

COPY

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

Tommy L. Lewis, Appellant

Vs.

State of Mississippi,

FILED

SEP 20 2007

CLERK OF THE COURT
SUPREME COURT
JUDICIAL BUILDING
JACKSON, MISSISSIPPI 39201

No. 2007-CP-00261-COA

BREIF IN SUPORT OF APPEAL

Comes Now, the Appellant, Tommy Lewis, Pro'se, and here by files this Brief in Support of his motion for Appeal on his Post Conviction and respectfully presents the following assignments of errors in the Order handed down on December 30, 2006.

1.) September 2006, the Appellant filed his Post Conviction For Collateral Relief (which is on file) and it was denied on December 30th, 2006. See <Exhibit A>

2.) The Appellant does met the requirements of Strickland v. Washington 466 U.S. 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Had counsel reviewed the Discovery and the facts and prepared a defence, He would not have convinced the Appellant to settle for a Plea.

According to page 2 of Strickland Vs. Washington marked <Exhibit B>. Based upon this test, counsel fail both areas of this test.

2a.) "Counsel made errors so serious that counsel was

Ms. Laurie did. He was the arresting officer, and he should have been the one to Read the Appellant's his Rights.

2c.) Had Appellant's counsel decided that a Plea would be the best way to go, It should have been discussed long before the hour of the trial. Not during the trial. Transcripts of Trial would show counsel delaying trial to talk to Appellant. Which have not been made available. See (Exhibit E)

2d.) During the conversation with defence attorney he advised the appellant that if he did not take the Plea, that he would get 30 to 40 years. Had he looked at the evidence or Discovery, He would have saw that the DA could only have proven one of the 4 counts which appellant was indicted for, "Touching of a child for Lustful Purpose." § 97-5-23, for a maxim of 20 years, even if the confession stood. See (Exhibit F) Because the appellant never had sex with the victim, the other 2 counts could not have been proven.

2e.) The defence counsel goes on to tell the appellant that, if he take this Plea, that the Court would grant the plea, and he

not functioning as the counsel guaranteed by the Sixth Amendment. <Exhibit C> Failing to perform the duties outlined in the Mississippi Rules of Professional Conduct Effective dated July 1, 1987, Page 354, see <Exhibit D>. This violated the appellant's Sixth Amendment Right.

2b.) Had defense counsel done an investigation of the case, he would have saw that the appellant's Memorandum Rights was violated. The appellant asked if he needed a lawyer present and he was told "No" by Ms. Laurie of (DHR). She told appellant he didn't need one. Neither did the defendant know whether anyone else would be present, because when the appellant's Aunt Lula Mae had ask to attend the meeting, she too was denied access. <Exhibit I> Further more, had defense attorney reviewed statement from Det. Conerly marked <Exhibit G>, he would have seen that Appellant's rights was violated, because Ms. Laurie never read appellant his Right, nor.

Could She have because she was not an officer of the Law. By Ms. Laurie stating that Appellant didn't need an attorney, she took a way the reason or need to exercise that right. Det. Cornerly did not read the appellant's rights. He stated

wouldn't have to do any time. But if they didn't take the time part, they still would not give you no more than 7 to 8 years, because you don't have a criminal history. Then he told the appellant "that all he had to do was to answer "yes" to the judges questions and give short answers. See cited case Timothy V. State of Mississippi (cite as: 583 So. 2d. 174) pg. 251. See <Exhibit G>

2c.) Had the appellant counsel decided that a Plea would have been the best way to go, it should have be discussed long before the day of the trial. Not the moment of the trial. The transcripts would show when the counsel took the time to talk to the appellant, which are unavailable. See <Exhibit E>

2d.) During the conversation between the counsel and Appellant, the counsel advised the ppealant that if he did not take the Plea, that he would get 30 to 40 years. There again had counsel looked at the evidence or Discovery, he would have saw that the DA could only have proved one of the 4 counts which the Appellant was charged for. Which may have been "Touching of a child For Lustful Purposes" § 97-5-23 for a maximum

of 20 years, and that's if the confession stood. see (Exhibit F). Due to the fact that Appellant never had intercourse with the victim, the other 2 counts could not have been proven.

