

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JULIUS WESLEY KIKER

APPELLANT

VS.

NO. 2008-CA-1341

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Issue	1
Statement of the Case	2
Statement of the Facts	3
Summary of the Argument	4
Argument	4
Conclusion	9
Certificate of Service	10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Holloway v. Arkansas</i> , 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)	8
<i>Strickland v. Washington</i> , 466 U.S. 688, 104 S.Ct. 3052, 80 L.Ed.2d 674 (1984)	5

STATE CASES

<i>Puckett v. Stuckey</i> , 633 So.2d 978, 980 (Miss.1993)	6, 7
<i>Sheffield v. State</i> , 749 So.2d 123, 126 (Miss.1999)	7
<i>Towner v. State</i> , 837 So.2d 221, 225	7
<i>Stringer v. State</i> , 485 So.2d at 275	8

STATEMENT OF THE ISSUE

I. Kiker's Sixth Amendment right to counsel was not violated because he had a conflict free attorney who represented him as his lead counsel throughout the duration of his trial and who vigorously cross-examined the State's witnesses, including Crawford.

STATEMENT OF THE CASE

On or about March 6, 2002, Julius Wesley Kiker was indicted for the murder of Sylvia Renee Kiker. On July 29, 2003, Kiker was tried with attorneys Darryl Hurt, Sr. and Sidney Barnett representing him at trial. He was convicted of murder. On August 8, 2003, he filed his Motion for New Trial. On September 29, 2003, the trial court entered its Order overruling Kiker's Motion for New Trial. On October 27, 2003, Kiker filed his Notice of Appeal. On June 7, 2005, the Mississippi Court of Appeals affirmed Kiker's conviction. On November 8, 2007, Kiker was granted leave to proceed in the trial court with a *pro se* motion for Post Conviction Collateral Relief on the single issue of whether Kiker's Sixth Amendment rights were violated due to his trial counsel's representation of a witness for the State. On July 10, 2008, an evidentiary hearing was held on Kiker's motion. Kiker's Motion for Post-Conviction Relief was denied by Order of the trial court on July 22, 2008. The instant appeal ensued.

STATEMENT OF THE FACTS

Kiker testified that Darryl Hurt, Sr. and Sidney Barnett were his counsel at trial for the murder of his wife. (Tr. 5) Barnett was appointed to represent Kiker a couple of days after the murder. Hurt was hired by Kiker's family a week later. (Tr. 6) He testified that he did see transcripts of the testimony that prosecution witness Bobby Crawford was to give against him.

He testified that Barnett did not tell him that he represented Crawford. (Tr. 7) Kiker testified that Hurt was his lead attorney during trial and was the main attorney defending him. (Tr. 12) He testified that Hurt cross examined Crawford and asked Crawford about the crimes he was charged with. (Tr. 18)

Lee Martin testified that he was the lead attorney representing the State of Mississippi in the trial of Julius Wesley Kiker for the murder of his wife, Kiker. (Tr. 23) The trial began July 29, 2003 and a verdict was returned on August 1, 2003. (Tr. 24) Kiker was represented by Darryl Hurt, Sr. and Sidney Barnett. (Tr. 24) Martin testified that prior to the testimony of Bobby Crawford, Sidney Barnett informed the prosecution and the state that he was presently representing Crawford in the matter of some criminal charges. (Tr. 33) Martin testified Darryl Hurt, Sr. was without a doubt the lead attorney for Kiker. There were twelve witnesses called by the State of Mississippi in its case-in-chief. (Tr. 24) Hurt conducted the cross-examination of all twelve witnesses for the prosecution. (Tr. 24) Hurt conducted the direct examination of three of the five witnesses called by the defense. (Tr. 25) Hurt also conducted the voir dire and made the opening and closing statements in Kiker's defense. (Tr. 25)

Martin testified that Bobby Crawford testified on behalf of the State of Mississippi at Kiker's trial. (Tr. 25) Hurt cross examined Crawford about his pending charges in George County as well as prior charges in Greene County. Hurt cross examined Crawford as to whether he had made any deals with the State in exchange for his testimony. Crawford answered that he did not have any deals with the State in exchange for his testimony. (Tr. 27) Martin testified that he objected during the course of Hurt's cross examination of Crawford, but that he withdrew the objection and Hurt continued the cross examination of Crawford as to his pending George

County charges. (Tr. 28) Hurt further cross examined Crawford as to whether he was friends with the victim's family and whether he was testifying against Kiker to help the victim's family. (Tr. 29) He testified that Hurt ended his cross examination of Crawford by stating that he had no further questions for Crawford. (Tr. 29) He testified that Hurt's cross examination of Crawford was not weak but was typical of a cross examination of a jailhouse informant. (Tr. 35) Martin testified that the case against Kiker was not a circumstantial evidence case, and that although there was no eye witness, there was ample physical evidence connecting Kiker to the murder. (Tr. 32)

