

COPY

IN The Court of Appeals Of The State of Mississippi

Betty W. Saphar
Supreme Court, Clerk
P.O. Box 249

FILED

DATE: June 20, 2007

JUN 20 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

JACKSON, MS 39205

RE: Junior Kimble v. State of Mississippi

No. 2007-CP-0132

Ms. Saphar, please find enclosed the original and two
copies of the Reply Brief of Appellant.

I have also delivered a true and correct copy
of this Brief to Hon. Attorney General Tim Hood

Thank you for your time and consideration
in this matter.

Respectfully Submitted

Junior Kimble #122757

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUNIOR KIMBLE

Appellant

vs.

STATE OF MISSISSIPPI

NO. 2007-CP-01582

Appellee

Reply To Respondent's Motion

Comes Now the Appellant in the above referenced cause and respectfully show unto this Honorable court that his claims in his Post-Conviction Motion, and in support thereof would show unto the court the following:

The Court in the state of Mississippi are admonished to make a complete record of a guilty plea proceedings, see, *Taylor v. State*, 689 So.2d 359 (Miss 1996)

Kimble asserts that the trial court failed to do so in this case. Though in the order of the trial court in its denial of Kimble's post-conviction motion made an allusion to the record to support its denial, No plea transcript has been made a part of the record on appeal.

It is well settled law in the state of Mississippi that "the appeal courts may not hear upon or consider matters which do not appear in the record, and must confine itself to what actually does appear in the record." *Dillon State*, 641 So.2d 1223, 1225 (Miss. 1994).

* Kimble asserts that there was no transcript in the Record filed on Appeal.

* Kimble asserts on February 12, 2007 he wrote Ms. Joyce Loftin informing her that the Record was not complete, as the record does not include the Guilty Plea Transcript in Cause No. CR05-838 (PEL), CR05-837 (PEL) and CR06-193 and that he was in need to support claim raised on Appeal. * (see Appendix 1-B)

* Kimble asserts the Respondent states the guilty plea transcript provide evidence contrary to Kimble's claim that his plea was given involuntarily, and that the trial court did not have factual basis to accept the plea of guilty from Kimble.

* But there is nothing in the record on Appeal that supports this conclusion of the trial court, as the guilty plea transcript has not been made a part of the record on Appeal.

* But, this was no fault of the appellant, as he had filed the designation of Record pursuant to Mississippi Rules of Appellate procedure, Rule 10(b)(1), clearly setting forth that the "guilty plea transcript was necessary to the issues raised on the Appeal (R.X3)

* But, the request for the guilty plea transcript has been ignored.

* * * Kimble alleges he brought the attention to this matter to the Clerk when he did receive the record or Appeal for his review on February 8th 2007, when he noticed this error, he promptly notified Ms Joyce Lottin, Circuit Clerk of Lee County, Mississippi, on February 12th 2007 of this discrepancy in the record. (See Appendix 1-A). But no response was forthcoming from Ms Lottin, and the record was filed by the Circuit Clerk without it being in compliance with the designation of record.

* Trial counsel told Kimble he would receive a life sentence if he was found guilty in a Jury trial. This was clearly an erroneous misrepresentation of counsel, because sexual battery does not carry a life sentence, and counsel did tell Kimble this to induce him to plead guilty. In the case sub-judice, when trial

Counsel did misstate the sentencing exposure that Kimble would be facing if found guilty at trial, did undermine confidence in the outcome, because if not for this erroneous advice, Kimble would surely insisted on going to trial, if he had been correctly informed.

The Mississippi Supreme Court held in *Alexander v. State*, 605 So.2d 1170 (Miss 1992) that where a defendant enters a plea on Advice of Counsel, the attorney performance is deemed "deficient for purposes of the Strickland standard, if it falls below "the range of competence demanded of attorney in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) quoted in *Wilson v. State*, 577 So.2d 394, 396, (Miss 1991). A defendant who pleads guilty to a crime is prejudiced by his counsel's erroneous advice if "he would have insisted on going to trial if he had been correctly informed." *Wilson v. State*, 577 So.2d at 396, *Hill*, 474 U.S. at 39.

Kimble's plea of guilty cannot be considered as voluntary act on his part, because it was induced by fear and deception of receiving a life sentence if he went to trial.

The Mississippi Supreme Court held in *Baker v. State*, 358 So.2d 401 (Miss 1978), the following:

"If, as alleged, appellants pleaded guilty under the mistaken advice that they could be subject to capital punishment if convicted at trial, this then is a factor which make appropriate a collateral attack... such allegations, if true, indicates that defendants were not fully aware of the implications of their plea, nor of the true consequences of a trial by jury. Such circumstances, if properly pleaded and supported by sufficient facts, make out a case where relief may be appropriate." Id. 403

* Kimble presented with his own sworn affidavit to the courts, the affidavits of his mother Pauline Kimble, and a friend Grace Matthews. Considered as a whole, there was sufficient facts that were presented to the trial court, that do entitle Kimble to an in court opportunity to prove his claims. (See *Washington v State*, 620, 502d, 966, 967 (Miss 1993))

* The Respondent would argue Kimble's affidavits carry no weight.

