

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

Troy Pittman,
Appellant


v.

State of Mississippi,
Appellee

On Appeal from the Circuit Court of Alcorn County, Mississippi

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Troy Pittman;
2. Jeffery M. Navarro;
3. Rob Laher, Esq., Attorney for the Defendant/ Appellant in the lower Court;
4. Hon, Jim Pounds, former Assistant District Attorney who tried the case in the lower Court;
5. Arch Bullard, Esq., Assistant District Attorney who tried the case in the lower Court;
6. John R. Young, District Attorney;

Conviction Relief;

By _____
Jeffery M. Navarro,
Attorney for the Appellant

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1. Whether or not the Trial Court was correct in summarily denying the Post-Conviction Motion after the Supreme Court granted the Defendant leave to proceed in the Trial Court?

As stated in the Appellant's original Brief, Pittman was convicted in the Circuit Court of Alcorn County, Mississippi on 13 April, 2000, of five (5) sex offenses. He filed an appeal in the Court of Appeals, Pittman v. State, reh. den. 12 Nov., 2002, 10 Dec., 2002, cert. den. 30 Jan., 2003, 836 So.2d 770 (Miss. COA, 2002). The Court of Appeals reversed, rendered and acquitted Pittman of two (2) of the charges. On 27 January, 2006, pursuant to *MCA Section* 99-39-7 (1984), Pittman filed his APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT in the Mississippi Supreme Court, Mississippi Supreme Court Cause No.: 2006-M-0159. The Supreme Court by Order dated 5 April, 2007, granted the Application. Pittman filed his motion in the Circuit Court of Alcorn County, Mississippi. The Circuit Court, sua sponte, denied Pittman's motion. Pittman filed a Motion to Reconsider. The Circuit court denied that motion as well.

The Statement of Facts as set forth in the Appellant/Defendant, Troy Pittman, (hereinafter "Pittman"), original Brief is accurate and sufficient insofar as the salient facts of this case are concerned except as set out hereinafter.

After the Supreme Court found that Pittman met his burden pursuant to *MCA Section* 99-39-27 (5) (2008), the Court granted his APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT, Mississippi Supreme Court Cause No.: 2006-M-0159. Pittman then filed MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT setting forth claims of both new evidence and ineffective counsel which require vacation of his convictions. (RE 4-269). Those claims of new evidence and ineffective counsel raise thirteen (13) separate grounds for relief which are elaborated in a 265 page Motion which includes expert affidavits and medical evidence. All of this is to point to the fact that Pittman's Motion before the Circuit Court was not only voluminous, but involved complex medical and legal questions incapable of cursory review. And, as conceded by the State, the Alcorn County, Mississippi Circuit Court, *sua sponte*, without benefit of a response to Pittman's motion filed in opposition to same, denied Pittman's motion. (RE 271-272).

A summary denial of Pittman's Motion for Post-Conviction Relief is improper given the specific facts and circumstances of this case inasmuch as the allegations raised by Pittman are reasonably complex. The Court is not equipped to reject the allegations in Pittman's Motion without countervailing argument and evidence from the State.

With great respect and admiration, reinforcing his confidence in our system of justice, counsel for Pittman commends the candor and courage of his counsel opposite in this matter. And, because of the forthrightness of the State's attorney, it appears that the remaining issue before the Court is whether or not this Court should affirm the lower Court on the strength of *Porter v. State*, 963 So.2d 1225 (Miss. COA, 2007).

The Supreme Court grant of Pittman's APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT, Mississippi Supreme Court Cause No.: 2006-M-0159, amounted to a prima facie showing that Pittman was entitled to an evidentiary hearing. *Porter v. State*, 963 So.2d 1225, 1228 (Miss. COA, 2007). Consistent with *Porter*, the Circuit Court should have requested the State to file an answer, raising any and all affirmative defenses, and allowed the case to proceed. *Id.* at 1228-1229.

As the State's attorney concedes, *Porter* was an ineffective counsel case, and this Court could review the record in that case and justify the lower court's summary denial of the defendant's Motion for Post-Conviction Relief because the record substantiated that finding. And, while part of Pittman's Post-Conviction Relief motion is grounded upon an

ineffective counsel claim, that claim is based upon ()
ineffective representation, all of which are supported by substantial evidence. In addition
to the ineffective counsel claim, Pittman has raised a new evidence claim on three (3)
grounds involving medical issues. Therefore, a review of the record in the case *sub*
judice in an effort to affirm the lower Court's ruling would be perfunctory only and of no
real substantive value.

