

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
No. 2006-CP-01844-COA

COPY

FILED

EDWARD D. FLOWERS

SEP 18 2007

APPELLANT

v.

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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PRO SE PRISONER'S BRIEF

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
No. 2006-CP-01844-COA

EDWARD D. FLOWERS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF FOR APPELLANT

COMES NOW Edward D. Flowers, Prose, hereinafter referred to as the Appellant and respectfully files this his Reply Brief in the above styled and numbered cause,

And in support thereof, would show unto-wit:

I.

on its face, the state has again, failed to address Flowers' claims according to the merits. And in doing so, have disregarded Honorable Judge David Anthony Chandler's order directed to state to answer the issues raised in the Appellant's Brief on their merits.

II.

The Appellant contends and asserts that the Appellee could not and should not be allowed to invoke the procedural bar defenses of "(1) second and successive motions, (2) statute of limitations, (3) res judicata and (4) collateral estoppel", because the District Attorney's Office of Washington County, Mississippi was placed on notice that Appellant

Flowers had filed a post-conviction motion in the Circuit Court as proven by the Certificate of Service attached to the original motion. The state had a unlimited opportunity to assert its defenses in the trial Court but never chose to do so. Therefore, the Appellee cannot contend that trial judge was at fault at not requesting the State to submit a response to Appellant's PCR motion. Appellant Flowers would now show that the state's defenses has been forfeited by the Appellee in this present Appeal.

First and foremost, the Circuit Court Judge Ashley Hines did not contend at or upon initial review of Appellant's motion for post conviction, that Appellant's motion was successive, time-barred or prohibited by the Statute of limitations. See (R. Vol. pp. 30-32a). The Honorable Judge Hines simply reviewed the claims upon the merits as the order discloses. The Appellant does not have any knowledge as to why Judge Hines did not apply successive and time-barred rulings to his motion in the Circuit Court. But whatever its reasoning the government has now waived its defenses of successive motion, time barred, procedurally barred, and its defenses of collaterally estopped as a defense in this present appeal. And its waiver leaves the Court of Appeals to confront Appellant's claims on their merits and possibly under the Summary judgment standard. See Allison v. Shackleford.

533 F.2d 894 (4th Cir. 1978). Parties & prosecutors included, should select the arguments they do and don't make with great care. See Wilson v. O'Leary, 895 F.2d 378, 384 (7th Cir. 1990) (affirming the grant of a writ of habeas corpus).

Astoundingly, the circuit court judge in Appellant's case did not mention any prohibition of successiveness, time or procedurally barred and collaterally estopped in its original and initial judgment in the trial court.

Procedures/procedural rules apply to the government as well as to defendants. The Appellee has forfeited all of its defenses raised in the brief for the Appellee. This Court has exclusive power to grant summary judgment relief to Appellant. Milam v. State, 578 So.2d 272, 273 n/1 (Miss. 1991)

However, the terms of the post-conviction Act specifically authorize reliance on the Mississippi Rules of Civil Procedure for some proceedings such as summary judgment under Rule 56. Id. at 273 n. 1, see Miss. Sup. Ct. Rule 56, see Miss. Sup. Ct. Rule 22 (recognizing procedures set forth in Miss. Code Ann. § 99-39-1, et seq. (Supp. 2001) for post conviction relief.)

III.

Moreover, Appellant raised issues in his motion that were of a fundamental magnitude. It can be supported by sound legal principles that they were also meritable. Here, the Appellant will show that at least two of his claims were excepted from any procedural bar which may

otherwise be applicable in the present proceedings?

Appellant Flowers was denied due process of law where the State charged Flowers with two different offenses in the same indictment (simple or aggravated assault - Armed Robbery) and where state failed to prosecute Flowers under the lesser offense and first offense charged, but prosecuted under the greater offense which was also the second offense charged in the indictment.

