IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEITH DURAN SANDERS — APPELLANT

VS. — NO. 2004-KA-0625-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Keith Duran Sanders, defendant, was convicted in the murder of Daryl Baxtrum in 2003 by the Neshoba County Circuit Court. Defendant was sentenced to life in prison. Defendant sought appeal from this judgment which was dismissed when his attorney failed to properly execute the appeal process. His appeal, *in forma pauperis*, was reinstated and he filed a subsequent brief to which the State now responds.

STATEMENT OF FACTS

Defendant's wife, Rhoda Sanders, had previously had an affair with victim, Daryl Baxtrum. A child was bore from this affair, much to the chagrin of the defendant.

In August 2001, defendant suffered brain damage from a gunshot wound. Defendant was temporarily paralyzed on his right side, and was placed on pain killers to palliate the healing process. He later regained use of his right leg, but walked with a severe and conspicuous limp. His speech was also impaired as a result of the brain damage sustained by the gunshot wound. His affliction also cost him his job and relationship with his wife in that she kicked him out and removed his name from her medicaid entitlement, thus disabling him from being able to afford to continue his medications as prescribed.

Defendant alleges to have been frequently assaulted and ridiculed by the victim prior to the victim's death. In the presence of several people, Defendant walked up to Daryl Baxtrum and shot him, resulting in Baxtrum's death. The Neshoba County Circuit court found him guilty of murder by deliberate design and he was sentenced to life in prison.

SUMMARY OF THE ARGUMENT

Issue I.

APPELLANT DID RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL

Issue II.

THE COURT DID NOT ERR IN FAILING TO CONDUCT A COMPETENCY HEARING

Issue III.

THE COURT DID NOT ERR IN REFUSING JURY INSTRUCTION D-8.

ARGUMENT

Issue I.
APPELLANT DID RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that the failure of his trial counsel 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 defendant "was not criminally insane" at the time of the murder, constituted an ineffective assistance of counsel. The State disagrees and asserts that the defendant has failed to meet any burden in proving such a claim.

The standard of review for ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which was adopted by the Mississippi Supreme Court in *Gilliard v. State*, 462 So.2d 710, 714 (Miss.1985).

The test to be applied is: (1) whether counsel's overall performance was deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. *Taylor v. State*, 682 So.2d 359, 363 (Miss.1996); *Cole v. State*, 666 So.2d 767, 775 (Miss.1995). The defendant has the burden of proving both prongs of the test. *Id.*. The record fails to show any deficiency or prejudice on behalf of the trial attorney and this claim should be dismissed.

The level of scrutiny to be applied when measuring the performance of counsel against the deficiency and prejudicial prongs of Strickland is to look at the overall performance. *Taylor*, 682 So.2d at 363. Overall, one can surmise that the trial attorney did his best in attempting to defend his client. The record shows no evidence of tardiness or any other lack of performance by the attorney. In fact, he was able to successfully submit jury instructions for deliberation that included the insanity defense that the defendant intended to assert. The reality is, that there was no ineffective assistance of counsel, but merely a defendant who was hoping to pass off being insane to a court of law, to avoid being punished for a murder he maliciously committed.

In such instances as with the case at bar where an attorney has used his discretion in choosing the best alternatives for his client, there is a strong, yet rebuttable, presumption that the actions by the defense counsel are reasonable and strategic. *Veilee v. State*, 653 So.2d 920 (Miss. 1995). Neither party has extrinsic evidence that would negate this presumption. Therefore, we are to yield to the discretion of the acting attorney and give deference to his decisions as counsel for his client at the time in question. Trial counsel undoubtedly had his own trial strategy to protect his client that cannot be determined from mere assumption. For these reasons, the State fails to find any deficiency on behalf of the defendant's trial

attorney.

Under the second prong of *Strickland*, the prejudicial prong, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mohr v. State*, 584 So.2d 426 (Miss. 1991).

Defendant has failed to meet this burden. 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 hoped for. Further, Dr. Webb's testimony was to be taken as only his professional opinion and not as a finding of law; as prescribed by jury instruction D-4.

For these given reasons, the State believes that the defendant did receive effective assistance of counsel and has failed to meet any required burden to establish otherwise. The State requests that this issue be dismissed.

Issue II.
THE COURT DID NOT ERR IN FAILING TO CONDUCT A COMPETENCY HEARING

Defendant moved for a psychiatric examination which was granted by virtue of his asserted defense of insanity. Defendant was examined by Dr. Mark C. Webb, a qualified psychiatrist of the State of Mississippi. Dr. Webb interviewed the defendant for approximately one-hour, in the presence of a Deputy Sheriff who could hear the entire interview. Dr. Webb testified that he found the defendant to have been pretending to be insane, or malingering. Dr. Webb felt that the defendant was coy, uncooperative and evasive in answering questions. From Dr. Webb's assessment, it is his professional opinion that the defendant is not criminally insane, and was therefore fully capable of standing trial, and was aware of the difference between right and wrong during the time in which he committed this act. No other psychiatric evaluation has been conducted.

