

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

Myron Pollard

APPELLANT


Vs.

Action No.2008- CA- 00678 - COA

State of Mississippi

APPELLEE

APPELLANT'S BRIEF

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Certificate of Interested Persons in

No.2008- CA- 00678 - COA

Myron Pollard

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

A handwritten signature in cursive script, reading "Cheryl Ann Webster", is written over a horizontal line.

Cheryl Ann Webster, Attorney of record for Myron Pollard

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Cheryl Ann Webster, Attorney of record for Myron Pollard

Table of Contents

Certificate of interested persons	Page 2
Table of Contents	Page 3
Table of Cases	Page 4
Table of Statutes	Page 5
Statement of the Issues	Page 6
Statement of the Case	Page 7
Summary of the Argument	Page 9
Argument	Page 10
Conclusion	Page 15

TABLE OF CASES

Presley v. State, 792 So.2d 950, (2001)

Sanders v. State, 435 So.2d 1177, 1179 (Miss. 1983)

Sullivan v. State, 234 Miss. 611, 613-14, 107 So.2d 123, 124 (1958).

Table of Statutes

UCCCR 10.05 . New Trials

UCCCR 8.04(5). Withdrawal of a plea of guilty

MCA 99-15-25. Entry of guilty pleas in vacation; sentencing records

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Statement of Issues

- 1) Whether or not the Circuit Court of Coahoma County, Ms. had jurisdiction to hear the Motion to set aside Pollard's involuntary guilty plea and Subsequent Sentencing Judgment and Motion demanding Trial?**

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Statement of the Case

Pollard was indicted May 29th, 2007, in a two count indictment. The first count was for possession of cocaine and second count was for possession marijuana. (CP 1)

July 13, 2006, Pollard entered into a petition to enter plea of guilty. (CP 5)

July 16th, 2007, The Order Adjudicating guilt and deferring sentencing was entered in order for him to make application to drug Court on. Pollard made a written application to enter into drug court.(T.12) This Application is not contained in his Coahoma County Circuit Court file.

Prior to August 20th, 2007, a presentence report was prepared. Pollard's presentence report is not made a part of his public records in the Circuit Court.

August 20th, 2007, the Court sentenced Pollard to 15 years in Count one with a five thousand dollar fine and sentenced Pollard to pay a fine of \$250.00 in Count two. (CP 16) This sentence is to run concurrent with the sentence in 2007-0042. (CP16)

Reference is made to an armed robbery charge and a simple assault and disorderly conduct charge, both of which he has not been convicted .(CP 17)

August 30th, 2007, the sentencing judgment was filed. (CP18)

September 6, 2007, Cheryl Ann Webster made an appearance of record .(CP 21)

September 6th, 2007 Webster filed a motion to set aside his involuntary guilty plea and subsequent sentencing judgment and Motion demanding Trial , serving the same on the District Attorney. (CP 22)

March 12, 2008, the Court set the motion for hearing. The Court refused to allow Pollard to proceed with the Motion or to make a proffer of proof in support of his motion. (T.19)

March 14th, 2008, the Circuit Court entered an order denying Pollard's motion due to the lack of jurisdiction to hear this case.(CP 37)

Feeling aggrieved by the decision, Pollard appeals this case.

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Summary of the Argument

Issue One: Whether or not the Circuit Court of Coahoma County, Ms. the eleventh Circuit Court District had jurisdiction to hear the motion to set aside his involuntary guilty plea and Subsequent Sentencing Judgment and Motion demanding Trial?

Pollard relies on Uniform Circuit and County Court Practice Rule 10.05 New trials. Also included is UCCCR 8.04(5). Withdrawal of a plea of guilty. The actual sentencing Judgment was entered on August 30th, 2007 the Motion was filed on September 6, 2007 less than ten days. It was filed seven days after the sentencing judgment was entered well within the time allowed by law. There are no time limits set forth in the Rules as to when such a motion to withdraw a guilty plea may be filed.

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Argument

Issue One: Whether or not the Circuit Court of Coahoma County, Ms. had jurisdiction to hear the Motion to set aside his involuntary guilty plea and Subsequent Sentencing Judgment and Motion demanding Trial?

