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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEITH DURAN SANDERS

v.

FILED
JUL - 1 2008
Office of the Clerk
Supreme Court
Court of Appeals

STATE OF MISSISSIPPI

NO. 2004-KA-00625-COA

Appeal from Circuit Court of Neshoba County, Mississippi

BRIEF FOR APPELLANT

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Oral argument is requested.

CERTIFICATE OF INTERESTED PERSON

KEITH DURAN SANDERS

v.

STATE OF MISSISSIPPI

NO. 2004-KA-00625-COA

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Hon. Jim Hood
Attorney General
State of Mississippi

Hon. Mark Duncan
District Attorney

Keith Duran Sanders
Appellant

Edmund J. Phillips, Jr.
Attorney of Record for Keith Duran Sanders

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

1) Appellant did not receive effective assistance of counsel in violation of the **Sixth Amendment.**

2) The Court erred in failing to conduct a competency hearing.

3) The Court erred in refusing jury instruction D-8.

STATEMENT OF THE CASE

The Appellant, Keith Duran Sanders, appeals his conviction by the Neshoba County Circuit Court on a charge of murder and a sentence of a life imprisonment in the custody of the Mississippi Department of Corrections.

Appellant's wife Rhoda Sanders had previously had an affair with Daryl Baxstrum and had a child by him. She also had a child by Appellant during their marriage.

In August, 2001, Appellant had been shot (T-146) in the head and had suffered extensive brain damage. He was temporarily paralyzed on his right side and was placed on a number of drugs to ameliorate resulting mental and personality disorders.

He regained the use of his right leg although he walked with a severe and pronounced limp. His speech was slowed and extensively impaired.

He was no longer able to do his job and lost it. His wife kicked him out of their mobile home and he moved back in with his mother.

Baxstrum began a series of confrontations with Appellant, physically attacking him (T-165, 170, 174) and trying to provoke fights. Because of his injury, Appellant was unable to attempt to defend himself and Baxstrum beat him severely.

At times he was unaware of his surroundings (T-167, 168): (from cross-examination of defense witness Willie Greer)

Q. But not crazy like he didn't know where he was or what he was doing?
A. Well, no, not like that. You know, he was like frightened, terrified, you know, stuff like that.
Q. It's like if something, if a picture fell off the wall over here and scared him, he figured out it was a picture that fell off the wall and not somebody shooting at him?
A. Well, at first, he wouldn't, but after he, you now, would look and see that picture fell and everything, he would be at his normal self, sure.
Q. So, he understood. The point I am trying to make is he understood where he was and who he was with and that type thing?
A. Sometimes and sometimes he didn't. That's the reason I was saying it have to be something concerning that medication or whatever he was taking. That I don't know.
Q. Tell me about a time he didn't know where he was or what he was doing.
A. After that fight at that party, he was blank. I mean he didn't know me until, you know, we all sat him down and was talking to him and everything. He didn't pass a lick. He didn't have a chance to pass a lick. He's disabled.
Q. But after the fight was over, he was able to figure out what happened?
A. After he came to his senses and stuff.
Q. And he started asking questions?
A. Asking questions about why he jump on him and stuff, and we told him.

Appellant had been taking certain prescribed anti-psychotic drugs, purchased by way of his wife's Medicaid entitlement, but, when she ordered him to leave their home, he did so. He lost the Medicaid privilege and he could no longer afford the medicine (T-174, 175):

He testified:

A. What about the incident that your sister, Ashley, testified about at your house? Tell us about that. What happened that day, Darryl driving by?
A. We was ---
Q. Do you recollect that?
A. We was on the porch, a little part of the porch. You know, this is the big porch and this is the little porch (demonstrating), and we was on the little porch, and he came by in a brown like truck, and he waved something that looked like a gun to me, and I just told Bay-Bay, you know, go in the house and don't worry about it. Wasn't no need in calling nobody, because by the time we called somebody, he would be gone anyway.
Q. Tell us whether or not that scared you.
A. Yes, sir.
Q. April 18th, 2003, could you tell us whether or not you were living afraid of Darryl Baxstrum?
A. I didn't hardly go nowhere, because I can't run, and people, you now, popping up behind me. You know, I just didn't want to take no chances trying to get off nowhere and get stranded.
Q. When you first came out of University Medical Center and came home, what medications were you taking?
A. Pain pills.
Q. Do you know the names of any of the medications you were taking?
A. I know three of them.
Q. What were they?
A. Zoloft, Nerantin, and Zyprexa.
Q. Do you know what milligrams of Zoloft you were taking?
A. I think 150.
Q. And did you take that medication as prescribed by your caregivers?
A. Yes, sir.

