

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-CP-01307-CA

Tommy Hamberlin

Appellant

v.

State Of Mississippi

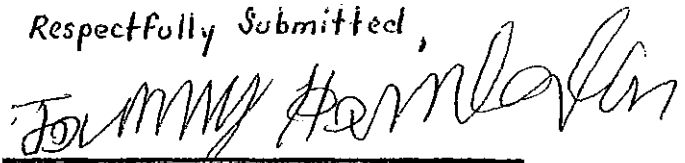
Appellees

FILED
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SUPREME COURT
COURT OF APPEALS

BRIEF FOR THE APPELLANT

BY: TOMMY HAMBERLIN
Petitioner pro se

Respectfully Submitted,



Unit D-2, Area II, #42740
P. O. Box 1419
Leakesville, Mississippi 39451

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO 2007-CP-01307-COA

Tommy Hamberlin

Appellant

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Certificate Of Interested Persons

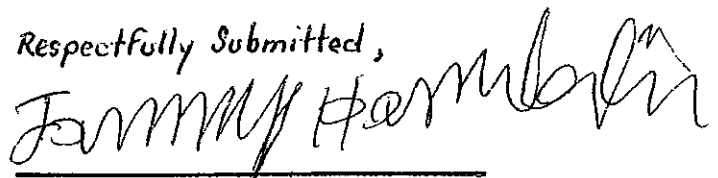
The undersigned Appellant-Petitioner pro se, of records certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusals.

Tommy Hamberlin, #42740, Appellant-Petitioner pro se;

Gil Martin, District Attorney for Warren County, Mississippi; And Jim Hood, Attorney General for Mississippi, attorneys for the Appellees;

Honorable Frank Vollar, Circuit Court Judge for Warren County, Mississippi, and presiding judge

Respectfully Submitted,



Unit D-2, Area II, #42740

P. O. Box 1419

Leakesville, MS 39451

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Statement Of Incarceration

That the Appellant is presently held in the custody of Mississippi Department of Corrections, housed at the South Mississippi Correctional Institution, P. O. Box 1419, Leakesville, Mississippi 39451 .

Statement Of The Issues

1. Appellant's Guilty Pleas Were Involuntarily, Unwillingly And Unintelligently Entered;
2. Appellant's Counsel Rendered Unconstitutionally Ineffective Assistance Of Counsel In Violation Of The Sixth And Fourteenth Amendment Of The United States Constitutions And Mississippi Constitution Art. 3, § 26, of 1890 (1972);
3. The Trial Court Erred And Abused Its Discretion As A Matter Of Law, When Denying Appellant's Post-Conviction Petition Without Causing The State Of Mississippi To Answer And/or Granting An Evidentiary Hearing

Statement Of The Case

This appeal results from the Warren County, Mississippi Circuit Court Judge, Order entered on July 9, 2007, and ruling upon the Appellant's, [hereinafter Hamberlin] post-conviction petition, filed by Hamberlin on or about May 9, 2007, denying reliefs, absent causing the State of Mississippi, Warren County, District Attorney, to answer or granting, and/or conducting an evidentiary hearing. See CR. p. 4, 11, 80. That the Appellant timely filed his Notice Of Appeal, accompanying motions on July 26, 2007. See CR. p. 81, 82, 83, and concluding the trial Courts' August 3, 2007, Order granting Hamberlin in forma pauperis, this Court has jurisdiction. See CR. p. 84.

see also Miss. Code Ann. § 99-39-25.