2e.) The Appellant counsel goes on to tell the Appellant that if he take this plea, that the court would grant the Plea and whether they except the sentence on the plea or not. The most time the Appellant would be looking at was any where from 7 to 8 years, because Appellant don't have a history of crime. Counsel told Appellant all he had to do was to answer the Judges question "yes" and give short answer to question that requires explanation. see *Timothy V. State of Mississippi* (cited as: 583 So. 2d 174) page 251 (Exhibit G).

2f.) Counsel nor the trial Judge told the Appellant about the minimum or maximum or mandatory sentences. see *Joseph D. Wittke V. State of Mississippi* (cited as: 556 So. 2d. 1062) (Exhibit J) page 239, also the transcripts would show this error, see (Exhibit E).

Therefore because of these error of the appellant Counsel, the Appellant, Tommy Lewis, Prose has met the requirements as stated in *Strickland V. Washing-*

ton 466 U.S. 104 S.Ct. 2052, 80 L.Ed. 2d 672 (1984),
for an appeal on the grounds of ineffectiveness of
assistance.

3.) Attached and marked Exhibits A-J, are the
documents that support the facts to the com-
plaints of the Appellant, Tommy Lewis, Prose.

4.) The Appellant does not want the Court to
base its finding on his alleged conduct or
"Good behavior". But the Appellant do how-
ever want the court to take in to consideration
of the Appellants lack of prior convictions. Also
take in consideration of the average time of
the persons with one count of the same
said charge. (Exhibit F)

Wherefore, Premises considered, the Appellant
do pray that this Appeal to modify the sentence
be received and filed and upon a hereon, this
Honorable court will reconsider the sentence and
would modify the sentence imposed upon him.

Respectfully,

Tommy Lewis

Tommy L. Lewis, Prose

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

Tommy L. Lewis, Appellant

Vs.

No. 2007-CP-00261-COA

State of Mississippi, Defendant

MOTION FOR APPEAL

Comes Now, the Appellant, Tommy Lewis, Pro se and respectfully files this motion For Appeal on his Post Conviction. In support there, would present the following facts and matters, to wits:

- 1.) That the Appellant, Tommy Lewis, was denied releif of his Post Conviction on December 30, 2006. see (Exhibit A)
- 2.) That the Appellant does meet the requirements of Strickland v. Washington 466 U.S., 104 S.Ct 2052, 80L.Ed. 2d 674 (1984).
- 3.) That the allegations are supported by discovery records on file and testimonies of witnesses.
- 4.) That the Appellant does not want the court to base it's findings on his alleged conduct or "Good behavior" after his sentence.

Wherefore, Premises Considered, the Appellant do pray that this appeal to modify the sentence be received and filed and upon a hereon, this

Honorable Court will reconsider the sentence and would modify the sentence imposed upon him.

Respectfully Submitted on this 20th day of December 2007.

Tommy Lewis
Tommy Lewis, Pro'se
Appellant.

Exhibit A 7

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

TOMMY L. LEWIS

PETITIONER

VERSUS

CAUSE #05-587

A2401.05-238

STATE OF MISSISSIPPI

RESPONDENT

ORDER

This case is before the court on a Petition for Post Conviction Relief. Having reviewed the petition and its exhibits, the file and the law, it is this Court's opinion that Petitioner is not entitled to any relief.

