

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00914-COA

RODGER DALE JORDAN

APPELLANT

VS.


STATE OF MISSISSIPPI

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED



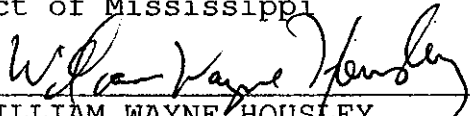
William Wayne Housley
Attorney for Appellant

WILLIAM WAYNE HOUSLEY
ATTORNEY AT LAW
110 ROBINS STREET
TUPELO, MS 38804
662-844-5635
MSB # [REDACTED]

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 justices of this Court may evaluate possible disqualifications or recusal.

1. Hon. Clay Joyner; Assistant District Attorney
2. Hon. William Wayne Housley, Jr.; Counsel for Appellant
3. Hon. Rob Laher; Lower Court Counsel
4. Hon. Kelly Mims; Filed Motion for Post Conviction
5. Honorable Thomas Gardner;
Senior Circuit Court Judge
First Judicial District of the State of Mississippi
6. Honorable Sharion Aycock;
Former Circuit Court Judge
First Judicial District of Mississippi



WILLIAM WAYNE HOUSLEY
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
I. CASES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
I. PROCEEDINGS & DISPOSITION IN THE TRIAL COURT.....	2
II. PROCEDURAL FACTS.....	2
III. STATEMENT OF FACTS.....	4
IV. STANDARD OF REVIEW.....	6
SUMMARY OF ARGUMENT.....	7
ARGUMENT OF APPELLANT.....	7
CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	20

TABLE OF AUTHORITIES

I. CASES

<u>Kirksey v. State</u> , 728 So.2d 565,567 (Miss. 1999).....	6
<u>Roland v. State</u> , 666 So.2d 747 (Miss. 1995).....	17
<u>Strickland v. Washington</u> , 466 U.S. 668 (1994).....	12,13
<u>Tiller v. State</u> , 440 So.2d 1001, 1006 (Miss. 1983).....	12
<u>Vielee v. State</u> , 653 So.2d 920,922 (Miss. 1995).....	8
<u>Weatherspoon v. State</u> , 736 So.2d 419, 421 (Miss. Ct App 1999).....	16
<u>Yates v. State</u> , 189 So.2d 917 (Miss. 1966).....	12

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00914-COA

RODGER DALE JORDAN

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF THE ISSUES

The appellant, Rodger Dale Jordan, assigns as errors, the following issues arising out of the review by circuit court. The issues are as follows:

Whether the ineffective assistance of counsel was in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Whether Jordan was denied due process of law where defense counsel coerced and manipulated Jordan into entering guilty plea involuntarily.

Whether the Court incorrectly ruled that there was not an existence of material facts that require the vacation of the guilty plea in the interest of justice.

Whether the cumulative effect of aforementioned errors greatly prejudiced Jordan and requires reversal of lower courts order.

STATEMENT OF THE CASE

I. PROCEEDINGS AND DISPOSITION IN THE CIRCUIT COURT

The lower court denied the Appellant's Motion for Post-Conviction Relief filed pursuant to Mississippi Code Section 99-39-1, et. seq. by way of Order on May 12, 2008. C.P. at 209-211. Jordan timely filed his Notice of Appeal to this Court to appeal the decision of the lower court. C.P. at 213. The matter is now before us due to the actions and/or inactions that occurred the last week of July in 2006. Jordan pled guilty in Pontotoc County Circuit Court on July 27, 2006 before Honorable Sharion Aycock. Judge Aycock sentenced Jordan to thirty years with fifteen years suspended for the crime of statutory rape. This appeal is accordingly postured for briefing and review by this Honorable Court.

II. PROCEDURAL FACTS

Rodger Dale Jordan was indicted by a Pontotoc County grand jury and named as a defendant in CR06-058 as a habitual offender. Jordan retained the legal assistance of Rob Laher. The case was first set for trial on the 17th day of July, 2006 for the July Term in the Circuit Court of Pontotoc County, Mississippi. Defense Counsel filed a Motion for Continuance stating a lack of preparation, his busy court calendar and the receipt of discovery just a couple of weeks prior. Additional time was granted, although brief, until July 27th, 2006.

On July 11, 2006, a Motion to Amend Indictment was filed requesting change in language from "a child under the age of sixteen years" to "a child under the age of fourteen years".

On July 24, 2006, a Rule 412 hearing was conducted and the court ruled to effectively bar their theory of defense. Defense renewed his Motion for Continuance and again was required to prepare for trial on July 27, 2006, the first term of court that the matter was placed on the criminal docket.

