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IN THE SUPREME COURT OF MISSISSIPPI

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONNIE MITCHENER	FILED	APPELLANT
VS.	MAY 19 2009	NO. 2008-CA-01750 COA
STATE OF MISSISSIPPI	OFFICE OF THE CLERK SUPREME COURT COURT OF APPEALS	APPELLEE

APPEAL FROM

THE CIRCUIT COURT OF

LOWNDES COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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ISSUE ONE: THE CIRCUIT COURT COMMITTED ERROR IN FINDING THAT THE GUILTY PLEA OF RONNIE MITCHENER WAS ENTERED VOLUNTARILY AND INTELLIGENTLY

Quite naturally and not surprisingly, the State, in the Appellee's Brief, has completely sided with the Circuit Court Judge and is in lock-step with the testimony of Jackson Brown, Ronnie Mitchener's former attorney. In adopting the positions and rulings of the lower Court, the State has sought to discount the testimony of Ronnie Mitchener's witnesses by arguing that the sworn accounts provided by Elizabeth Stephens, Christine Mitchener, Betsy Chandler, and Carolyn Bentley were not corroborated by phone records or some independent proof of phone conversations.

As the Mississippi Supreme Court clearly pronounced in *Sanders v. State*, 440 So.2d 278 (Miss. 1983):

> Where defense counsel *lies to the defendant* regarding the sentence he will receive, the plea may be subject to collateral attack. Where defense counsel advises the defendant to lie and tell the court that the guilty plea has not been induced by promises of leniency (when in fact it has) the plea may be attacked. The law is clear that where the defendant receives any such advice of counsel, and relies on it, the plea has not been knowingly and intelligently made and is thus subject to attack. *Burgin v. State*, 522 S.W. 2d 159 (Mo.App. 1975).
>
> This Court has gone further and has recognized that *mistaken advice of counsel* may in some cases vitiate a guilty plea.

(*Sanders*, at p. 283-284, emphasis added)

See also *Rochell v. State*, 748 So.2d 103 (Miss. 1999) where defense counsel allegedly guaranteed the Defendant a different sentence than the one he received plus assertions that lying under oath was involved in the plea plus the Defendant was brow beaten to enter the guilty plea.

Mitchener also relies upon *Hall v. State*, 800 So.2d 1202 (Miss.App. 2001) which states as follows:

> Nevertheless, mere proof that a defendant has been misinformed as to some aspect of his prospective sentence does not automatically permit him to have that plea set aside. Rather, the defendant must show that he legitimately relied on the misinformation in the decision process that led to his guilty plea. *Banana v. State*, 635 So.2d 851, 854 (Miss. 1994).
>
> (*Hall*, at p. 1206)

Ronnie Mitchener testified at great length that he was (1) misinformed by Jackson Brown; (2) lied to by Jackson Brown; and (3) legitimately relied upon the misinformation and the lies in the decision process that led him to enter his guilty plea. As shown in the Appellant's Brief at pages 18-19, Jackson Brown only gave a general denial under oath with no details with the only possible exception of his *home* (not his office) telephone bill. Is this now considered corroboration that closes the door on a PCR?

Had phone records been part of a requirement to prove a post conviction relief petition under Mississippi law, then the undersigned counsel would have been glad to subpoena same and present them to the Court. The statutes on PCRs mentions absolutely *nothing* about the presentation of phone records.

Ronnie Mitchener's burden of proof in this matter *is not* beyond a reasonable doubt or by clear and convincing evidence. The burden of proof in a PCR hearing is by a *preponderance of the evidence*. *See* Section 99-39-23 (7) of the Mississippi Code of 1972, as amended. Mitchener, by his testimony and the testimony of his witnesses, has established by a preponderance of the evidence that his conviction should be set aside because of the actions of Jackson Brown. Mitchener's plea of guilty is clouded by Brown's misrepresentations.

