

IN THE SUPREME COURT OF MISSISSIPPI

GEORGE G. MORRIS

APPELLANT

VS.

CAUSE NO. 2008-CA-1361-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

Appeal from the Circuit Court of Hinds County, Mississippi

Oral Argument Not 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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This the 21st day of July, 2009.


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STATEMENT OF ISSUES

1. The trial court erred in not finding that Morris was denied the effective assistance of counsel.
2. The trial court erred in not allowing Morris to present relevant and material evidence at his sentencing hearing.
3. The trail court erred in not finding when ruling on Morris' Petition for Post-Conviction Relief that it erred in not allowing Morris to present relevant and material evidence at his sentencing hearing.
4. The trail court erred in finding the Morris' guilty plea was freely and voluntarily given.

STATEMENT OF THE CASE

This case is a criminal appeal from the Circuit Court of Hinds County, Mississippi, from the ruling on Morris' petition for post-conviction relief. Morris plead guilty to one count of gratification of lust and one count of sexual battery on September 12, 2005, and was sentenced to serve 10 years (R.16-19, 32-35). Morris subsequently filed a petition for post-conviction relief (R.43) that was denied on December 13, 2007 (R.151).

Morris was denied effective assistance of counsel at the trial level. Trial counsel was ineffective in presenting evidence on behalf of Morris (T.9, 19-22 of September 26, 2005, proceedings). Trial counsel also misinformed and misled Morris and others about the length of sentence Morris would receive (R.142-146, 149). This ineffective assistance of counsel was the cause of Morris' decision to plead guilty. Morris would not have plead guilty but for the ineffective assistance of counsel (R.149).

Also, the trial court did not allow Morris to present witnesses on his behalf during sentencing in violation of his constitutional rights (T.9 of September 26, 2005, proceedings).

Further, Morris' plea was not freely and voluntarily given. Morris did not understand the effect of his plea and he did not understand what the possible sentence might be because of his plea (T.1-12 of September 12, 2005, proceedings, R.142-146, 149), therefore his plea should not be binding upon him.

SUMMARY OF THE ARGUMENT

1. Morris was denied effective assistance of counsel at the trial level. Trial counsel was ineffective in presenting evidence on behalf of Morris - trial counsel did not object to the court denying Morris the right to call two witnesses who were present, trial counsel did not question Morris during sentencing, and trial counsel also misinformed and misled Morris and others about the length of sentence Morris would receive. This ineffective assistance of counsel was the cause of Morris' decision to plead guilty, i.e., Morris believed and took the erroneous advice of trial counsel when trial counsel convinced Morris that he would only receive time served if he plead guilty. Morris would not have plead guilty but for the ineffective assistance of counsel.
2. Also, the trial court did not allow Morris to present witnesses on his behalf during sentencing in violation of his constitutional rights. Morris had four witnesses present to testify on his behalf at sentencing, and the trial court did not allow two of them to testify. This action of the trial court violated Morris' constitution rights to due process, his right to compel witnesses in his favor, his right to equal protection of law, and his right to a reliable sentencing hearing.
3. Further, Morris' plea was not freely and voluntarily given. Morris did not understand the effect of his plea and he did not understand what the possible sentence might be because of his plea, due to ineffective assistance of counsel. Also, the trial court did not advise Morris of what effect his plea would have and also did not advise him of what the possible sentence might be because of his plea. Therefore, Morris' plea should not be binding upon him.

ARGUMENT

Procedural History

Morris was indicted in October 2004 on thirteen counts of Gratification of Lust and Sexual Battery in Hinds County, Mississippi, in cause number 251-04-1-058 (R.2-6). On September 12, 2005, Morris entered a plea of guilty to one count of gratification of lust and one count of sexual battery (R.16-19, 32-33), and was sentenced to ten years to serve (R34-35), and the remaining counts were remanded (R.21-31). Morris was sentenced on these two counts on September 26, 2005 (R. 34-41). On May 7, 2007, Morris filed, in the Circuit Court of Hinds County, a *Petition to Set Aside Pleas of Guilty Pursuant to Mississippi Code 1972 Annotated, Title 99, Chapter 39, Mississippi Uniform Post-Conviction Collateral Relief Act and Attached Exhibits in Support of Petition for Post-Conviction Relief* based on ineffective assistance of counsel and refusal of the trial court to allow relevant and material evidence in mitigation during sentencing (R.43). On December 13, 2007, the Circuit Court of Hinds County, Mississippi, issued an *Order Denying Petition to Set Aside Plea, Post Conviction Relief and Dismissal of Case* (R.151). From this December 13, 2007, order, Morris appealed and filed a *Notice of Appeal* on January 11, 2008 (R.153).

