

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GEORGE DAVIS, JR.

APPELLANT

VS.

NO. 2007-CP-0578

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GEORGE DAVIS, JR.

APPELLANT

VERSUS

NO. 2007-CP-00578

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLEE

PROCEDURAL HISTORY:

On April 4-6, 2005, George Davis, Jr., "Davis," was tried for armed robbery of the Sheraton Casino before a Tunica County jury, the Honorable Kenneth L. Thomas presiding. R. 1. Davis was represented by Mr. Richard Lewis. R. 1.

Davis was found guilty and given a fifteen with three years suspended sentence in the custody of the Mississippi Department of Corrections. R. 225; C.P. 204-205.

On June 27, 2005, Davis filed an "affidavit" waiving either filing a motion for a new trial or an appeal to the Mississippi Supreme Court. C.P. 228-229.

On March 29, 2006, Davis filed a pro se "Petition For Out of Time Direct Appeal." C.P. 218. On January 10, 2007, the trial court filed an order denying relief, finding that Davis had waived any right to appeal his conviction. C.P. 260.

Davis filed notice of appeal to the Mississippi Supreme Court. C.P. 263.

ISSUES ON APPEAL

I.

DID DAVIS VALIDLY WAIVE HIS RIGHT TO APPEAL?

II.

DID DAVIS RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE NO APPEAL WAS PERFECTED?

STATEMENT OF THE FACTS

On February 10, 2004 , Davis was indicted, individually or while aiding and abetting others, for armed robbery of the Sheraton Casino in Tunica on December 8, 2003 by a Tunica County Grand jury. C.P. 15.

On April 4-6, 2005, Davis was tried for armed robbery before a Tunica County jury, the Honorable Kenneth L. Thomas presiding. Davis was represented by Mr. Richard Lewis. R. 1.

Davis was found guilty. R.225. He was given a fifteen with three years suspended sentence. C.P. 204-205.

On June 27, 2005, Davis executed and filed a notarized and witnessed "affidavit." C.P. 201-202. This was with the assistance of counsel. Davis waived either filing a motion for a new trial or the perfecting an appeal to the Mississippi Supreme Court. R. 201. Davis knowingly "released" his counsel "from any obligation to perfect any appeal" on his behalf. C.P. 202.

On March 29, 2006, Davis filed a pro se "petition for an out of time direct appeal." C.P. 218. This would be under the provisions of the Mississippi Post Conviction Collateral Relief Act, "the UPCCR act," M. C. A. 99-39-5 (1) (h)"That he is entitled to an out of time appeal."

On January 10, 2007, the trial court issued an order denying relief, finding that Davis had waived any right to appeal his conviction. The Court found "no basis to support the petitioner's contentions." C.P. 260.

Davis filed notice of appeal to the Mississippi Supreme Court. C.P. 263.

No out of
time appeal
to be filed
in the 30 day
period.
DCL.

SUMMARY OF THE ARGUMENT

1. The record reflects that Davis filed an affidavit waiving his right to appeal his conviction to the Mississippi Supreme Court. This was with benefit of counsel. C.P. 201-202. The record also reflects that the trial court correctly denied Davis' request to file an out of time direct appeal. The Court found "no basis to support the petitioner's contentions." C.P. 260.

The record reflects that Davis had until "July 27, 2005," which was thirty days from entry of his judgment of conviction for armed robbery, to revoke his waiver to perfect a direct appeal. C.P. 207. M. R. A.P., Rule 4; **Jones v. State** 700 So.2d 631, 632 (Miss.1997).

Davis' motion came more than six months after this thirty day deadline. It was filed on March 14, 2006. C.P. 218-225. There was no "oath of the prisoner" or affidavit from either Davis or his attorney included with Davis' petition. In that petition Mr. Lewis was accused of misinforming and misleading Davis. Davis alleged that he was "manipulated" by Lewis into executing a waiver of his right of appeal. C.P. 220-221.

The appellee would submit that Davis did not meet his burden of proof. M. C. A. 99-39-23(7). He had no evidence to show that his failure to appeal occurred "through no fault of his own." **Fair v. State** 571 So.2d 965, 967 (Miss. 1990).