This Court noted that the lower court in *Porter* followed the wrong procedure in denying
the defendant's Motion for Post-Conviction Relief, but the error was harmless. *Id.* at
1227. In *Porter* the defendant filed a Motion for Post-Conviction Relief after he was
granted leave to do so by the Supreme Court. The State did not respond to the Motion,
and the trial court summarily denied the Motion. This Court held that in that instance,
and despite the procedural errors committed by the lower court, that the lower court was
limited to the defendant's Motion only from which to base its decision to deny the
defendant the opportunity for an evidentiary hearing. *Id.* at 1228-1229. Porter alleged
that his defense counsel was ineffective, and raised two (2) grounds:

- 1) Failure to adequately conduct pre-trial investigation (the defense counsel allegedly
either failed to locate or call a rebuttal witness); and
- 2) Allowing the State to introduce evidence of his prior criminal history by "opening the
door" to same, and by failing to timely object to the introduction of such evidence.

Porter at 1229-1232.

This Court discussed the effect of Porter's defense counsel a rebuttal witness (the record was not clear as to which had happened), and pointed out that it may have been trial strategy to not call the witness; that Porter had not demonstrated what the witness may have testified about that was not already before the trial court, and how the lack of his testimony impacted the defense; and that Porter and his wife both testified sufficiently as to all matters that the rebuttal witness would have testified about. *Porter* at 1230-1231.

As to the allegation that defense counsel was ineffective regarding the admission of prior criminal activity regarding Porter, this Court held that he met the first prong *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but that he had not met the second prong requiring a showing of a reasonable probability of a different outcome in the trial. *Porter* at 1231-1232.

In the case *sub judice*, Pittman has assigned thirteen (13) grounds which would have changed the outcome of his trial. Three (3) of those ground are based upon new evidence which is scientific in nature and deal with Herpes. In his trial, the State introduced evidence that it contended showed that Pittman had sexual relations with the victim because they both had Herpes. The State contended at trial that the Herpes connection between Pittman and the victim was the "fingerprint" of the crime. Pittman now has evidence which was not presented at trial which shows that he could not have given the

Pittman has also assigned ten (10) grounds regarding his ineffective counsel claim.

Those grounds, in summary, are as follows:

A) Failure to develop an alibi defense and present alibi witnesses who were present and able to testify;

B) Failure to cross-examine the victim;

C) Failure to call the victim's mother as an adverse witness;

D) Failure to prosecute a M.R.E. 412 (b) (2) (C) motion;

E) Failure to engage a defense expert witness on the subject of Herpes;

F) Failure to introduce evidence of past litigation between the Defendant and the victim's mother accusing the Defendant of sexually molesting the victim, including the failure to call Ms. Margaret Duncan, the Area Social Work Supervisor for Alcorn County, Mississippi, who had interviewed the alleged victim, Emily Pittman, for past allegations of sexual misconduct by the Movant against the aforesaid alleged victim, Emily Pittman, and found them to be without any basis;

G) Permitting the introduction into evidence of the Movant's blood test/ Herpes test results which were obtained in violation of his Constitutional rights guaranteed under the 4th Amendment of the United States Constitution, and Article 3, Section 23 of the Mississippi Constitution;

H) Failure to introduce into evidence a Sexually Transmitted Disease test which the Movant had done on 29 October, 1999 at the Tishomingo County, Mississippi Health

1) Failure to explore any and all defenses available
he gave the alleged victim Herpes, such as having the Movant's wife tested for Herpes in order to create reasonable doubt; and

J) The conflict within defense counsel between service to his client, the Movant, and service of counsel's own pecuniary interest.

(RE 12-35).

In total, Pittman has fifty (50) exhibits to support his MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT. This case is sufficiently different from *Porter* to justify the Court to abstain from sustaining the summary denial of Pittman's Motion. As the attorney for the State concedes, this case should be remanded to the lower Court so that the State can respond to Pittman's Motion, and thereafter allow the trial Court the opportunity to evaluate Pittman's claims before deciding on the issue of an evidentiary hearing.

The Court should reverse and remand this matter, so that Pittman can prosecute his post-conviction relief.


Pittman has made a prima facie showing of his entitlement to an evidentiary hearing.

The Alcorn County, Mississippi Circuit Court should have not acted on its own imitative. The State of Mississippi should have been required to answer, and raise any defenses. It did not. Therefore, the Court should reverse and remand this case so that Pittman can prosecute his post-conviction relief. To do otherwise will defeat the interests of justice, and frustrate the prior order of the Supreme Court.

Respectfully Submitted,

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I, Jeffery M. Navarro, Attorney for the Appellant, Troy Pittman, do hereby certify that I have this day mailed, postage pre-paid, a true and correct copy of the above and foregoing Brief to:

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Certified, this the 16th day of March, 2009.



Jeffery M. Navarro