Former ADA Kevin Bradley testified that he was present for the plea hearing for Bobby Crawford and that Sidney Barnett was present as Crawford's attorney. (Tr. 43) Crawford was charged with possession of less than 10 grams of a controlled substance, possession of two or more precursors. (State's Exhibit 2, page 15) The State recommended that Crawford be sentenced to 8 years on each count, three years to serve, five years on Post Release Supervision, and a \$5,000 fine on Count II. He also pled guilty to a Bill of Information for failure to register as a sex offender. The prosecution's recommendation was five years, three years to be served consecutively with his other two sentences and two years Post Release Supervision. (Tr. 44) The trial court accepted the State's recommendation and sentenced Crawford accordingly. (State's Exhibit 2; Tr. 44) Crawford therefore had approximately six years to serve. Bradley testified the plea negotiations with Crawford were made independent of any knowledge of anything else and were based on the charges that were presently facing him. Bradley testified that he had no involvement with Kiker's trial or Crawford's testimony in that trial. Bradley testified that there was no plea deal in connection with Crawford testifying in Kiker's trial. (Tr.

45)

Bradley testified that the recommendation was made based on his experience of similar cases in George County. The plea deal was offered in an effort to resolve the case via plea instead of taking the case to trial. (Tr. 52) Bradley testified that he did not make the recommendation that Crawford not be sent to a facility where Kiker was being kept. He testified that he did not ever hear Sidney Barnett speak of Kiker. He further testified that the stipulation that Crawford not be sent to a facility where Kiker was being kept was not a reward or a deal for testimony given in a previous case. (Tr. 53)

SUMMARY OF THE ARGUMENT

While Barnett's simultaneous representation of Crawford and Kiker is certainly ethically problematic for him, it does not necessitate the grant of Post Conviction Relief for Kiker under the facts of this case. Kiker was not denied his Sixth Amendment right to counsel, since, despite Crawford's conflict, he had a conflict-free attorney who ably defended his case and who cross examined Crawford. The record reflects that Hurt's cross examination of Crawford was thorough. The trial court's ruling that Kiker is not entitled to Post Conviction Collateral Relief is correct and should be upheld.

ARGUMENT

- I. Kiker's Sixth Amendment right to counsel was not violated because he had a conflict free attorney who represented him as his lead counsel throughout the duration of his trial and who vigorously cross-examined the State's witnesses, including Crawford.**

Kiker argues that he is entitled to Post Conviction Collateral Relief due to the trial court's

finding that Sidney Barnett had no actual conflict in his representation of Kiker. However, under the facts of this case, Barnett's conflict does not necessitate a grant of relief for Kiker. Kiker had conflict-free counsel in Darryl Hurt, Sr., who was, by all accounts, the lead counsel in Kiker's defense. Hurt conducted the voir dire, gave the opening and closing statements, cross examined all witnesses for the prosecution and directly examined three of the five witnesses for the defense. Hurt had no conflict of interest and his representation was sufficient to satisfy Kiker's Sixth Amendment right to counsel. Kiker cites numerous cases for the proposition that it is error for a court to fail to dismiss an attorney with a conflict of interest and that where a conflict of interest exists the client is denied ineffective assistance of counsel. However, none of these cases involve the unique circumstance in the instant case, where the defendant has a second, conflict-free counsel, who led his defense.

Kiker filed his Motion for Post Conviction Collateral Relief and Evidentiary Hearing on November 28, 2007, alleging that he was denied effective assistance of counsel as contemplated by the Sixth Amendment to the United States Constitution in that his trial counsel Honorable Sidney Barnett, without Petitioner's knowledge, had a conflict of interest because he was representing Petitioner and a state witness, Bobby Crawford, at the same time and that Crawford, a prison inmate, gave damaging testimony against Kiker. (C.P. 6) Kiker further alleged that his trial attorney was ineffective and prejudicial under the test set forth in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 3052, 80 L.Ed.2d 674 (1984). Kiker was granted leave to proceed on one issue by Order of the Supreme Court of the State of Mississippi, whether Kiker's Sixth Amendment rights were violated due to his trial counsel's representation of a witness for the State. (C.P. 9)

Ordinarily, a situation where trial counsel simultaneously represents a defendant and a witness for the prosecution would be a violation of the defendant's Sixth Amendment right to counsel. However, the instant case is unique in that Kiker had *two* counsel at trial, only one of whom had a conflict of interest. While Barnett did have a conflict of interest, Hurt, lead counsel for Kiker, did not. In holding that Kiker was not entitled to Post Conviction Collateral Relief, the trial court ultimately held that Kiker's Sixth Amendment rights were not violated. This ruling is correct since Kiker did have conflict-free counsel who conducted the lion's share of his defense and cross examined the particular witness with whom Kiker's other counsel had a conflict. The trial court correctly held that Kiker was not entitled to Post Conviction Collateral Relief. This is clearly a case of "right result, wrong reason". For the sake of judicial economy, it is proper for the appellate court to affirm the trial court if the right result is reached for the wrong reasons. Puckett v. Stuckey, 633 So.2d 978, 980 (Miss.1993).

