 2013 suggests there were 134 VORs in 2014, including 54 (134-80) in unpublished decisions. By elimination, 42 of these must go to criminal defendants. If 44.8% of criminal defendants significantly improved their situation in unpublished VORs, that would equal 19 successful unpublished criminal appeals. The grand total is 49 significant improvements out of 1019 criminal appeals filed by defendants, a 4.8% success rate.

Now some caveats. From the standpoint of appellants, we made two optimistic assumptions. First, we assumed that the ratio of unpublished VORs that help a criminal appellant equals the ratio of published VORs that do so. This ignores my surmise that many unpublished VORs deal with merger. Second, we assumed defendants get a good outcome half the time on remand.

Another caveat. This analysis assumes that prisoners who prevail on merger issues and companion charges don't get much benefit from doing so. That is a simplification. Prisoners who prevail on merger issues and companion charges may improve their situation if they received long, consecutive sentences, and are ineligible for parole. But, for the most part, only defendants who received unusually severe sentences will be helped by litigating a merger issue. Even if the Court of Appeals put these defendants in a better position than the trial court, these are the defendants who had the most to gain through accepting responsibility in superior court rather than appealing.

In any event, my revised estimate of 4-5% "success" rate appears robust. The biggest uncertainty is what happens to the cases which were remanded for a new trial. However, plausible alternative assumptions don't swing the numbers much. When a case is remanded we know two things: (1) the evidence was sufficient to persuade a jury to convict; and (2) the evidence was not so overwhelming that the Court of Appeals held that the trial court's error was harmless. There are very few trial courts in the state where the criminal defendant wins over half of all jury trials. A second trial should be easier for the prosecution because the weakest cases for the state will result in acquittals during the first trial and the defendant has already revealed his defense. In addition, the prosecution maybe able to fix weaknesses in its presentation during the retrial, cut deals with co-defendants, finds new witnesses, plant jailhouse snitches, etc. What would the result be if the Defendant only gets a significant benefit from remand 40% of the time? This would reduce the proportion of total ROVs which significantly benefit the defendant to 40.6%, a total of 43 cases out of 1019 appeals by defendants. It yields a success rate of 4.2%.

Let's go a step further and say that only 1/3 of the unpublished VORs rather than 45% significantly help criminal appellants. This would give us a total of 40 out of 1019 successful appeals or a success rate of 3.9%.

Finally, if I miscategorized a net of 10 successful appeals as unsuccessful (a large error rate when there were only 64 published VORs where the defendant appealed and where I tried to split the difference) that would only affect the final number by one percentage point. If the denominator is off by 100 (again a rather large error) that would only affect the final result by half a point. Thus, we can say with a fair degree of confidence that, state wide, between 4 and 5 percent of criminal appellants significantly improve their outcome in the appellate courts.