2. In Davis' "Petition For Out of Time Direct Appeal," he accused his trial counsel, Mr. Richard Lewis, of ineffective assistance of counsel. C.P. 222-223. Since there are no oath of affirmation, affidavit or statements of witnesses in support of Davis' claim of being misled by his counsel, Davis did not meet his burden under the provisions of the Uniform Post Conviction Relief Act. See M. C.A. 99-39-9, requirements of motion, which includes "affidavits," as well "oath of the prisoner."

In Davis' appeal brief, he includes additional issues never raised with the trial court, such as issues about accomplices' testimony and jury instructions. Appeal brief, page 8, etc. Issues raised for the first time on appeal are waived. **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988). ✓

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT DAVIS VALIDLY WAIVED HIS RIGHT TO PERFECT AN APPEAL. DAVIS' PETITION CAME MORE THAN THIRTY DAYS AFTER ENTRY OF JUDGMENT. AND THERE WAS NO OATH OR AFFIDAVIT IN SUPPORT OF HIS REQUEST FOR AN OUT OF TIME APPEAL.

Davis argues in his pro se appeal brief that the trial court erred in denying his motion to file an out of time appeal. Davis argues that he was improperly induced to execute an affidavit waiving his right to appeal. He thinks his affidavit was erroneously completed because it was based upon faulty and erroneous information allegedly provided by his counsel, Mr. Richard B. Lewis. Appellant's brief page 1-34.

The record reflects that the trial court denied relief, finding that Davis filed a valid waiver of his right to perfect an appeal. The trial court found "no basis to support the petitioner's contentions." Those contentions were that his attorney coerced him into filing such a waiver of right to appeal. C. P. 260. ✓

As stated by the trial court in denying relief:

The petitioner seeks to file his direct appeal to the Mississippi Supreme Court even though the time period for perfecting such an appeal has lapsed. An affidavit was executed by the petitioner on June 27, 2005, in which he knowingly and voluntarily waived his right to an appeal. **He now claims that he executed said affidavit because he was coerced to do so by his attorney and was misled by his attorney.**

This court can find no basis to support the petitioner's contentions. He executed an affidavit waiving his right to an appeal and stating that he did so knowingly, voluntarily, understandably and without duress. C.P. 260. (Emphasis by appellee).

The record reflects evidence in support of the trial court's decision. The record contains Davis' affidavit. In that affidavit the appellant stated that he "voluntarily, knowingly and understandingly and without duress" waived his right to an appeal from his conviction for armed robbery. C.P. 201-202. He also stated that after "discussing the waiver fully with his attorney," he "knowingly and voluntarily releases his attorney from any obligation to perfect any appeal..." R. 202.

This affidavit was signed before a notary who witnessed Davis' signature. C.P. 202. This affidavit was also signed by his trial court, Mr. Richard B. Lewis. This was on June 27, 2005. C.P. 201-202.

As stated in the affidavit:

That said defendant after conferring with his attorney, Richard B. Lewis, and after being advised of all his constitutional rights, does not desire to perfect an appeal in the above mentioned cause. **Said George Davis, Jr., fully understands his legal right to perfect an appeal of this cause but does hereby voluntarily, knowingly, understandingly and without duress waive any and all rights to perfect an appeal in the above mentioned cause or to have his attorney, Richard B. Lewis, file any request for a new trial or notice of appeal. C.P. 201.**

That George Davis, Jr., has discussed this waiver fully with his attorney, the Honorable Richard B. Lewis, who was appointed to represent him in this matter. **After numerous discussions with said attorney, the said George Davis, Jr., still desires to waive his right to an appeal and knowingly and voluntarily releases his attorney from any obligation to perfect any appeal of said conviction in cause number 2004-059. R. 202. (Emphasis by appellee).**

In **Fair v. State** 571 So.2d 965, 967 (Miss. 1990), the Court found that Fair was not entitled to an out of time appeal. Fair, like Davis, executed a waiver of his right to a direct appeal.

