

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2007-TS-01144-CA

CORNELIUS BADY

v.

STATE OF MISSISSIPPI

FILED APPELLANT

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SUPREME COURT
COURT OF APPEALS APPELLEE

BRIEF FOR APPELLANT

BY: X Cornelius N. Bady

Cornelius Bady # M2672

ICCF, Dorm-D, Bed 24H

P.O. Box 220

Mayersville, MS. 39113

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2007- TS- 01144- COA

CORNELIUS BADY

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Cornelius Bady, certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Cornelius Bady, Appellant pro se.
2. Honorable Jim Hood and Staff, Attorney General
3. Honorable Sharon Aycock,
4. District Attorney, Lee County

Respectfully Submitted,
By: X *Cornelius Bady*
Cornelius Bady, Appellant
Iccf, D-zone Red 24H
P.O. Box 220
Mayersville, MS. 39113

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STATEMENT OF ISSUES

ISSUE ONE - Whether the trial court erred in failing to find that Cornelius v. Bady was subjected to a denial of due process of law where the trial court failed to advise Bady of the right to appeal the sentence, which the court imposed, directly to the court of appeals of the state of Mississippi or Supreme Court of Mississippi, in view of the sentence being excessively imposed upon petitioner where it was ordered to run concurrent with the sentence in cause No. CROS-720 CAL, which included a Twenty Four Year (24) post-release term, and where the sentence ultimately doubled the receiving stolen goods prescribed punishment by statute.

ISSUE TWO - whether the trial court erred in failing to find that the indictment was faulty where it failed to set forth the judicial district in which the indictment is brought as required by Rule 7.06 of the Mississippi Uniform Rule of Circuit and County Court practice. The indictment was the instrument in which the court assumed jurisdiction over the defendant. Such indictment was faulty and void and thereby failed to invoke jurisdiction.

ISSUE THREE - whether the trial court erred in failing to find that Cornelius v. Bady was denied his Sixth Amendment Right to effective Assistance of Counsel where defense Counsel failed to adequately advise him of his possible defenses prior to the guilty plea and failed to bring out the issues stated herein, where if raised, there would have been a different result.

ISSUE FOUR - whether the trial court erred in failing to find that Cornelius v. Bady was denied due process of law where the State alleged that Bady received and possessed a 32" inch sharp television, being of a value of (\$ 500.00) and more, where the State failed to prosecute Bady under lesser offense in statute. Since the television originally costed (\$ 349.99), and warranty value should not have been included where the warranty was never in Petitioner's possession and where it was an separate purchased item.

ISSUE FIVE - whether the trial court erred in failing to find that Appellant's plea of guilty was not knowingly and intelligently made

ISSUE SIX - whether the trial court erred in failing to find that the affidavit for the search warrant lacked the required substance, where it failed to state, "that the officer had reason to believe and "does believe"

ISSUE SEVEN - whether the trial court erred in failing to find that the executing officers' failure to produce warrant to Appellant prior to initiating the search of his home rendered the search and seizure invalid, and consequently voids the conviction and sentence in the above styled case.

STATEMENT OF CASE

Cornelius V. Bady was indicted on October 20, 2005, in the Circuit Court of Lee County, Mississippi, for the offense of Receiving Stolen goods. Appellant was subsequently allowed to enter a plea of guilty to the Receiving Stolen goods charge and was sentenced to a term of six (6) years in custody of the Mississippi Department of Corrections with the sentence to run concurrent with said sentence in Lee County cause No. CROS-720(A)L. (The sentence in cause No. CROS-720(A)L was for the offense of possession of cocaine greater than 10 grams with intent to sell, transfer or distribute. Appellant received six (6) years to serve in custody of the Mississippi Department of Corrections with twenty-four (24) years post-release supervision). See: APPEAL RECORD at page(s) (25), (26), (27), and (28).

Appellant subsequently provided his post conviction Motion (PCR) to the Circuit Clerk of Lee County, Mississippi, which was denied as ordered by the Circuit Court Judge on June 21, 2007. Also, leave to proceed with PCR in forma pauperis appeal was granted by trial court. See: APPEAL RECORD at page(s) (1), (26), and (43).