I. THE TRIAL COURT ERRED IN FAILING TO FIND THAT MORRIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND IT'S PROGENY

Standard of Review

A circuit court's denial of post-conviction collateral relief will not be reversed absent a finding that the court's decision was clearly erroneous. However, when reviewing issues of law, this Court's proper standard of review is de novo. Brown v. State, 731 So.2d 595, 598 (Miss. 1999).

Law, Facts and Analysis

To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The burden of proof rests with the defendant to show both prongs. McQuarter v. State, 574 So. 2d 685, 687 (Miss. 1990). "The defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694.

"In order to prevail on the issue of whether his defense counsel's performance was ineffective, [a defendant] must prove that his counsel's performance was deficient and that he was prejudiced by counsel's mistakes." Kinney v. State, 737 So. 2d 1038, 1041 (Miss. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687-96 (1984)). The test set forth in Strickland to determine whether the defendant has received ineffective assistance of counsel applies to challenges to guilty pleas as well. *Id.* (quoting Hill v. Lockhart, 474 U.S. 52, 58 (1985)).

Specifically, when challenging a guilty plea based on ineffective assistance of counsel, a convicted defendant "must show unprofessional errors of substantial gravity." Reynolds v. State, 521 So. 2d 914, 918 (Miss. 1988), Buck v. State, 838 So. 2d 256, 260 (Miss. 2003). In addition, the defendant "must show that those errors proximately resulted in his guilty plea and that but for counsel's errors he would not have entered the plea." Reynolds at 918.

In short, if a defendant pleads guilty, the key issue is if counsel's performance had been effective, there was a reasonable probability the defendant would not have pleaded guilty, but would have gone to trial. Bell v. State, 751 So. 2d 1035, 1038 (Miss. 1999). The defendant

claiming ineffective assistance of counsel must show, by a preponderance of the evidence, that there is a reasonable probability that had counsel's assistance been effective, he would not have pled guilty, but would have insisted on going to trial.

Bell v. State, 751 So.2d 1035 (Miss.1999).

Trial counsel was ineffective in presentation of evidence on behalf of Morris. There were four witnesses present at the sentencing hearing on behalf of Morris. Trial counsel for Morris conceded without objection and without making a proffer to allowing only two of the four witnesses to testify (T.9 of the September 26, 2005, proceedings - Sentencing). Trial counsel conducted no questioning of Morris (T.19-22 of the September 26, 2005, proceedings - Sentencing). There is a reasonable probability that the result of the sentencing would have been different if more attention had been drawn to Morris' past good conduct, if Morris had been questioned, and if the witnesses for Morris had been allowed to testify. Such actions or inactions constituted ineffective assistance of counsel and significantly affected Morris' rights to present all relevant evidence in mitigation, as will be discussed further in issue II below.

Deborah K Morris-Kern provided an affidavit outlining the ineffective assistance of counsel know to her (R.142 - 143). Mrs. Morris-Kern states in her affidavit that counsel for Mr. Morris explained to her prior to Morris entering a guilty plea, that once Mr. Morris entered a plea of guilty, then the Court would consider the one year Mr. Morris had already served in jail as sufficient punishment and give Mr. Morris time served, thus allowing him to be released on the day he was sentenced. Mrs. Morris-Kern further states in her affidavit that following the conversation with counsel for Mr. Morris that she understood counsel to tell her that Mr. Morris "would serve nothing more than the year in pretrial detention and that he was assured of going home upon making his final appearance in court . . ." (R.142-143).