Statement OF The Facts

That on or about the July Term 2006, a Warren County, Mississippi Grand Jury, in No. 06, 0181 and No. 06, 0182, returned two separate indictments, allege that Hamberlin committed a sell and deliver a certain controlled substance cocaine, on October 24, 2005, to a cooperating individual for the sum of \$60.00 in money and on October 25, 2005, \$100.00 in money, United States Currency in violation of Miss. Code 1972, Ann. Sec. 41-29-199(a) Furthermore, both the indictments charged Hamberlin a Second And Subsequent Offense, pursuant Miss. Code Ann. § 41-29-147, and as an Habitual Offender pursuant to Miss. Code Ann. § 99-19-81. See CR. p. 12, 13, 14, 15, 16, 17, 18, 19. Because these indictments were brought by grand-jury, secrecy, Hamberlin was subsequently arrested on or about July, August 2006. See CR. p. 7, n.1, 8. Hamberlin retained the legal services of Attorney, Omar L. Nelson, to represent him, and who did represent him, with respects both the said indictment. See CR. p. 7, n.1. Upon several visits from Attorney, Nelson with Hamberlin at the Warren County Jail Detention Center, and after repeated discussion, refusals to a plea agreements, Nelson attempted to get Hamberlin to plead, Hamberlin became agitated, consulted his immediate family members, who convinced Hamberlin to maintain Nelson's legal services. See CR. p. 7, n.1, 8, n.1, 9, n.1. Hamberlin in a first guilty plea proceedings, became ill during the proceedings, causing his hospitalization. See CR. p. 9, n.1. On or about and between the times and dates Hamberlin was in the Hospital, Nelson, contacted and visited Hamberlin's family, still his efforts were to have Hamberlin plead guilty to 8 years mandatory and that this would be all of the time of a 20 years sentence Hamberlin would have to serve in prison for all charges, but Hamberlin unconvinced, still said no, and refused the State's plea-bargain offer. See CR. p. 9, n.1. On or about February 7, 2007, at approximately 8:00 or 8:30 a.m., and just before a 9:00 am court trial schedule, Attorney Nelson at the Court house with Hamberlin, then asked

Hamberlin, if Hamberlin desired to relieve him from representing at this time, whereas, Hamberlin answered in the negative, however explaining to Nelson, it was then too late for him to hire another attorney in time for Court, and Nelson, did not advise Hamberlin otherwise, ways that he could. See CR. p. 9, n.1. That at that moment of moments, Attorney, Nelson, knowingly under the circumstances of duress for Hamberlin, put, placed a Petition To Enter Plea Of Guilty in Cause Numbers 06-0181; 06-0182, and an Agreed Order Revoking Suspended Sentence, before Hamberlin, for Hamberlin to sign, whereas, due to a 1997 Stroke and glaucoma, and can not see far as signing his own name, and while dastardly, explained to Hamberlin, he was signing to an 8 years sentence mandatory, in Cause No. 06-0182 and that the 8 years would eat up the 7, 5 years 180 days sentences. See CR. p. 9, n.1, 20, 21, 26, 30, 32, 33. Attorney Nelson, was very aware, that Hamberlin could not see well,¹ especially as to know the substances of the petition to enter plea of guilty and agreed order revoking suspended sentence, waiving a revocation of probation proceeding, on a probation 13 days from completion. See CR. p. 9, n.1. But, now, as Hamberlin declared in his sworn declaration to the trial court, but for Appellant's conduct and concealment by his Attorney, during this guilty-plea proceedings, Appellant would not have pleaded guilty but would have insisted upon going to a trial. See CR. p. 8, n.1, 9 n.1. Furthermore, Appellant would not have waive his rights to a revocation of probation hearings and proceedings. Finally, Nelson ill advised Appellant, to lie to the trial Court, that no promises was made to Appellant in order to get Appellant to plead guilty, and that he had explained to Appellant, all of Appellant's constitutional rights, Appellant was giving up or waiving, and that Nelson lied to the Court, that he had advised Appellant of such constitutional rights Appellant was waiving. See CR. p. 10, n.1, 71, 72, 73, 74, 75.

1.

Appellant notes for and request the Justices, to take judicial notices, that as presented the trial court in his PCP court-papers, even the trial judge, Assistant DA Michael Bonner, including Nelson were aware of Hamberlin's inability to see, as each endorsed medical papers and Knowledge. Dr. David Prudhomme diagnosed Hamberlin of having a serious glaucoma disease and requiring immediate surgery and just preceding the guilty-plea proceedings held February 7, 2007. Too, just prior the proceeding, while Hamberlin set in jail, as a bail was denied, Judge Voller ordered Hamberlin's immediate release on a recognizance bond, on Dr. Prudhomme, so as to be treated, and recommended the trial judge that the surgery be performed by Dr. Herrington, Jackson Eye Associates, prior to Hamberlin's

Summary Of The Arguments

Appellant begs the Courts to note, where, as here, a prisoner is proceeding pro se, Courts take that fact into account and, in their discretion, credit not so well pleaded allegations, to the end that a prisoner's meritorious complaint may not be lost because inartfully drafted. 'Our constitutions and case law demands so much. See Moore v. Ruth, 556 So.2d 1059, 1061 (Miss. 1990).

