

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED

Timothy Sharp

Vs

STATE OF MISSISSIPPI

MAY 22 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Appellant

No. 2006-CP-01407

Appellee

Appellant's Reply Brief

Appellant will request oral argument; Appellant's briefing may be unprofessional, and oral argument may be necessary.

Statement of the case

Timothy Sharp, pro se appellant, appeals the Itawamba County Circuit Court's denial of post conviction relief.

Statement of the issues

Appellee argues that appellant made a technical error in the appellate procedure by failing to see to it that a copy of the hearing transcript was included in the record for appeal. And appellee argues that, for that reason the trial court's ruling cannot be shown as error because there is no evidence in the record to support the claim.

Summary of the argument

Appellant will show that the appellees argument is irrelevant, and should be rejected.

Argument

The appellee follows the trial court's strategy. The appellee seeks to evade the main issue of appellant's claim. This appeal is not based on facts presented at the hearing. The trial court's strategy made the hearing void.

However, appellant did request a hearing transcript, even though he has no independent right to one, Fleming v. State, 553 So.2d 505. Appellant stated in his notice of appeal that, the supreme court may need a copy of the hearing transcript, and that appellant wants a copy also. (Record page 77). Appellant also asked the trial court clerk to take any other action necessary in the matter. Appellant has assumed that the court's copy of the record contain a transcript of the hearing.

Appellant's principle brief was filed in September of 2006, long before the record for appeal was prepared. On December 11, 2006, the trial court clerk notified all parties that the record was ready for examination and correction. (Record page 81). The record was not filed in the court until January 23, 2007. The appellee or any other party, Assistant District Attorney Dennis Farris, or appellant's post conviction counsel Lori Basham could easily have requested that transcripts of the hearing be included in the record. All parties knew what was stated in appellant's brief concerning the hearing, but they declined the opportunity to dispute appellant's claim that the hearing was inadequate. It is evident that appellee did not really want to show the transcript to the court. Appellant's claim about the hearing is undisputed. Appellant wanted a transcript to be shown, but appellant's request for a transcript was either ignored or denied.

(hearing) . .

This appeal does not rely on facts or evidence of the post conviction. This appeal involves evidence that was submitted to the trial court Judge sometime after the hearing. see (Exhibit 1). And facts and evidence presented at trial. Thereby, this appeal shows evidence that should have been presented at trial, but was not, due to ineffective assistance of counsel.

And there shows that the trial court's ruling on appellant's post conviction motion for relief was erroneous.

In the trial court's order denying relief the trial court did not mention any fact or evidence presented at the hearing. (Record page 71-73). Notice also that the trial court made no mention of having considered the medical records of prior examinations. The trial court actually insinuates that the medical records do not exist. The trial court's statements are proof that the trial court has avoided any discussion regarding another possible source of injury. The supreme court ordered a hearing for that purpose. (Record page 56-57). We know that appellant's post conviction counsel has stated that she sent the medical records to the trial court judge. ~~Exhibit 1~~ (Exhibit 1). We know that the medical records concern vaginal examinations, and we know that injury is mentioned in the records. We know that the trial court has ignored the issue of another possible source of injury.

One of the examinations was due to a bicycle accident, but the first page of that particular record is missing. Appellant sent a letter to his post conviction counsel, and the trial court judge asking that the error be corrected. Appellant showed clear evidence of a missing page. (Exhibit 2) Appellant did not get a response. It appears that the trial court is deliberately withholding evidence.

Appellant will now demonstrate that the prosecution concealed the same evidence at trial. At appellant's trial the prosecution's expert witness, Dr. Linda Chidester testified that she had the medical history of the alleged victim, and there had not been any previous physical examinations. See, (appellants exhibits, trial transcript page 43-44). However, appellant has shown that there were prior examinations. (vaginal examinations).

Dr. Chidester committed an act of concealing evidence, and perjury. As seen in appellant's principle brief, Dr. Chidester made other false statements also. Therefore proving that her testimony was unreliable.

Appellant's trial counsel's failure to conduct a pre trial investigation of previous medical examinations allowed Dr. Chidester to conceal favorable evidence. Holsomback v. White, 133 F.3d 1382, "Trial counsel was ineffective in failing to investigate the medical evidence, mainly failed to contact the family physician, which had examined the alleged victim since the time the alleged incident supposedly occurred. The court ruled that, "defense was sufficiently prejudiced by attorney's failure to conduct an adequate pre trial investigation that our confidence in the trial outcome is undermined," at 1388.

When a physician examines a 10 year old girl's vagina, the physician will naturally pay attention to the condition of the hymen and all other parts of the vagina area. We know with certainty that there were at least 3 physical examinations in that area. No signs of sexual penetration were found. If appellant's trial counsel had called the family physician to testify at trial, the jury have had an entirely different picture of evidence.

In this appeal appellant has shown evidence that is in direct conflict with the prosecution's version of evidence. Appellant has shown evidence of another possible source of injury. There is no doubt that appellant's trial counsel was ineffective assistance of counsel. There is no doubt that appellant's defense was prejudiced by his trial counsel's failures.

Appellant has shown that (1) the counsel's performance was deficient, and (2) the deficient performance prejudiced appellant's defense, and (3) but for counsel's unprofessional errors, there is a reasonable probability that the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 678; 104 S.Ct. 2052, 80 L.Ed 2d (1984)

The point to be shown in this appeal is that the trial court erred in denying relief. To do that appellant has shown medical records that point out another possible source of injury. Appellant has shown that his trial counsel was ineffective assistance of counsel at trial.

