

COPY

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2007-CP-00544-CA

FILED

KENNETH DEWAYNE DAVIS

MAY 25 2007

Appellant

VS.

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE of Mississippi

Appellee

BRIEF OF APPELLANT

Respectfully Submitted

Kenneth Davis

KENNETH DEWAYNE DAVIS, #118297

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GREENWOOD, MS. 38930

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2007-CP-00544-CA

KENNETH DEWAYNE DAVIS

Appellant

VS.

STATE OF Mississippi

Appellee

Certificate of Interested Persons

The undersigned pro se appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF ISSUES

1. INEFFECTIVE ASSISTANCE OF COUNSEL IN DENYING APPELLANT TO HIS
RIGHT TO TRIAL BY JURY BY THE USE OF THREATS AND COERCION
TO FORCE THE APPELLANT TO ENTER A PLEA OF GUILTY
2. APPELLANT'S PLEA OF GUILTY WAS NOT VOLUNTARILY AND INTELLIGENTLY
GUILTY
3. TRIAL COURT FAILED TO CONDUCT A PROPER HEARING PURSUANT TO
RULE 8.04 UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE
4. APPELLANT'S POST-CONVICTION MOTION RAISED FACTS WHICH DID
REQUIRE THE TRIAL COURT TO GRANT AN EXPANSION OF THE RECORD
AND CONDUCT AN EVIDENTIARY HEARING

STATEMENT OF CASE

ON or ABOUT November 1st 2005, the Grand Jury of Copiah County, Mississippi, returned a true bill of indictment charging KENNETH DEWAYNE DAVIS with the sale of a controlled substance, i. e., MARIJUANA, ON or ABOUT the 6th day of October, 2004, CONTRARY to AND IN VIOLATION of SECTION 41-29-139 of the Mississippi Code of 1972, BEING CAUSE Number 2005-0174-CR.

ON or ABOUT the 27 day of February, 2006, Appellant KENNETH DEWAYNE DAVIS entered a plea of guilty to the charge of SALES OF A controlled substance in CAUSE Number 2005-0174-CR, AND WAS subsequently SENTENCED to a Term of Twenty-Five (25) years with the Mississippi Department of Corrections, with SAID sentence to run consecutively with CAUSE Number 2006-0042CR, Conspiracy To Commit Murder.

Appellant KENNETH DEWAYNE DAVIS did file on the 9th day of February, 2007, his motion for post-conviction motion pursuant to Mississippi Code Ann. Section 99-39-1 et. seq. (2005), BEING CAUSE Number 2007-0044.

The Circuit Court of Copiah County, Mississippi granted Appellant IN FORMA PAUPERIS status AND ON the 15th day of March, 2007, did file AN order denying the motion for post-conviction. This appeal stems from the denial of his post-conviction motion.

SUMMARY OF THE ARGUMENT

1. INEFFECTIVE ASSISTANCE OF COUNSEL IN DENYING APPELLANT TO HIS RIGHT TO TRIAL BY JURY BY THE USE OF THREATS AND COERCION TO FORCE THE APPELLANT TO ENTER A PLEA OF GUILTY

Appellant, KENNETH DEWAYNE DAVIS, (hereinafter known as DAVIS), while he was being held on the charge of conspiracy to commit murder in Cause Number 2006-0042CR, was informed by his court appointed attorney, Andre Degruy, (hereinafter known as trial counsel), that the prosecution did have another charge for the sale of marijuana that was pending against DAVIS, and that the prosecutor wanted to discuss a possible plea of guilty.

DAVIS informed his trial counsel that he had not sold marijuana to anyone, and was not going to plead guilty to that charge. Trial counsel did state that the prosecutor wanted to have a meeting about the charge. DAVIS agreed to the meeting and trial counsel arranged this meeting.

At the meeting, the prosecution alleged that they, (the State), had evidence that would show that on or about the 6th day of October, 2004, DAVIS had met with MBN Agent James Ragan and Confidential Informant 078 at his mother's residence, and did then sell two(2) ounces of marijuana to Agent Ragan. DAVIS did deny this

allegation of ~~the~~ prosecutor, and did ask that the prosecutor to show him the evidence, The prosecutor refused to do so.