In a petition for an out of time appeal, Fair claimed a lack of understanding of what waiver meant. This was when he filed his waiver of appeal. The Supreme Court found that the fact that Fair did nothing to revoke his waiver within thirty days after entry of his judgment of conviction was fatal to his claim.

On the other hand, it is settled that a defendant desiring an out-of-time appeal must, at the very least, show that the failure timely to perfect an appeal was through no fault of his own. See, e.g., **Moawad v. State**, 531 So.2d 632, 633 (Miss.1988); **Barnett v. State**, *supra*. Here the Circuit Court heard the matter extensively in open court and found as a fact that Fair was fully advised of his right to appeal, that he understood his right to appeal, and that he did nothing indicating he wished an appeal until well after the time limit had expired. We reiterate that the sworn waiver filed February 14, 1989, was wholly revocable at the time, and it is clear that the Circuit Court regarded it as such. Fair did not lose his right to appeal because he waived it on February 14, 1989, but because he did not revoke the waiver and give notice of appeal on or before March 8, 1989. **The sworn waiver functions in this context as substantial credible evidence that Fair did, in fact, receive contemporaneous advice regarding his right to appeal and that he did knowingly and intelligently waive same.** (Emphasis by appellee).

The record reflects that the date of Davis's judgment of conviction was on June 27, 2005. C.P. 207. This was the same date on which Davis filed an affidavit waiving his right to file post conviction motions or to perfect a direct appeal from his conviction for armed robbery. C.P. 201-202.

This affidavit cited above provides "substantial credible evidence" that Davis was given advice regarding his right to appeal. It also provides evidence that he knowingly waived the same. Davis has provided no evidence, affidavits or otherwise, indicating that his failure to perfect an appeal was "through no fault of his own." Petition, page 218-230.

In **Jones v. State** 700 So.2d 631, 632 (Miss.1997), the Supreme Court stated that one has thirty days after entry of judgment of conviction to file a direct appeal.

¶ 3. Appeals to this Court are made by filing a notice of appeal with the trial court “within 30 days after the date of entry of the judgment or order appealed from.” M. R. A. P. Rule 4(a).

The record indicates that Davis had until July 27, 2005 to revoke his waiver.

The record reflects that his motion for an out of time appeal came on March 14, 2006. C.P. 224. There was no claim and no evidence in support of any claim that Davis attempted to revoke his waiver at any time prior to his March 14, 2006 filing.

M. C. A. § 99-39-5(h) of the Uniform Post Conviction Collateral relief which provides “grounds for relief” states at section (h): “That he is entitled to an out of time appeal.” ✓

Under M. C. A. §99-39-9 which deals with “requirements” for post conviction relief motions it states at sections (c),(d), and (e) , the need for “a concise statement of the grounds for relief,” “affidavits of witnesses” for facts to be proven not within the prisoner’s personal knowledge and “verified by the oath of the prisoner.” ✓

There was no “oath of the prisoner” included with Davis’ petition. C.P. 218-227. There were no affidavits of proposed witnesses for facts to be proven which would be outside the prisoner’s knowledge. His attorney, accused of wrongdoing, in Davis’ motion, has his signature contained on Davis’ waiver of his right of appeal. This also included a knowing and voluntary release of his counsel to perfect an appeal. C.P. 202.

That counsel, Mr. Lewis , would obviously be knowledgeable about the accusations made against him by Davis in his accusatory petition for out of time direct appeal. The accusation was that “immediately after his armed robbery” Davis allegedly advised his attorney he desired an appeal. C.P. 220. Davis then accused Mr. Lewis of providing erroneous advise as to his sentence, and that

Mr. Lewis “manipulated petitioner into signing a waiver.” C.P. 221. Yet the record contains no affidavit from Mr. Lewis included with Davis’s petition.

In **Lindsay v. State**, 720 So. 2d 182, 184 (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant’s affidavit. If an ineffective assistance claim is deficient without support of an affidavit, then the appellee would submit this is also the case for a prisoner attempting to fault his counsel for want of an appeal. On a motion for an out of time appeal the burden is on the petitioner to provide support for his request.

