

COPY

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2007-CA-00330-COA

LAWRENCE KIRBY PAYNE

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

FILED
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SUPREME COURT
COURT OF APPEALS

REPLY BRIEF OF THE APPELLANT

Appeal from Judgment denying Motion for Post Conviction Relief in the
Circuit Court of Desoto County, Mississippi

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Lawrence Kirby Payne, Appellant, requests oral argument in this cause pursuant to MRAP 34. Payne asserts that his case is excepted from the three (3) year statute of limitations of Miss. Code Ann. §99-39-5(2) because he was denied a fundamental right during the proportionality analysis during his sentencing hearing. Oral argument will be invaluable to the Court in understanding the facts that support this argument.

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I. INTRODUCTION

The State of Mississippi (“State”), Appellee, argues in its brief that Payne’s motion for post conviction relief is time barred. The State further argues that there is no merit to Payne’s claim of ineffective assistance of counsel. Payne will address these points in the argument below.

II. ARGUMENT

A. THE DENIAL OF A FUNDAMENTAL RIGHT EXCEPTS PAYNE’S CLAIM FROM THE STATUTE OF LIMITATION OF MISS. CODE ANN. §99-39-5(2).

The basis of the State’s argument for affirmance of the decision of the trial court is that Payne’s claim is time barred. The State opines that because the motion for post conviction relief was filed more than three (3) years after the entry of the judgment of conviction, it is untimely under Miss. Code Ann. §99-39-5(2).

Payne maintains that he was denied a fundamental right during his sentencing. During the sentencing hearing the Court stated that “considering the evidence before the Court, the evidence today, *the evidence brought out at the Balfour trial as it related to you*, clearly the Court finds without question that you are entitled to absolutely no consideration by this Court regarding a reduction in sentence....”

This statement was made during the deliberation required by *Solem v. Helm*. *Solem* held that a criminal sentence must not be disproportionate to the crime for which the defendant is being sentenced. *463 U. S. at 290, 103 S. Ct. at 3009, 77 L. Ed. 2d at 649*. In *Solem* the Supreme Court set out objective factors which should guide proportionality analysis in each case: (1) the gravity of the offense and the harshness of the penalty; (2) comparison of the sentence with sentences

imposed on other criminals in the same jurisdiction; (3) comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case. 463 *U. S. at 290-91, 103 S. Ct. at 3011, 77 L. Ed. 2d at 650.*

In dereference to *Solem*, the Payne trial court conducted the proportionality analysis. The fatal flaw that occurred during this analysis is when the trial court considered evidence that was not in the record, but was adduced at the trial of Susie Balfour. No evidence of the Balfour trial was introduced at Payne's hearing. At no time was Payne given an opportunity to rebut this evidence. The right to cross examination with reference to this evidence was denied.

It is without question that the consideration of evidence during a sentencing that is not a part of the record, that has not been introduced into evidence and which has not been subject to cross examination or the opportunity to rebut by the Defendant implicates a fundamental right. *See Lockett v. State*, 582 So.2d 428 (Miss. 1991) (failure of the Court to consider and make record of factors to aid in fixing proper sentence).

The Mississippi Supreme Court has held that when it is necessary to protect a fundamental right, a procedural bar such as the statute of limitations, may be excepted. *Ivy v. State*, 792 So.2d 319, 320 (Miss. App. 2006); *Sneed v. State*, 722 So.2d 1255, 1257 (Miss. 1998).

The proportionality analysis would determine if Payne would be given an enhanced sentence. If improper evidencing was considered in that analysis, then Payne was denied a fundamental right. The denial of this fundamental right is grounds for excepting Payne's request for post conviction relief from the statute of limitations of Miss. Code Ann. §99-39-5(2). The decision of the trial court should be reversed, with directions for the trial court to set this matter for an evidentiary hearing.

B. PAYNE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

To prove ineffective assistance of counsel, Payne must show:

1. deficiency of counsel's performance;
2. sufficient to constitute prejudice to the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Payne contends that his trial attorney:

1. failed to present evidence of testimony from the trial of Susie Balfour that would have effectively shown that Payne was the less culpable party and therefore should have received a lesser sentence;
2. failed to object to the trial court considering evidence outside the record during the application of the proportionality analysis during the sentencing hearing;
3. failed to present evidence to show that the State intentionally delayed the trial of the conspiracy to commit capital murder charge until it had obtained convictions on lesser charges in order to charge Payne as a habitual offender;
4. failed to present mitigating evidence on behalf of Payne.

All of this factors show the deficiency of counsel for Payne's performance. Additionally, they are sufficient to show that prejudice inured to the defense.


The failure of Payne's defense counsel to offer mitigating evidence in his defense entitles him to a hearing before the court on the issue of ineffective assistance of counsel. *Lynch v. State*, 951 So.2d 549 (Miss. 2007). This, combined with the other errors set forth, constitutes reversible error.

III. CONCLUSION

Payne has established that he was denied a fundamental right that excepts his case from the bar of Miss. Code Ann. §99-39-5(2). Additionally, Payne has met the *Strickland* test to show that his counsel's performance was deficient and prejudiced the defense of the case and played a major role in the excessive sentence handed down.

The Court should remand this cause to the trial Court with instructions to conduct an evidentiary hearing.

Respectfully submitted,
Lawrence Kirby Payne

By: 
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CERTIFICATE OF SERVICE

I certify that I served a copy of this REPLY BRIEF OF THE APPELLANT to:

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CIRCUIT COURT JUDGE
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ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
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This the 25 day of September, 2007.



RANDOLPH WALKER

