IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEITH DURAN SANDERS

v.

STATE OF MISSISSIPPI

NO. 2004-KA-00625-COA

Appeal from Circuit Court of Neshoba County, Mississippi

REPLY BRIEF TO APPELLEE'S BRIEF

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ARGUMENT

APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

I.

The United States Supreme Court has long recognized that "the right to counsel is the right to effective assistance of counsel". McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441 (1970). The qualitative nature of effectiveness distinguishes this right from others protected by the constitution and renders the standard subjective. In the case before the Court, the dispositive nature of the testimony meant that the failure to object to it resulted in an absolute and certain level of prejudice to Appellant's sole defense, which level is objective and exceeds any reasonable limit.

The record in the case before the Court is replete with evidence that Appellant's having been shot in the brain affected his cognitive and motor abilities. His counsel pled the defense of insanity (C. P. 15) and presented only this defense.

Two errors of omission by said counsel contributed to Appellant's conviction. Appellant's trial counsel failed to request the appointment of an expert to advise them on this defense and to assist in evaluation, preparation and presentation of this defense, and failed to object to the testimony of Dr. Webb, the Court appointed psychiatrist, that Appellant "was not criminally insane" (T-137, 194).

The thrust of Appellee's response to Appellant's claim was that these decisions of

the trial counsel were strategic in nature and that the reviewing court should not second-guess trial counsel's strategy.

Dr. Webb twice testified that Appellant was not criminally insane. Because this testimony was a legal conclusion and thus went beyond Dr. Webb's area of expertise and because it concerned an ultimate issue of law, thus violating MRE 704, on objection this testimony would have been inadmissible. Roundtree v. State, 568 So. 2d 173 (Miss. 1990). Appellee makes no claim that this testimony was admissible over objection.

Appellee correctly states that there is a presumption that an Appellant had received effective assistance of counsel. Here that presumption is overcome.

In Johns v. State, 592 So. 2d 86 (Miss. 1991), the failure of Appellant's trial counsel to object to likewise damaging testimony was reversible error. The fact that the trial counsel failed to object to damaging testimony overcame the presumption of competence and met the first prong of the Strickland test, that the defendant must show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984).

Appellee asserts that, "the record fails to show any deficiency or prejudice on behalf of the trial attorneys."

The one ultimate issue to be decided by the jury was whether Appellant was legally insane (M'Naghten insane) at the time of the shooting. Dr. Webb's said direct examination and rebuttal testimony denied that there was any validity to Appellant's sole

defense and should have been objected to. There was no possible tactical or strategic advantage to be gained by permitting the entry of this testimony into evidence (by not objecting). The testimony was not only objectionable but also severely damaging. Thus, Appellant's trial counsel's performance met the second prong of the Strickland test, that the defendant must show that the deficient performance prejudiced the defense.

On this error alone, the trial counsel's performance was reversibly deficient and prejudicial.

The second error was the failure to ask the trial court for expert assistance per Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84L Ed. 2d 53 (1985), to advise Appellant's trial counsel on the behavioral effects of traumatic brain injury, to testify about the effects and to perceive and advise about the weaknesses in Webb's testimony.

The question of the behavioral effect of traumatic brain injury is an unusual one for a trial court (and likely a psychiatrist without military experience) to address. There was no possibility that Appellant's indigent defense trail counsel had the knowledge or experience to handle such an unusual type insanity defense without expert advice on the effects of such an injury and on Dr. Webb's approach, analysis and testimony. An expert might also testify about the results of his own examination.

The failure to request the assistance was certainly deficient performance by the trial counsel. Their lack of knowledge of behavioral effects of traumatic brain injury could best be helped by such an appointment and could not be remedied without it. Had

the trial court denied such a request, the court would have committed reversible error. This failure to request the assistance meets the first prong of the Strickland requirements.

The problematic aspect of this question of failure to request Ake assistance is whether it is sufficiently prejudicial to meet the requirements of the second Strickland prong. It is uncertain whether the provision of such an expert to the defense would have resulted in a different outcome.

The opinion in Strickland v. Washington (supra) at 466 U.S. 687 describes the second prong:

> **Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.**

Without knowledge of the effects of traumatic brain injury, Appellant's trial counsel were thereby unable to contest the only issue of the trial. The result of Appellant's trial may or may not have been correct but it certainly was unreliable and Appellant was denied a fair trial.

Appellee asserts (p. 6, Brief for the Appellee):

> The notion that the employment of another expert psychiatrist would have unearthed different results pertaining to the defendant's strategy is merely conjecture and has no merit. The court appointed, Dr. Webb had no interest in this case and was impartial to both parties. His professional opinion was given from an objective observation of the defendant during a routine interview. The findings of this esteemed psychiatrist should not be nullified because his opinion did not yield the results the defendant hope for.

This is an attack on the rationale of the holding in Ake. The correctness of the Ake holding is not before the Court.

The verdict should be overturned.

II.

THE COURT ERRED IN FAILING TO CONDUCT A COMPETENCY HEARING

The issue of whether the court erred in not holding a hearing to determine Appellant's ability to assist his attorney is covered by MRCCC 9.06 which makes the hearing mandatory.

Appellee (Brief for the Appellee, p. 7, 8) asserts that the issue is whether there is doubt about an accused's competence.

In the case before the court, the affidavit of Hon. Robert Brooks (C.P. 8) and the fact that Appellant had been shot through the brain provided such doubt and warranted the hearing. MRCCC 9.06 required it. Failure to hold the hearing was error. Howard v. State, 701 So. 2d 274 (Miss. 1997); Bridges v. State, 807 So. 2d 1228 (Miss. 2002); Underwood v. State, 708 So. 2d 18 (Miss. 1998); Rogers v. State, 222 Miss. 690, 76 So. 2d 831 (1955).

III.

THE COURT ERRED IN REFUSING JURY INSTRUCTION D-8

Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts submitted as a factual issue for

determination by the jury under proper instruction of the court. Adams v. State, 772 S. 2d 1010 (Miss. 2000); Hester v. State, 602 So. 2d 869 (Miss. 1992); Murphey v. State, 566 S0. 2d 1201, 1207(Miss. 1990); U.S. v. Hankins, 410 F. 2d 753(1969).

Appellee asserts that there was no evidence of Appellant's insanity justifying a jury instruction on insanity and then asserts that Instruction D-8 was duplicative of Instructions S-3 and D-10, (both insanity instructions granted by the Court) two positions in conflict with each other.

That an insanity instruction was justified was demonstrated by the fact that Instruction S-3 was propounded by the State.

That Instruction D-8 was not duplicative of the other two is shown by the fact that they make no reference to his withdrawal from medicine leading to insanity.

The proof showed that Appellant became unable to afford drugs prescribed for mental illness resulting from brain injury (T-148, 149, 174, 175, 139, 140, 141, 142) (Appellant had earlier been shot in the brain). As a result, the traumatic mental illnesses or defects that these drugs had addressed returned.

The verdict should be overturned.

RESPECTFULLY SUBMITTED,
KEITH DURAN SANDERS, APPELLANT

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CERTIFICATE OF SERVICE

I, EDMUND J. PHILLIPS, JR., Attorney for Keith Duran Sanders, Appellant, do hereby certify that on this date a true and exact copy of the Reply Brief to Appellee's Brief was mailed to:

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Keith Duran Sanders
APPELLANT

DATED, this the 20th day of August, 2008.

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