IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

MAURICE GRAY — APPELLANT

VS. — NO. 2007-CA-0160(2)-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

MAURICE GRAY **APPELLANT**

VS. **NO. 2007-CA-0160(2)-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Defendant was convicted of Murder & 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.

Counsel for defendant filed a brief to which the State responded. Then defendant hired different appellate counsel and initial counsel withdrew. The second counsel filed another brief, to which the State now responds.

STATEMENT OF FACTS

Fact relevant to the facts of the murder and aggravated assault are to be found in the opinion of the Court of Appeals. *Gray v. State*, 846 So.2d 260 (Miss.App. 2002), to wit:

> ¶ 2. In August 1998, Maurice Gray was arrested for drug possession. Thereafter, Gray was heard to make threats against Ladell Lay and other persons he thought had alerted the police as to his possession of the drugs. On or about September 10, 1998, Gray approached a car which was occupied by Lay and Alonzo Cooper. After words were exchanged, Gray pulled out a gun and shot both Lay and Cooper, striking Lay in the head which killed him and striking Cooper in the buttocks as he tried to flee. Gray left the scene, but was later apprehended and was ultimately charged with murder and with aggravated assault.
>
> *Gray v. State*, 846 So.2d 260 (Miss.App. 2002).

SUMMARY OF THE ARGUMENT

Issue I.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AND DID NOT MEET HIS BURDEN AS REQUIRED IN *STRICKLAND* TO GARNER ANY RELIEF. THERE WAS NO EVIDENCE OF DEFICIENT PERFORMANCE AND NO PREJUDICE SHOWN.

ARGUMENT

Issue I.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AND DID NOT MEET HIS BURDEN AS REQUIRED IN *STRICKLAND* TO GARNER ANY RELIEF. THERE WAS NO EVIDENCE OF DEFICIENT PERFORMANCE AND NO PREJUDICE SHOWN.

A.

With a look at the transcript of the evidentiary hearing – evidence regarding only one issue was presented for the trial court's consideration. The trial court specifically held that trial counsel (Johnnie Walls) was more than adequate and much higher than the minimum required. Further, the trial court specifically found defendant had wholly failed to show any prejudice. (C.p. 107).

> ¶ 15. As stated supra, there is a rebuttable presumption that counsel's performance was effective. Id. "[C]ounsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall[s] within the ambit of trial strategy." Cole v. State, 666 So.2d 767, 777 (Miss.1995) (citing Murray v. Maggio, 736 F.2d 279 (5th Cir.1984)). We find nothing in the record affirmatively showing constitutional ineffectiveness. Furthermore, Givens has failed to show prejudice. Thus, Givens has failed to meet his *Strickland* burden and we find these two issues to be without merit.
>
> *Givens v. State,* 967 So.2d 1(Miss. 2007).

Therefore it is the succinct position of the State the trial court clearly addressed the issue regarding effective assistance of counsel. The State will stand on the findings of the trial court.

> ¶ 14. . . . Consequently, considering the totality of the circumstances, we find that Williams has failed to rebut the strong presumption that his attorney's performance was reasonable. This issue is without merit.
>
> *Williams v. State,* 937 So.2d 35 (Miss.App. 2006)(claimed ineffective assistance of Johnnie Walls).

No relief should be granted on this assertion of error.

Now as to the limited claim of ineffective assistance raised in this second appellate brief – specifically, that trial counsel should have transcribed the testimony of the preliminary hearing so that it could have been used to impeach the eye-witness testimony of one the victims of defendant's shooting spree.

First of all, to read appellate counsel's brief you would think trial counsel actually had a tape of the testimony of the preliminary hearing testimony. Such a conclusion is not supported by the testimony elicited during the post-conviction evidentiary hearing. And yet, a few paragraphs later appellate counsel correctly concludes there was no transcription and no tape. (Br. at p.7).

And, such a conclusion would be amply supported by the record on review. When asked about a 'tape of the preliminary hearing' defendant's trial counsel stated (more than once) that he didn't have it and had never seen it. So there is not even a real claim of deficient performance and certainly no evidence to support it.

Interestingly within this brief counsel opines the fear induced by his victim's driving by (earlier in the day) was the reason he sought to confront them later that

evening.

However, looking at pages 56 & 57 of the transcript it would appear that defendant didn't want to explore his reasons for confronting his victims. He never stated why he approached his victim's that evening. That is quite different from the now raised claim that it was because of fear he sought them out to confront them. (Which by the way is not such good behavior to claim when raising the issue of self-defense.)

But I digress, the facts presented at the evidentiary hearing amply support the ruling of the trial court in applying the law as delineated in *Strickland.* The conclusion being – even with this latest raised issue – there is no proof of deficient performance.

No relief should be granted on this claim of trial court error.

B.

In this sub-issue counsel claims trial counsel failed to adequately prepare. Defendant claims trial counsel only met with him twice. Trial counsel stated he met with defendant " ... several times. It was certainly more than two." Tr. 7 & 12.

Be that as it may, the ruling of the trial court is amply supported by the record of the evidentiary hearing. As trial counsel noted many of the decisions made were part of trial strategy. In fact defense counsel conducting the evidentiary hearing clearly brought to the trial court's attention that many of the strategies, decisions and actions taken prior to and at trial were part of trial strategy. Tr. 26, 27, 36.