Section 99-39-3, MCA 1972, mandates that direct appeals remain: "...the principal means of reviewing all criminal convictions and sentences." Petitions for post conviction relief are collateral attacks of a criminal conviction which are: "...limited in nature, to review those objections defenses, claims, questions, issues or errors which could not be or should not have been raised at trial or on direct appeal." In addressing this statute Presiding Justice Hawkins in a dissent joined by Roy Noble Lee, C.J., and Dan M. Lee P.J. stated:

A post-conviction proceeding to set aside a guilty plea should be reviewed with the utmost gravity. This matter is not before us upon a direct appeal, but a collateral attack. The polestar inquiry should be: was there a miscarriage of justice in the accused pleading guilty? (Emphasis added)

....

I cannot imagine anything more difficult for a rational person than to plead guilty in open Court to a serious crime, if he is in fact innocent. Indeed, it poses an almost insuperable burden upon a *guilty* person to plead guilty. Vittitoe v. State 556 So2d 1062 at 1066 (Miss. 1990). (emphasis added)

In Sanchez v. State 913 So2d 1024, J. Barnes, in establishing the value our Supreme Court places on sworn pleas of guilty in open court, quoted the following:

“Great weight is given to statements made under oath and in open court during sentencing.” Young v. State, 731

So2d 1120, 1123 (Miss. 1999). “The trial court is right to place great emphasis upon th[e] statement under oath made ...in open court during the taking of ...guilty pleas and sentencing. There should be a strong presumption of validity of anyone’s statement under oath.”
Mowdy v. State, 638 So2d 738, 734 (Miss. 1994).

Petitioner was indicted by the Grand Jury on four counts of sex crimes involving the same victim, his daughter, who was under the age of 14. The indictment charged that on or about June to September of 2000, Petitioner: 1. engaged in touching her vagina with his hands; 2. rubbing her vaginal area with his penis; 3. having sexual intercourse with a child under the age of 14 and 24 or more months younger than Petitioner; and, 4. engaged in the act of sexual penetration by inserting his finger in the vagina of his daughter who was under the age of 14.

On September 13th, 2002, Petitioner entered a plea of guilty to Count I Touching of a Child for Lustful Purposes. The plea was entered without any recommendation from the State, but with an announcement by them that upon the court accepting Petitioner’s plea, the State would pass Courts II, III, and IV to the files. After the plea was accepted and sentence imposed, the State presented such an order to the court. This order, passing said counts to the files, was signed by the court on the same day.

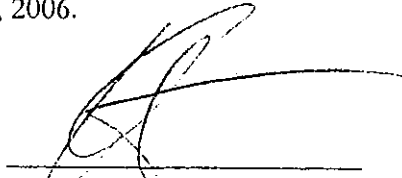
Although the State made no recommendation, paragraph 7 of Petitioner’s Petition to Enter Plea of Guilty, contains the following: “...and the District Attorney shall make no recommendations to the Courts concerning my sentencing except as follows: **Open Plea; Defense recommends fifteen (15) years, suspended, 5 years probation, \$5000.00 fine, cost of court.**” The portion of the quote typed in bold and underline, *is exactly how it appears in the plea petition*. Plea petitions filed immediately before a plea are handwritten rather than type.

In this case the petition is statutorily and case law deficient. On the issue of ineffective assistance of counsel the petition does not meet the requirements of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80L.Ed.2d 674 (1984). As to the remainder of the allegations, they are not supported by the file or the record made at the plea hearing.

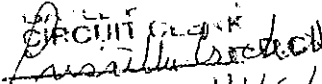
Furthermore, a review of the prayer of his petition reveals that he wants reconsideration of his sentence. Clearly, what the petitioner desires is a commutation of sentence based on his alleged conduct or “good behavior” after sentence. The Mississippi Constitution and our statutes vest such authority in the Executive and Legislative branches. A review of the petition with its exhibits, the file, and the law, compels this court to find that Petitioner, being aggrieved with his sentence, should seek relief in those branches

ORDERED, that the Petition for Post Conviction Relief filed by Tommy L. Lewis, Petitioner is hereby denied.

ORDERED this the 30th day of December, 2006.