SUMMARY OF THE ARGUMENT

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous.

Kirksey v. State, 728 So.2d 565, 567 (Miss. 1999).

In the instant case, well-settled law dictates that the trial court's decision was clearly erroneous since the trial court failed to fully address all substantial and meritorious claims made by Bady in the motion, i. e., the record clearly demonstrate that Appellant Bady suffered Constitutional violations where the trial court accepted plea without making Bady aware of his right regarding that "the sentence" which the court imposed may be appealed directly to the supreme court just as if the sentence had been imposed after a jury trial. Additionally, the record reflects and confirms that Bady never fully admitted the elements required for Receiving stolen goods conviction under the standards and elements required by statute. Appellant's attorney never did object where there was evidence contradicting the state's case because the television's value did not exceed (\$500.00) or more as required for felony charges. The true value fell within a (\$300.00) range, therefore Bady should have been prosecuted under the lesser included charge and punished as a misdemeanor offense.

More over, the state asserts that Bady's voluntary

guilty plea waives his right to raise arguments underlined or stated in Appellant's post-conviction Relief Motion. The state is correct. However, Bady raises his issues in order to establish that he received ineffective assistance of counsel. This court should review the argument because an ineffective assistance of counsel claim is cognizable on post-conviction relief from a voluntary guilty plea. This matter has already been decided in other cases such as Robinson v. State, 2003 Miss. App. Lexis 229 (Miss. Ct. App. 03/03/03) (Speedy trial claim sufficed on issue of competency of counsel); see Roland v. State, 666 So. 2d 747, 749 (Miss. 1995); also Hynes v. State, 703 So. 2d 258, 260-61 (pp. 11-14) (Miss. 1997) (holding that counsel's failure to raise a Speedy trial violation is grounds for a claim of ineffective assistance of counsel). Thus, it is no defense to the state to overlook Appellant's claims because of a voluntary guilty plea.

The trial court should have allowed Bady an evidentiary hearing on the claims before summarily dismissing the motion.

ARGUMENT

ISSUE ONE

while the trial court found that Bady was properly advised by the court regarding his right to appeal the sentence in his case, after entering a plea of guilty, it is clear that the court failed to fully grasp the decision rendered by the Supreme Court in Trotter v. State, 554 So. 2d 313 (Miss. 1989) and for that reason the trial court's ruling is clearly erroneous. The trial court has fashioned Bady's claim as to be seeking an appeal from the fact and act of the guilty plea itself. However, this is not the actual issue. The true and genuine issue in this instance is whether the trial court should have told Bady that he had the right to appeal the sentence imposed by the court, not the plea, to the court of appeals the same as if he was appealing from an actual trial and conviction. There is a statutory prohibition to direct appeals from a guilty plea under state law. see Miss. Code Ann. § 9-3-101. Nevertheless, the Mississippi Supreme Court carved out an exception, allowing an appeal from a guilty plea within thirty (30) days when the issue concerned an alleged illegal sentence. Burns v. State, 344 So. 2d 1184 (Miss. 1977); Campbell v. State, 743 So. 2d 1050 (Miss. App. 1999); and Acker v. State, 797 So. 2d 966 (Miss. 2001). Here to fore, the Appellant has stated he was denied due process of the law where the above exceptions allowed him to appeal the illegal and excessive sentence directly to the Supreme Court. The

9.

Court imposed said sentence, but failed to bring this fact to Appellant's attention. As stated above, the Appellant's Six (6) Year sentence for Receiving Stolen goods offense, was ordered to be run Concurrent with the sentence of six (6) years and twenty-four (24) years term of post-release supervision in Cause No. C85-706AL.

The trial court corroborated Appellant's assertion of his sentencing proceedings in its order denying post-conviction Relief. See: APPEAL RECORD at page (5) (00036).

It is clear that Badu's Six (6) year sentence in this case "Combined" with the twenty four (24) term of post-release supervision totals thirty (30) years and therefore, "exceeds the statutory punishment of ten (10) years for Receiving stolen goods. A recent decision condemned such actions of the trial courts.