Appellant has shown that the trial court failed to consider the issue.

The appellee also complains that appellant raises other claims of ineffective assistance of counsel that should be ignored.

The post conviction hearing was limited. However, all issues of ineffective trial counsel are properly before this court.

The focus of inquiry should be on the fundamental fairness of the trial and whether, despite the presumption of reliability, the result is unreliable because of a breakdown in the adversarial process. Strickland v. Washington, 466 U.S. at 696, 104 S.Ct at 2069.

In appellant's case there was no real defensive action taken at any time, prior to trial, nor during trial.

Appellant went to trial totally unprepared. Appellant had no idea as to when the alleged act of sexual battery supposedly ~~happened~~ happened. And to this day, Appellant still don't know. Nobody knows. The indictment states that it happened sometime between July of 1996 and July of 2000. (Record page 50-51). The alleged victim testified that she had no real idea when it happened, other than she was 6, 7, or 8 years old. Which would have been at least 2, 3, or 4 years back. (Appellant's exhibits, trial transcript page 57-58) Apparently someone forgot to tell her when it happened. Her testimony was based on suggestion, instead of what she knew. Appellant is in prison for an alleged crime that nobody has any idea as to when it supposedly happened, not even the alleged victim. Appellant's trial counsel was content with that, he never raised one question about when it supposedly happened.

Conclusion

In appellant's motion for post conviction relief, appellant asked the trial court to set aside his conviction and sentence, and grant appellant a new trial, or in the alternative dismiss count one (1) of the indictment.

Appellant will ask this Honorable Supreme Court to reverse the trial courts judgement, and order a new trial, or grant appellant any other relief that this Court deems appropriate.

Respectfully submitted, this the 22nd day of May, 2007.

Appellant Timothy Sharp
Timothy Sharp K5328
Unit 30-D
Parchman, Ms. 38738

Exhibit (1.)

B

**Lori Nail Basham, P.A.
Attorney at Law**

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December 29, 2005

VIA: UNITED STATES MAIL

Mr. Timothy Sharp
Inmate #K5328
Unit 30-D
Parchman, Mississippi 38738

RE: POST CONVICTION RELIEF HEARING

Dear Tim:

I am in receipt of your letter in the above referenced matter. I am writing to inform you that I spoke to Judge Gardner regarding your case a few days after your hearing. He agreed to allow me to subpoena your daughter's medical records for the two (2) year period prior to your arrest. I subpoenaed these documents and had a nurse translate them for me. There was no mention in the records of a bicycle accident. However, there was some mention of a prior pelvic exam and some type of prior vaginal infection for which she received treatment. Per his request, I forwarded these documents and nurse's notes to Judge Gardner. As of today's date, the Judge has not yet issued an opinion on your hearing. I can only assume that he still has the matter under advisement. I will forward any information I receive to you.

In your letter, you asked that I forward you a copy of the transcript from your hearing. I can order the transcript for you, but I do not have one. The county will not pay for the cost of a transcript past your initial appeal. However, if you wish to purchase the transcript for yourself, please let me know and I will see that one is ordered.

Thank you for your help in this matter.

Sincerely,


Lori Nail Basham

LNB:ns

Exhibit 2.

To: Honorable Lori Basham
P.O. Box 1726
Fulton, Ms. 38843

Date 1-9-02

Re: (Medical records); Post Conviction Motion - Cause no. CV05-104 (G) I

Dear Lori

I have many times examined the medical records you sent, and have discovered evidence that atleast one page of the record is missing. I feel that it is important for me to inform you, Judge Gardner, and the medical center of this error, and ask that it be corrected. The particular missing page concerns the central issues of my case and it's absence is a serious matter. I have sent certain records, (labeled as Exhibits), to explain and show evidence of the missing record.

As you know I have explained that Amber had an accident, (crashed her bike), and was taken to the medical center because of a straddle injury. After a research of the legible words on the medical record dated 5-8-00, it proved to be a pelvic examination due to vaginal injury. However, the beginning portion of that record, which should state the cause of examination is missing. Note that each examination does not necessarily begin on a new page. See Exhibit-A, this record dated 5-8-00 also contains the beginning of the next record of examination, dated 5-10-00, at the bottom of the page. The beginning of each record list's vital signs and cause for examination. Now see Exhibit-B, this is a notice of absence from school due to illness, dated 5-5-00, and see Exhibit-C, this is a record of urinalysis procedure having been done on 5-6-00. It is made clear by these records that Amber had been to the medical center on 5-5-00, however there is no record of an examination on that date in the records you sent. The beginning of the record dated 5-8-00 is missing, and the record of examination dated 5-5-00 is missing. There is only one possible explanation, it is on the same missing page.

Exhibit 2.

Date 1-9-~~20~~07

I respectfully request that you will investigate this matter, and that you will send me a copy of the record of examination dated 5-5-00, and the beginning portion of the record dated 5-8-00.

Your assistance will be greatly appreciated.

Sincerely,
Timothy Sharp K5328
Unit 30-D, B-Zone bed 110
Parchman, Ms. 38738

cc: Honorable Judge Thomas Gardner 117
P.O. Drawer 1100
Tupelo, Ms. 38802

cc: Gilmore Fulton Medical Center
302 Hospital Drive
Fulton, Ms. 38843

Certificate of Service

This is to certify that I have this day caused to be mailed, via, United States mail, postage pre-paid, a certified copy of the foregoing brief to the following: Mississippi Supreme Court.

This the 22nd day of May 2007. Timothy Sharp

*Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, Ms. 39205*