An 803(25) hearing was had on July 26, 2006 and alleged victim appeared before the Court with the obvious effects of treatment, without any hair visible.

The life expectancy of the alleged victim played a major role in the arguments made by counsel opposite and an impact on the court's refusal to grant continuance to a later term of court that counsel might be better prepared.

Though counsel argued lack of preparation and the likely impact on Defendant's case, the alleged victim's condition have detrimental effect on all present and rendered this matter as urgent to all but defendant. The pressure thus associated was greater than typical in a criminal proceeding. The request for continuance from one term to another where it is the first term on docket is routinely granted.

A guilty plea hearing was conducted by Judge Aycock on July 26th and 27th of 2006. Appellant was sentenced to thirty years with

fifteen suspended plus fine and court costs. Jordan retained the assistance of Kelly Mims as his legal counsel to represent his interest in filing Motion for Post Conviction Relief. Judge Aycock, the judge that handled the guilty plea and sentencing was courted by the federal court system and she now sits on the federal bench. The Post Conviction matter was next assigned to Honorable James Roberts, but the matter was reassigned by order to Senior Judge Thomas Gardner in Pontotoc County CV07-137G-PO. C.P. at 196. Judge Gardner set matter for hearing on March 31, 2008 by order with witnesses being taken on that date and concluded on April 11, 2008. C.P. at 199.

III. STATEMENT OF FACTS

This case is fraught with danger and filled with pitfalls, but only one sits accountable for his alleged misdeeds. This account includes many players on a stage set for drama, but the major player is casually cast aside due to his incredulous and reliant demeanor favoring the plan of his legal representative. Jordan, having retained an attorney to represent his best interest, blindly and faithfully, relied on the advice and counsel of his representative.

Jordan's counsel paints a bleak and solemn outlook where a trial is had. Jordan continually asserts his innocence and yet is persuaded under the insurmountable pressures that mount. He finally crushes under the weight and waives, unbeknownst to him, his desire to present a defense to these claims.

A matter that is for the first time placed on the docket in the circuit court of Pontotoc County is forcibly hurled at the feet of the defendant and his counsel. Counsel continually begs for relief and an extension of time and is mercifully given a brief extension. The fact remains that he is still unable to adequately prepare and defend the merits of the case. The alleged victim is presented during pre-trial hearings haggard and weak and is foreseen as an insurmountable hurdle to climb as a result.

Counsel begs that defendant consider a plea based on the bleak appearance of victim and his inability to adequately prepare. Jordan stands his ground as long as possible until he is presented with an option by counsel to plead and then get there ducks in a row for appeal. Counsel bombards him with this unsound option but offers that record is full of issues to address at another time and to another court. The incredibly troubling aspect of this guilty plea is that defendant's counsel presents refrain and chorus for the prosecution's case by focusing on the appearance of alleged victim and not considering the possibilities that a trial might produce. Counsel hammers that his concern that outcome of trial would be a life sentence and convinces Jordan to take the deal of fifteen years only after a "plan" is concocted to appeal due to the many perceived errors. Jordan was misled and he relied on his counsel and received poor advice to his obvious detriment.

Jordan was displeased with his counsel and the way the matter was handled and the lower court recognized said displeasure by the tone during the acceptance of the guilty plea.

Jordan was prevented from offering his version of the facts and to present his case before a jury. The Perfect Storm was brewing around this particular case: the prosecutor wanted defendant especially because he was a habitual offender, the alleged victim was ailing and accordingly did not want a continuance, defense counsel was overwhelmed with his workload and unable to present a competent defense, and defendant unwittingly complied with the scheme presented by his representative.

IV. STANDARD OF REVIEW

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 demonstrates that the trial court's decision was clearly erroneous since the lower court excludes the testimony of Debbie McGregor and the affidavit of Sappington in concluding that there was not any evidence supporting Jordan's position on purported scheme and coercion and duress by attorney showing ineffectiveness and involuntariness of guilty plea.

SUMMARY OF THE ARGUMENT

Jordan respectfully submits that the lower court judge erred in denying his motion for post-conviction collateral relief to vacate and set-aside conviction and sentence where Jordan demonstrated by a preponderance of the evidence that his plea of guilty was motivated by information from his attorney that he would be afforded the opportunity to appeal after offering guilty plea. Rodger Dale Jordan assigns numerous errors, most of which concern the failure on the part of defense counsel to represent his best interest and his detrimental reliance on said counsel.

Jordan was, in essence, denied an opportunity to a trial because he relied on advice of counsel and said advice was glaringly ineffective.