In the case of Johnson v. State, 925 So.2d 36; (Miss. 2006) the Supreme Court held: "That Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-33, permits a post-release supervision term and suspended sentence so long as the sentence does not involve a period of supervised probation and does ~~not~~ not exceed the maximum penalty statutorily prescribed for the offense committed; or that the total number of years of incarceration, plus the total number of years of ~~post-release supervision~~ post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed.

In the case at bar, Appellant was convicted under § 97-17-10. That statute only authorizes a sentence not exceeding ten (10) years, or by a fine of not more than Ten thousand Dollars (\$10,000.00), or 10.

both, see: Appeal Record at pages (000 a9). The Appeal Record on page (000 a7), shows that said sentence was ordered to be ran concurrently with the six (6) year term and twenty-four (24) year post-release term of supervision. Also, there was an additional five (5) years of supervised probation. The trial court failed to advise Bady of this right and now has made this shortcoming appear as that the court had no obligation to tell Bady he had the right to appeal from an actual guilty plea. Appealant would assert that the Supreme Court in Trotter recognized that an appeal from a sentence imposed upon a plea of guilty may be taken to the Court of Appeals, or the Supreme Court, as if it were a sentence rendered from a trial and verdict. An appeal from a sentence is not analogous to an appeal from a conviction or from the plea itself. Since the Supreme Court made this a right to be enjoyed by the defendant who enters a guilty plea, then the right should be revealed to the defendant at the time the sentence is imposed the same as it would be revealed to one who is found guilty by a jury and receives knowledge of his right to an appeal. The court has recognized this right in a number of other decisions since Trotter. Bady should have been told this in order to make his decision to enter a plea guilty and before such plea should be considered a knowing and voluntary act. Being made aware of all rights associated with a plea of guilty is a prerequisite to Constitutional plea. Certainly Appealant Bady should not have been left unaware of this exceptional right whatsoever.

ARGUMENT
ISSUE TWO

"FAILURE OF INDICTMENT TO CITE JUDICIAL DISTRICT

Rule 7.06(4), Miss. Unif. Rules of Circuit and County Court practice requires that the indictment set out the county and judicial district in which the indictment is brought. In the instant case the indictment sets out the county and court in which the petitioner was indicted in, but fails to state any judicial district. see: Appell Record at page (00025)

Rule 7.06, which was promulgated by the supreme court, requires that the "indictment shall also include the following:

"The county and judicial district in which the indictment is brought"

Appellant would assert that without this language being in the indictment, the indictment is faulty in its attempt to acquire jurisdiction and the Lee County Circuit Court was without jurisdiction to proceed.

The conviction and sentence imposed there under should be void and null. This court should so find and should issue an order dismissing the conviction and sentence with prejudice.

ARGUMENT

ISSUE THREE AND ISSUE FOUR

Appellant Cornelius v. Bady was denied his sixth Amendment Right to effective assistance of counsel where his attorneys representing him during criminal charges of receiving stolen goods failed to adequately represent Appellant by failing to object where trial Court accepted pleas and imposed sentence without determining that Petitioner knew elements and that his actions fell under the lesser penalty charged under receiving stolen goods statute and without advising Petitioner of adequate defenses and of the right to direct appeal the illegal sentence imposed by the Court.

In Jackson v. State, _____ So. 2d _____ (Miss. 2002); (No. 2000-KA-01195-SCT), the Court held the following in regards to ineffective assistance of counsel:

Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. Hill v. State, 660 So. 2d 961, 965 (Miss. 1995).

Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby.

Strickland v. Washington 466 U.S. 668, 687 109 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

Additionally, the defendant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992).

Finally the court must then determine whether Counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss. 1988). Appellant would urge that he had the right to appeal the sentence because the actions of the lower court in imposing the concurrent sentences exceeded the maximum penalty allowed by law and imposed a prohibited supervised probation term because he was a repeat offender. Moreover, defense counsel never mentioned to Appellant Body or to the court that the state's admission of the facts of the alleged charges were insufficient where the stolen property Appellant ~~possessed~~ possessed did not exceed (\$500.00) in value which was a necessary factor to be considered in bringing felony charges against Appellant. Appellant's counsel never objected to the affidavit for arrest warrant or other illegal acts committed by officers who executed the warrant in their attempt to secure an indictment against Cornelius Body. Also, defense counsel never objected to the legality of the indictment based upon its failure to comply with the provisions of Rule 7.06 of the Mississippi Uniform Rules of Circuit and County Court practice.