Q. Did there come a time when you no longer took that medication?
A. I ran out and my wife and I we – she throwed me out of my trailer out there. I got the Medicaid because she had a little boy, and it kicked in. I didn't have no insurance, and then I got the Medicaid, and when they throwed me out, you know, she told the Welfare or wherever she went, that I wasn't staying there and they cut me.
Q. So at the time you stopped living there, were you on medication anytime after that? After you were out of the trailer, living with your mother, from that time forward, were you on medication?
A. Yeah.
Q. You were? When did you stop taking your medication?
A. When I ran out.
Q. Okay. When was that?
A. Can't hardly remember. It was warm, I know. Probably July, August, I believe.
Q. Would that have been in 2002?
A. Yes, sir, or three. I don't know.

Because he could no longer afford the psychiatric drugs prescribed for him as treatment after he had been shot in the head (resulting in brain damage) Appellant could not take them.

In the presence of several people, Appellant walked up to Darryl Baxstrum and shot him. Baxstrum died.

Appellant was charged with murder by deliberate design.

SUMMARY OF ARGUMENT

1) Appellant's counsel's failure to request appointment of an expert to assist in preparation and presentation of his insanity defense and their failure to object to a court appointed psychiatrist's conclusion that Appellant "was not criminally insane" at

the time of the shooting were ineffective assistance of counsel depriving Appellant of his right to counsel in violation of the **Sixth Amendment to the United States Constitution.**

2) When the competency of a defendant is raised, the Court should conduct a hearing to determine whether there is a probability that the defendant is capable of making a rational defense.

3) A defendant is entitled to submit by instruction to the jury every defense he claims even if it is supported by only meager evidence.

ARGUMENT

1.

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

The **Sixth Amendment** right to counsel in criminal cases is a right to effective assistance of counsel." **McMann v. Richardson, 397 U.S. 751, 779, 90 S. Ct. 1441 (1970).**

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) established the standard for determining effective assistance of counsel. To establish reversible error, the accused must satisfy two requirements:

> First, the defendant must show that counsel's performance was deficient. This required showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. 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.

The first component is:

> Regarding the first component. The Court said that it could be no more specific than that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

Appellant gave proper notice of his defense of insanity. In the trial of the case before the Court, appellant's competence at the time of the offense was the only issue. A Court appointed psychiatrist who had examined Appellant for one hour in his office testified that Appellant was legally sane (T-137) and was "malingering" and pretending to be insane (T-133).

The one-hour interview of Appellant by the psychiatrist, Dr. Mark Webb, took place in the presence of a Deputy Sheriff, who could hear every question. At the time of the interview Appellant was being treated with the psychiatric drugs prescribed for him as treatment after he had been shot in the head (resulting in brain damage). When Appellant shot Baxstrum he was not and had not been taking the drugs because he could not afford them as a result of his separation from his wife and loss of access to her Medicaid privileges.

In his testimony Webb often accused Appellant of "malingering" (pretending insanity) because Webb felt Appellant was coy, (T-132, 133, 134), uncooperative and evasive in answering questions.

Certainly Appellant had been instructed by his counsel not to discuss his case in the presence of law enforcement officers, Appellant had been instructed by his counsel

not to discuss his case in the presence of the Deputy Sheriff, and Webb misinterpreted Appellant's evasiveness in following his Attorney's instruction as evidence of malingering.

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 the defense, and failed to object to the testimony of the Court appointed psychiatrist that Appellant "was not criminally insane" (T-137).

The landmark case of **Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84L ed. 2d 53 (1985)** was the first U.S. Supreme Court case to recognize a constitutional right of an indigent accused's right to expert assistance. The issue was whether an indigent was entitled to psychiatric assistance required to prepare an effective defense when his sanity at the time of the offense was in issue. The Court held that the due process clause of the **Fourteenth Amendment to the United States Constitution** entitled him to this assistance.

In the case before the Court, an expert on the behavioral effects of traumatic brain injury would have been able to testify about those effects, and would have been able to perceive and advise about weaknesses in Webb's testimony.

In the case before the Court, the Court appointed expert, Dr. Webb was accepted as an expert in the field of psychiatry, and testified for the State as follows (T-137):

Q. Finally, Dr. Webb, based upon your evaluation on September the 8th and the things you have learned today about the case and watching the testimony, can you give us an opinion as to the Defendant's mental state at the time this act was committed?

A. That he was not criminally insane. He knew the nature and quality of his actions at the time and also knew the difference between right and wrong at the time of the incident.