Glenn Kern provided an affidavit outlining the ineffective assistance of counsel know to him R.145 - 146). Mr. Kern states in his affidavit that counsel for Mr. Morris explained to him prior to Morris entering a guilty plea, that once Mr. Morris entered a plea of guilty, then the Court would consider the one year Mr. Morris had already served in jail as sufficient punishment and give Mr. Morris time served, thus allowing him to be released on the day he was sentenced. Mr. Kern further states in his affidavit that following the conversation with counsel for Mr. Morris that he understood counsel to tell him that Mr. Morris "would serve nothing more than the year in pretrial detention and that he was assured of going home upon making his final appearance in court . . ." (R.145-146).

Mr. Morris himself provided an affidavit outlining ineffective assistance on the part of his trial counsel. Mr. Morris states in his affidavit that based on conversations with his trial counsel that he believed that if he agreed to an open plea that he would be released after having served one year that he had already served in pre-trial detention (R.149). Mr. Morris cites misinformation from trial counsel as the cause of Mr. Morris making the decisions that he did (R.149).

Morris' affidavit in pertinent part is as follows:

3. On or about September 12, 2005, my attorney persuaded me to enter a[n] open plea of guilty to Counts II and IV of the indictment. Based on conversations with my attorney and family members I was led to believe that if I agreed to an open plea of guilty and based on my past good behavior and lack of any criminal history I would more than likely receive a sentence of a year or less. Since I had been incarcerated for almost a year at that time, I believed that I would soon be released, after having served one year. My younger sister Deborah Morris-Kern and her husband Glenn confirmed my belief as they had conversed with Thomas Fortner in August of 2005. Those conversations convinced my sister and [her] husband that I would be released soon after entering an open plea of guilty after I had completed serving one year.

4. On September 12, 2005, I entered an open plea of guilty to Counts II and IV of the indictment . . . Had I not been led to believe otherwise, I would not have agreed to an

open plea of guilty. My open plea of guilty was not knowingly and voluntarily made as it was made based on misinformation from my attorney . . . (R.149)

Clearly, trial counsel's performance was deficient as trial counsel is not able to advised a client as to what decision a judge will actually make, and clearly Mr. Morris' reliance on the deficient performance of trial counsel prejudiced his defense, especially since no defense was prepared based on the advice and guidance of trial counsel. But for Mr. Morris' detrimental reliance on the erroneous and deficient advice of trial counsel, the result of Mr. Morris' proceedings would have been different, especially since Mr. Morris in his affidavit states that he would not have agreed to an open plea of guilty if he had not been misled by trial counsel (R.149). Further, the affidavits of others clearly show that Mr. Morris made his decision based on defective performance and advice of trial counsel. Clearly, Mr. Morris his met the burden of showing that if trial counsel's performance had not been defective, then there was a reasonable probability that Mr. Morris would not have plead guilty but would have gone to trial.

Conclusion

Morris clearly demonstrated ineffective assistance of counsel. Morris was prejudiced by counsel's lack of effective representation and commission of errors of substantial gravity, and these errors proximately resulted in Morris' guilty plea. But for the errors and ineffective assistance of trial counsel, Morris would not have entered the plea. The trial court's decision in not finding ineffective assistance of counsel was clearly erroneous. Thus, the decision of the Hinds County Circuit Court should be reversed and this cause be remanded to the Hinds County Circuit Court for review for determining the ineffectiveness of counsel, the voluntariness of Morris' open plea of guilty, and setting aside Morris' plea of guilty and vacating the sentences imposed by the trial court.

II. THE ERRORS AND OMISSIONS OF THE TRIAL JUDGE AT THE SENTENCING HEARING, i.e. NOT ALLOWING MORRIS TO PRESENT RELEVANT AND MATERIAL EVIDENCE AT THE SENTENCING HEARING, AND SUBSEQUENT RULING ON MORRIS' PETITION FOR POST-CONVICTION RELIEF RESULTED IN THE DENIAL OF MORRIS' FUNDAMENTAL RIGHTS AS GUARANTEED UNDER RELEVANT PROVISIONS OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS

Standard of Review

A circuit court's denial of post-conviction collateral relief will not be reversed absent a finding that the court's decision was clearly erroneous. However, when reviewing issues of law, this Court's proper standard of review is de novo. Brown v. State, 731 So.2d 595, 598 (Miss. 1999).