Kosta N. Vlahos, Judge

FILED
DEC 29 2006

By 
445/500-502

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Public Trial
[HN1]See U.S. Const. amend. VI.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

[HN2]A person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Civil Procedure > Trials > Closing Arguments > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Trials

[HN3]The right to counsel is the right to the effective assistance of counsel. Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN4]The benchmark for judging any claim of

ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN5]A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Criminal Law & Procedure > Guilty Pleas > General Overview

Criminal Law & Procedure > Counsel > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

[HN6]The proper standard for attorney performance is that of reasonably effective assistance.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN7]Judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects 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.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

(Exhibit C)

Comment: Legal scholars disagree about what right is protected by the Second Amendment. Some scholars have concluded that this amendment affirms a broad individual right to gun ownership. Others interpret the amendment as protecting only a narrow right to possess firearms as members of a militia. Supreme Court decisions have not resolved the debate. However, the courts have held that the Second Amendment does not preclude certain government regulations on gun ownership, such as laws prohibiting ownership of firearms by felons.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Comment: The Third Amendment forbids the government from quartering soldiers in private residences during peacetime without the resident's permission, and during wartime only according to law. Under British rule, American colonists were forced to feed and house British soldiers deployed to help enforce colonial tax laws. The colonists resented this practice, and so banned it with this amendment. This amendment has been basically irrelevant since the end of the American Revolution (1775-1783).

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Comment: The Fourth Amendment prohibits the police and other government officials from searching people's homes or offices or seizing their property without reasonable grounds to believe that a crime has been committed. In most cases, police can conduct a search of a person's home or office only after they get a written search warrant from a judge, detailing where they will search and what they expect to find.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Comment: The Fifth Amendment provides five important protections against arbitrary government actions. First, no one may be prosecuted for a federal crime without first being indicted (formally accused) by a grand jury. Second, a criminal suspect may be prosecuted only once for each crime. If a jury acquits the accused person, there can be no retrial. Third, a person cannot be forced to testify against himself or herself in any criminal case. This is the right against self-incrimination. Fourth, the due process Clause bars the government from arbitrarily depriving anyone of life, liberty, or property. Fifth, the government may not take anyone's private property unless it is necessary for a public purpose and unless the government pays a fair price for it.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

PROPERTY OF SMCI
INMATE LEGAL ASSISTANCE PROGRAM

Exhibit C

Rule

- 7.3 Direct Contact With Prospective Clients.
- 7.4 Legal Service Information.
- 7.5 Evaluation of Advertisements.
- 7.6 Communication of Certification or Designation.
- 7.7 Firm Names and Letterheads.

Rule

MAINTAINING THE INTEGRITY
OF THE PROFESSION

- 8.1 Bar Admission and Disciplinary Matters.
- 8.2 Judicial and Legal Officials.
- 8.3 Reporting Professional Misconduct.
- 8.4 Misconduct.
- 8.5 Jurisdiction.

PREAMBLE: A LAWYER'S
RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes

persons who are not poor, cannot afford adequate legal assistance and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal pro-

<Exhibit E>

Gayle Parker

CLERK OF CIRCUIT AND COUNTY COURTS
HARRISON COUNTY

P.O. BOX 998
GULFPORT, MS 39502

CIRCUIT COURT
865-4147
FAX 865-4009

VOTER REGISTRATION
& MARRIAGE LICENSE
865-4005
FAX 865-4099

COUNTY COURT
865-4010
FAX 867-6523



P.O. BOX 235
BILOXI, MS 39533

PHONE
435-8258
FAX 435-8277

PLEASE REPLY TO
GULFPORT

Date Mailed: 9/6/07

Cause No. A 2401-05-00238

RE: Tommy L. Lewis vs. State of MS

Dear Sir or Madam:

We are in receipt of your letter. In response to your requests:

There is no transcript in your Criminal
Record. No transcript will be in your
Appeal Record.