To be enforceable, a guilty plea must emanate from the accused's informed consent. See Myers v. State, 583 So.2d 174, 177 (Miss. 1991). In the instant case, the guilty pleas Hamberlin entered February 7, 2007 could not have emanated from informed consent. See White v. State, 751 So.2d 481, 483, 484 (Miss. App. 1999). Moreover, a defendant in the posture as Hamberlin, who pleads guilty to a crime is "prejudiced" by his counsel's erroneous advice if "he would have insisted on going to trial if he had been correctly informed". See Alexander v. State, 605 So.2d 1170, 1172-73 (Miss. 1992). Finally, even if it is proper for a trial court to suspend the execution of a defendant's sentence and later revoke the suspended sentence, without express imposition of probation, it is necessary for that court to base its revocation on the violation of the clear terms and conditions of the suspended sentence. See CR. p. 19, 40, 41, 42., see also Artis v. State, 643 So.2d 533, 537-38 (Miss. 1994), as in Artis, supra, here there are none. See Id. Finally, and even in the context of a post-conviction petition, the Supreme Court has established the premise, a complaint should not be dismissed for failure to state a claim unless it appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Myers, Supra, Id. at 179-80 (Miss. 1991). Therefore, attending any court proceedings, requiring Hamberlin's reading and writing.

Arguments

1. Appellant's Guilty Pleas Were Involuntarily, Unwillingly, And Unintelligently Entered;

In Myers, a case factually on the mark with the case sub judice, the Courts stated, counsel's representation to the defendant that he will receive a specified minimal sentence may render a guilty plea involuntary. See Id. at 583 So.2d 174, 177 (Miss. 1991). Thus, in the instant case, the only conclusion in which can be reached, Hamberlin's guilty pleas entered February 7, 2007, should be rendered involuntary, in the cases of Warren County Circuit Court Criminal Cause Numbers: 06-0181; 06-0182-FV. Especially in this case, as Hamberlin's Attorney, lied to him regarding the sentence, he would receive, by having Hamberlin, under circumstances of duress, to sign legal documents, for a sentence, he knew Hamberlin, was not going to receive, but which legal documents, he well knew Hamberlin, due to serious glaucoma disease, could not "see", to know what sentence he actually was signing this document[§] for, too, Hamberlin's attorney, advise Hamberlin to lie and tell the trial court that his guilty pleas had not been induced by promises of leniency (when in fact it had), thus, courts have held and holds, where the defendant, like Hamberlin, receives any such advice of counsel, and relies on it, as Hamberlin, declares under oath he did, the plea has not been knowingly and intelligently made, but to which too, Hamberlin declares. Id. 177-78. But, what else could have eight (8) years, mandatory and that would be all the time Hamberlin would have to serve, been, but "a firm representation" of such lesser sentence, to which Hamberlin sorely did not receive. Id. 177-78. Therefore, Appellant urges the Courts, this issue has merits, and thus requests the Courts, as a matter of law, vacate the guilty pleas in this case, and/or reverse and remand to the lower Court for an "Evidentiary Hearing". Id. 178. And, under principles of Artis, vacate Hamberlin's sentence of Five (5) years, in Warren County Circuit Court Criminal Cause No. 000059, as null and void, the transcripts do not reflect that the trial Court at the guilty plea proceedings, did not inform Hamberlin of any of the conditions, upon which could cause the revoking of Hamberlin's probation. Id. at 543 So. 2d 533, 538 (Miss 1994).

2. Appellant's Counsel Rendered Unconstitutionally Ineffective Assistance Of Counsel In Violation Of The Sixth And Fourteenth Amendment Of The United States Constitutions And Mississippi Constitution Art. 3, § 26, of 1890 (1972)

In Alexander, our Supreme Courts holds, when evaluating claims of ineffective assistance of counsel, this Court applies the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1994). Under this standard, the claimant must show (1) that counsel's performance was deficient and (2) that the deficient performance was prejudicial to the defendant in the sense that it undermined confidence in the outcome. [Emphasis Added]. Further, where a defendant enters a plea on advice of counsel, the attorney's performance is deemed "deficient" for purposes of Strickland standard if it falls below "the range of competence demanded of attorneys in criminal cases." [Emphasis Added]. Thus, in Alexander, the Court held; that ;

A defendant who pleads guilty to a crime is "prejudiced" by his counsel's erroneous advice if "he would have insisted on going to trial if he had been correctly informed. See Id. at 605 So. 2d 1170, 1172-73 (Miss. 1992).

