IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MAURICE GRAY — APPELLANT

V. — CAUSE NO. 2007-CA-0160-COA

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM BOLIVAR COUNTY CIRCUIT COURT
DISTRICT 2

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 Court of Appeals may evaluate possible disqualification or recusal.

1. Maurice Gray, Appellant
2. State of Mississippi, Appellee
3. Robert Sneed Laher, Counsel for Maurice Gray, Appellant
4. Jeffrey A. Klingfuss, Special Assistant Attorney General, Counsel for Appellee
5. Judge Albert B. Smith III
6. Laurence Mellen, Bolivar County District Attorney

This the 14 day of April 2008.

Robert Sneed Laher

ROBERT SNEED LAHER, MSB NO. [redacted]
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MAURICE GRAY — APPELLANT

V. — CAUSE NO. 2007-CA-0160-COA

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S BRIEF

I.

STATEMENT OF THE ISSUES

WAS IT INEFFECTIVE ASSISTANCE OF COUNSEL OF THE TRIAL COUNSEL, FOR FAILURE TO TRANSCRIBE RECORDING OF PRELIMINARY HEARING?

II.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Defendant was convicted of Murder and Aggravated Assault, which was affirmed on direct appeal. Gray v. State, 846 So.2d 260 (Miss. App. 2002). Certiorari was denied by the Mississippi Supreme Court. Subsequently a motion for post-conviction relief was filed and granted by the Mississippi Supreme Court.

A hearing was held at which Defendant was represented by counsel. Subsequently, the trial court denied relief by order with findings of fact and conclusions of law. (Order denying relief, c.p. 105-07).

Pursuant to request Defendant was granted an out-of-time appeal of the denial of post-conviction relief.

B. Statement of the Facts

Fact relevant to the facts of the murder and aggravated assault are in the opinion of the Court of Appeals. Gray v. State, 846 So.2d 260 (Miss. App. 2002). Subsequent facts are mostly procedural and are succinctly laid out by appellate counsel.

III.

SUMMARY OF THE ARGUMENT

It was ineffective assistance of counsel for the trial counsels failure to transcribe the recording of the preliminary hearing.

IV.

ARGUMENT

A. Was it ineffective assistance of counsel of the trial counsel for failure to transcribe recording of Preliminary Hearing?

FAILURE TO TRANSCRIBE RECORDING OF PRELIMINARY HEARING

During the trial of this case, the State of Mississippi called Alonzo "B.J." Cooper as a witness. Cooper was the alleged victim of the count charging the Defendant with aggravated assault. Additionally, Cooper was the sole true eyewitness to the events surrounding the murder count. Prior to trial, the Defendant had requested and conducted a preliminary hearing wherein Cooper had testified. A tape recording was made of this hearing including the testimony of Cooper. It is undisputed that such a hearing took place, that it was recorded and that Cooper in fact testified (R. at 23-25). One of the more significant revelations obtained from Cooper during said hearing was the fact that he and Ladell Lay probably did drive by Maurice Gray's girlfriend's home earlier in the day of the shooting (R. at 23). This fact was also not disputed during the evidentiary hearing (R. at 23). This fact was significant in that Gray's primary defense at trial was that he acted in self-defense. Further, that the requisite fear was instilled not only by the actions of Cooper and Lay during the final confrontation, but also due the numerous instances where Lay and Cooper drove by Gray's girlfriend's home earlier in the day (R. at 23).

Several defense witnesses testified during trial to the "gun-like" gestures made by Cooper and Lay during the drive-bys (R. at 1-20). The testimony adduced at trial indicated that they occurred at a time when Gray was outside the home and holding his small child (R. at 1-20). Gray himself testified that these actions placed him in fear for his own safety as well as that of his child and girlfriend (R. at 1-20).