M. C. A. 99-39-23(7), states that a the petitioner must prove he is entitled to relief “by a preponderance of the evidence.”

(9) No relief shall be granted under this chapter unless the prisoner proves by a preponderance of the evidence that he is entitled to relief.

The appellee would submit under the authority of M. C. A. 99-39-23(7), when a petitioner has only his own accusations and no oath, affidavit or even a statement of proposed witnesses in support of his claims, he has not met his burden of proof “by a preponderance of the evidence.”

Therefore, the appellee would submit that this issue is lacking in merit.

PROPOSITION II

THERE IS NO SUPPORT FOR ANY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

As shown under proposition one, Davis did not meet his burden of proof for showing that he was entitled to any relief under the provisions of “the UPCCR act.” This was on his pro se “petition for an out of time direct appeal.” C.P. 218-227.

The appellee also claimed that his trial counsel was ineffective in his representation. Petition, page 5. If , as Davis claimed in his petition, his counsel did not perfect his direct appeal to the Supreme Court, then his counsel would have been arguably deficient in his responsibilities.

However, as shown under proposition I , there were no affidavits from Davis, much less his counsel, Mr. Lewis, who is being accused of dereliction of duty. There was also no oath verifying the facts alleged in Davis petition. M. C. A. 99-39-9(2)

In **Robertson v. State** , 669 So. 2d 11, 12-13 (Miss. 1996), the Supreme Court stated that motions for post conviction relief should contain affidavits which include information about facts and how or by whom these facts will be proven. A prisoner's affidavit without any other support is insufficient to met his burden of proof.

For Davis to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Davis must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" his defense. The burden of proving both prongs rests with Davis. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Davis must show that there is "a reasonable probability" that but for the alleged errors of his counsel, his appeal would have been perfected. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is a reasonable probability that but for the alleged errors of his counsel, Davis would have perfected his direct appeal. This is to be

determined from “the totality of the circumstances” involved in his case.

The appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is “a reasonable probability” that Mr. Richard Lewis erred in advising Davis of his right to appeal, and then assisting him in waiving that right knowingly and understandingly. C.P. 201-202.

The appellee would submit that based upon the record of this cause, there was no showing of any deficient performance on the part of Mr. Lewis, much less any showing of “prejudice” to Davis’ claim for out of time appeal relief.

In his thirty something page appeal from the trial court’s order denying relief, Davis attempts to raise other issues never raised with the trial court. They included evidentiary issues, such as an accomplice’s testimony, discovery issues, as well as jury instruction issues. Appeal brief page 1-33. The appellee would submit that these issues were all waived under the provisions of “the UPCCR act.”

In **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

The issue regarding the constitutionality vel non of Sect. 97-1-1, M.C.A. (1972), was not raised in Gardner’s motion for post conviction relief and may not be raised now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983)

In this case, the trial court denied a request for an out of time appeal. C.P. 261. It was uncontested that Davis did nothing to revoke his waiver of his right to appeal within thirty days after entry of his judgment of conviction, which was on June 27, 2005.

There is no evidence in support of Davis' claim in his petition that his failure to perfect an appeal "was through no fault of his own." The record contains Davis' waiver and release of his attorney from any obligation to file any post trial motions or a direct appeal. C.P. 201-202. ✓

Therefore, the appellee would submit that the additional evidentiary issues included in Davis' pro se appeal brief were waived. The appellee would submit that issues related to Davis' unsupported claims of ineffective assistance were lacking in merit. ✓

CONCLUSION

The trial court's Order denying an out of time appeal to Davis should be affirmed for the reasons cited in this brief. His claim of ineffective assistance was also lacking in merit. Other issues never raised with the trial court were waived.

Respectfully submitted,

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CERTIFICATE OF SERVICE

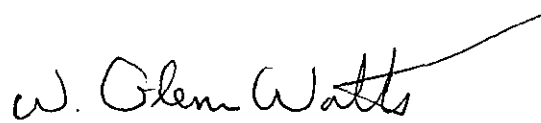
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 8th day of April, 2009.



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