DAVIS' trial counsel stated that it would be best to plead guilty to this charge, so that all of this could be cleared up. DAVIS told his trial counsel that he was willing to plead guilty on the conspiracy charge, but, he was not going to plead guilty to a charge that he was innocent of. At this time, DAVIS told his trial counsel in the presence of the prosecutor, that, he was not pleading guilty to the sales charge and wanted to go to trial.

When DAVIS demanded a trial, the prosecutor did state that since the incident had occurred at the home of DAVIS' mother, that if DAVIS refused to plead guilty to the sales charge, that the state would seek an indictment against his mother for sale of marijuana.

DAVIS did then ask to speak with his trial counsel in private about this matter. Once alone, DAVIS did tell his trial counsel that he had not sold any marijuana, and that he did not want to plead guilty. Trial counsel told DAVIS that the prosecutor would indict DAVIS' mother and send her to prison. But if DAVIS would plead guilty, that his mother would not be implicated.

DAVIS BECAME CONFUSED AND DIDN'T UNDERSTAND HOW THIS COULD BE HAPPENING, AND ASKED THAT TRIAL COUNSEL TO HELP HIM TO PROVE HIS INNOCENCE. BUT TRIAL COUNSEL TOLD DAVIS THAT HE HAD NO CHOICE IN THE MATTER. THAT IT WAS EITHER HE PLEAD GUILTY, OR THAT HIS MOTHER WOULD GO TO PRISON WITH HIM.

DAVIS NOT KNOWING THE LAW, FELT THAT HE HAD NO CHOICE, BUT TO PLEAD GUILTY TO SAVE HIS MOTHER. AT THIS TIME, DAVIS DID AGREE TO ENTER A PLEA OF GUILTY TO THE SALES CHARGE.

TRIAL COUNSEL DID CONSPIRE WITH THE PROSECUTOR, AND DID MISREPRESENT THE LAW ABOUT CHARGES BEING FILED AGAINST HIS MOTHER TO COERCE DAVIS TO ENTER A PLEA OF GUILTY TO THE SALES CHARGE. THE ACTIONS OF TRIAL COUNSEL DID FRUSTRATE AND DID DENY DAVIS HIS SIXTH AMENDMENT RIGHT NOT TO PLEAD GUILTY AND HAVE A TRIAL BY JURY.

IT CANNOT BE SAID THAT DAVIS' TRIAL COUNSEL WAS ACTING IN THE CAPACITY OF EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND HIS COMPARABLE RIGHTS PURSUANT TO ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION.

TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT IN GOING ALONG WITH THE PROSECUTION IN USING COERCION TO GET DAVIS TO ENTER A PLEA OF GUILTY TO THE CHARGE OF SALES OF MARIJUANA. DAVIS DID SUFFER

prejudice by the unprofessional conduct of trial counsel, because if not for the deficient performance of counsel, DAVIS would have insisted on going to trial on the charge of the sale of marijuana.

2. DAVIS' PLEA OF GUILTY WAS NOT VOLUNTARILY AND INTELLIGENTLY GIVEN

DAVIS contends that Due Process demands that a plea of guilty should be voluntarily and intelligently given. Also Due Process is violated when the plea is the product or induced by threats or coercion. So that, when a plea is entered or induced by coercion, it cannot be said to be a voluntary and intelligent plea. Such is the case sub judice, DAVIS' plea was given in violation of Due Process.

It has long been held that when a defendant is misinformed by his trial counsel, or trial counsel's ineffectiveness has a coercive effect that causes the defendant to plead guilty, that that plea has not been entered voluntarily and intelligently, so that the plea is subject to collateral attack.

DAVIS' trial counsel failed to render effective assistance of counsel, when trial counsel used coercion to cause DAVIS to enter a plea of guilty. DAVIS was misinformed by trial counsel and did enter his plea of guilty involuntarily.

DAVIS ASSERTS THAT HIS IGNORANCE, INCOMPREHENSION AND THE BLATANT THREATS BY THE PROSECUTOR AND DEFENSE COUNSEL CAUSED HIS PLEA TO BE GIVEN INVOLUNTARILY, AND THAT HE DID NOT MAKE A INTELLIGENT DECISION TO ENTER A PLEA OF GUILTY.