Law, Facts and Analysis

In criminal prosecutions, the accused has a right to have compulsory process for obtaining witnesses in his favor. U.S. Const. amend. VI; Miss. Const. art. 3, §26.

Exclusion of testimony in the sentencing phase denies the defendant his right to present all relevant evidence in mitigation. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). The sentencer may not refuse to consider relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982).

The plain error rule is codified within Miss. R. Evid. 103(d). It provides that nothing precludes a court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the plain error rule. The plain error rule arises if an error is so fundamental that it generates a miscarriage of justice. Davis v. State, 891 So.2d 256, 259 (Miss. 2004).

There were four witnesses present at the sentencing hearing on behalf of Morris. The trial

court unfairly, capriciously, and without just cause denied Morris presentation of two of the four witnesses (T.9, lines 15 -17 of the September 26, 2005, proceedings - Sentencing). Trial counsel for Morris conceded without objection and without making a proffer to allowing only two of the four witnesses to testify (T.9 of the September 26, 2005, proceedings - Sentencing). Even though trial counsel did not object to the action of the court but acquiesced therein, this error should be reviewed under the plain error rule since the substantial rights of Morris were affected by this fundamental error of the trial court that created a miscarriage of justice, and subsequent injustice will occur if the plain error rule is not invoked.

The denial of the presentation of the witnesses on behalf of Morris and the subsequent failure of the trial court to recognize such in the context of Morris' Petition for Post-Conviction Relief constituted a violation of Morris' rights to due process, right to compel witnesses in his favor, equal protection of law, and a reliable sentencing hearing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Mississippi Constitution, and was clearly erroneous. U.S. Const. amend. V, VI, VIII, XIV; Miss. Const. art. 3, §§14, 26, 28.

Conclusion

The failure of the trial court to allow the witnesses on Morris' behalf, and the subsequent denial of Morris' Petition for Post Conviction Relief which brought the error before the trial, were clearly erroneous as they violated Morris' Constitutional rights and created a miscarriage of justice. Thus, the decision of the Hinds County Circuit Court should be reversed and this cause be remanded to the Hinds County Circuit Court for review and setting aside Morris' plea of guilty and vacating the sentences imposed by the trial court.

III. THE TRIAL COURT ERRED WHEN IT FOUND THAT MORRIS' PLEA WAS FREELY AND VOLUNTARILY GIVEN

Standard of Review

A circuit court's denial of post-conviction collateral relief will not be reversed absent a finding that the court's decision was clearly erroneous. However, when reviewing issues of law, this Court's proper standard of review is de novo. Brown v. State, 731 So.2d 595, 598 (Miss. 1999). *Law, Facts and Analysis*

A guilty plea must be voluntarily, intelligently, and knowingly entered in order to be binding upon a criminal defendant. Spry v. State, 796 So.2d 229, 231 (Miss. 2001). To determine this, an appellate court must find that "the defendant knows what the elements are of the charge against him including an understanding of the charge and its relation to him, what effect the plea will have, and what the possible sentence might be because of his plea." Wilson v. State, 577 So.2d 394, 397 (Miss. 1991) (citing Schmitt v. State, 560, So.2d 148, 154 (Miss. 1990)). The petitioner carries the burden of proof to demonstrate his plea was not voluntary, intelligently, and knowingly given. Hannah v. State, 943 So.2d 20, 25 (Miss. 2006) (citing Gardner v. State, 531 So.2d 805, 810 (Miss. 1988)).

The trial court found that Morris "... did willingly, intelligently, knowingly and voluntarily plead guilty to the charges ..." (R.151). However, the trial court did not advise Morris of what effect the plea would have and the trial court did not advise Morris of what the possible sentence might be because of his plea, and the trial court did not advise Morris of the minimum or maximum sentence for the charges (T.1-12 of the September 12, 2005, proceedings - Guilty Plea).

Deborah K Morris-Kern provided an affidavit and states in her affidavit that counsel for Mr.

Morris explained to her prior to Morris entering a guilty plea, that once Mr. Morris entered a plea of guilty, then the Court would consider the one year Mr. Morris had already served in jail as sufficient punishment and give Mr. Morris time served, thus allowing him to be released on the day he was sentenced. Mrs. Morris-Kern further states in her affidavit that following the conversation with counsel for Mr. Morris that she understood counsel to tell her that Mr. Morris "would serve nothing more than the year in pretrial detention and that he was assured of going home upon making his final appearance in court . . ." (R.142-143).

