

IN THE SUPREME COURT OF MISSISSIPPI

2007-CA-00604-C0A

DARIOUS CALVERT

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM THE CIRCUIT COURT  
OF LEE COUNTY, MISSISSIPPI

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

1. Darius Calvert, Appellant
2. State of Mississippi, Appellee
3. Robert Sneed Laher, Counsel for Darius Calvert, Appellant
4. Assistant District Attorney, Heather Emerson, Counsel for Appellee
5. Judge Paul S. Funderburk, 1<sup>st</sup> Judicial District

This the 26 day of June, 2007.

  
ROBERT SNEED LAHER MSB NO [REDACTED]  
ATTORNEY FOR APPELLANT

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**STATEMENT OF THE ISSUES**

COMES NOW, the Appellant, Darius Calvert, by and through counsel, Robert Sneed Laher, and requests the Court to review the following issues:

- I.     **WHETHER APPELLANT'S CONVICTION IS VOID BECAUSE  
HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE?**
  - (A) **FAILURE OF COUNSEL TO FILE PRETRIAL MOTIONS  
REGARDING THE SEARCH**
  
- II.    **WHETHER DARIOUS CALVERT'S PLEA WAS MADE  
INVOLUNTARY?**

## **STATEMENT OF THE CASE**

(I) **Course of the proceedings and disposition in the Court below:**

This case comes before the Court on appeal from a guilty plea entered by the Circuit Court of Lee County, Mississippi on August 18, 2006.

The State of Mississippi charged Darious Calvert in a one count indictment with Possession of Methamphetamine, a Schedule II Controlled Substance, greater than .1 gram but less than 2 grams with intent to sell, transfer or distribute.

(1) **Statement of the Facts:**

That the Defendant retained the Honorable Sam Reedy to represent him in this cause. Thereafter, on August 18, 2006, Defendant entered a plea of guilty to this offense and was sentenced to a term of 16 years in the Department of Corrections with 10 years suspended.

That after being arraigned on May 30, 2006, Defendant only saw his attorney on 2 other occasions, one of which was the day before trial. That little or no time was spent between attorney and client in discussing the case and developing a strategy for trial.

That his attorney did not file any pretrial motions concerning the search of the residence. That Defendant requested that this be done. In fact, Defendant's mother, Dr. Calvert went so far as to research and prepare various evidentiary motions and submitted them to the attorney for consideration and filing.

That Defendant was summoned to Court on August 18, 2006, by his attorney.

Defendant was informed at that time of the State's plea offer. At this time, Defendant refused the offer. In the presence of several witnesses who have given Affidavits, the attorney threatened to quit the case unless Defendant accepted the offer and plead guilty.

That it was Defendant's understanding from the attorney that if he did not plead guilty at that time, he would be facing a trial the next morning without the aid and assistance of any attorney.

Thus, while the transcript reveals the Defendant answering affirmatively to the questions posed by the Court, the proceeding had been tainted by the events transpiring beforehand.

Further, a Motion to Set Aside Plea of Guilty was filed on or about December 6, 2006. Thereafter, an Order was entered by the Honorable Paul Funderburk Denying the Defendant's Motion to Set Aside the Plea of Guilty.



### **SUMMARY OF THE ARGUMENTS**

It was apparent that counsel did not do any meaningful investigation. Counsel only saw Defendant on two other occasions, one of which was the day before trial. That little or no time was spent between Attorney and Client in discussing the case and developing a strategy for trial. That the Attorney did not file any pretrial motions concerning the search. That the Attorney threatened to quit the case unless the Defendant accepted the offer made by the State and plead guilty. That it was the Defendant's understanding from the Attorney that if he did not plead guilty at that time he would be facing a trial the next morning without the aid and assistance of an Attorney.

## **ARGUMENT**

### **I. DARIOUS CALVERT'S CONVICTION IS VOID BECAUSE HE RECEIVED IN EFFECTIVE ASSISTANCE OF COUNSEL**

To successfully claim ineffective assistance of counsel, the Defendant must meet the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), Moody v. State, 644 So.2d 451, 458 (Miss. 1994). The Strickland test requires the Defendant demonstrate first the deficiency of the counsel's performance and second that the deficiency was sufficient to prejudice the defense. Strickland, 466 U.S. at 687. He faces a strong yet rebuttable presumption that counsel performed adequately, and the Defendant must show a reasonable probability that but for counsel's errors, Defendant would have received a different result. Moody, 644 So.2d at 456. This test has been applied to ineffective assistance of counsel claims arising out of guilty pleas. Riggs v. State, 912 So.2d 162, 164 (Miss. Ct. App. 2005)(citing Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). The Court must look at the totality of the circumstances, with deference towards counsel's action, to determine a factual basis for the claim. Id.

The two pronged Strickland test instructs this court to determine: (1) whether counsel's performance was deficient, and, if so, (2) whether the deficient performance

was prejudicial to the defendant in the sense that our confidence in the correctness of the outcome is undermined. Washington v. State, 620 So.2d 966, 670 (Miss. 1993). Judicial scrutiny of counsel performance must be highly deferential...a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy"... In short, defense counsel is presumed competent. Bailey v. State, 760 So.2d 781 (Miss. Ct. App. 2000). Where Defendant makes this claim for the first time on appeal, the procedural bar rule does not apply to claims involving ineffective assistance of counsel. Hall v. State, 735 So.2d 1124, 1126 (Miss. Ct. App. 1999).