Additionally, Appellant can successfully meet both prongs since his attorney has been deficient and prejudicial. Under the standards set forth in Strickland, and by a demonstration of the record and the facts set forth in support of the claims, it is clear that Appellant Cornelius Bady has suffered a violation of his Constitutional rights to effective assistance of counsel in violation of the 6th Amendment to the United States Constitution. Defense Counsel should have made Appellant aware of the fact that the indictment failed in its language to properly charge jurisdiction where the indictment did not state the judicial district in which it was being brought. Counsel never objected. The Appellant's counsel should have also advised him that his actions as it pertained to the charges entitled him to be tried and prosecuted under the lesser included offense since he only possessed the television. The lesser offense would have been a misdemeanor ~~under~~ under Subsection (4) of the charged statute since the value of the television, excluding the warranty, was only (\$ 349.99). See: APPEAL RECORD at page(s) (00029 - 00030).

The Supreme Court has repeatedly held that an allegation that Counsel for a defendant failed to advise him of the range of punishment to which he was subject to give rise to a question of fact about the attorney's Constitutional proficiency that is to be determined in the trial Court.

Nelson v. State, 626 So.2d 121, 127 (Miss. 1993); Alexander v. State 605 So.2d 1170 (Miss. 1992) This Court should

conclude that here Counsel rendered ineffective assistance

of counsel and that such ineffectives prejudices petitioner's guilty plea in such a way as to mandate automatic reversal of the plea as well as the sentence imposed.

In the case at bar, the facts charged in the indictment, constitute a lesser offense, that being the proper offense since the evidence and acts committed by petitioner Bady was consistent with elements. "The state prosecuted Bady under the greater offense based upon a misrepresentation of the value of said property which was alleged to have been found in Appellant's possession. The evidence will show that Bady only received into his possession a television which had a value of (\$349.99)". The warranty was never mentioned in the indictment and the facts of the initial investigation clearly shows that Bady did not possess a warranty. Therefore, the state illegally proceeded against Bady with the felony offense receiving stolen goods pursuant to, or under Miss. Code Ann. § 97-17-70 (3), when it should have charged him under subsection (4), that being the lesser offense since his actions and the facts fall under the language of statute. Bady's actions or criminal involvement constitute receiving stolen goods under § 97-17-70 (4) and made him entitled to be tried under the lesser offense. The law is clear that when such a case presents itself before the court then the defendant should be tried and prosecuted under the lesser offense and according to the required elements or proof consistent with the defendant's action, see: Cunningham v. State, 478 So.2d 308 (Miss. 1985); Grillis v. State, 196 Miss. 576, 586, 17 So.2d 525, 527 (1944); Herring v. Estelle, 491 F.2d ...

125, 123 (5th Cir. 1974); Corley v. State, 585 So.2d 765, 767 (Miss. 1991); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988); See also: URCC 8.04 (A)(3) as amended.

Such actions by the trial court denied Bady fundamental due process and constitute plain error which should be open for collateral attack at any time.

This court should so find and should vacate the conviction and sentence for receiving stolen goods or proceed against Bady for the lesser included offense under subsection (4) of same statute.

ARGUMENT

ISSUE FIVE

Appellant Bady entered a plea of guilty to receiving stolen goods with the advice of his attorney. Such plea of guilty was made without Bady having a knowingly understanding of the elements or factual proof of the charges and without the trial court or Bady's attorney making him aware that (the trial court or Bady's attorney making him aware that his action as it related to the criminal offense entitled him to be tried for the lesser penalty).