Glenn Kern provided an affidavit and states in his affidavit that counsel for Mr. Morris explained to him prior to Morris entering a guilty plea, that once Mr. Morris entered a plea of guilty, then the Court would consider the one year Mr. Morris had already served in jail as sufficient punishment and give Mr. Morris time served, thus allowing him to be released on the day he was sentenced. Mr. Kern further states in his affidavit that following the conversation with counsel for Mr. Morris that he understood counsel to tell him that Mr. Morris "would serve nothing more than the year in pretrial detention and that he was assured of going home upon making his final appearance in court . . ." (R.145-146).

Mr. Morris himself provided an affidavit and in his affidavit he states that based on conversations with his trial counsel that he believed that if he agreed to an open plea that he would be released after having served one year that he had already served in pre-trial detention (R.149). Mr. Morris cites misinformation from trial counsel as the cause of Mr. Morris making the decisions that he did (R.149).

Morris' affidavit in pertinent part is as follows:

3. On or about September 12, 2005, my attorney persuaded me to enter a[n] open plea of guilty to Counts II and IV of the indictment. Based on conversations with my attorney and family members I was led to believe that if I agreed to an open plea of guilty and

based on my past good behavior and lack of any criminal history I would more than likely receive a sentence of a year or less. Since I had been incarcerated for almost a year at that time, I believed that I would soon be released, after having served one year. My younger sister Deborah Morris-Kern and her husband Glenn confirmed my belief as they had conversed with Thomas Fortner in August of 2005. Those conversations convinced my sister and [her] husband that I would be released soon after entering an open plea of guilty after I had completed serving one year.

4. On September 12, 2005, I entered an open plea of guilty to Counts II and IV of the indictment . . . Had I not been led to believe otherwise, I would not have agreed to an open plea of guilty. My open plea of guilty was not knowingly and voluntarily made as it was made based on misinformation from my attorney . . . (R.149)

The failure of the trial court to advise Morris what effect the plea would have and what the possible sentence might be, and the failure of the trial court to confirm that Morris knew what effect the plea would have and what the possible sentence might be because of his plea, coupled with the fact of the evident misinformation about the amount of the sentence Morris would get as evidenced by the affidavits, clearly demonstrates that Morris' plea was not voluntarily, intelligently and knowingly given.

Conclusion

The failure of the trial court to find that Morris' plea was not voluntarily, intelligently and knowingly given was clearly erroneous. Thus, the decision of the Hinds County Circuit Court should be reversed and this cause be remanded to the Hinds County Circuit Court for review for determining that Morris' plea was not voluntarily, intelligently and knowingly given, and setting aside Morris' plea of guilty and vacating the sentences imposed by the trial court.

CONCLUSION

But for the errors and ineffective assistance of trial counsel, Morris would not have entered the plea, thus, the trial court's decision in not finding ineffective assistance of counsel was clearly erroneous. Morris' lack of knowledge of the law as a layman should not be held against him, and his reliance upon ineffective counsel should not be held against him.

Further, the violations of Morris' Constitutional rights in not being allowed to call witnesses on his behalf warrant relief for Morris.

Morris' lack of knowledge as to what effect his plea would have, and what the possible sentence might be because of his plea, clearly demonstrates that his plea was not voluntarily, intelligently and knowingly given, and thus relief for Morris is necessary.

Based on the foregoing, this case should be reversed and remanded to the Circuit Court of Hinds County, Mississippi.

CERTIFICATE OF SERVICE

I, Joseph Patrick Frascogna, Attorney for Appellant, do hereby certify that I have this day served by U.S. mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

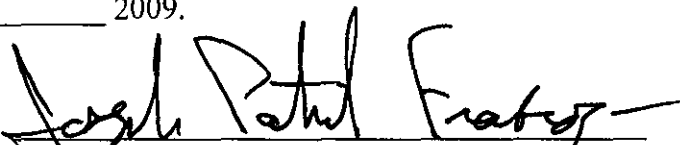
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