> ¶ 4. . . . The Strickland test is applied with deference to counsel's performance, considering the totality of the circumstances to determine whether counsel's actions were both deficient and prejudicial. Conner v. State, 684 So.2d 608, 610 (Miss.1996). The test is to be applied to the overall performance of the attorney. Strickland, 466 U.S. at 695, 104 S.Ct. 2052. ***With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy.***" Scott v. State, 742 So.2d 1190 (¶ 14) (Miss.Ct.App.1999); Cole v. State, 666 So.2d 767, 777 (Miss.1995); Murray v. Maggio, 736 F.2d 279, 283 (5th Cir.1984).
>
> *Henderson v. State,* 852 So.2d 40 (Miss.App. 2002)(emphasis added).

Counsel for defendant asserts that had trial counsel attended "...any given fifteen (15) minutes of any evidence class would..." he would have been adequately prepared to raise objections at trial. The State would aver trial counsel probably

stayed for more than fifteen (15) minutes and was familiar with the score or more of exceptions to such things as hearsay.[1] Regardless, the transcript of the hearing is replete with trial counsels discussion of strategy and specifics to this case. While it is obvious the attorney conducting the hearing would have done things differently, it does not mean trial counsel was ineffective or that defendant suffered prejudice. In fact, looking at the overall conduct of counsel, as the hearing judge noted, trial counsel was more than Constitutionally effective.

There is no merit to this second claim of ineffective assistance and no relief should be granted.

As to issues previously raised and brief the State will rely upon the previously submitted brief.

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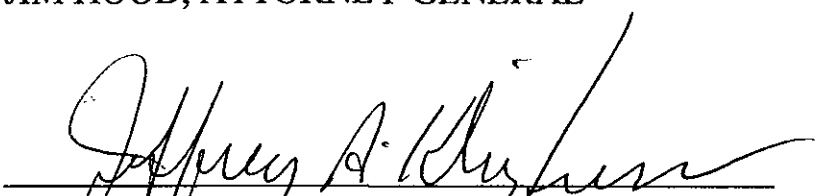
[1] In the future such an argument may carry more credibility as it would now appear our State's law schools no longer require taking "Evidence" before earning a law degree.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith
Circuit Court Judge
Post Office Drawer 478
Cleveland, MS 38732

Honorable Laurence Mellen
District Attorney
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Jeffrey L. Ellis, Esquire
Attorney At Law
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This the 8th day of July, 2008.

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Serial: 117361

IN THE SUPREME COURT OF MISSISSIPPI

No. 2004-M-00828

MAURICE GRAY — ***Petitioner***

v.

STATE OF MISSISSIPPI — ***Respondent***

ORDER

This matter is before the panel of Smith, C.J., Cobb, P.J., and Dickinson, J., on the Application for Leave to Proceed with Motion for Post-Conviction Relief in the Trial Court filed by counsel for Maurice Gray. After receiving Gray's petition, this Court sought a response from the Attorney General of the State of Mississippi in accordance with Miss. Code Ann. § 99-39-27. The State's response was due on September 10, 2004. No response has been filed. After due consideration, the panel finds that the petition should be granted. Gray is hereby granted leave to proceed in the trial court on his claims that his attorneys were ineffective.

IT IS THEREFORE ORDERED that the Application for Leave to Proceed with Motion for Post-Conviction Relief in the Trial Court filed by counsel for Maurice Gray is granted.

SO ORDERED, this the 22nd day of September, 2004.

JAMES W. SMITH, JR., CHIEF JUSTICE

Serial: 146217

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00160-COA

MAURICE GRAY — *Appellant*

v.

STATE OF MISSISSIPPI — *Appellee*

ORDER

This matter came before the Court on Motion to Substitute Counsel, filed by Robert Sneed Laher, seeking to be substituted as lead counsel for the appellant and to allow Jeffrey Ellis to withdraw as counsel for the appellant.

The Court finds that the motion is well taken and should be granted.

THEREFORE IT IS ORDERED that the Motion to Withdraw and to Substitute Counsel be, and hereby is, granted. Jeffrey Ellis shall be permitted to withdraw as counsel for the appellant and Robert Sneed Laher shall be substituted as lead counsel for the appellant.

SO ORDERED, this the 3rd day of April, 2008.

T. KENNETH GRIFFIS, JR., JUDGE

Serial: 147095

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00160-COA

MAURICE GRAY — ***Appellant***

v.

STATE OF MISSISSIPPI — ***Appellee***

ORDER

This matter came before the Court on Motion for Enlargement of Time Within Which to File Response to Appellee Brief, filed by the appellant, seeking additional time to file the reply brief. While this motion was pending, the reply brief was filed.

The Court finds that the motion should be dismissed as moot.

THEREFORE IT IS ORDERED that the Motion for Enlargement of Time Within Which to File Response to Appellee Brief be, and hereby is, dismissed as moot.

SO ORDERED, this the 21st day of April, 2008.

DAVID MICHAEL ISHEE, JUDGE