Again, the Court's attention is directed to the testimony of Carolyn Bentley. Ms. Bentley is an independent unbiased witness who had *never even met* either Ronnie Mitchener or Jackson Brown in this matter. Here are portions of Ms. Bentley's testimony:

BY MR. BEACH: All right. Did you ever hear any conversations or statements, I should say, made by Mr. Brown to Mr. Mitchener about what sentence Mr. Mitchener would get if he pled guilty?
BY MS. BENTLEY: *Yes. I heard him several – more than once tell him that if he would plead guilty, that he would get time served plus probation. And that the gentleman that he supposedly kidnapped could not testify if he pleaded guilty. And Ronnie told him if he could, if that gentleman could testify, he wanted to go to trial.*

But Mr. Brown just kept telling him, Ronnie, you don't want to do that. You don't want to go to trial. I already know. You're going to get probation and time served.
Q: How emphatic was Mr. Brown in his statements to –
A. Very emphatic.
Q: Now approximately how many times did you hear Mr. Brown say that?
A: Probably – *easily 10 times*.

(R 34, emphasis added)

* * * * *

BY MRS. HAYES-ELLIS: Okay. So, if Mr. Mitchener was arrested in January of 2004, from that date up until the following of '04, you really can't testify as to anything that might had transpired between Mr. Mitchener and his attorney during that time period, can you?
BY MS. BENTLEY: No. *Other than I didn't really start listening in to the phone calls until later in the summer when I was amazed as to what I heard Mr. Brown say. And then I started listening*.

(R 36, emphasis added)

The Court then asked more detailed questions of Ms. Bentley and she testified that she had the three-way conversations on speakerphone. When asked by the Judge if she had phone records related to the conversations, Ms. Bentley stated that the records were available. (R 36-40) At no time did the Court request in any form or fashion that Ms. Bentley produce the records. During his testimony, Jackson Brown stated that he did not know Ms. Bentley. (R 142)

In the Court's June 23, 2008, Opinion and Order, the Court appeared to hold this lack of production records against Ms. Bentley, yet, Ms. Bentley's testimony could not have been more precise to the point of this appeal. (CP 90) It is

interesting to note that the Court *did not make a specific finding* that Ms. Bentley's testimony was not credible. Ms. Bentley's testimony is as pristine, clear, and credible as it can be, yet the Court, in a *clearly erroneous* finding states that Ms. Bentley's testimony does not show that Brown promised Mitchener probation or that Boterf would not testify. Couple this with the Court's statements about Jackson Brown (CP 91) and you can see that the odds were stacked against Ronnie Mitchener in this hearing.

It is disconcerting to see that, on the one hand, a completely independent unbiased witness' testimony is discarded by referencing a vague "requirement" to produce phone records against, on the other hand, an unsolicited ringing endorsement of another witness. These are the types of rulings that bring serious scrutiny to the justice system in this state. As this Court ruled in the first appeal: "Mitchener's allegations were very specific and detailed as to the time, place, and content of the attorney's assurances." *See Mitchener v. State*, 964 So.2d 1188 at p.1194 (Miss.Ct.App. 2007). And those allegations were only contained the affidavits attached to the PCR! The testimony has more than backed up those specific allegations of Brown's misrepresentations.

Under Mississippi law, Ronnie Mitchener provided proof by a preponderance of the evidence through the very credible testimony of Carolyn Bentley that his conviction should be set aside. Contrary to the State's argument, he has "shouldered his burden," and the Court below was clearly erroneous in its ruling.

ISSUE TWO: THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THAT RONNIE MITCHENER'S FORMER ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL

The State, in its Appellee's Brief at pages 13-14, brushes off the Appellant's argument in this issue by invoking the doctrine of *res judicata*. The State argues that in the first Mitchener appeal, the Court of Appeals stated that Mitchener's allegations regarding the failure of Jackson Brown to have the sentencing hearing preserved were without merit.

Here is what this Court actually ruled in the opinion by Justice Chandler:

> Finally, for the first time on appeal, Mitchener argues that his attorney was deficient for neglecting to assure that a transcript was made of the aggravating and mitigating testimony at the sentencing hearing. Mitchener does not allege any specific error occurred that would have been shown by the missing transcript. Therefore, he has failed to show prejudice from the failure to transcribe the aggravating and mitigating testimony and his ineffective assistance of counsel claim on this ground is without merit.