Kiker argues that the trial court erred in finding that Crawford was not a key witness and that the State had no deal with Crawford. He further argues that the trial court's finding that his counsel was not deficient pursuant to *Strickland* was irrelevant and gratuitous. However, even if the trial court erred in these findings, the trial court's ultimate ruling that Kiker was not entitled to Post-Conviction Collateral Relief was correct, since Kiker had counsel for the duration of trial who had no conflict and who ably represented him. His Sixth Amendment right to counsel was therefore not violated despite Barnett's conflict of interest.

Kiker's argument that Crawford's testimony converted the case from a direct case to a circumstantial case is without merit, since there was ample physical evidence to convict Kiker. The victim's son saw Kiker with a gun in his possession and heard Kiker and his mother arguing.

The deputy who came to the scene observed Kiker trying to conceal and dispose of the body and saw Kiker in possession of the gun. There was physical evidence collected at the scene that connected Kiker to the murder. (Tr. 31) These pieces of direct evidence and eye witness testimony precluded a circumstantial evidence instruction. A circumstantial evidence instruction is proper only if the case is based wholly on circumstantial evidence. Sheffield v. State, 749 So.2d 123, 126 (Miss.1999). A circumstantial evidence instruction is not proper if the case contains both circumstantial evidence and direct evidence such as eyewitness testimony. Id.

As Kiker notes in his brief, “the sole issue before the trial court was “whether Kiker’s Sixth Amendment rights were violated due to his trial counsel’s representation of a witness for the State.”” Kiker’s Sixth Amendment rights were satisfied by the representation of Hurt throughout the trial. As argued previously, there is not indication that Hurt had a conflict of any kind. He was clearly the lead attorney and provided excellent representation for Kiker. He vigorously cross-examined Crawford so that Kiker had representation for Sixth Amendment purposes at the only time during trial when Barnett’s conflict was applicable.

Kiker freely admits in his brief that the trial court ensured that Kiker had conflict-free counsel during the trial cross examination of Crawford. Therefore, based on his own admission, Kiker’s Sixth Amendment rights were not violated since he did indeed have conflict free counsel throughout the duration of the trial and at the point of the cross examination of Crawford and he is not entitled to Post Conviction Collateral Relief.

As noted earlier, “[i]t is the customary practice, in the name of judicial economy, for an appellate court to affirm the trial court if the right result is reached even though for the wrong reason.” Towner v. State, 837 So.2d 221, 225 Miss.Ct.App.2003) (citing Puckett v. Stuckey, 633

So.2d 978, 980 (Miss.1993)).

The courts have repeatedly held that “joint representation of co-defendants is not per se violative of the Sixth Amendment right to effective assistance of counsel.” Stringer, 485 So.2d at 275 (citing *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). These holdings are applicable in the case at hand. In *Stringer*, the Mississippi Supreme Court set out the two prong test for establishing a violation of the defendant's Sixth Amendment right to effective assistance of counsel: “a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.” Stringer, 485 So.2d at 275 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

While counsel Barnett had a conflict of interest due to his simultaneous representation of prosecution witness Bobby Crawford, Kiker cannot satisfy the second part of the test which requires that the conflict of interest adversely affected his lawyer's performance. Kiker had other counsel, Darryl Hurt, who had no conflict and who vigorously cross examined Crawford and presented Kiker's defense.

Kiker also alleges that Crawford “triangulated” in his testimony and that this maneuver somehow prejudiced Kiker. However, the record reflects that Hurt cross examined Crawford about his pending charges in George County as well as prior charges in Greene County. Hurt cross examined Crawford as to whether he had made any deals with the State in exchange for his testimony. Crawford answered that he did not have any deals with the State in exchange for his testimony. (Tr. 27) Lee Martin, who prosecuted Kiker, testified that he objected during the course of Hurt's cross examination of Crawford, but that he withdrew the objection and Hurt continued the cross examination of Crawford as to his pending George County charges. (Tr. 28)

Hurt further cross examined Crawford as to whether he was friends with the victim's family and whether he was testifying against Kiker to help the victim's family. (Tr. 29) He testified that Hurt's cross examination of Crawford was not weak but was typical of a cross examination of a jailhouse informant. (Tr. 35) Kiker is unable to suggest any avenue of questioning that went unexplored in Hurt's cross-examination of Crawford. Further, the testimony of the Lee Martin and Kevin Bradley clearly establishes that there was no "deal" in exchange for Crawford's testimony against Kiker.

CONCLUSION

The Appellant's assignments of error are without merit and the judgment of the trial court that Kiker is not entitled to Post Conviction Collateral Relief should be upheld.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

By: Laura H. Tedder
Laura H. Tedder, [REDACTED]
Special Assistant Attorney General

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220
Telephone: 601-359-3680

CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert P. Krebs
Circuit Court Judge
P. O. Box 998
Pascagoula, MS 39568-1959

Honorable Anthony Lawrence, III
District Attorney
355 Cox Street, 2nd Floor
Lucedale, MS 39452

Percy S. Stanfield, Jr., Esquire
Attorney At Law
Stanfield Hall Poole & Associates, PLLC
405 Tombigbee Street
Jackson, MS 39201

This the 16th day of April, 2009.


LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680