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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FILED

GENARRO D. SHUMPERT A/K/A

JUN 11 2007

GENARRO SHUMPERT,

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SUPREME COURT
COURT OF APPEALS

Appellant,

v.

NO. 2006-CP-02164-COA

STATE OF MISSISSIPPI,

Appellee,

BRIEF OF APPELLANT

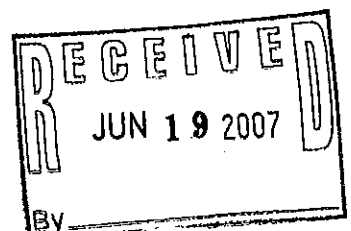
GENARRO SHUMPERT

WCCF# N8253

Post Office Box 1079

2999 US HIGHWAY 61 NORTH

WOODVILLE, MS 39669



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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Appellant,

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NO. 2006-CP-02164-COA

STATE OF MISSISSIPPI,

Appellee.

CERTIFICATE OF INTERESTED PARTIES

The undersigned Appellant, Genarro Shumpert, pro se, 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 this Court may evaluate possible disqualifications or recusal.

1. STATE OF MISSISSIPPI

2. GENARRO SHUMPERT

Done this 11th day of June, 2007.

Genarro Shumpert, pro se

GENARRO SHUMPERT, pro se

Post Office Box 1079

2999 US Highway 61 North

Woodville, MS 39669

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER DEFENSE COUNSEL WAS INEFFECTIVE WHEN COUNSEL FAILED TO OBJECT TO THE JURY COMPOSITION, THUS, ALLOWING PLEA TO BE COERCED AND INVOLUNTARY IN VIOLATION OF DUE PROCESS OF LAW DUE TO THE MISREPRESENTATIONS COUNSEL AND THE COURT AND WHETHER TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF.

STATEMENT OF THE CASE

On or about February 15, 2004, defendant Genarro Shumpert was arrested and charged with Kidnapping 3 counts, Aggravated Assault. 1 Count, burglary and larceny of a dwelling 1 count, Carjacking 1 count and armed robbery 3 counts. (Indictment c.p. 14-19). A jury trial was commenced on February 22, 2005, in which an all white jury was empanelled. However, after the testimony of two(2) of the State's witness, Debbie and Jamie Malone, the trial was interrupted and the defendant entered into a plea agreement in which for certain considerations, defendant agreed to testify for the State at the jury trial of his co-defendant Kenneth Lee Taylor.

Within the statutory period for filing defendant filed his motion for post-conviction collateral relief pursuant to M.C.A. 99-39-1 et seq. (C.p. 2-13). Said motion was dismissed on December 15, 2006. (C.p. 54-55).

With liberal application of the "prison mailbox rule" defendant asserts the present appeal is timely.

STATEMENT OF THE FACTS

A review of the record will show that on February 12, 2004, there was a home invasion committed at the residence of Thomas Malone and family (Debbie and Jamie) for the purpose of committing a burglary. During the alleged invasion certain property of the victims were taken, the victims allegedly kidnapped, assaulted, their vehicle stolen and the victims robbed at gun point; all of which forms the basis for which the defendant stands convicted.

On February 15, 2004, a jury was empanelled and trial of the defendant was commenced, however, after testimony of two (2) of the State's witness (Debbie and Jamie), trial was interrupted and a plea agreement were entered into by the defendant.

As part of the plea agreement defendant agreed to testify for the State in the trial of co-defendant Kenneth Lee Taylor, subsequently, sentencing of the defendant were postponed until until August 5, 2005.

SUMMARY OF THE ARGUMENT

It is Defendant's contention that trial Counsel was ineffective in his failure to file certain motions, to object to the composition of the jury and the empanelling of an all white jury. That counsel's performance permitted the Court to deny the Defendant his rights to Due Process of Law therefore, prejudicing the defense of the defendant.

Defendant entered into a plea agreement when it became clear that Counsel's inability to perform and function as counsel for the defendant as guaranteed by the Sixth Amendment to the United States Constitution. Therefore, the resulting plea became the product of coercion and was not made knowingly, intelligently and voluntarily.

ARGUMENT

I.

WHETHER DEFENSE COUNSEL WAS INEFFECTIVE
WHEN COUNSEL FAILED TO OBJECT TO THE
THUS, ALLEGED PLEA TO BE COERCED AND
INVOLUNTARY IN VIOLATION OF DUE PROCESS
OF LAW DUE TO THE MISREPRESENTATION
COUNSEL AND THE COURT AND WHETHER
TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF.

A criminal defendant is entitled to the effective assistance of counsel not only at trial, but at all critical stages. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alf Mann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); U.S. Const. Amend. VI, XIV. If the attorney makes serious mistakes which could affect the verdict, reversal is required even if the attorney was generally competent.

Under Strickland, supra, the United States Supreme Court adopted a two-prong test for determining whether counsel was ineffective. First, was counsel's performance deficient and Second, whether the deficient performance prejudiced the defense.

Factually this case is straightforward. Defendant Benarro Shumpert was charged with and pled guilty to 3 counts of Kidnapping, 1 count of burglary and larceny of a dwelling, 1 count of carjacking and 3 counts of armed robbery.

Had it not been for the composition of the jury pool, the empanelled jury itself and the implied misleading by counsel and the court that cooperation with law enforcement and testifying for the State in the trial of co-defendant, Kenneth Lee Taylor would result in leniency from the Court, defendant would not have pled guilty. (C.p. 45).

The question presented is whether or not the plea of guilty was involuntary or, in the alternative, was based on the inadequate assistance of counsel.

