IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2007-CA-00672-COA

MARK S. ALLEN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF ADAMS COUNTY

COUNSEL FOR APPELLANT

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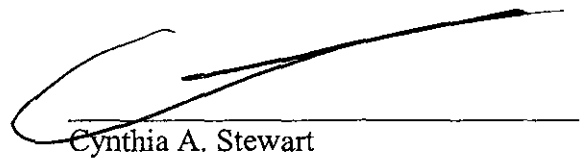
CERTIFICATE OF INTERESTED PERSONS

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. State of Mississippi .....Appellee
2. David W. Hall, Esq.....Attorney for Appellee
3. Honorable Forrest A. Johnson, Jr.....Circuit Court Judge
4. Mark S. Allen.....Appellant
5. Cynthia A. Stewart, Esq. .....Attorney for Appellant



Cynthia A. Stewart
Attorney of record for Appellee

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The United States Supreme Court set forth the standard for competency to stand trial in 1960 in a case called *Dusky v. United States,* 362 U.S. 402 (1960). It held that a defendant must have adequate ability to lucidly consult with his attorney and to have rational and factual comprehension of the charges against him in order to be found competent to stand trial. In *Godinez v. Moran*, 113 S.Ct. 810 (1992), the United States Supreme Court applied the same standards of competency to stand trial to a defendant who "knowingly and voluntarily" waives his constitutional rights in order to enter a plea of guilty.

The rules of professional conduct place a lawyer under heightened responsibility when dealing with a client under a disability. Mark Allen was unquestionably a client under a disability. Rule 1.14 provides:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.
>
> (c) Information relating to the representation of a client who may be impaired is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

The commentary to Rule 1.14 notes that "in particular, an incapacitated person may have no power to make legally binding decisions."

The State is incorrect insofar as it suggests that there was an actual hearing held to determine Mr. Allen's competence. The Order attached to the previous pleading as A.R.E. 18 states:

> This cause came before the Court on November 20, 2000, for a hearing on the defendant's Motion as to Competency to Stand Trial. The Court had previously granted the defendant's motion for a competency examination. The defendant underwent a thorough mental examination at the Mississippi State Hospital at Whitfield and was found to be competent to stand trial, with an official report submitted to the Court and to each counsel.
>
> **The defendant presented no evidence at the hearing.** The State presented no evidence. Therefore, based upon the official report from the Mississippi Sate Hospital, the Court found that the defendant was competent to stand trial.
>
> So ordered, this the 6th day of December, 2000.

Counsel, in order to provide constitutionally effective representation under the United States and Mississippi Constitutions, was, at the very least, obligated to bring the information concerning Mr. Allen's lengthy mental history to the attention of the Court.

It is a violation of due process to try and convict a defendant who lacks mental competence. *Cooper v. Oklahoma,* 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *See Pate v. Robinson,* 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Carter v. Johnson,* 131 F.3d 452, 459 (5th Cir.1997).

Due process requires the judge to order a competency hearing "where there is substantial evidence of a defendant's incompetence at the time of trial." *Pate v. Smith,* 637 F.2d 1068, 1071 (6th Cir. 1981). There is ample reason here to believe that Mark Allen had competency and sanity issues that could not be ignored and comply with the United States and Mississippi Constitutions.

This obligation falls as much on the Court as it does on trial counsel. The only order entered by the Court placed that burden on the trial counsel.

Counsel's failure constitutes ineffective assistance. *See People v. Shanklin,* 814 N.E.2d 139 (Ill. App. 2004). In that case, trial counsel was held ineffective in an attempted murder plea for failing to request a hearing on the defendant's competence or fitness or, alternatively, asking the trial Court to question the defendant carefully as to the plea he entered and the consequences. This was based on a mildly mentally retarded defendant who had been hospitalized three times as a teenager. Mark Allen's mental history far outweighs that and mandates both trial counsel pursuing vigorously through the hearing level a judicial determination of his competency to stand trial and the trial Court holding such a hearing before entering any order without hearing evidence on the matter.

CONCLUSION

Allen is entitled to an evidentiary hearing at which to prove his claims. Where defendant has pleaded a claim that meets the requirements of the post-conviction act and where the claim, if true, would entitle petitioner to relief, "the petitioner is entitled to an in court opportunity to prove his claims." *Billiot v. State*, 515 So.2d 1234, 1237 (Miss. 1987); *Neal v. State*, 525 So.2d 1279, 1281 (Miss. 1987). Upon hearing, he is entitled to a new trial.

WHEREFORE, PREMISES CONSIDERED, Mark S. Allen respectfully moves this Court to grant him a full evidentiary hearing and to enter an order setting aside his conviction and sentence and ordering a new trial and for whatever relief may be appropriate and just.

This the 31st day of March, 2008.

Respectfully submitted,

Cynthia A. Stewart [redacted]
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Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via U.S. Mail, postage pre-paid, to:

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This the 31st day of March, 2008.

Cynthia A. Stewart