The gun-like gestures and the multiple instances wherein Cooper and Lay drove by the residence can only be seen as threats of a most serious and deadly nature. It is inexplicable as to why two (2) acquaintances of the Defendant would take such action unless they intended to instill fear. The fear Lay and Cooper obviously intended was that the Defendant and his family would inevitably suffer some deadly harm at the hands of Cooper and Lay. The direct threat caused by the actions of Lay and Cooper certainly would explain the Defendant's decision to attempt to discuss the issue with them later that same evening. As such, Cooper's preliminary hearing testimony was incredibly material to the self-defense claims of Gray. The testimony explained Gray's fear of Lay and Cooper, the need to confront them prior to any harm befalling his child or family and his knowledge that Cooper and Lay intended to do him harm. Cooper's testimonial admission that he and Lay drove past Gray, his child and girlfriend thus was material, probative and essential for the defense.

If counsel for the Defendant had acted properly and in a professional manner, he, at the very least, would have had the preliminary hearing tape transcribed. The transcription would

then have been available for use in preparing for trial and potentially impeaching Cooper should he deviate from his prior testimony during trial. Sadly, not only was there no transcription, there was no tape (R. at 23, 25).

According to the testimony adduced at the evidentiary hearing, Attorney Bogen recorded the preliminary hearing. The tape of this recording was delivered to Attorney Walls when he took over as counsel for the Defendant. At no time was the Defendant given a copy of this tape or a duplicate. There is no evidence that the tape was transcribed. How could any argument be made that Attorney Walls was prepared for a murder trial when he failed to even make a transcript of the tape of the preliminary hearing. This is even more damning when one considers the fact that Cooper, the primary witness against the Defendant actually testified at the hearing. The fact that no tape or transcript exists shows how little preparation was done for this case. Counsel must ordinarily investigate possible methods for impeaching prosecution witnesses, and failure to do so is sufficient to prove ineffective assistance of counsel. ***Strickland v. Washington,*** 466 U.S. 668, 690-694 (1984).

Had a transcript or the tape been available, imagine the difference in how Cooper's testimony would have been perceived. Cooper flatly denied ever driving by the home, either with or without Lay (R. at 1-20). Cooper further testified that the Defendant was not provoked or threatened by either he or Lay (R. at 1-20). Again, Cooper represented the sole eyewitness to the shooting. As such, his credibility was paramount and the credulity of his testimony pivotal.

Had counsel been prepared, not only could he have confronted Cooper with his inconsistent earlier testimony. At the least, his credibility would have been damaged beyond repair. At best, Cooper would have had to retract and/or correct his direct examination testimony and admit that he and Lay had in fact driven by the Defendant's girlfriend's home earlier in the day. When confronted with his obvious lie on direct, Cooper would then have had to admit to making the threatening gestures and the corresponding fear instilled in the Defendant and his family. The crux of the self-defense claim would have been made before the Defendant had ever put on a witness. There is simply nothing more material in a murder case where the Defendant is claiming self-defense. Even without the admission, the jury, upon learning Cooper had lied as to a material fact on direct, would have discarded the whole of his testimony. This would have left the jury with the Defendant's version of the events as its sole barometer as to what really happened that evening.

Surely a Defendant confronted with a murder charge should enjoy this modest modicum of preparation. Surely an attorney who fails to perform such a modest task be labeled as ineffective. Surely a prosecution witness who so obviously lies on direct examination be confronted with the truth when a man's life and freedom rest in the balance. Surely anyone knowing that the chief accuser against a defendant was a liar would have serious doubts about the validity of a conviction based on the same. An American citizen and indeed all American citizens deserve more. Gray deserved a fair trial. Gray did not get a fair trial due to Walls ineffectiveness.