In this case Hamberlin, alleges that had he known, that on the morning he entered his guilty pleas, that he could have hired another attorney, he would have accepted Nelson's offer to relieve himself from representing him, also that absent running the charges concurrent to the eight sentence as an habitual, and if he could have seen the substances of the petition to enter plea of guilty, and known the actual substances, he would not have signed, or accepted the prosecution's plea bargain offer. But, the worst case scenario, Hamberlin's, Attorney knew of Hamberlin's seeing impairments, his previous, repeat to refuse the prosecution's plea bargain offers, to just the sentences, he preyed on Hamberlin, to get him to sign for, and even repeatedly consulted Hamberlin's family members, informing them that Hamberlin would receive the sentence, he knew Hamberlin would not and did not receive. See Alexander, Supra,

Therefore, as established by Mississippi Supreme Court's precedent, contends and complains, and maintains but for Counsel's, well calculated and erroneous advice, he would not have pleaded guilty, but would have insisted on going to trial, and consequently his counsel rendered unconstitutionally ineffective assistance of counsel during the plea process. See Alexander, Supra; see also Readus v. State, 837 So. 2d 209, 214-15 (Miss. App. 2003). Therefore, Appellant urges the Courts, this issue has merits, and thus requests the Courts, as a matter of law, vacate the guilty pleas in this case, and/or reverse and remand to the trial Court for an "Evidentiary Hearing". Id.

3. The Trial Court Erred And Abused Its Discretion As A Matter Of Law, When Denying Appellant's Post-Conviction Petition Without Causing The State Of Mississippi To Answer And/Or Granting An Evidentiary Hearing

In the instant case, the lower court summarily dismissed appellant's post-conviction petition, and stating after it having examined the motion and transcripts of the Guilty Pleas of February 26, 2001 and February 27, 2001, along with the order and plea petition and found Hamberlin is not entitled to any relief. Appellant submits the Courts, that the procedural posture of an appeal from summary dismissal of a PCP "is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim. [Emphasis Added]. Readus v. State, 837 So. 2d 209, 212 (Miss. App. 2003). Thus, as in a 12(b)(6) dismissal, this Court reviews the record de novo to determine whether [the movant] has failed to demonstrate 'a claim procedurally alive substantially showing denial of a state or federal right.... [Emphasis Added]. Id. 212. "In other words, has [the movant] allege facts which require further inquiry in the expanded setting of an evidentiary hearing?" Id. 212. In this case, Hamberlin asserts the trial court should have granted an evidentiary hearing, as to whether his guilty pleas of February 7, 2001, entered knowingly, and voluntarily; and whether his counsel provided effective assistance during the plea process. Id. 212-13. Therefore, Appellant urges the Courts, this issue has merits, and thus requests the Courts, as a matter of law, vacate the

guilty pleas entered February 7, 2007 and order revoking probation in Case No. 000059, and/or reverse and remand for an "Evidentiary Hearing". Id.

Conclusion

Wherefore, These Premises Considered, And based upon the foregoing facts, arguments, authorities, the Courts inherent power, and the law as determined by the Supreme Court of the United States and Mississippi, grant Appellant the reliefs requested herein and any such other good and equitable reliefs the Courts deems Appellant is entitled.

Certificate Of Service

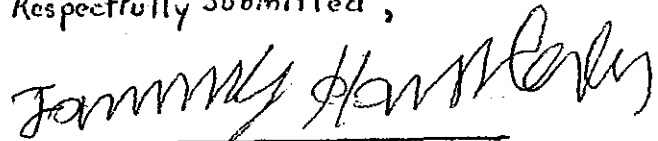
This is to certify that I, Tommy Hamberlin, Appellant pro se, pro bono assisted, have on this day, date via United States Postal Services, postage prepaid, mailed a true and correct copy of, Brief For The Appellant, to the following persons below;

Mrs. Betty W. Sephton
SUPREME COURT CLERK
P. O. Box 249
Jackson, MS 39205

Honorable Jim Hood
ATTORNEY GENERAL
P. O. Box 220
Jackson, MS 39205

Executed, this the _____ day of NOVEMBER, 2007.

Respectfully Submitted,



Unit-D-2, Area II, #42740

P. O. Box 1419

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