Further, on rebuttal Webb testified (T-194) that Appellant's mental illnesses were not "criminal insane".

Appellant's trial counsel's failure to object either time permitted this testimony to be entered into evidence. Upon objection it would have been inadmissible. **Roundtree v. State, 568 So. 2d 173 (Miss. 1990).** In **Roundtree** the Court held that the defendant's insanity was a mixed question of fact and law and that **M.R.E. 704** prohibits expert evidence which concerns ultimate issues of law.

In Roundtree at 568 So. 2d 1180, the Court held:

> **Whether Eula was M'Naghten insane at the time of the shooting was purely a legal question which the trial judge logically prohibited Ritter from answering.**

Ritter was a psychiatrist whose testimony that the Defendant was M'Naughten insane had been proffered by the Defendant and held inadmissible by the trial Court. The Mississippi Supreme Court held this testimony inadmissible, because it was a legal conclusion and thus went beyond Ritter's area of expertise and because it concerned an ultimate issue of law, thus violating MRE 704.

On objection in the case before the Court, this testimony would properly have been inadmissible for the same two reasons.

The failure to object in the case before the Court was deficient performance by the trial counsel, and prejudiced Appellant so severely that it left him without a defense.

As an indigent defendant, Appellant had counsel appointed to defend him (C.P. 50) and could not afford to employ a psychiatrist or neurologist to advise his counsel and to testify in his behalf. Although Appellant had given notice of the insanity defense, he could not present it and had no other defense.

The failure to object to Webb's testimony and to request expert assistance were deficient performance of counsel which deprived Appellant of his only defense.

NOTE: The undersigned knows Appellant's counsel to be fine, well qualified litigators; however, in the case before the Court their errors deprived Appellant of a fair trial.

ARGUMENT

II.

THE COURT ERRED IN FAILING TO CONDUCT A COMPETENCY HEARING

In the case before the Court, the Appellant's counsel moved for a psychiatric examination under **MRCCC 9.06** (C.P. 6) and filed a supporting affidavit (C.P. 8), and

the Court ordered a psychiatric examination "to determine his present ability to stand trial and assist his attorney in the defense" (C.P. 9).

The examination was conducted but no hearing was held to determine his ability to assist his attorney.

MRCCC 9.06 reads in pertinent part as follows:

> After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case shall then proceed to trial . . . . . .

When the competency of a defendant to stand trial is raised, the trial court should order a hearing to determine whether there is a probability that the defendant is incapable of making a rational defense. **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).**

Here the affidavit and the severe brain injury combined to warrant the hearing as a matter of a rule of reason. **MRCCC 9.06** requires it. Failure to hold the hearing was error.

The verdict must be overturned.

ARGUMENT

III.

THE COURT ERRED IN REFUSING JURY INSTRUCTION D-8

The court refused appellant's proposed jury instruction D-8 (C.P. 28). 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.

Jury Instruction D-8 read as follows:

> Even though voluntary intoxication by use of alcohol or illegal drugs is not a defense to crime based upon the negation of the defendant's specific intent, insanity produced by drugs administered as medicine, or withdrawal from such medicinal drugs, is a complete defense.
>
> Therefore, if you find from the evidence, or even have a reasonable doubt thereto, that at the time of the commission of the offense the Defendant did not have the mental capacity to realize and appreciate the nature and quality of his criminal acts and to distinguish between right and wrong due to withdrawal from legal drugs administered as medicine, then it is your sworn duty to return a verdict of not guilty by reason of insanity.

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.**

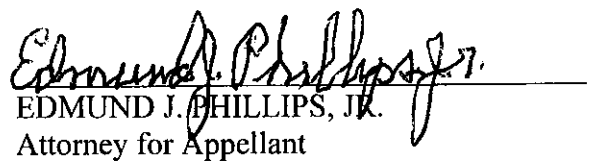
2d 1010 (Miss. 2000); Hester v. State, 602 So. 2d 869 (Miss. 1992); Murphey v. State, 566 S0. 2d 1201, 1207(Miss. 1990); U.S. v. Hankins, 410 F. 2d 753(1969).

The failure of the trial court to permit the jury to consider this defense was error. The verdict should be overturned.

CONCLUSION

Appellant's counsel's failure to request appointment of an expert to assist in preparation and presentation of his insanity defense and their failure to object to a court appointed psychiatrist's testimony that Appellant "was not criminally insane" at the time of the shooting were ineffective assistance of counsel depriving Appellant of his right to counsel in violation of the **Sixth Amendment to the United States Constitution.**

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to:

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