

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2007-CA-00330-COA

LAWRENCE KIRBY PAYNE

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

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

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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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

LAWRENCE KIRBY PAYNE

APPELLANT

STATE OF MISSISSIPPI

APPELLEE

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**ATTORNEY FOR
APPELLANT**

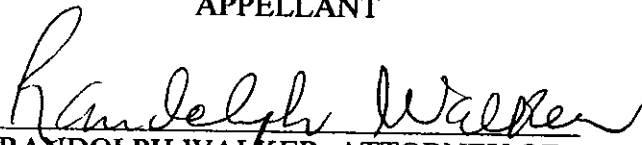

RANDOLPH WALKER, ATTORNEY OF
RECORD FOR LAWRENCE KIRBY
PAYNE

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STATEMENT OF THE ISSUES

- I. DID THE TRIAL COURT COMMIT ERROR IN FINDING THAT PAYNE DID NOT PROVE THE DENIAL OF A FUNDAMENTAL RIGHT?
- II. WHETHER THE JUDGMENT OF THE TRIAL COURT DENYING THE MOTION FOR POST CONVICTION RELIEF AND FAILING TO GRANT AN EVIDENTIARY HEARING WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

STATEMENT OF THE CASE

i. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This is an appeal from a January 19, 2007 Order of the Circuit Court of DeSoto County, Mississippi, denying the Motion of Lawrence Kirby Payne ("Payne") to Reconsider or Alter or Amend. (Record excerpts ((("RE")), p. 6). This Order was a denial of Payne's motion to reconsider the December 21, 2006 Order of the Court denying his Motion for Post Conviction relief (RE., p. 2-5).

On February 20, 2007, Payne filed his Notice of Appeal of the Judgment of the Circuit Court. (R., p. 60-61).

ii. Statement of the Facts

Payne was charged and indicted for conspiracy to commit capital murder as a habitual offender. (R., p. 10-11). On December 20, 1979, Payne entered a guilty plea to this charge. (R., p. 13-44). In applying the proportionality test during the sentencing hearing, the Court considered evidence not in the record, specifically evidence from the trial of Payne's alleged co-conspirator, Susie Balfour. (R., p. 42). Additionally, Payne's attorney failed to present any evidence at the hearing in mitigation to show that Payne was less culpable than Susie Balfour.

The Court did not grant an evidentiary hearing on Payne's motion for post conviction relief, but rather entered an Order denying the motion. (RE., p. 2-5).

SUMMARY OF THE ARGUMENT

Payne's motion for post conviction relief asserted that he was denied fundamental rights in connection with his conviction for conspiracy to commit capital murder. Errors affecting fundamental constitutional rights are excepted from the time limitations of Miss. Code Ann. §99-39-5(2). *Lockett v. State*, 582 So.2d 428, 430 (Miss. 1991).

The primary fundamental right denial suffered by Payne was that the Court considered evidence outside of the record in applying the proportionality test in determining his sentence. In *Solem v. Helm* the United States Supreme Court 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. *Clowers v. State*, 522 So.2d 762 (Miss. 1988) adopted the proportionality test of *Solem*.

The consideration of factors outside of the record had the effect of Payne receiving a sentence that was disproportionate to his culpability. An evidentiary hearing would have allowed Payne to effectively demonstrate this fact.

This Court should reverse the decision of the Circuit Court, and remand with instructions to conduct an evidentiary hearing.

ARGUMENT

I. DID THE TRIAL COURT COMMIT ERROR IN FINDING THAT PAYNE DID NOT SHOW THE DENIAL OF A FUNDAMENTAL RIGHT?

The trial court held that Payne's motion for post conviction relief was barred by Miss. Code Ann. §99-39-5(2) because it was not brought within three (3) years from the date of the judgment of conviction. (RE. p. 3). Payne asserts that he was denied a fundamental right during his sentencing. The three (3) year statute of limitations is waived when a fundamental is implicated. *Hudson v. State*, 891 So.2d 260, 262 (Miss. App. 2004).

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...."

In *Solem v. Helm* the United States Supreme Court 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*.

It is elementary 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*

Luckett 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).

Solem had the effect of creating a fundamental right to application of the proportionality test in sentencing in cases such as *Payne*. When the Court considered factors that were not in evidence in sentencing *Payne*, it violated his fundamental rights. Violation of a fundamental right is an exception to the three (3) year statute of limitations contained in the Post Conviction Collateral Relief Act.

The Court should reverse the decision of the trial court and remand this cause with instructions to grant an evidentiary hearing in this matter.