The Eleventh Circuit District Attorney's Office's response to Pollard's Motion Entitled "Motion so Set aside Guilty Plea and Subsequent sentencing judgment and motion demanding trial" (C.P. 34) indicates the Summer term of Circuit Court ended on August 17, 2007. (C.P. 34) The DA states that therefore the Defendant Pollard could not challenge the Sentencing Judgment in this case. In other words, Pollard was too late to file a motion pursuant to UCCCR 10.05 even though the Sentencing Judgment from which one defines the time of appeal was filed on August 30th, 2007(C.P. 37) some 13 days after the close of the term. (CP 1)

The supporting language in the UCCCR 10.05 ".....The court, **on motion of a defendant, may vacate judgment** (emphasis added) and dismiss the case without prejudice if the indictment or complaint did not charge an offense, or if the court was without jurisdiction, and bind the defendant over to the action of the

grand jury, or **take other proper steps regarding the defendant**” (Emphasis added) UCCC Rule 10.05, designated “New Trials” , is an all encompassing rule for motions to be made prior to the running of the ten days. After ten days, a Judgment is final.

Pollard has asked the Court to do just as this says. Vacate the Judgment. Set him for trial.

The law is that if a final judgment is entered on the last day of the term, the Defendant still has ten days to file his motion. Presley v. State, 792 So.2d 950, (2001) “.... our holding that a circuit court cannot rule on motions which are not pending at the end of the term of court when sentencing was imposed does not apply to U.C.C.C.R. 10.05, which provides that a motion for a new trial should be filed within ten days of the entry of judgment. Therefore, if the judgment is entered on the last day of the term of court, a defendant still has ten days in which to file such a motion.” (Presley v. State, id.) Does this mean that other motions such to vacate Judgments are to be filed within ten days? I think the answer is yes.

Pursuant to MCA 99-15-25. Entry of guilty pleas in vacation; sentencing records. (2) “ All judgments and orders imposing sentences in vacation upon such pleas of guilty shall be entered upon the minutes of the proper court in vacation as though same were had and **entered during term time.** ” (emphasis added) Even if the August 30th,2008 Sentencing Judgment is filed out of term, the

Defendant has ten days to file a motion asking to have the guilty plea withdrawn essentially vacating the judgment, and demanding a new trial.

A post conviction petition is not required to have an illegal guilty plea set aside prior to the running of the ten days. The Court, however, is of the opinion that it is mandatory that a post conviction petition be filed. (T. 20) The Court and Pollard take issue with each other on this point.

Pollard submits if a Sentencing Judgment which is entered thirteen days after the close of a term, the Defendant is allowed ten days thereafter within which to file his motion to vacate pursuant to UCCCR.10.05.

The crux of the argument which was not heard by the Court is as follows:

Pollard pled guilty if he was accepted into drug court. However, The order reads "The defense indicated for the record that the defendant was making application to Drug Court." (C.P. 15.) Pollard had already made application. (T.12)

Pollard's defense lawyer, David Tisdell, could not have made it clearer the reason for the guilty plea. When asked by the Court if there was an announcement in 2007-0042 and 2007-43, quoting from the transcript, Tisdell replies, "Yes your honor. In both cause numbers, 2007- 0042 and -43, Mr. Pollard wishes to withdraw his previously entered pleas of not guilty and enter please of guilty to both indictments to both counts -- to all counts, and request that he be **accepted** into the Eleventh Circuit Drug Court." (T. 5) (Emphasis

added) Pollard did not ask to make application to drug Court; Pollard believed he would be accepted into Drug Court if he pled. The Court, in comments from the bench, acknowledged that "... the defendant having made application to Drug Court." (T. 12)

These comments were memorialized into an interim order. (CP 14) This was not the Final Judgment. The Sentencing Judgment was entered on August 30th, 2007, would have been the Final judgment had ten days lapsed without appeal.

The issue before the Court is whether or not the motion to set aside his involuntary guilty plea and Subsequent Sentencing Judgment and Motion demanding Trial was filed timely. Does the Court have jurisdiction to hear this motion and consider it? Clearly the Court maintains jurisdiction until the Sentencing Judgment becomes final. This is not an appeal on the merits of the motion, but only on whether or not the motion was timely filed. It was. The sentencing was not done during the term. There is no indication or record of when or why he was actually rejected from Drug Court because of the star chamber nature of Drug Court. These facts must be developed in a hearing before the Court in order to be a complete record. It is common for the sentencing judgment to be entered after the close of the term. The Court does this as a matter of course.