DAVIS' TRIAL COUNSEL WAS FURTHER DEFICIENT, WHEN THAT ATTORNEY DID COACH DAVIS TO LIE TO THE TRIAL COURT THAT HIS PLEA WAS NOT THE PRODUCT OF THREATS OR COERCION. TRIAL COUNSEL TOLD DAVIS HOW TO ANSWER THE QUESTIONS PRESENTED BY THE TRIAL COURT. TRIAL COUNSEL DID STATE TO DAVIS THAT HE SHOULD ANSWER A CERTAIN WAY SO THAT THE COURT WOULD ACCEPT THE PLEA OF GUILTY.

DAVIS DID ASK TRIAL COUNSEL IF HE WOULD BE LYING TO THE COURT? TRIAL COUNSEL STATED THAT THIS WAS A LIE OUT OF NECESSITY, SO THAT THE TRIAL COURT WOULD ACCEPT HIS PLEA. DAVIS DID STATE TO TRIAL COUNSEL, THAT HE DID NOT FEEL RIGHT BY SAYING THINGS THAT WERE NOT NECESSARILY TRUE. BUT TRIAL COUNSEL DID STATE THAT THIS HAD TO BE DONE, BECAUSE IF THE TRIAL COURT DID NOT ACCEPT THE PLEA, THAT THE PROSECUTOR WOULD SEEK AN INDICTMENT AGAINST HIS MOTHER.

DAVIS CONTENDS THAT HIS RIGHT TO DUE PROCESS WAS VIOLATED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL. THAT BECAUSE OF THE VIOLATION OF HIS RIGHT TO DUE PROCESS, THAT HIS PLEA OF GUILTY CANNOT BE CONSIDERED VOLUNTARILY AND INTELLIGENTLY GIVEN.

3. Trial Court Failed To Conduct A Proper Hearing Pursuant To Rule 8.04 Uniform Rules Of Circuit And County Court Practice

Rule 8.04 (A)(3) states the following:

3. Voluntariness. Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record.

Davis appeared before the Circuit Court of Copiah County, Mississippi, to enter his plea of guilty. The circuit judge read the charge in Cause Number 2005-0174-CR, and then asked Davis if he was going to plead guilty? Of the which, Davis answered in the affirmative. The circuit judge then stated he would accept the plea of guilty to the charge.

At this time, the circuit judge did ask Davis some perfunctory questions concerning whether Davis had been promised anything, and whether Davis was satisfied with his attorney. And Davis according to the prior coaching of his attorney answered these questions according.

Davis asserts that the trial court failed to form a factual basis for accepting a plea of guilty from Davis. Rule 8.04(A)(3) states that the court must form this factual basis for a plea of guilty to be valid. The trial court failed to ascertain that the

ELEMENTS OF THE OFFENSE WERE PRESENT, AND THAT WHAT WAS CHARGED IN THE INDICTMENT WAS ACTUALLY WAS WHAT DAVIS WAS ENTERING HIS PLEA ON.

DAVIS CONTENDS THAT A MERE READING OF THE INDICTMENT IN THE PRESENT OF DAVIS AND ASKING HIM IF HE WAS GUILTY OF THIS OFFENSE WILL NOT BE SUFFICIENT TO FORM A FACTUAL BASIS FOR THE PLEA. RULE 8.04(A)(3) REQUIRES THAT THE TRIAL JUDGE TO QUESTION DAVIS PERSONALLY TO SEE IF HE ACTUALLY DID THE CRIME AND WHAT DAVIS WAS ADMITTING HIS GUILT, WAS ACTUALLY WITHIN THE AMBIT OF THAT AS DEFINED CRIMINAL IN THE INDICTMENT. FOR THIS REASON, DAVIS ASSERTS THAT THE TRIAL COURT DID NOT HAVE A FACTUAL BASIS TO ACCEPT HIS PLEA.

DAVIS ASSERTS THAT HIS PLEA WAS GIVEN IN VIOLATION OF DUE PROCESS WHICH IS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE 3, SECTION 14 OF THE MISSISSIPPI CONSTITUTION.

4. APPELLANT'S POST-CONVICTION MOTION RAISED FACTS WHICH DID REQUIRE THE TRIAL COURT TO GRANT AN EXPANSION OF THE RECORD AND CONDUCT AN EVIDENTIARY HEARING

DAVIS ASSERTS THAT THE CLAIMS THAT HE RAISED IN HIS POST-CONVICTION MOTION, DID MEET THE PLEADING REQUIREMENTS OF SECTION 99-39-9 MISSISSIPPI CODE ANN. (REV. 2000), THAT THE MOTION DID

raise questions that cannot be resolved short of an evidentiary hearing. Davis is entitled to an evidentiary hearing pursuant to sections 99-39-13 through 99-39-19 Mississippi Code Ann. (Rev. 2000), on the issue whether or not his plea of guilty was entered voluntarily and intelligently with an understanding of the consequences of his plea.