II. WHETHER THE JUDGMENT OF THE TRIAL COURT DENYING THE MOTION FOR POST CONVICTION RELIEF AND FAILING TO GRANT AN EVIDENTIARY HEARING WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

The decision of the trial court to deny an evidentiary hearing and dismiss *Payne*'s motion was against the overwhelming weight of the evidence. In his motion for post conviction relief, *Payne* stated that:

3. The basis for this motion is as follows:
 - a. Ineffective assistance of counsel, due to the failure to effectively present evidence that *Movant* was not the true culprit, but rather his girlfriend, *Susie Balfour*, was the culpable party;
 - b. Insufficient evidence to support the conspiracy to commit murder charge;
 - c. A sentence on the charge (conspiracy) that is grossly disproportionate to *Payne*'s culpability, specifically addressing the possession and ownership of the gun involved in the murder;
 - d. The failure of previous convictions to support the sentencing of *Payne* as a habitual offender under Miss. Code Ann. §99-19-81, because the convictions used to support the enhanced sentence were obtained after *Movant* had been

charged with the crime of conspiracy to commit murder.

e. the hearing at which the guilty plea was taken was conducted in DeSoto County, Mississippi, when venue for this action had been changed to Itawamba County, Mississippi. The trial court impermissibly conducted these proceedings in an improper venue, and therefore all actions taken by it are void;

f. the Court, in imposing a mandatory sentence under Miss. Code Ann. §99-19-81, applied the proportionality test established in *Clowers v. State*, 522 So.2d 762 (Miss. 1988). In applying the test the trial judge considered matters that were not part of the record, and based his decision on matters his personal opinion derived from observations and information received outside of the proceedings involving this Movant. (Transcript p. 26-27). A copy of the transcript of the guilty plea is attached as exhibit C and incorporated by reference.

(R., p. 4-5).

The Court, without providing Payne an opportunity to present any evidence to support his allegation or to conduct discovery, summarily dismissed the Motion. The Court admitted that it considered facts not in evidence at the hearing. It opines that because there is no case authority prohibiting such activity, then no fundamental right is implicated.

In *Lockett*, the Court found that the failure to conduct a proper sentencing hearing violated a fundamental right and mandated remand of the cause for a re-sentencing hearing. *Lockett*, 582 So.2d at 430. A denial of due process during a sentencing implicates a fundamental right. *Strath v. State*, 477 So.2d 191, 195-96 (Miss. 1985).

Payne's trial attorney 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. One who claims ineffective assistance of counsel must demonstrate that counsel's performance was deficient and prejudiced the defense of the case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Payne's only hope of leniency at the sentencing was to show that he was not the primary actor in the tragic events that lead to the crime spree that ultimately led to his incarceration. His

trial counsel did not attempt to adduce any of these facts, notwithstanding the fact that they were readily available.

Defense counsel for Payne had a plethora of evidence available to present on his behalf, including:

1. Payne had never used a firearm in the commission of any of his crimes (the weapon of choice was pepper spray);
2. Payne's crime spree was one continuous action rather than separate incidents¹;
3. The state either intentionally or negligently delayed action on the conspiracy to commit capital murder offense until they could obtain conviction on the other crimes with which he was charged. This was done in order to use these other convictions to enhance Payne's sentence under the habitual offender statute²;
4. Payne was not the most culpable party in these crimes. Susie Balfour was the instigator, and in the case of the murder, the trigger person.³

Had Payne's attorney presented evidence of these facts at his sentencing hearing, it is likely that Payne would not have received the twenty (20) year mandatory sentence handed down by the trial judge.

A defense counsel's failure to offer mitigating evidence in defense of his client, at a minimum, entitles the defendant to a hearing before the court on the issue of ineffective

¹ The crimes with which Payne was charged, including the ones that were used to enhance his sentence were the result of a series of nearly identical robberies, over the course of approximately two (2) weeks, of small businesses where pepper spray was used to distract the attendants while the robberies were performed. None of these crimes involved the used of a deadly weapon.

² Payne is aware of the case law that permits convictions for crimes committed after the crime sought to be enhanced, to be used under the habitual statute. Payne argues that in the instant case, there was a deliberate plan to delay sentencing on the conspiracy to commit capital murder until the other convictions could be obtained for enhancement purposes.

assistance of counsel. *Lynch v. State*, 951 So.2d 549 (Miss. 2007). In the instant case, Payne was deprived of his last chance to offer mitigating factors that may have resulted in a lesser sentence.

Payne's sentence is excessive and was precipitated by his attorney's failure to be a vigorous advocate on his behalf. Payne's attorney did not use everything at his disposal to assure that his client received effective representation in this fight for his freedom; this fight for his life.

An evidentiary hearing is essential in order to bring out the facts necessary to illustrate that Payne was denied a fundamental right and that his counsel was ineffective. Payne is therefore entitled to an Order remanding this case for an evidentiary hearing on this issue.

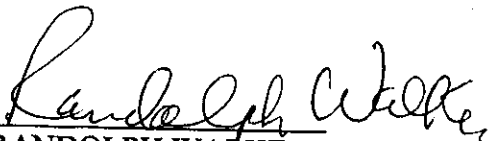
³ Payne's counsel failed to stress the fact that Balfour was the primary culprit in the murder or in the other crimes. While not attempting to downplay Payne's culpability, it is evident that the Court should have been advised of Payne's role in these crimes, relative to the role of Balfour.


CONCLUSION

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. Additionally, the evidence is uncontroverted that Payne was denied due process in his sentencing when the Court considered evidence outside of the record. Payne had no opportunity to rebut these facts, because no evidence was presented to establish the facts the Court relied on in applying the proportionality test.

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 hand delivered a copy of this BRIEF OF THE APPELLANT to:

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This the 21st day of August, 2007.


RANDOLPH WALKER