Darius Calvert's trial counsel was ineffective from the very beginning of his representation. This ineffective representation continued throughout the guilty plea. The lack of communication between Darius Calvert and counsel fell below objective standard of reasonableness. It precipitated a deficient performance that prejudiced Darius.

**A. FAILURE OF COUNSEL TO FILE PRETRIAL MOTIONS  
REGARDING THE SEARCH**

Part of the function of defense counsel is to prevent the admission of evidence offered by the state which is improper. The impropriety of evidence can be through its content or its presentation. In this case, counsel for Defendant wholly failed to file pretrial motions when highly prejudicial and highly objectionable matters were presented in discovery.

The record reveals no Motion to Suppress or other attempt to prevent evidence of the search from coming in. Without challenging its admission, counsel simply allowed highly prejudicial materials to come into evidence and prejudice Defendant, this is not strategy; it simply is ineffective.

Counsel's lack of preparation was evident. This lack of performance of counsel was not within the range of competence demanded of attorneys in criminal cases. Winters v. Cook, 333 F.Supp. 1033, reversed 466 F.2d 1393, on rehearing 489 F.2d 174, affirmed 489 F.2d 174 (N.D. Miss. 1971). Darious Calvert was prejudiced because he had little or no communication with his attorney and his attorney failed to file any pretrial motions.

Additionally, the defendant must show that there is a reasonable probability that, but for this attorney's errors, he would have received a different result in the trial court.

Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992). Finally, the Court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss. 1998).

Finally, if defendant raises a question of fact regarding deficiency of counsel's conduct or prejudice to defendant, he is entitled to an evidentiary hearing on the claim of ineffective assistance of counsel. Stringer v. State, 627 So.2d 326 (Miss. 1993), certiorari denied 114 S.Ct. 2684, 512 U.S. 1209, 129 L.Ed.2d 817. By not seeing his counsel, Darius Calvert was denied effective assistance of counsel. For the foregoing reasons, Darius Calvert received ineffective assistance of counsel and his conviction should be vacated and a new trial granted. Alternatively, an evidentiary hearing on Darius Calvert's charge of ineffective assistance of counsel should be ordered by the Court.

## **II. WHETHER DARIOUS CALVERT'S GUILTY PLEA WAS MADE INVOLUNTARILY?**

The standard of review pertaining to voluntariness of guilty pleas is well settled: "this Court will not set aside findings of a trial court sitting without a jury unless such findings are clearly erroneous." Weatherspoon v. State, 736 So.2d 419, 421 (Miss. Ct. App. 1999). The burden of proving that a guilty plea was involuntary is on the Defendant

and must be proven by a preponderance of the evidence. Id at 422 (superceded by Miss. Code Ann. Section 99-39-23 (Rev. 2000)); Terry v. State, 839 So.2d 543, 545 (Miss. Ct. App. 2002). A plea is considered “voluntary and intelligent” if the Defendant is advised about the nature of the charge against him and the consequences of the entry of the plea. Alexander v. State, 605 So.2d 1170, 1172 (Miss. 1992).

As discussed previously, the Defendant was given a choice by his defense counsel. The Defendant could plead guilty or he could go to trial the next morning without his defense counsel. Feeling backed into a corner, the Defendant reluctantly plead guilty. The Defendant plead guilty but not willfully or voluntarily. Further, had counsel performed in a competent manner, the Defendant would not have been faced with such dire circumstances. By filing the proper pre-trial motions, counsel could have obtained potentially favorable rulings. This obviously would have had an effect on Defendant and decisions as well as the outcome of the case. At the very least, hearing(s) on the motion(s) would have given counsel and Defendant valuable opportunities not only to meet and discuss the case, but also to obtain a better and more complete understanding of the evidence.

The record is devoid of any meaningful preparation by counsel. The fact that the Defendant’s own mother, a non-lawyer, felt the need to research and prepare the motions herself reveals the urgent circumstances the Defendant was facing.

## **CONCLUSION**

For the foregoing reasons and authorities, and based upon the record, Darious Calvert's conviction should be reversed and remanded for a new trial. In the alternative, this court should order the trial court to conduct an evidentiary hearing on Darious Calvert's charge that he received ineffective assistance of counsel. If the trial finds that Darious Calvert received ineffective assistance of counsel, it should be ordered to grant him a new trial.

CERTIFICATE OF SERVICE

I, ROBERT SNEED LAHER, do hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of this document to the following:

Honorable Heather Emerson  
Assistant District Attorney  
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Corinth, Mississippi 38834

Circuit Court Judge Paul S. Funderburk  
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Tupelo, Mississippi 38802

Attorney General  
Post Office Box 220  
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This the 26 day of June, 2007.

ROBERT SNEED LAHER  
ROBERT SNEED LAHER