Davis also contends that the issue of his trial attorney's ineffectiveness cannot be decided by reviewing the record alone. This issue cannot be resolved short of an in-court opportunity to present witnesses and to fully develop the facts to show that his trial counsel's misrepresentation and ineffectiveness caused Davis to enter an involuntary plea.

ARGUMENT

i. Ineffective Assistance of Counsel in Denying Appellant To His Right To Trial By Jury By The Use Of Threats And Coercion To Force The Appellant To Enter A Plea Of Guilty

The claim of ineffective assistance of counsel is judged by the two-prong standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). The two inquiries which must be made under that standard are "(1) whether counsel's performance was deficient, and, if so, (2) whether the deficient performance was prejudicial to the defendant in the sense that confidence

in the correctness of the outcome is undermined." NEAL v. State, 525 So.2d 1279, 1281 (Miss. 1987). This standard applies to the entry of a guilty plea. Schmitt v. State, 560 So.2d 148, 154 (Miss. 1990).

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that "where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill, 474 U.S. at 56 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

Appellant asserts that by the above standard he was denied the effective assistance of counsel when his trial counsel used threats and coercion that did force him into pleading guilty to something that he did not do. The Mississippi Supreme Court held in Dunn v. Reed, 309 So.2d 516 (Miss. 1975), that where a defendant had pleaded guilty under the mistaken advice of counsel, that this would amount to the ineffective assistance of counsel.

Appellant's trial counsel used the threat that if he didn't plead guilty that, the prosecutor would indict his mother as the alleged sale of marijuana was conducted on her premises. Appellant did not want to plead to what he knew was a

bogus charge, but felt that he had no choice, so that his mother would not be arrested. If not for this false misrepresentation of his counsel, he would have demanded a trial.

It has long been held that "A plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Kercheval v. United States, 274 U.S. 220, 223 (1927).

Appellant's trial counsel's deficient performance did cause him to plead guilty, and he was prejudiced by the coercion and improper inducements to plead guilty, and, by the very fact that "but for his attorney's errors, he would have pleaded not guilty and would have insisted upon going to trial." See, Nelson v. Hargett, 989 F.2d 847 (5th Cir. 1993); also see Hubbard v. State, 628 So.2d 1386 (Miss. 1993).

The actions of Appellant's trial counsel did frustrate and denied him of his Sixth Amendment right to a trial by jury, and of his comparable rights pursuant to Article 3, Section 26 to the Mississippi Constitution. The actions of trial counsel did deny the Appellant of his right to plead not guilty and demand his right to trial by jury. See, Via v. Superintendent, Powhatan Correctional Ctr., 643 F.2d 167 (4th Cir. 1981).

Appellant has met the two-prong standard of Strickland v. Washington, 466 U.S. 668 (1984), and he has been denied his right to the effective assistance of counsel. So that, if it were not because of trial counsel's ineffectiveness, he would have not plead guilty and would have insisted on going to trial.

2. Appellant's Plea of Guilty Was Not Voluntarily And Intelligently Given

Where a defendant's plea of guilty is coerced or otherwise involuntary, any judgment entered thereon is subject to collateral attack. See on, Boykin v. Alabama, 395 U.S. 238 (1969). The Mississippi Supreme Court has held that to be enforceable, a guilty plea must emanate from the accused's informed consent. See, Vittitoe v. State, 556 So.2d 1062 (Miss. 1990).

Appellant's plea of guilty was not the product of his voluntary and intelligent consent on his part, this is so because of the spurious threats of the prosecutor and his court appointed counsel. The United States Supreme Court has held that "[A] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." See on Marchibroda v. United States, 368 U.S. 487 (1962).

A "voluntary plea" within the meaning of Mississippi Uniform Criminal Rules of Circuit Court Practice, Rule 8.04(A)(3), "is one which is not induced by fear, violence, deception or improper inducements." Smith v. State, 636 So.2d 1220 (Miss. 1994). In the case sub judice, it cannot be said that Appellant's plea was a voluntary plea, because of the threats by the prosecutor and his attorney. The Mississippi Court of Appeals has held "where the defendant was literally misinformed and misled this Court has held that the defendant's plea to have been involuntary." Bronson v. State, 786 So.2d 1083 (Miss. Ct. App. 2001). Such is the case of the Appellant, he was forced to plead guilty, so that his plea was not a voluntary act and should be vacated.