The Appellant Edward D. Flowers is entitled to relief as a matter of fundamental right under the due process clause. Since the single count indictment in this case charged an additional aggravated assault offense which was the first offense charged and also, contained distinct and inconsistent language of the principal charge, that being Armed Robbery where the assault was not an element or constituent of Armed Robbery under Mississippi law, see: Thomas v. State, 930 So. 2d 1264 (Miss. App. 2005). Appellant Flowers was a sixteen-year-old juvenile and first time offender at the time of his sentencing. He was ignorant of the fact that the language of the indictment constituted a lesser offense and that his trial counsel Johnnie E. Walls, Jr., was ineffective at allowing Flowers to enter a guilty plea to a greater offense, being Armed Robbery, which was also the second offense charged in the indictment. "It was in every aspect, unfair to punish Appellant under Armed Robbery offense since it was a more serious crime and carried a stricter mandatory sentence

The law is clear that where an indictment charges more than one offense then the defendant should be prosecuted under the lesser offense. See:

Cunningham v. State, 478 So.2d 308 (Miss. 1985)

Appellant Flowers should have been prosecuted under the initial charge where the allegations of the indictment constitute two offenses. The lesser included should have been applied. Here the state, even after citing two different offenses in the indictment, sought and convicted Flowers on the greater offense. Such actions clearly denied Appellant Flowers fundamental due process of law and constitute plain error which should be open for collateral attack at any time. It is obvious that the Appellee has failed to acknowledge and recognize the significance of this issue and notice that it was meritable and also not subject to procedural prohibition under Miss. Code Ann. § 99-39-11(2) (Rev. 2007); § 99-39-11(3) (Rev. 2007); § 99-39-23(6) (Rev. 2007); and § 99-39-5(2) (Rev. 2007).

Here, the Appellant has demonstrated that his claims are excepted from the above procedural bars that the Appellee States to prohibit consideration of this present appeal. The Appellant asserts that he has in fact, overcome bar of successive writs, time limitations, res judicata and collateral estoppel in his November, 2005 post conviction filing where he raised fundamental state constitutional right on the above demonstrated ground for relief. In Gray v. State, 819 So.2d 542 (Miss. App. 2001),

this Honorable Court of Appeals held: "Errors affecting Fundamental Constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration on successive petition for post-conviction relief," - Quoting Lockett v. State, 583 So. 2d 428, 430 (Miss. 1991)).

The Constitutional issue here concerns the indictment and the charges Appellant Flowers plead guilty to in the Circuit Court.

The actions of the trial court in its decision to try Flowers under the greater charge in the indictment denied Flowers due process of law and is equivalent to an illegal sentence under Mississippi law. Appellant Flowers properly brought this issue before the Court where he stated "whether trial court erred in failing to find that Edward Flowers was subjected to a denial of due process of law where the trial court failed, during the guilty plea proceedings to advise Flowers of his right to appeal the sentence which the court imposed, directly to the Supreme Court in view of the sentence being a harsh sentence imposed upon a first time offender and where the law allowed the court to impose a lesser term." In the past there has been a statutory prohibition to direct appeals from guilty pleas under state law. The state supreme court has since enacted a limited statutory exception to this general rule. This exception is outlined in Burns v. State 344 So. 2d 1189 (Miss. 1977) and Campbell v. State 743 So. 2d 1050 (Miss. App. 1999).

The Provisions are equally applicable to Appellant's case as demonstrated in the Brief for Appellant and herein.

CONCLUSION

Appellant Flowers respectfully submits that based on the authorities cited in the Appellant's Brief and Reply Brief for Appellant, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial Court in regards to the postconviction relief motion.

This case warrants a remand to the trial Court for resentencing or an Evidentiary Hearing. Appellant also prays for summary judgment in this matter.

Further, the Appellant Edward Flowers, fervently asks this Honorable Court to exercise its inherent powers to notice any plain errors not identified or distinctly specified by Appellant.

By: Edward Flowers

EDWARD P. FLOWERS

CERTIFICATE OF SERVICE

I, Edward Duane Flowers, the Prose Appellant in the foregoing proceedings do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply for Appellant to the following: Ms. Betty W. Sephton, Supreme Court Clerk, P.O. Box 249, Jackson, MS. 39205-0249.

RESPECTFULLY SUBMITTED,
Edward P. Flowers