

In the Court of APPEALS of the State of Mississippi **COPY**

Lewis Jenkins

FILED

Appellant

Versus

AUG 13 2007

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SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0768-COA

State of Mississippi

Appellee

Reple Brief
For the Appellant

Lewis Jenkins, (Appellant Pro se)

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Appellant's Reply to Appellee's Statement of Facts

On Page (3) of the Appellee's Brief, Paragraph (6), the Appellee states that Jenkins twice confessed to Law Enforcement that he shot Queen Bee.

For sake of keeping the Record correct, Nowhere in the Record does it state Jenkins shot anyone.

The Appellee at Page (3) Appellee's Brief states that, "Witnesses saw Jenkins cleaning up what appeared to be blood on the interior wall of a rental trailer located next to the house where Jenkins lived with his mother."

Mr. Wayne Black, Lead investigator in the case, at (R.161) (the follow-up on the Lab Report) advised Mr. Bush from the Crime Lab, that he (Black) had information from credible witnesses that the occupant of the questioned mobile home was observed cleaning a large amount of blood from the Living Room area sometime prior to Christmas."

Jenkins was not the occupant of the trailer and Mr. Black never tried to find out who the occupant was. Turkey News (a known drug dealer) was the occupant of the trailer at the time.

Issue One - Denial of Evidentiary Hearing

Appellee submits that "Defendant's must show compelling reasons why the trial court should conduct an evidentiary hearing. Citrus, Couch v. State, 836 So. 2d. 772 (Ct. App. Miss. 2002)

Jenkins submitted an Affidavit from Mr. Thompson, (who was listed as a witness) that the truck the state alleges was used in this crime was not operable during the period of time the state alleges this crime was committed.

this would reflect the confession was fabricated and involuntary.

At the time the motions ~~to~~ suppress, Motion to Dismiss were filed and heard, Jenkins was still charged with murder.

Counsel was ineffective at these hearings, as she had not interviewed witnesses, nor done an independent investigation of the facts and circumstances of the case.

There also exists highly circumstantial evidence that this offense was committed by another person.

Ms. Strickland was made aware of this, as the handwritten witness list reflects the name of Turkey Kew. She never tried to find Kew and neither did Law Enforcement.

Kew was leasing and the occupant of the trailer at the time the state alleges the murder took place. The state alleges Ms. Gillum was murdered inside the trailer.

Kew tore the trunk lining out of his car and sold the car.

Poor Police Investigation has caused the innocent to be in prison for this offense. Underhanded questioning techniques and threats by Police.

Jenkins could have proved this and other claims had he been granted an Evidentiary Hearing.

Jenkins submits that he demonstrated through sworn Pleadings and Affidavits that evidence exists in support of his Allegation to be entitled to an Evidentiary Hearing. Whittfield v. State, 845 So.2d 762 (2003); Lewis v. State, 798 So.2d 632 (Miss. 2001); Putnam v. State, 877 So.2d 468 (2003).

Jenkins should have been entitled to an Evidentiary Hearing.

Issue two - Involuntary Confession

The Appellees rely heavily on the guilty plea as leaving all defenses he might have had to the charges and obviated the necessity for the Prosecution to prove his confessions voluntary beyond a Reasonable doubt.

Jenkins submits that evidence does exist that would establish the alleged confession were fabricated and involuntary. Had counsel adequately performed an independent investigation of the facts and circumstances of the case and interviewed potential witnesses, Reasonable doubt would have been shown as to the voluntariness of the alleged confession.

Dickerson v. United States, 530 U.S. 428, 130 S.Ct. 2326, 147 L.Ed. 2d. 405 (2000)

Jenkins alleged confession should be held as involuntary, fabricated, coerced and inadmissible.

Issue Three - Denial of Speedy trial

The Appellees Lean heavily on the issue of Jenkins guilty plea waiving his right to a speedy trial.

At the time the Motion to Dismiss on Speedy trial grounds Jenkins was still charged with Murder and there was no talk of a plea.

The Speedy trial Right attaches at the time of Arrest. Smith v. State, 912 So.2d. 1645 (Covl). In this case March 14, 2002.

Jenkins was Appointed Counsel on the same date, March 14, 2002.

Jenkins was not indicted on said charge until March 13, 2004. A Period of twenty-Four (24) months after Arrest.

In Slaggs v. State, 676 So.2d. 897, 300 (Miss. 1996) the Court held that "A delay in excess of Eight (8) months between Arrest and trial establishes 'Presumptive Prejudice' sufficient to trigger analysis under Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d. 300 (1972).

In the instant case, the delay was three (3) times longer than the Eight (8) months under Slaggs, supra.

In Alexander v. State, 873 So.2d. 261 (Miss. Ct. App. 2004) this Court held that the twenty-Five (25) month delay was Presumptively Prejudicial and in violation of his Constitutional Rights.