Sincerely yours,

Gayle Parker, Circuit Clerk
Harrison County, Mississippi

By: Lisa Beck D.C.

47-7-34 Post Release

Exhibit F

Citation
MS ST S 97-5-23
Miss. Code Ann. § 97-5-23
C

Found Document

Rank 1 of 1

Database
MS-ST-ANN

WEST'S ANNOTATED MISSISSIPPI CODE
TITLE 97. CRIMES
CHAPTER 5. OFFENSES AFFECTING CHILDREN

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Current through End of 2002 3rd Ex. Sess.

§ 97-5-23. Fondling child; punishment

(1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen (16) years, with or without the child's consent, or a mentally defective, mentally incapacitated or physically helpless person as defined in Section 97-3-97, shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court.

(2) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child younger than himself or herself and under the age of eighteen (18) years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court. A person in a position of trust or authority over a child includes without limitation a child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

(3) Upon a second conviction for an offense under this section, the person so convicted shall be punished by commitment to the State Department of Corrections for a term not to exceed twenty (20) years, however, upon conviction and sentencing, the offender shall serve at least one-half (1/2) of the sentence so imposed.

CREDIT(S)

1999 Main Volume

Laws 1958, Ch. 276, § 1; Laws 1980, Ch. 387, § 1; Laws 1985, Ch. 389, § 1; Laws 1993, Ch. 512, § 4; Laws 1995, Ch. 487, § 1; Laws 1998, Ch. 549, § 5, eff. July 1, 1998.

< General Materials (GM) - References, Annotations, or Tables >



Supreme Court of Mississippi.

Timothy MYERS

v.

STATE of Mississippi.

No. 89-KP-1272.

June 19, 1991.

Motion for postconviction relief was filed alleging that defendant's lawyer's advice was so problematical that his plea was involuntary. The Circuit Court, Hinds County, William F. Coleman, J., dismissed complaint on its face. Defendant appealed. The Supreme Court, Robertson, J., held that defendant's motion and supporting affidavits provided sufficient evidentiary facts and conclusory allegations to state claim for relief on its face such that defendant was entitled to evidentiary hearing with respect to his allegations.

Reversed and remanded.

Hawkins, P.J., concurred with separate opinion joined by Roy Noble Lee, C.J., Dan M. Lee, P.J., and Sullivan and McRae, JJ.

McRae, J., specially concurred and filed opinion joined by Hawkins and Dan M. Lee, P.J., and Robertson, J.

West Headnotes

[1] Criminal Law Ⓒ1578
110k1578

(Formerly 110k998(14.1), 110k998(14))

Where prisoner is proceeding pro se on motion for "postconviction relief," Supreme Court takes that fact into account and, in its discretion, credits not so well-pleaded allegations to end that prisoner's meritorious complaint may not be lost because inartfully drafted. Code 1972, §§ 99-39-9, 99-39-27(5).

[2] Criminal Law Ⓒ273.1(1)
110k273.1(1)

Where defendant's plea of guilty is coerced or otherwise involuntary, any judgment of conviction entered thereon is subject to collateral attack; to be enforceable, a guilty plea must emanate from accused's informed consent.

[3] Criminal Law Ⓒ1580(3)
110k1580(3)

(Formerly 110k998(15))

[3] Criminal Law Ⓒ1655(3)
110k1655(3)

(Formerly 110k998(19))

Defendant provided evidentiary facts and conclusory allegations in sworn form sufficient on its face to be entitled to hearing on postconviction motion alleging that his plea was involuntary because counsel misinformed him that if he entered plea of guilty, court would sentence him to no more than 12 years, but instead that he received 16 years for aggravated assault. Code 1972, §§ 99-39-1 et seq., 99-39-19(2); Rules Civ.Proc., Rule 56.

*174 Timothy Myers, pro se.

Mike C. Moore, Atty. Gen., Jackson, for appellee.

Before HAWKINS, P.J., and PRATHER and ROBERTSON, JJ.