The cumulative effect of the aforementioned and others mentioned throughout appellant's brief suggest and require that for justice to be had that the guilty plea be set aside and the defendant be granted a trial on the merits.

ARGUMENT OF APPELLANT

I. WHETHER JORDAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL VIOLATIVE OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Jordan relied on the advice of his counsel to go forward with the plea of guilty and then get matters in order so that they could win on appeal. The lower court ruled that petitioner cannot make

a valid claim for ineffective assistance of counsel if the only proof he has concerning deficient performance of his counsel is his own statement. Citing Vielee v. State, 653 So.2d 920, 922 (Miss. 1995). The court relies on the statement by Laher that he did not render the advice complained of. C.P. at. 298. The fact remains that the court overlooked the complete testimony of his mother, Debbie McGregor. She was present during all proceedings on the last week of July, 2006 and present during majority of conversations between her son and his attorney. R. at 36. Debbie McGregor described atmosphere surrounding said discussions as pretty devastating. That Laher coerced and cajoled Rodger to plead guilty and they both responded why plead guilty to something he did not do and she stated that he was forced to plead guilty by Laher. R. at 37. Lack of counsel's preparation, along with refusal to grant continuance and results of lower court's rulings concerning pretrial issues compounded the situation. Debbie McGregor stated that Laher was not prepared and forced the plea on him.

Debbie McGregor offers following: And so again asked Rob, said, "Well, if I appeal," he said, "man, I'm going to turn it right back around. We're going to get in the courts. We should have got the continuance. That's in your favor is rights violated. You've got more than I've ever seen in the transcripts to get you

where you need to be... He was not prepared, he was relying on a continuance,... Do not worry. We can turn right around and appeal, the evidence in the transcripts...And it was appeal that he stated. He never talked about post conviction relief...He told Rodger to plead guilty and to appeal. R. at 39-40.

Rob prepped him to answer in the affirmative in respect to questions of whether he understood the process and that he should "stay with the plan." That he was to answer in the affirmative the question, "Do you understand that by entering a plea of guilty that you waive any right to appeal." Regardless, the plan was to appeal and we'd get right back in the courts, and he would have time to investigate, and we would have a fair trial." R. at 41.

Rodger followed the plan that was laid out by his attorney and he relied on his advice to his detriment.

In addition, the affidavit signed by Courtney Sappington stated that counsel advised of right of appeal and that he would win and that he should expect Judge to question regarding waiving appeal rights and answer in the affirmative. Affidavit Received as evidence. R. at 48. Rodger, Debbie McGregor, and Sappington through affidavit, all stated that Laher mislead Jordan and that Jordan relied on that information.

Jordan offered testimony at evidentiary hearing. He stated, "I never once considered a plea. Never would have...If I've done

something I will accept the consequences. But this, there wasn't no way. And I voiced my opinion to him. And the plea wasn't on the table. R. at 80. Rodger continues, "...I mean he begged me. He said, 'Please don't make me carry this to trial. I won't be able to sleep at night,' were his exact words. He said, "Please don't carry this to trial." He said, "You will get life." R. at 81.

Rodger stated, "... I couldn't fathom pleading to something that I hadn't done...cut my losses and he could appeal it. He said, "You've got enough on the transcripts." Laher assured him that he had a winner on appeal. R. at 82-83.

Jordan just wanted a fair playing field as evidenced by following: "I wanted a fair trial with a decent time frame so I could have all my ducks in a row. I didn't want it to be the way it played out." R. at 88.

Rodger acknowledged that he was in fact committing perjury during the court's questioning regarding his waiving constitutional rights including right to appeal. R. at 90. He also opined that the court could sense the duress that he was under. R. at 92. His plan given by his attorney was "I could plea and appeal. That was my game plan. Plea to what I had to go on was my transcript to appeal. R. at 93. Jordan explained his reasoning for lying during the guilty plea as follows: "To go in

and plead. I had more than enough in my transcripts to appeal this thing, and he could have all of his ducks in a row, and we could prove my innocence. That was the game plan." R. at 96.

The obvious fact is that where you believe the testimony of Debbie McGregor, the affidavit offered of Sappington that is in record, and the testimony of Rodger Jordan; it is clear that Rob Laher was patently ineffective. To advise one to plead guilty and then that an appeal is an option is without a doubt ineffective on its face.

The position taken by Laher is understandable in that he believed that he was protecting his client; maybe even trying to protect his client from himself. Counsel for a criminal defendant cannot accept the position of the prosecution without an independent and thorough investigation of the matter and then giving advice on the best route to take. In this instance, Laher mislead Jordan, Debbie McGregor and Ms Sappington into believing that the consequences of pleading guilty were easily overturned. Review of the record indicates that Laher is not overly confident regarding the facts surrounding this matter. Appellant asserts that the facts offered by them are factual.