B. FAILURE TO ADEQUATELY PREPARE

In order to adequately prepare for trial, counsel must have meaningful discussions with the client. This is an axiom that cannot be avoided any more than death or taxes. There simply is no substitute for face to face conversation between a defendant and his attorney concerning strategy, facts and the law. Certainly, no doctor, or patient for that matter, would feel comfortable embarking upon a complicated surgical procedure or course of treatment without lengthy discourse concerning the different facets, complexity, risks associated and potential outcomes. Additionally, how would the treating physician know what method of treatment to provide unless she was fully advised by the patient as to what was wrong? The case at bar presents with the equivalent of a surgeon performing life or death surgery without ever having asked the patient what was wrong. Prior to the trial of this cause, trial counsel and the Defendant had met twice (R. at 23). The first meeting was to retain Mr. Walls; a brief encounter where presumably money exchanged hands. This was done at a time when Walls did not know anything about the facts of the case, had not been privy to any discovery nor attended any hearings. The second and final meeting occurred at the Bolivar County Jail. At this meeting, Walls dropped off the discovery to the Defendant and advised that he would return to discuss later. "Later", if it ever occurred, must have been during voir dire as Walls never came back to

visit prior to announcing ready for trial. Using the surgeon example, imagine the difference between diagnosis, treatment and prognosis for the doctor who actually discusses the symptoms with his patient before taking up the scalpel and administering anesthesia. Is there any doubt that the prepared surgeon would produce a different result than the doctor who simply shows up and starts cutting? There is a reason why discussion and counseling are required.

Although argued above, the fact that no transcript was ever made of the preliminary hearing buttresses Gray's claim that Walls was woefully unprepared for this trial. In fact, it is a legal certainty that he was not. Another example was Walls' failure to prepare and file pretrial motions (R. at 26-27). A cursory reading of the discovery would have revealed the state would rely on Gray's prior arrest to establish motive. That same scan would have shown that the state was hitching their wagon to the alleged "threats" the Defendant made prior to the shooting. Any given fifteen (15) minutes of any evidence class would indicate that both of these subjects were objectionable and needed to be addressed prior to the morning of trial. The fact that Walls stood by and remained silent until the moment of trial had arrived reveals a dearth of preparation that severely prejudiced Gray. It is the same as running the 400 meters and spotting the field the first 300. Imagine the difference in this trial had Walls filed the necessary pretrial motions and obtained hearing on the same in advance of voir dire. At the very least Walls would have understood where the state was going and the type of extra-curricular proof they were relying on. Without question, the trial court would have had more and better research to rely upon in ruling

on admissibility. Instead, the court was confronted with little or no case law and a prosecutor who was claiming that the state was not going to use the questionable proof for inadmissible purposes (R. at 26-27). The result was a fiasco where the state used their case in chief as a laboratory for producing second and third-hand hearsay. Further, Gray was faced with defending himself both as an accused murderer as well as a drug dealer. The state actually spent more time and more witnesses establishing this incredibly prejudicial "fact" than on what actually occurred between Cooper, Lay and the Defendant.

The reason we have the indictment process is to advise a defendant of what he is charged with and what he is not. Had the state somehow passed an indictment through which alleged both drug dealing and allegedly murdering Lay, the argument would be different, but the result no less corrupted. The only chance at fairness Gray had, in the face of such tactics designed to pervert justice, was counsel who was prepared with the facts and the law. Walls brought neither when he appeared for trial. The result is Gray did not receive a fair trial. With adequate preparation, consultation and research, the result would have been very different. Adequate preparation, consultation and research would have displayed for the jury the artifice that was the state's case.

All other issues were contained and covered in Appellant's Brief filed on November 30, 2007.

Respectfully submitted, this the 14 day of ~~May~~ April, ~~2006~~ 2008.

Robert Sneed Laher

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CERTIFICATE OF SERVICE

I, ROBERT SNEED LAHER, do hereby certify that I have this day served by Federal Express, postage prepaid, and electronic service, a true and correct copy of this document to the following:

Judge Albert B. Smith III
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Honorable Laurence Mellen
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This the 14 day of April, 2008.

Robert Sneed Laher

ROBERT SNEED LAHER