Under the Federal rules, a motion for withdrawal of a plea may be made at any time before sentencing and, on sufficient showing, even after sentencing. 3

Charles Alan Wright, Federal Practice and Procedure: Criminal 2d Sec 537 , at 188 (1982) as quoted in Presley v. State, 792 So.2d 950, (Miss. 2001)

During the term of Court, there was nothing in the record which would give thought that Pollard would be denied Drug Court. His sentencing is the only evidence that he was rejected after agreeing to plead guilty upon acceptance. Pursuant to UCCCR 10.05, Pollard demands that his guilty pleas be withdrawn and a trial set. He made his demands in a timely manner.

The Court indicates that once the sentencing judgment was filed that Pollard's only avenue for success is a post conviction petition. Pollard maintains this is error. Filing a motion for a post conviction before the ten days had run is premature. The Circuit Court did not allow Myron Pollard to make a record or present evidence that on the main issue he was to present that his guilty plea rested in a significant degree upon a promise or agreement as the inducement.

I submit that a conviction becomes final ten days after the Sentencing Judgment is filed if no appeal is taken. " Although not at issue here, we note that a defendant has the right to withdraw his guilty plea at any time prior to a conviction becoming final." Sanders v. State, 435 So.2d 1177, 1179 (Miss. 1983); Sullivan v. State, 234 Miss. 611, 613-14, 107 So.2d 123, 124 (1958). Both of these decisions were made prior to the adoption of the UCCCR which was adopted in 1995. Because the Motion to withdraw was filed within the ten days pursuant to the Rules, after the filing of the Sentencing Judgment, the conviction

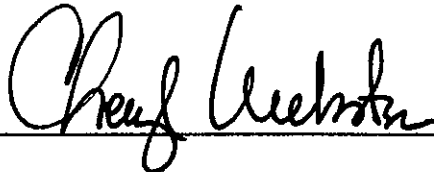
was not final. This Court could have acted. Pollard should have been allowed to proceed with his motion, put on proof, been heard, and made a record in the criminal case. Had his motion then been denied, then he would have filed for Post Conviction Relief.

This Appellate Court has to answer two questions. 1) When does a Conviction become final? I am of the opinion that it is a Final Judgment , ten days after the Sentencing Judgment is filed with the Clerk. What is the last day a Defendant may file a motion to withdraw his guilty plea in the original criminal case? I am of the opinion that he can file a motion to withdraw his plea in a criminal case, until the 11th day after the sentencing judgment has been filed. On the eleventh day, his only relief is a motion for post conviction relief.

Conclusion

Pollard asks this Court to remand his motion for hearing and that a record be made.

Respectfully submitted,

_____, Cheryl Webster


CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing :

Appellant's Brief, ~~Record of Excerpts~~ and Addendum on Circuit Court Judge Albert Smith, at Post Office Box 478, Cleveland, Ms. 38732 and District Attorney Laurence Mellen, at Post Office Box 848, Cleveland, Ms. 38732, Jim Hood, the Attorney General of Mississippi at Post Office Box 220, Jackson, Ms. 39205.

by hand delivering, mailing , faxing, or otherwise delivering electronically a copy of the same, postage prepaid, to the above stated addresses.

On this Wednesday, 27th of Aug, 2008.

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ADDENDUM

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Rule 10.05

State Court Rules

UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE

Adopted effective May 1, 1995

Rule 10.05 NEW TRIALS

Rule 10.05 NEW TRIALS

The court on written motion of the defendant may grant a new trial on any of the following grounds:

1. If required in the interests of justice;
2. If the verdict is contrary to law or the weight of the evidence;
3. Where new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner, by reasonable diligence of the attorney;
4. If the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;
5. If the jurors, after retiring to deliberate upon the verdict, separated without leave of court; and
6. If the court has misdirected the jury in a material matter of law, or has failed to instruct the jury upon all questions of law necessary for their guidance.

A motion for a new trial must be made within ten days of the entry of judgment. The trial judge may hear and determine a motion for new trial at any time and in any county or judicial district within the trial judge's jurisdiction.