Where Laher did offer the plan of action taken by Jordan it is evident that his counsel was ineffective. In regards to the advice of counsel, "[t]his Court has recognized that mistaken

advice of counsel may vitiate a guilty plea." Tiller v. State, 440 So.2d 1001, 1006 (Miss. 1983).

The record is clear that Jordan answered all the right questions in order to get through the guilty plea. That was the plan. The fact is that he did deceive the court, but he did so on the advice of his counsel that he could appeal and then be prepared for a jury trial at a later date so that adequate preparation might be had.

This court has ruled that where a minimal sentence was the anticipated result suggested by counsel and that result was not had that the guilty plea would be rendered involuntary. Yates v. State, 189 So.2d 917 (Miss. 1966). This court has firmly held that a defendant is entitled to withdraw his plea of guilty if he can prove that which he alleges. Tiller v. State, 440 So.2d 1001, 1004 (Miss. 1983) In the instant case, Jordan proved that his attorney did, in fact, advise him to plead so that they could appeal matter and that he would be better prepared.

As suggested previously the perfect storm had gathered to persuade Jordan to agree with his counsel. He did so to his detriment.

Laher's representation of availability of an appeal clearly renders said representation defective and the apparent prejudice from Laher's performance coerced Jordan to plead to activity that he did not even commit. See Strickland v. Washington, 466 U.S. 668 (1994). Pursuant to said standard for one to prevail on such a claim,

a defendant must show that his attorney's performance was so deficient and that the deficiency was so substantial that he or she was deprived of a fair trial. Id. The defendant must prove both elements. Id. Jordan argues that counsel's plan concocted and relied on by him are clear evidence of ineffective assistance of counsel.

Where a defendant is not afforded his day in court, the process is fatally skewed. The world we live in is one that accuses and charges without merit. The worst is automatically believed, but the issue remains, did Jordan knowingly, understandingly, willingly and voluntarily give up his rights by pleading pursuant to the advice of counsel.

This sustained pressure was apparent by the numerous heated discussions between attorney and client. The transcript shares following colloquy between court and Jordan:

Q. Mr. Jordan, are you satisfied with your legal counsel Mr. Laher?

A. Yes, Ma'am.

This is where the court diverged from typical questioning.

Q. Now let's talk about that a moment. We've been on the record all day with you expressing to the Court your dissatisfaction with Mr. Laher and your desire to enter into an attorney-client relationship with some attorney

other than Mr. Laher, but you have been in the courtroom all day and you've heard the evidence yesterday and you've heard the evidence in these motion hearings today. Do you believe that Mr. Laher has adequately explained to you this plea, consequences, penalties involved so that you've been able to, on your own, determine whether you wish to voluntarily and freely enter this plea this afternoon?

A. Yes, Ma'am.

Q. Do you have any reservations about entering the plea in light of the fact that you have expressed to the Court some reservation about your attorney?

A. No Ma'am.

Q. It's your desire that I take the plea today?

A. Yes Ma'am.

Q. To avoid a trial tomorrow?

A. Yes Ma'am.

Q. Understanding that if I didn't take the plea today, we would proceed to a trial tomorrow?

A. Yes Ma'am.

Q. Having considered the penalties, the charge, the consequences, the advice that your attorney has given you,

what you've heard in the courtroom on your own, do you believe it to be in your best interest that you enter this plea today?

A. Yes, Ma'am..

Q. And, again, are you doing it freely and voluntarily?

A. Yes, Ma'am.

The pressure exerted is obvious by the Court's questioning. Jordan was told by his representative that he had no choice but to plead guilty. Laher informed his client that he should take the offer and plead guilty and that he would certainly be able to appeal the matter. Kortney Sappington, by affidavit, Debbie McGregor, and Jordan all share this version.

The law is clear that where you plead guilty, your right to an appeal is lost forever. To influence his client to plea with an assurance that an appeal was available is patently ineffective assistance of counsel.

The second prong requires that defendant be thereby prejudiced by his attorney's defective service. Jordan relied on his counsel's advice to plead and adhere to plan of appealing. Jordan clearly perjured himself during court's questioning but did so to place the "plan" of his attorney into effect. This reliance to advice of counsel continues to have a detrimental effect.