ROBERTSON, Justice, for the court:

I.

This case presents the perennially troublesome question of whether and when a felon convicted on a plea of guilty may secure post-conviction relief on grounds his lawyer's advice was so problematical that his plea was, in law, involuntary. Today we face the more limited question whether the prisoner's complaint in this regard is legally sufficient, such that it may not be dismissed on its face.

We hold that the complaint passes this threshold test and reverse and remand for further proceedings.

II.

On December 8, 1987, the grand jury for the First Judicial District of Hinds County returned an indictment charging Timothy *175 Myers with the offense of aggravated assault. [FN1] Miss.Code Ann. § 97-3-7(2) (Supp.1987). The Circuit Court appointed Jeffrey Weill, a lawyer who has his office in Jackson, Mississippi, to represent Myers on this charge. On March 4, 1988, Myers petitioned the Court that he be allowed to enter a plea of guilty to

the indictment. The Circuit Court accepted the plea and on April 13, 1988, adjudged Myers guilty of aggravated assault and sentenced him to sixteen years imprisonment in the custody of the Mississippi Department of Corrections.

FN1. The indictment charged that on October 6, 1987, Myers recklessly and feloniously caused serious bodily injury to Olevia Leflore under circumstances manifesting extreme indifference to the value of human life by discharging a firearm in a reckless fashion, the projectile therefrom striking Olevia Leflore.

On September 17, 1989, Myers filed in the Circuit Court of the First Judicial District of Hinds County, Mississippi, his complaint for post-conviction relief, alleging his guilty plea was involuntarily given. Miss.Code Ann. § 99-39-5(1)(f) (Supp. 1989). He charges, *inter alia*, that in the course of the original criminal proceedings before the Circuit Court, his lawyer, Weill, advised Myers that, if he went to trial on the aggravated assault charge, he would likely receive a sentence of twenty-five years. More to the point, Myers says Weill told him that, if he entered a plea of guilty, the Court would sentence him to no more than twelve years.

① * Myers' complaint is supported by the affidavit of his mother, Claudette Williams, who states, *inter alia*:

During the interview, Mr. Weill told Timothy that if he appeared at the blind hearing the judge would give him less than twelve (12) years but if he insisted on going to trial, he would get twenty-three (23) years.... Timothy, while I was present, continuously told Mr. Weill that he was not guilty of aggravated assault and he did not want to plead guilty.

② * Cynthia Woodall, Myers' sister, filed a supporting affidavit stating that she, too, was present when Myers was meeting with his attorney, Jeffrey Weill, and that in her presence,

Mr. Weill informed us that this hearing would result in Timothy receiving a sentence of not more than twelve (12) years.

In his complaint, Myers charges further that, in preparation for the plea hearing, his lawyer advised him "that when the judge asked him a question he should respond Yes and not hesitate or go into long drawn answer." He says further that Weill provided him "with incorrect advice and information

to induce ... [him] to plead guilty, misinformed ... [him] as to the possible sentence the court would impose ... [and] had ... [him] to lie to the court."

On September 7, 1989, the Circuit Court entered an order reciting that:

It plainly appearing from the motion, exhibits, and prior proceedings in the case that the movant is not entitled to the relief and the motion should be dismissed.

And thereupon, the Court dismissed Myers' complaint with prejudice. Myers now appeals to this Court.

III.

Our procedural posture is all important. Myers' complaint has been dismissed on its face, and, when this has happened and a prisoner appeals pro se, we employ special rules, familiar and well settled.

We put the premises in *Billiot v. State*, 515 So.2d 1234 (Miss.1987):

... we today encounter the sole question of whether Billiot, within the pleading confines of the Uniform Post-Conviction Relief Act, has sufficiently posed allegations which, if proven, would entitle him to relief. In other words, has he alleged facts which require further inquiry in the expanded setting of an evidentiary hearing?