The court may, with the consent of the defendant, order a new trial of its own initiative before the entry of judgment and imposition of sentence.

The court, on motion of a defendant, may vacate judgment and dismiss the case without prejudice if the indictment or complaint did not charge an offense, or if the court was without jurisdiction, and bind the defendant over to the action of the grand jury, or take other proper steps regarding the defendant.

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Rule 8.04

State Court Rules

UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE

Adopted effective May 1, 1995

Rule 8.04 ENTRY OF GUILTY PLEAS, PLEA BARGAINING, WITHDRAWAL OF GUILTY PLEAS

Rule 8.04 ENTRY OF GUILTY PLEAS, PLEA BARGAINING, WITHDRAWAL OF GUILTY PLEAS

A. Entry of Guilty Pleas

1. A defendant may plead not guilty, or guilty, or with the permission of the court, nolo contendere.

2. Entry of Guilty Plea. A person who is charged with commission of a criminal offense in county or circuit court, and is represented by an attorney may, at his/her own election, appear before the court at any time the judge may fix, and be arraigned and enter a plea of guilty to the offense charged, and may be sentenced by the court at that time or some future time appointed by the court.

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.

4. Advice to the Defendant. When the defendant is arraigned and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally and to inquire and determine:

a. That the accused is competent to understand the nature of the charge;

b. That the accused understands the nature and consequences of the plea, and the maximum and minimum penalties provided by law;

c. That the accused understands that by pleading guilty (s)he waives his/her constitutional rights of trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; if the accused is not represented by an attorney, that (s)he is aware of his/her right to an attorney at every stage of the proceeding and that one will be appointed to represent him/her if (s)he is indigent.

5. Withdrawal of Plea of Guilty. It is within the discretion of the court to permit or deny a motion for the withdrawal of a guilty plea.

6. Sufficiency of Motion. In order to be sufficient, a motion to withdraw a plea of guilty must show good cause.

7. Inadmissibility of Withdrawn Guilty Plea. The fact that the defendant may have entered a plea of guilty to the offense charged may not be used against the defendant at trial if the plea has been withdrawn.

B. Plea Bargaining

1. The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by the defendant. Any discussions or agreements must be conducted with defendant's attorney, or if defendant is unrepresented, the discussion and agreement may be conducted with the defendant.

2. The prosecuting attorney, defendant's attorney, or the defendant acting pro se, may reach an agreement that upon an entry of a plea of guilty to the offense charged or to a lesser or related offense, the attorney for the state may do any of the following:

a. Move for a dismissal of other charges; or

b. Make a recommendation to the trial court for a particular sentence, with the understanding that such recommendation or request will not be binding upon the court.

3. Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant. Defense attorneys must advise defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives.

4. The trial judge shall not participate in any plea discussion. The court may designate a cut-off date for plea discussions and may refuse to consider the recommendation after that date. After a recommended disposition on the plea has been reached, it may be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea. The court shall require disclosure of the recommendation in open court, with the terms of the recommendation to be placed in the record.

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99-15-25**Statutes and Session Law****TITLE 99 CRIMINAL PROCEDURE****CHAPTER 15 PRETRIAL PROCEEDINGS****99-15-25 Entry of guilty pleas in vacation; sentencing; records.****99-15-25. Entry of guilty pleas in vacation; sentencing; records.**

(1) Any person who is charged in any circuit or county court with the commission of a criminal offense by a proper affidavit, indictment or information in cases of misdemeanors or by indictment by the grand jury in cases of felonies, and who is represented by counsel, may, by his own election, appear before the judge of the court at such time as the said judge may fix in vacation of the court and be arraigned and enter a plea of guilty to the offense with which he is charged. Upon the entering of such plea of guilty, the judge shall have the power and authority to impose any lawful and proper sentence upon the defendant in vacation just as though the plea was entered and the sentence imposed during a regular term of the court.

(2) All judgments and orders imposing sentences in vacation upon such pleas of guilty shall be entered upon the minutes of the proper court in vacation just as though same were had and entered during term time.

Sources: Codes, 1942, § 2564.5; Laws, 1960, ch. 259, §§ 1, 2.

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