Bady was not aware that the sentence imposed on such offense could be appealed independently of the fact that a plea was entered. The record demonstrates that during the plea colloquy Bady never was truthfully advised of the elements of the charge which must be discussed before a adequate plea of guilty be entered. Appellant never clearly stated he committed such actions to be violative of the law and the trial court never asked. The pleas were not voluntary under these circumstances.

There has been supreme court decisions that a guilty plea is only valid if it is both "voluntary" and "intelligent". ("The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"). The assistance of counsel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowing and intelligent understanding. (The Appellant is also raising by separate argument that he was denied effective assistance of counsel). There are state supreme court decisions to support the petitioner's proposition. In Vittito v. State, 556 So. 2d 1062 (Miss. 1990), the court stated that a guilty plea must emanate from the accused's informed consent. In a similar context, in Sanders v. State, 440 So. 2d 278, 283-284 (Miss. 1982), the court held: the question whether a plea of guilty was as voluntary and knowing one necessarily involves issue of fact. Advice received by the defendant from his attorney and relied upon by him in tendering his plea is a major area of factual inquiry. Chavez v. Wilson, 411 F. 2d 584, 586 (9th Cir. 1969) Applying this concept to the Appellant's case the Appellant all the more sets out a claim for relief under the Mississippi Uniform Post-Conviction Collateral Relief Act.

This court should vacate the plea of guilty and the sentence imposed upon body and should find that body never pleaded guilty to a crime since the facts of the case, along with the state's offer of proof does not constitute an adequate ingredient to Miss. Code Ann. § 97-17-70 (3).

ARGUMENT

ISSUE SIX AND ISSUE SEVEN

Appellant's attorney overlooked important defenses which could have caused a different result in the outcome of the case. The following errors are articulated to prove counsel's ineffectiveness at not conducting an independent investigation and discovering said violations prior to advising Appellant to enter a plea of guilty.

Counsel's actions have caused Badly grave consequences and such actions were tantamount to:

In Ward v. State — So. 2d — (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

Effective assistance of Counsel contemplates counsel's familiarity with the law that controls his client's case. See Strickland v. Washington 466 U.S. 668, 689 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also Herring v. Estelle 441 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not familiar with the facts and relevant law cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a identical test of the first prong of the Strickland analysis); Leatherwood v. State 473 So. 2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law).

In the instant case, defense counsel failed to know the law in regards to receiving stolen goods as well as the law concerning Affidavits and warrants.

The Appellant avers that the affidavit for the search warrant lacked the required substance, where it failed to state, "that the officer had reason to believe and "does believe" see: APPEAL RECORD at page 600031).

The affidavit for a search warrant must allege in substance that the officer has reason to believe and "does believe" before a valid warrant can issue thereon for search and seizure, see Porter v. State, 135 Miss. 789, 100 So. 377 (1924); Morrison v. State, 140 Miss. 221, 105 So. 491 (1925).

Also, the officers executing the search failed to serve it according to law, neither was the warrant served at all until after the search. The video camera will corroborate that the State entered Appellant's home and searched it without serving a warrant as required by law. Miss. Code Ann. § 41-24-157. This practice has been condemned by our State Court.

In Adam v. State, 30, So. 2d 593, 597 (Miss. 1947), the Mississippi Supreme Court held: provisions for search and seizure are to be construed strictly against the state. The should so find that where the officers failed to produce the warrant, the search and seizure of the television was invalid and consequently voids the conviction and sentence in this case.

CONCLUSION

Appellant Cornelius Badly respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial Court in regards to the post conviction relief motion. This case should be remanded to the trial Court for an evidentiary hearing.

Respectfully Submitted
By: X Cornelius L. Badly
Cornelius v. Badly # 12672
ECCF, Dorm-D, Bed 24H
p.o. Box 220
Mayersville, MS. 39113

CERTIFICATE OF SERVICE

This is to certify that I, Cornelius v. Badly, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal Service, First Class postage prepaid, to:
Honorable Jim Hood, Attorney General, p.o. Box 220, Jackson, MS. 39205
Ms. Betty W. Sephton, Office of the Clerk, p.o. Box 249, Jackson, MS.
39205-0249

This, the 29th day of Aug, 2007 A.D.,