It further held that "When a defendant's Constitutional Right to a speedy trial is at issue, the balancing test set out in Barker is applicable. Whe v. State, 616 So.2d. 298, 300 (Miss. 1993). No single factor controls. Furthermore, the Court is not strictly limited to consideration of the Barker factors. State v. Magnusen, 646 So.2d. 1275, 1278 (Miss. 1994). "Alleged violations of the Right to a speedy trial are decided on a case by case basis, weighing the facts and circumstances and conduct of the Prosecution and Defense." Elder v. State, 750 So.2d. 540, 542 (P-7) (Miss. Ct. App. 1999).

Jenkins submits that taking into account the Booker factors along with the conduct of the Prosecution and defense on this case, he was denied his right to a speedy trial.

This Court in Alexander supra found that Alexander was not denied his right to a speedy trial and affirmed the trial court's decision.

Jenkins submits that Alexander is distinguished from the instant case in the following facts:

Alexander was arrested and charged on March 9, 2001. The Grand Jury convened twice over the next fifteen months, but Alexander was still not indicted. He was indicted on June 10, 2002, approximately fifteen (15) months after arrest.

Jenkins was arrested and charged on March 14, 2002. According to trial court's denial of the motion to dismiss on grounds of speedy trial, there was no Grand Jury convened from March 14, 2002 til March 12, 2004. Approximately twenty-four (24) months later, after arrest and charge.

Alexander was brought before the Court on September 23, 2002 and signed an "Order Continuing and Pre Setting trial" and an "Acknowledgment of Right to be Arraigned", thus waiving his right to a speedy trial.

From March 14, 2002 til March 12, 2004, absolutely no action was taken by the Prosecution nor defense in the instant case.

The trial Court in denying the speedy trial claim was not based upon anything other than the fact there was no Grand Jury in Jones County for two (2) years. It did not consider the conduct of the Prosecution or defense over this two (2) year period. Certainly a constructive denial of Counsel on a Murder charge and Counsel bringing the Motion did not raise the issue in that context.

Jenkins asserts that had the trial Court considered the conduct of the Prosecution and defense, it would have reached a different decision on the Motion to Dismiss on speedy trial grounds.

The trial Court erred in denying Jenkins Motion to Dismiss on speedy trial claim.

Issue Four - Involuntary Plea.

The Appellees, at page 11 of Appellee's Brief argues that the Record belies the claims by Jenkins that he was not advised by the Court of the minimum and maximum sentence for manslaughter and never informed of the elements of manslaughter.

The Appellee's Argue that the Prosecutor gave a Recitation of the reduced charge of manslaughter which alleged: inter alia, that Jenkins killed Gillum "... without malice in the heat of passion by striking her in the head with an object and without authority of law and not in necessary self defense..." then continue by stating, "If that doesn't inform a defendant of the elements of manslaughter, we don't know what does."

Jenkins submits that this recitation by the Prosecutor fails to inform defendant according to the Law of this state.

In Austin v. State, 734 So. 2d 234 (Miss. 1999) the Court held that the "Trial Court did not perform its duty of fully informing defendant of elements of crime to which he was pleading guilty. When it merely informed defendant that manslaughter lacked the element of malice aforethought present in original charge of Murder.

Jenkins stated the Court did not advise him of the minimum and maximum sentence as is Required by URecc 8.04 (a) (4)(b).

Also, that Counsel was ineffective. Page 27, Appellant's Brief.

Issue Five - Material Facts Not Previously Presented.

Jenkins submits that the issues presented reflecting that his Daddy's truck could not have been used in this crime as alleged by the state and that no homes were in the trailer, were highly relevant evidence that would have clearly established that his alleged confession was fabricated, coerced and involuntary of the suppression Hearings on the Murder charge.

Retained Counsel was not prepared for the Hearing, due to the fact, Ms. Strickland performed no independent investigation of the facts and circumstances of the case and did not interview potential witnesses, who could have placed reasonable doubt on the issue of the alleged confession of Jenkins being voluntary.

In the instant case, the evidence is supported by sworn Pleasuries and Affidavits, Whitfield supra.

The Appellees admit that the facts not presented would have been relevant to Jenkins defense had he gone to trial. (Appellees Brief, Page 12).

Counsel's failure to investigate and interview potential witnesses was the cause for these facts not to be presented.

Counsel relied solely on the state's evidence.

Jenkins should have had the opportunity to present these facts at an Evidentiary Hearing.

Sufficient factual and circumstantial evidence exists to establish that the occupant of the trailer committed this crime.

Also, that Jenkins was denied the effective assistance of counsel.

Jenkins should be entitled to an Evidentiary Hearing in the interest of Justice.

Issue Six and Seven - Denial of Counsel and Effective Assistance of Counsel

Appellees submit that nothing in this Record reflects the Public Defender's representation was deficient or that any deficiency actually prejudiced Jenkins.

The Record reflects Counsel was appointed to represent Jenkins on the charge of Murder on March 14, 2002.