(*See* ***Mitchener v. State***, 964 So.2d 1188, at 1195 (Miss.Ct.App. 2007)

The first ***Mitchener*** case dealt with the denial of an evidentiary hearing by the Court below. The evidentiary hearing ordered by this Court on reversal and remand produced a sharp exchange between the Circuit Court Judge and the undersigned counsel as outlined in the Appellant's Brief at pages 24-27. (Reference is made to the record at R 151-154, RE 104-107, RE 86-107, and, specifically, RE 112, CP 118, RE 86, CP 91, RE 58-59.)

Attention is directed to the following passage in the record:

> BY THE COURT: Let me ask you something right quick. I'm curious about that. The Court has to do the sentencing, not the district attorney, not Mr. Beach, not Mr. Brown. Do you think the Supreme Court is going to look at a record and determine that something is mitigating and something is aggravated different than this Court? Is that where you're headed with this witness, because—

BY MR. BEACH: I honestly can't tell you from day-to-day what the Supreme Court of the State of Mississippi is going to do, Judge.
BY THE COURT: Right.
BY MR. BEACH: *But I respectfully submit that if you're going to properly represent your client, events that occur in open court should be documented on the record.*
BY THE COURT: *Let me suggest to you that from days of John C. Stennis, who sat in this chair before I did many years prior. I'm not aware of any Judge in this district, when it's matters of aggravation and mitigation transcribing those because the Judge sentences at that point and time after a hearing.*

I've not known of any judge who has gone back and reviewed that and mulled over that. *I don't know that this line of questioning really affects Mr. Brown. Your concern seems to be more with this Court and then quite frankly, Judge Howard, Judge Montgomery, Judge Sams, Judge Brown, Judge Buck, Judge Green, all of those that have come before us. I've never have been aware in this district where Judges had that done.*

If you look, you'll see what I found to be aggravating and mitigating in my fairly lengthy discussion before I sentenced this gentleman. *So, I think if you're looking for clues, what I found to be aggravating and mitigating, it's there...*

(R 152-153, emphasis added)

* * * * *

BY MR. BEACH: All right. Sir, let me make this comment. In all deference to the Court, Your Honor, I understand the authority of this court, other court, local courts: Circuit and Chancery, County, to make their own local rules.

But I also understand that the rules established by the Supreme Court say that if a local rule is adopted, this local rule must be approved by the Supreme Court.
BY THE COURT: *So, we'll know, this is not a local rule. This is – matters in aggravation and mitigation are for the Judge who is doing the sentencing and that's it.*

(R 153-154, emphasis added)

Suffice it to say that the festering issue over the failure of counsel to preserve the record has now been litigated fully for additional appellate review. Certainly there must be serious concerns raised in this appeal regarding the apparent "time-honored" unwritten and unapproved local rule of not taking down sentencing testimony in this particular lower Court.

Chief Justice Roy Noble Lee stated the importance of keeping and maintaining a record of all stages of a criminal proceeding in *McCreary v. State*, 582 So.2d 425 (Miss. 1991). In *McCreary*, the Mississippi Supreme Court reversed a Circuit Court ruling which dismissed a PCR. Justice Lee noted as follows:

> We take this opportunity to reiterate that the ends of justice are more efficiently served when a full record of each stage of the criminal process is preserved and available for review, although we caution to add that it is not always necessary to include everything as part of the record, so long as each and every stage of the criminal process is preserved and available. *See Gibson v. State*, 580 So.2d 739 (Miss. 1991); *Garlotte v. State*, 530 So.2d 693, 694 (Miss. 1988).
>
> (*McCreary*, at p. 426)

By declaring Mitchener's argument regarding the failure to preserve the record in a criminal case by defense counsel as being *res judicata* without citing any legal authority whatsoever, the State has essentially waived this argument and conceded this point to Ronnie Mitchener.