** Kimble alleges his mother and friend will testify to the fact that his attorney told him that he would receive a life sentence if he did not

take the plea

* * Kimble alleges his affidavit along with his mother's and friends require and evidentiary hearing.

* The Respondent Argue that the affidavits are nothing but hearsay. Kimble asserts he can prove his allegation upon and evidentiary hearing, Pauline Kimble and Elmer Matthews will testify under oath that Junior Kimble stated his attorney told him if he didn't take the guilty plea, he would receive a life sentence if he went to trial. Appellant assert his attorney actions entitle him to an in court opportunity to prove his allegations. *Snaders v. State*, 439 So.2d 1271, 1276 (Miss. 1983)

* Kimble asserts his plea is unconstitutional and should be vacated as a matter of law.

* Kimble should be allowed to be placed back into the position that he was in before he entered his plea, and that he should be GRANTED a jury trial. See *Sullivan v. Poney*, 469 So.2d 1233, 1234 (Miss. 1983), Also *Harris v. State*, 806 So. 2d 1127 (Miss. 2002) that this Court should vacate the Circuit Court denial of his Post-Conviction motion on this issue.

* The indictments in this case sub judice, were fatally defective as they did fail to conform to the requirements of Rule 7.06(2) of the Uniform Rules of Circuit and County Court Practice, and Mississippi Code Ann Section 99-7-9 (2005). This was because of the fact that they were not signed by the foreman of the grand jury, nor were they signed and stamped filed by the Circuit Clerk (A-26-31) * Kimble alleges these indictments were fatally defective.

* Though a guilty plea waives any non jurisdictional defects in the indictment, Butford v. State, 756 So.2d 815 (Miss.2000) A plea of guilty does not waive a claim that the indictment failed to give the trial court subject matter jurisdiction. see Conley v. State, 607 So.2d 1153 (Miss.1992).

* This was ineffective assistance of the part of trial counsel, as it has long been held in the State of Mississippi that it is unconstitutional to proceed against a defendant without a valid indictment returned by the Grand Jury. see State v. Sansome, 133 Miss 428, 97 So.2d 723 (1923)

* Kimble alleges his attorney was deficient when he failed to demur these indictment.

* Kimble further asserts his trial attorney was deficient when he advised Kimble to enter a plea of guilty to these indictments, because it cannot be said with certainty that these indictments were returned by the grand jury.

* * * There is a good chance that Kimble's lawyer allowed him to enter a plea of guilty to the indictments without actually being indicted by the grand jury. See *Gray v. State*, 819 S.O.2d 1549 (Miss. 2003).

* Trial Counsel knew that it is the indictment that gives the trial court the jurisdiction to try a felony case. See, *Telferson v. State*, 556 S.O.2d 1016 (Miss. 1989) and since Kimble's indictment is fatally defective, the trial court did not have the subject matter jurisdiction to accept Kimble's plea of guilty. See *Williamson v. State*, 41 Miss. 229, 150 S.O. 177 (1897).

* Kimble asserts trial counsel was deficient, and he has been prejudiced by the deficient performance of counsel, by the very fact that counsel allowed him to proceed against in violation of Article 3, section 27 of the Mississippi Constitution by being not indicted by the grand jury.

* Kimble has been denied his rights to the effective assistance of counsel and pursuant to *Strickland v. Washington* 466 U.S. 668 (1984) * Kimble plea should be vacated.

* Kimble asserts that his indictments had been manufactured by the district attorney, and were never considered by the grand jury.

* Kimble would show to this Hon Court that he is semi illiterate, and did not possess the legal expertise to know anything about the indictment.

*** It was plain that these indictments were fatally defective, as Rule 706(e) mandates that "the signature of the foreman of the grand jury issuing it," must be included in the indictment for the indictment to be valid.

*** Also, Mississippi Code Ann. section 99-7-9 (2005) states in pertinent part: "All indictments and the part of the grand jury must be presented to the Clerk of the Circuit Court by the foreman of the grand jury or by a member of such jury designated by the foreman, with the foreman's name endorsed thereon, accomplished by his affidavit that all indictments were concurred in by (2) or more members of the jury, and must be marked, filed, and such entry be dated and signed by the Clerk.

Kimble alleges his indictments did not meet the requirements of Rule 706(e) and section 99-7-9

This Hon Court will see Kimble's indictments were defective, and trial Court never had subject matter jurisdiction. Appellant pray this Hon Court grant him a hearing. (9.)

CERTIFICATE OF SERVICE

This is to certify that I have this date, caused to be mailed, via United States Mail,
postage pre-paid, a true and correct copy of the above and foregoing Pleading to:

Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205

Attorney General for Mississippi
P.O. Box 220
Jackson, MS 39205

SO CERTIFIED, this the 20 day of June, 2007.

Jurior Kimble

Petitioner

122757

MDOC #

P.O. Box 88550 C.M.C.F.

Address

Pearl, MS 39288

Address