It further reflects that the Public Defender did absolutely nothing regarding this case for two (2) years.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) the Court, itself added that:

"In certain Sixth Amendment contexts, Prejudice is Presumed. Actual or Constructive denial of the Assistance of Counsel altogether is Legally Presumed to result in Prejudice. See United States v. Cronk, 466 U.S. at 659 and n. 25, 104 S.Ct. at 2046, 2047 and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into Prejudice is not worth the cost. 466 U.S. at 659, 104 S.Ct. at 2047. Moreover, such circumstances involve impairments of the Sixth Amendment Right that are easy to identify.

(Underlined for Emphasis by Appellant)

The Constitution's guarantee of assistance of Counsel cannot be satisfied by mere formal Appointment. Avey v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 38, 377 (1940) (Cited in Tucker v. Day 969 F.2d 155, 159 (5th Cir. 1992))

The mere formal Appointment of the Public Defender is all that happened in the instant case. For two (2) years, Counsel did absolutely nothing to assist Jenkins.

Jenkins submits this case falls squarely in the context of the Sixth Amendment where Prejudice is Legally Presumed as stated in Strickland, id.

Jenkins was deprived of "the guiding hand of Counsel" for two (2) years, while facing the charge of Murder, carrying the most extreme sentence anyone could receive, with the exception of the Death Penalty.

Counsel never even attempted in any manner to subject the Prosecution's case to adversarial testing, but was totally inert. Wherefore Prejudice must be Presumed. Strickland, supra; Cronk, 466 U.S. at 659, 104 S.Ct. at 2047; Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 53, 61, 77 L.Ed. 158 (1932).

Had the Public Defender, early on adequately investigated the facts and circumstance of the case and interviewed Potential witnesses, he would have found the state did not have a case against Jenkins.

1. The truck Alleged to have been used by Jenkins was not operable during the time the state alleges the crime occurred.
2. There were no Lamas in the trailer during this time.
3. A Known Drug dealer, Trucken Kous was the occupant of the trailer at this time.
4. The day Jenkins was called to the trailer by Kous, Kous showed Jenkins a 9mm Pistol with the clip busted.
5. Kous told Jenkins he hit some guy in the head with the Pistol and busted the clip.
6. Jenkins was called to the trailer to clean up the blood.
7. The next day, Kous asked Jenkins if he (Jenkins) could fix the Lock on the trunk of his car.
8. Jenkins discovered the trunk Linner had been torn out and asked Kous what happened. Kous told him he (Kous) had torn it out.
9. A couple of days later, Kous got rid of the car and left that residence and did not return.
10. Kous was never found or questioned by Law Enforcement or either counsel for Jenkins.
11. A PAGER was found and Wayne Black took possession of it. At that time, All-tell did not live and out lets in Mississippi. They were out of New Orleans. Trucken Kous and Hulis were from New Orleans or spent a Lot of time there. The Pager was found near the GRAVE where they found Mr. Gillum.
12. No Finger Prints were identified in the trailer.
13. Presense of Human Blood was found, but could not be tested by DNA or Blood typing.
14. Wayne Black told Mr. Jamee Bush of the crime Lab that he had credible witnesses that saw the occupant of the trailer cleaning up a large amount of blood inside the trailer.

15. Ms. Gillum frequented the trailer to obtain drugs from Keys and was in debt to Keys.

Prejudice in this case must be presumed from the constructive denial of the Assistance of Counsel for two (2) years, allowing the evidence to become stale, witness memories faded, possible defenses lost, due to lack of investigation by Counsel early in the case.

Trioletti v. State, 666 So. 2d 1356, 1361-62 (Miss. 1995); Nealy v. Cabana, 764 F. 2d 1173, 1177 (5th Cir. 1985).

The Appellees claim that this argument regarding the Public Defender is devoid of merit because Jenkins had effective counsel representing his interests after his indictment on March 14, 2004.

The Appellees cite no authority supporting this claim.

The Mississippi Supreme Court has held that the standard set forth in Strickland v. Washington, is also applicable to a guilty plea. Schmitt v. State, 560 So. 2d 148, 154 (Miss. 1990).

Appellant relies on his argument in the original brief to support his claim that he was denied effective assistance of counsel at the Plea Hearing and all times prior to the Hearing.

Issue Eight - Cumulative Error.

Jenkins submits that the cumulative effect of the errors in the instant case have deprived him of due process of law and fundamentally fair judicial proceedings, in violation of the 5th, 6th and 14th Amendments to the United States Constitution.

Conclusion.

Wherefore, Premises Considered, Jenkins Respectfully submits that he is entitled to Post-Conviction Relief and at the very least in the interest of Justice an Evidentiary Hearing in this case. That the ruling of the Trial Court be Reversed and Remanded.

Respectfully submitted,
Lewis Jenkins
Lewis Jenkins (Appellant Pro Se)