The law is equally clear. An involuntary plea is unconstitutional. Marchibroda v. United States, 386 U.S. 487 (1962). Similar to the ruling in Blackledge v. Allison, 431 U.S. 63 (1973), this Court has also ruled that a plea induced by misrepresentation of defense counsel and prosecutor may be involuntary. Courtney v. State, 704 So.2d 1352 (Miss. 1997).

Where a defendant's plea of guilty is coerced or otherwise involuntary, any judgment of conviction

entered thereon is Subject to collateral attack. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Myers v. State, 538 So.2d 174 (1991) (quoting Boyking, supra). To be enforceable, a guilty plea must emanate from accused's informed consent. See generally Vittitoe v. State, 556 So.2d 1062 (Miss. 1990). The question whether a plea of guilty was voluntary and knowing one necessarily involves issues of facts.

Where defense counsel advises the defendant not to disclose to Court implied promises of a guilty plea, that plea may be attacked.

If the Court finds the guilty plea entered in this case by the defendant were involuntary as defined by existing law, then not only the Defendant's sentences, but also his guilty pleas, must be vacated. See Stevenson v. State, 674 So.2d 501, 506 (Miss. 1996); Patterson v. State, 660 So.2d 966, 969 (Miss. 1995).

The implied incentive by the Court for the defendant's cooperation with the State in providing testimony against co-defendant, Kenneth Lee Taylor (C.p. 23) was indicative of the Court's intention to take into consideration defendant's cooperation when it postponed sentencing of defendant until after the trial of Mr. Taylor. This allegation, in light of other

circumstances of this case, raised the serious constitutional question whether the guilty plea was knowing and involuntarily made. See Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 74 (1970).

This conclusion by the Court that a plea may be involuntary, if it is the result of misrepresentation made by defense counsel as to an implied promise by the judge or prosecutor, is the same as that of decisions by federal courts. United States ex rel. Thurman v. Mancusi, 275 F.Supp. 568 (S.D. N.Y. 1967); Mosher v. LaValle, 351 F.Supp. 1101 (S.D. N.Y. 1972), affirmed 491 F.2d 1346 (1974); United States ex rel. Oliver v. Vicent, 498 F.2d 340 (2nd Cir. 1974); Tarnabine v. Warden of Louisiana State Penitentiary, 331 F.Supp. 975 (E.D. La. 1971).

It is also clear that a defendant's acknowledgment of voluntariness at his plea proceedings cannot be utilized on review as conclusive proof that the plea was in fact voluntary. Fontaine v. United States, 411 U.S. 213 (1973).

See Rhinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977) for a discussion of the totality of circumstances test of determining whether or not a plea of guilty

was not voluntary. The Court also discussed the question of competence of counsel. It held counsel was inadequate for, inter alia, his failure to properly inform defendant of the consequences of his plea of guilty. Akin to *Rhinehart, supra*, is the instantaneous decision of counsel to discontinue trial and allow defendant to plead guilty absent the benefit of securing a favorable position for defendant's cooperation and testimony.

Therefore, the plea of guilty in this case was based on misrepresentation of counsel and court was involuntary. The problem being implied comments from the Court and silence on the matter by the State.

An accused in a criminal prosecution is entitled to the effective assistance of counsel. Tollett v. Henderson, 411 U.S. 258 (1973). A guilty plea which is produced as a result of ineffective assistance of counsel is unconstitutional. *Henderson, supra*; *Mosher, supra*.

A duty of defense counsel to truthfully advise his client is basic to the adversary system. The American Bar Association Standards Relating to the Administration of Criminal Justice have applicable sections. The standards relating to the plea of guilty include the following:

"3.2 Relationship between defense counsel and client.

"(a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant.

"(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching the decision." (Emphasis added.)

The standard is reinforced by Section 6.2 of the standards relating to the defense function which states:

6.2 Conduct of Discussions.

"(a) In conducting discussions with the prosecutor the lawyer should keep the accused advised of the developments at all times and all proposals made by the prosecutor should be communicated

promptly to the accused."

Thus, it is clear that the defense counsel has a duty to truthfully advise the defendant of the position adopted by the prosecutor and the Court denied Defendant of the effective assistance of counsel.

Whether the Constitutional deprivation is characterized as a denial of Due Process of Law because of guilty plea was involuntary, or inadequate assistance of counsel which denied Defendant Due Process of Law, the questions are so closely related that the authorities discussed them together. See, e.g. Mosher v. LaValle, 491 F.2d 1346 (2nd Cir. 1974).

Though the test for actual or apparent bias is applied consistently, Circuit Courts will frequently phrase it differently. See, e.g. U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) (whether "the facts asserted provide what an objective, knowledgeable member of the public would find to be reasonable basis for doubting the judges impartiality," (quoting In re Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001)). The fact that trial judge had frequent visits to the establishment of the victims presents a question of intimate association thus, rendering his ability to rule impartial impossible.

CONCLUSION

For the foregoing reasons as stated above, the decision of the trial court Dismissing Motion For Post-Conviction Collateral Relief should be vacated in the interest of justice and remanded back to trial court for New Trial or in the alternative, Evidentiary Hearing.

Dated this 11th June, 2007.

Genarro Shumpert

GENARRO SHUMPERT

Post Office Box 1079

2999 US Highway 61 North

Woodville, MS 39669

CERTIFICATE OF SERVICE

I, Genarro Shompert, do hereby certify that
a true and correct copy of the above and foregoing
Brief of Appellant was deposited in the U.S. mail,
postage prepaid this 11th day of June, 2007, and
properly addressed to:

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39202-0220

Genarro Shompert
Genarro Shompert