As we have recently noted in another ... case, review of claims brought via formal post-conviction petition proceeds in a structural order whereby "[o]ur procedural posture is analogous to that *176 when a defendant in a civil action moves to dismiss for failure to state a claim. See Rule 12(b)(6), Miss.R.Civ.P.; *Stanton & Associates, Inc. v. Bryant Construction Company, Inc.*, 464 So.2d 499, 504-06 (Miss.1985). Functionally, Section 99-39-9 is substituted for the pleadings requirements of Rule 8(a) and (e), Miss.R.Civ.P." *Neal v. State*, 525 So.2d 1279, 1280 (Miss.1987). *Neal* further instructs that we examine such petitions for the following essential pleading components:

- (c) A concise statement of the claims or grounds upon which the motion is based.
- (d) A separate statement of the specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner.
- (e) A specific statement of the facts which are not within the prisoner's personal knowledge. The

< Exhibit M >

GULFPORT POLICE DEPARTMENT DETECTIVE INVESTIGATIVE REPORT

Case Number: 01-002747 (A)

Type Incident/Crime: Capital Rape	Date of this Report: 01-17-01	Date of Original Report: 01-04-01
Suspect/Victim Name: SUS: Tommy Lee Lewis, Sr.	Connected Case Number(s):	

Lewis, Sr., for interview but there was no such address as # 40 Holly Round Circle. Det. Conerly provided Laurie with the correct address for Tommy Lee Lewis, Sr., and a cellular phone number to get in contact with him. Laurie stated she would notify Lewis and set up an interview time and date.

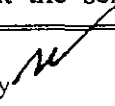
On January 09, 2001, Gertha Laurie called Det. Conerly and informed him that she had arranged for an courtesy interview at the DHS for 10:30 a.m. with Tommie Lee Lewis Sr. Det. Conerly advised Laurie that he wanted to be present when she interviewed Tommy Lee Lewis.

On Tuesday, January 09, 2001, at approximately 10:30 a.m., Det. Conerly met with Gertha Laurie and Tommy Lee Lewis, Sr. at the Department of Human Services building in Gulfport. Ms. Laurie the assigned case worker for the Department of Human Services conducted the interview while ~~Det. Conerly was only there to assist.~~ Laurie advised Lewis of his constitutional rights to have an attorney present while being questioned about the sexual misconduct. Lewis stated he did not want an attorney at this time.

Det. Conerly asked permission from Tommy Lewis to use a audio cassette recorder to record the interview, which Lewis gave consent, and confirmed by Ms. Laurie.

An synopsis of the audio tape interview with Tommy Lewis Sr. is as following: Ms. Laurie started the interview by establishing the residency of Lewis for the past six years. Laurie inquired about the sleeping arrangements of his children Chelsea and Tommy Jr. while they were residing at 45 Holly Circle. Laurie also questioned Lewis why Chelsea was removed from school and learned Chelsea was removed by her mother Kimberly Lewis when informed Chelsea had been sexually molested. The interview shifted to the complaint of sexual misconduct initiated by his girlfriend Cynthia Hutchins. Lewis was asked has he ever engaged in any inappropriate behavior with his daughter Chelsea. Lewis admitted to Laurie and Det. Conerly that he had engage in an inappropriate behavior with Chelsea. ~~Lewis stated one night the father and daughter relationship crossed the line and I touched Chelsea between her legs on top of her clothing.~~ The incident occurred in the living room while we were watching a movie.

At this point Det. Conerly advised Lewis of his constitutional rights based on his own admission of sexual misconduct with his daughter Chelsea. Det. Conerly further questioned about the sexual

Reporting Officer: 54 Det. Greg Conerly	Division: Detectives	Reviewing Supervisor: 28 Det. Lt. Danny Holloway 
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Investigating Detective:

54 Det Conerly

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< [scribble] >

<Exhibit I>

<Exhibit I>

will be Amended
have not received yet