Davis' plea was further made an involuntary act when his trial counsel did coach him to answer the court a certain way, causing Appellant to be exposed to perjury. Appellant's trial counsel stated that he must give certain answers so that the court would accept his plea. The Mississippi Supreme Court has held that such a plea was not voluntarily given, and that, such a plea should be vacated and a new trial be given. See, Myers v. State, 583 So.2d 174 (Miss. 1991).

Appellant's plea is unconstitutional and he should be allowed to be placed by in the position he was in before he plead guilty. See, Sullivan v. Pouncey, 469 So.2d 1233 (Miss. 1985).

3. TRIAL COURT FAILED TO CONDUCT A PROPER HEARING PURSUANT TO RULE 8.04 UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE.

The Mississippi Court of Appeals has held that "factual basis is AN ESSENTIAL part of the constitutionally valid AND ENFORCEABLE decision to plead guilty, AND that basis CANNOT be implied from the fact that defendant entered a plea of guilt." SEE, Austin v. State, 734 So.2d 234 (Miss. Ct. App. 1999). IN the case now before this Court, the trial court failed to find the requisite factual basis to accept a plea of guilty from Appellant.

The trial court must have an evidentiary foundation in the record which is sufficiently specific to allow the court to determine that Appellant's conduct was within the ambit of that defined as criminal. The trial court in the case sub judice, read the charge from the indictment, AND THEN ASKED the Appellant how he plead. Without doing ANYTHING more, accepted the plea. IN doing this, without nothing more, did NOT satisfy the requirement that a factual basis did exist AND should NOT HAVE accepted the Appellant's plea. SEE, Lott v. State, 597 So.2d 627, 628 (Miss. 1992).

The trial court failed to form a factual basis before accepting the plea of Appellant. Rule 8.04(A)(3) states that the court must form this factual basis for the plea to be valid. The

trial court did fail to ascertain that the elements of the offense were present, and, that what was charged in the indictment was actually what the appellant was pleading.

The trial judge should have questioned the appellant personally, to see if he actually did the crime. So, when the trial court failed to do this, there was no factual basis to accept a plea of guilty from the appellant, and to enter a conviction against him. See, Nelson v. State, 626 So.2d 121, 126 (Miss. 1993).

Because of this fact, the plea should be vacated and he be allowed a new trial. See Harris v. State, 806 So.2d 1127 (Miss. 2002).

4. Appellant's Post-Conviction Motion Raised Facts Which Did Require The Trial Court To Grant An Expansion Of The Record And Conduct An Evidentiary Hearing

A defendant is entitled to an evidentiary hearing to determine whether or not his plea was voluntarily and intelligently given. See, Alexander v. State, 605 So.2d 1170 (Miss. 1992). Since the appellant raised a question of whether his plea was a voluntary and intelligent relinquishment of a known right or privilege, he should be allowed an evidentiary hearing to determine the voluntariness of his plea. See, Sanders v. State, 440 So.2d 278 (Miss. 1983).

The Mississippi Supreme Court has mandated an evidentiary hearing on an ineffectiveness of counsel that raises the question of the erroneous advice given by counsel that does induce a defendant to enter a plea of guilty. See, Myers v. State, 583 So.2d 174 (Miss. 1991).

Appellant's motion has raised such questions of fact regarding his counsel's deficiencies and the prejudice that he has suffered, and he is entitled to an evidentiary hearing. See, Conner v. State, 684 So.2d 608 (Miss. 1996).

Conclusion

Wherefore Premises Considered, Appellant moves this Court to vacate the guilty plea and order a new trial. Or in the alternative, remand this case back to the Circuit Court of Copiah County, Mississippi for an evidentiary hearing to be had on his post-conviction motion.

Respectfully Submitted this the 25 day of May, 2007.

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Certificate of Service

This is to Certify, that I, KENNETH DEWAYNE DAVIS, Appellant, have caused to be delivered this day, via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the below listed persons:

Honorable Jim Hood
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P.O. Box 220
JACKSON, MS, 39205-0220

This the 25 day of May , 2007.

Kenneth Davis
KENNETH DEWAYNE DAVIS