The Mississippi Supreme Court, in *Rigdon v. General Box Co.*, 162 So.2d 863, 249 Miss. 239 (1964) made the following ruling regarding appellate procedure:

> An appellee should anticipate that the case may be reversed on the issues raised by the appellant, and if he wishes to raise a point in event of reversal, he must do so in his brief, otherwise, he waives it. The reasons for this rule are found in the necessity for orderly procedure so that cases may be disposed of on one hearing rather than by piecemeal.
>
> (*Rigdon*, at p. 247)

To this day, the decision in *Rigdon* is still good law and has not been superseded by statute, subsequent cases, and/or the Rules of Appellate

Procedure. It's an amazingly simple concept: when an appellee fails to address an issue raised by the Appellant, the Appellee *waives the argument.*

In addition to the procedural bar to the State's *res judicata* declaration, Ronnie Mitchener hereby submits that specific error related to this issue has been effectively raised and re-litigated. As noted in the Appellant's Brief at pages 27-28, it is extremely difficult to show specific error when there is no transcript. The failure of counsel to make the record and challenge the unapproved unwritten local rule *is* the specific error which prejudices the case against Ronnie Mitchener.

Moreover, this issue was based on two assertions: misrepresentation related to the entry of the guilty plea and the failure to preserve the record. Ronnie Mitchener has claimed that Jackson Brown's performance was deficient and this deficiency prejudiced his case. *See Appellant's Brief at p. 21-22.* This Court's ruling in reversing the Circuit Court's summary dismissal was based on the claim that Brown misrepresented the length of Ronnie Mitchener's sentence along with the Brown assurance that Mitchener would received time served plus probation and that Adam Boterf would not be allowed to testify at the sentencing hearing. *See Mitchener* at pages 1194 & 1195; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Sanders v. State*, 440 So.2d 278 (Miss. 1983); *Rochell v. State*, 748 So.2d 103 (Miss. 1999).

"But for" the representations of Jackson Brown regarding the sentencing guarantee and whether or not the victim would be able to testify, Ronnie

Mitchener would not have accepted the open guilty plea and would have proceeded to trial.

CONCLUSION

Having been granted his evidentiary hearing denied by the Circuit Court in the first appeal, Ronnie Mitchener seized the opportunity allowed by this Court to prove his case by a preponderance of the evidence. As with all PCRs, Mitchener urges this Court to carefully examine the entire record, particularly the testimony of Carolyn Bentley and the exchanges between the undersigned counsel and the Court below.

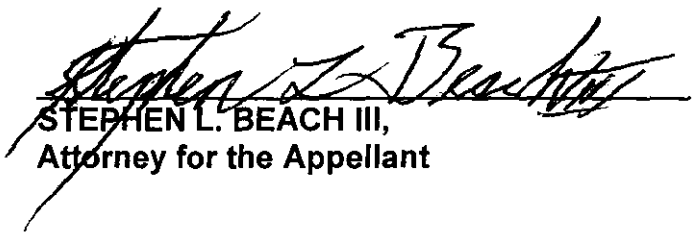
Ronnie Mitchener has met all of the statutory requirements for this Court to set aside the guilty plea and allow him to take this matter to trial. Ronnie Mitchener's plea is tainted by the misrepresentations and lies of Jackson Brown and Brown's ineffectiveness as counsel to even bother to ask the Court below to take down the testimony at a sentencing hearing, an elemental request for any criminal defense attorney to make in any type of criminal proceeding.

Despite the lower Court's pronouncement that "an appellate court cannot look at a cold transcript and upon review determine that one witness' testimony should have carried more weight than another's in a sentencing matter" (CP 118), Ronnie Mitchener firmly believes and fervently argues that this Court will find clear error and reverse the Circuit Court's rulings.

Ronnie Mitchener again respectfully asks this Court to set aside the Opinion and Order of the Circuit Court dated June 20, 2008, and the Order Overruling Request to Alter and Amend Judgment filed October 2, 2008, and

finally vacate the Judgment of Conviction dated November 12, 2004, and the Sentencing Order dated March 3, 2005, thereby remanding this cause to the Lowndes County Circuit Court for trial.

Respectfully,



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CERTIFICATE OF SERVICE

I, Stephen L. Beach, III, Attorney of Record for Ronnie Mitchener, Appellant, do hereby certify that I have this date mailed, by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Reply Brief of the Appellant to the following persons:

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