Whereas the circuit court chose to forego a competency hearing in this case, we fail to see any error in having done so. For purposes of reviewing a decision to forego a competency hearing, the Fifth Circuit Court of Appeals has suggested the following test: Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competence and alerted him to the possibility that the defendant could neither understand the proceedings,

appreciate their significance, nor rationally aid his attorney in his defense? *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir.1980). From the facts and previous proceedings of the instant case, there is no evidence of the judge having received any information, which when analyzed objectively, should have raised a doubt about the defendant's competence.

The trial judge graciously granted the defendant's motion to be evaluated by a psychiatrist. When the judge received the results of the examination, he then acted upon his best, reasonable judgment to not conduct a competency hearing based upon the findings of the evaluation.

The Mississippi Supreme Court has held that determination of what is a reasonable ground to believe that defendant is insane, so as to require competency hearing, rests largely within the discretion of the trial judge. *Richardson v. State*, 722 So.2d 481 (Miss. 1998). The trial judge [is] in the best position to make a determination whether there existed a reasonable ground for the court to order a competency hearing on its own initiative. *Jones v. State*, 902 So.2d 593 (Miss. App. 2004).

In light of the totality of these circumstances and points of Mississippi law, we contend that the lower court committed no error in denying the defendant a competency hearing. We ask this decision be affirmed.

Issue III.
THE COURT DID NOT ERR IN REFUSING JURY INSTRUCTION D-8.

Rejected Jury Instruction D-8 reads 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. (C.P. 28)

This instruction was correctly refused by the lower court. Defendant produced no evidence to support his contentions of being insane. The psychiatrist testified in his professional capacity that the medications the defendant had stopped taking would have had no adverse withdrawal effects. Further, the facts reveal that the defendant was aware of the hostile environment he entered into as he approached the scene of the incident in question. He fired multiple rounds at the victim, hitting him three times, which manifested a specific intent to murder the victim as he is charged.

While a defendant is entitled to every legal defense he asserts to be submitted as a factual issue, as held in *Adams v. State*, the language of that case provides there be at least "meager evidence." 772 S.2d 1010 (Miss. 2000). Here, the defendant has produced no evidence to support his contention that his withdrawal from prescription

medications is what caused him to be criminally insane and unaware of his actions at the time he killed the victim.

In reviewing a trial court's grant or denial of jury instructions, the standard of review is that the Supreme Court does not read the jury instructions in isolation, but instead it will read them as a whole. *Rushing v. State*, 911 So.2d 526 (Miss. 2005). A defendant is entitled to have jury instructions given which present his theory of the case; however, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law, to repeat a theory fairly covered in another instruction, or to be without proper foundation in the evidence of the case. *White v. State*, 842 So.2d 565 (Miss. 2003); *Davis v. State*, 909 So. 2d 749 (Miss. App. 2005).

Reading the instructions as a whole, as held in *Rushing*, one can plainly see that the components of Rejected Jury Instruction D-8, are already covered in approved instructions S-3, and D-10.

According to *White* and *Davis*, the trial judge properly exercised his sound discretion in refusing jury instruction D-8 because it would have repeated a theory that was fairly covered in another instruction. Further, the record shows no evidence that the defendant was in fact insane, and thus, lacks the foundation of evidence required to merit an instruction. For these reasons, we are able to conclude that the court did not err in refusing jury instruction D-8.

CONCLUSION

It has been settled that the defendant did in fact murder the deceased victim. The only issue before us now is to determine the defendant's mental state at the time of the murder.

The defendant, Keith Duran Sanders, was afforded a fair and speedy trial among a jury of his peers, who found beyond a reasonable doubt, that the defendant had willfully murdered Daryl Baxtrum. There is unbiased testimony from a qualified Mississippi psychiatrist, Dr. Mark C. Webb, that supports this conviction with his professional opinion that the defendant was not criminally insane at the time of the commission of this heinous murder. Testimony from witnesses who know the defendant in his present mental state, stated that he is still aware of his actions and knows right from wrong, despite being paranoid from time to time.

It was also resolved, that during his psychiatric evaluation, defendant was cognizant enough to recognize that he could potentially incriminate himself, and withheld certain information from Dr. Webb because a law enforcement official was present.

Based upon the arguments presented herein as supported by the record on appeal, the State asks this reviewing court to affirm the trial court's verdict of guilty, and see that Mr. Keith Duran Sanders serves his life sentence for the murder of Daryl

Baxtrum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 21st day of July, 2008.

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