II. WHETHER JORDAN WAS DENIED DUE PROCESS OF LAW WHERE DEFENSE COUNSEL COERCED AND MANIPULATED JORDAN INTO ENTERING GUILTY PLEA INVOLUNTARILY

Appellant Rodger Jordan was denied due process of law where defense counsel coerced and manipulated Jordan into entering guilty plea. Defense counsel was obviously ill prepared to defend said action, manipulated Jordan into adopting an ill advised plan, and, in essence, coerced him into pleading guilty to something that he did not do. Such actions violated the 5th, 6th, and 14th Amendments to the United States Constitution.

The record is replete with testimony that defense counsel persuaded Jordan to plead guilty in order to place his "plan" into action. Jordan was coerced to enter the plea by his own attorney. Debbie McGregor, Ms Sappington, and appellant all testified regarding this position.

The standard of review to voluntariness of guilty pleas is well settled: "this Court will not set aside findings of a trial court sitting without a jury unless such findings are clearly erroneous." Weatherspoon v. State, 736 So.2d 419, 421 (Miss Ct. App. 1999). The burden of proof that guilty plea was involuntary is on the defendant and must be proven by a preponderance of the evidence. *Id.* At 422. (superceded by Miss. Code Ann. Sec. 99-39-23 (Rev.2000)).

Jordan's answer cannot constitute a solemn declaration in open

court as stated in Roland v. State, 666 So.2d 747 (Miss. 1995).

Jordan clearly stated that he proceeded in this manner based upon the pressures and coercion applied by counsel and his fanciful position that an appeal could be effected. This plea was had the day before trial, the day after he requested new counsel and court advised that he would be proceeding to trial regardless. Jordan then relied to his detriment on the poor advice of counsel and his mother, his fiancé all state that he must plea and let an appeal be had.

Appellant Jordan's testimony along with Debbie McGregor and Sappington affidavit satisfies the burden of proof, by a preponderance of evidence, that the plea of guilty entered in this case was coerced and the deceit by Laher was utilized with undue pressure to give the guilty plea.

While it could be reasonable that Jordan made this up, it is not reasonable that Debbie McGregor and Sappington by her affidavit made this up. This Court should find that the trial court erred in failing to grant the relief requested in this case.

III. WHETHER THERE EXIST ANY EVIDENCE OF MATERIAL FACTS, NOT PREVIOUSLY PRESENTED AND HEARD, THAT REQUIRES VACATION OF THE PLEA IN THE INTEREST OF JUSTICE

In the instant case, Jordan argued in hearings that the victim falsely accused defendant of having sexual relations with her to prevent her from telling her father the true culprits. The hearing revealed to witnesses, Jessie Corneo and

Jonathan Bolton. The Defense did not have adequate time to investigate these leads. The court erred in ruling that the information was irrelevant and immaterial. The credibility of the accusing witness is always an issue for the jury and where the court, in essence, stripped defendant of his theory of defense it hampered his ability to mount a defense.

In applying Witherspoon, the guilty plea should be set aside. The Defense strategy was to show motive for the victim to falsely accuse defendant of rape in order to hide the true identities of her sexual partners. She had been engaged in activities with males that were not Caucasian and victim's father was believed to be a racist. The victim had lied about her partners and this would go to her credibility. This new evidence would totally change the outcome of the 412 hearing and would cast reasonable doubt on the victim in any trial.

In addition, this new evidence was discovered the day before trial leaving absolutely no time to investigate. His motion to continue was denied.

Also, this evidence was not available until disclosed by prosecutor. This information is material to the main issue. This all goes to credibility and that is always a jury issue. The evidence must be heard in the interest of justice.

IV. THE CUMULATIVE EFFECT OF AFOREMENTIONED ERRORS GREATLY
PREJUDICED JORDAN AND REQUIRES REVERSAL OF LOWER COURTS ORDER

The cumulative errors taken in unison clearly show that Jordan
relied to his detriment on the advice of counsel which made his guilty
plea involuntary, unwilling, unintelligent, and not knowing.

CONCLUSION

Jordan asserts that he did not receive minimal competent
representation and that he offered the guilty plea pursuant to advice
of counsel and under coercion and duress.

CERTIFICATE OF SERVICE

I, William Wayne Housley, Attorney for the Appellant, do hereby certify that a true and correct copy of the foregoing Appellant's Brief was this day mailed via the United States Postal Service, first class mail, postage prepaid, to the following at their usual and customary business addresses.

Hon. Clay Joyner
Assistant District Attorney
PO Box 7237
Tupelo, MS 38802-7237

Honorable Thomas J. Gardner
Senior Circuit Court Judge
PO Drawer 1100
Tupelo, MS 38802-1100

Attorney General Jim Hood
PO Box 220
Jackson, MS 39205

Signed this the 4th day of November, 2008.


WILLIAM WAYNE HOUSLEY