2008-KA-00814-COA

COA RE

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APPELLANT'S REPLY TO THE STATE'S BRIEF

A. Clarification of the History and Status of Defendant's Two Pending Appeals:

The State's brief, to a degree, misstates the status and history of the Appellant's dual pleadings. An accurate historical synopsis follows:

Appellant Shawn McLaurin, hereinafter "Defendant", has two simultaneously pending appeals before this Court. This particular Reply Brief (No. 2008-KA-00814-COA) concerns Defendant's out of time direct appeal of the jury verdict in Hinds County Mississippi, Honorable Tomie Green presiding.

Because of the twisted history of this case, there is also concurrently pending with the direct appeal, an appeal of the lower Court's denial Defendant's request for out of time Post Conviction Relief (No. 2008-CA-01251). Judge Green did not, as the State's brief represents, consider the merits of the PCR or make any determination as to the appropriateness of an evidentiary hearing. (State's Brief, p. 13, 16, 21). She determined that the Circuit Court's dismissal on July 6, 2004 of a defective PCR motion filed on behalf of the Defendant should stand.

When current counsel was retained to assist the Defendant in seeking appellate relief, the time for filing his direct appeal had run by a number of years. Further eroding the Defendant's appellate footing was a 2 page skeleton PCR (with none of the required supporting affidavits) which was perfunctorily filed before Judge Bobby DeLaughter on February 13, 2003 by yet another lawyer. The attorney filing the perfunctory PCR then failed to prosecute or supplement the defective PCR after he was called out of the country to serve with his military unit in Iraq for

over a year. The deficient two page Motion for PCR was facially defective and was dismissed, without notice to the Defendant.

When hired by the Defendant's family, current counsel had to develop a strategy to attempt to revive the Defendant's ability to pursue a direct appeal and PCR - both of which had been severely botched by previous retained counsel. Current counsel filed before Judge Green a "Petition for Out of Time Appeal and to Set Aside Order Dismissing Motion for Post Conviction Relief or, New Trial". Albeit an unusually styled motion, it was the most logical vehicle by which to bring to the trial court's attention the two instances of devastatingly mishandled appeals (direct and PCR). The Hinds County District Attorney never filed a response to the Defendant's request for relief with Judge Green.

On April 2, 2008 Judge Green Ordered that the Defendant should receive an out of time direct appeal; finding that trial counsel had accepted responsibility (and payment) to pursue a direct appeal, then never filed one. (See R.E. "G"). Judge Green did not agree that the Defendant should receive a chance at an out of time PCR and refused to set aside the dismissal of the facially defective PCR. The actual merits of a post conviction motion were never considered by Judge Green, or Judge DeLaughter for that matter. Unless this Court rules in favor of the Defendant in 2008-CA-01251, or alternatively orders an evidentiary hearing to facilitate consideration of the PCR-type issues presented in this direct appeal, the Defendant may never have a vehicle to pursue issues properly brought in post conviction.

Current counsel appreciates that there is some duplicity in the two currently pending appeals. That is, the Defendant raises PCR-type appellate issues in his direct appeal, but separately asks for permission to file an out of time PCR in the second pleading before this court.

On one hand, this Court has granted an out of time appeal. Rule 22(b) of the Mississippi Rules of Appellate Procedure allows, maybe mandates, the presentation of post-conviction issues in the direct appeal when trial counsel and appellate counsel are different and the issues are apparent from the record. MRAP 22(b). The ineffective counsel issues are quite evident from the record. In order not to waive those issues we bring them in the direct appeal. A more compelling reason to bring them in the direct appeal is because unless this Court allows an out of time PCR by granting the relief requested in Defendant's other pending appeal (No. 2008-CA-01251) then the Defendant may be estopped from filing another Motion for Post-conviction Relief due to his first one being dismissed as defective. So, it is doubly important to aggressively seek consideration of the PCR-type issues in the direct appeal and seek remand for an evidentiary hearing herein.

B. Response to State's Arguments by Issue

I. The Defendant deserves a new trial based on ineffective assistance of counsel as specifically described herein and, in considering the trial transcript as a whole.

There is a special irony in the fact that the State cites as fatal to almost every single assignment of error raised in the Defendant's appeal that trial counsel either waived the issue by failing to contemporaneously object or, failed to preserve an error by failing to make a proffer or, that the record was not made to sufficiently protect an issue for appeal. Yet, the State describes trial counsel's performance as "vigorous and effective". (States Brief, 2). A drowning man will flail vigorously to stay afloat though he does not know how to swim. Though vigorous, he is ineffective and will still drown. That is the case here, except, "vigorous" counsel does not drown, the client does.

The State's repeated highlights of the lack of error preservation by trial counsel give legitimacy to the Defendant's argument of ineffective counsel. For example, failure to make a proffer out of the presence of the jury in order to preserve an error is not a trial strategy. The State poses that it is "elementary that contemporaneous objection is required to preserve an error for appellate review." (State Brief, 32). Yet, the State's brief is brimming with references to trial counsel waiving appellate issues by lacking this "elementary" skill. (State Brief, 27-29, 32, 37, 38).

The State wants to pass off other deficient lawyering as "trial and litigation strategy". (State Brief, 19). Failure to preserve for the record the errors cited in the list of at least 21 instances of ineffective conduct briefed by the Defendant can't all be trial strategy. How is it "trial strategy" to fail to review the evidence in possession of the State before trial (TR, 99), not file a motion to suppress statements made by your client to the police in a conversation post arrest and post appointment of counsel initiated by the police (TR. 112, 176), fail to timely object to a suggestive lineup (TR. 120-121), fail to cross examine on a previous statement by the Complainant to police that the perpetrator could not achieve an erection when vaginal penetration is an element of rape (TR 132-133) and (RE "B", Box #74[3]), failure of defense counsel to tender medical records in discovery that could have proved misidentification of the Defendant, which allowed the prosecutor to shut down cross examination of the accuser on this issue (TR. 149-150), not object to the introduction of numerous instances of other crimes evidence (TR 215-218, 230-233, 264, 91-94, 259-263). These are examples of just a few moments of ineffectiveness in this case. These inadequacies do not fit the mold of "trial strategy". They establish, along with the other list of ineffective actions in the Defendant's brief, a prima facie case of ineffectiveness. Though the Defendant believes the bad lawyering at the

trial level is self evident in the transcript, Defendant tends to agree with the State's eloquent statement "only an evidentiary hearing in a post conviction environment can furnish insight into the reasons for trial counsels alleged omissions." (State Brief, 21). Since this direct appeal may be the only time these PCR type issues may be considered, unless this Court grants the relief requested in 2008-CA-01251, the Defendant's concurrently pending appeal, a remand for evidentiary hearing is warranted, if an outright reversal for new trial is not granted.

II. The trial court impermissibly denied the defense the opportunity to cross examine the Complainant on the issue of her failure to describe to the police McLaurin's healing gunshot wound to the leg, an identifying mark, recognizable at the time of the alleged rape.

The State repeatedly remarks while briefing this issue and others that the evidence in the case is overwhelming. (State Brief, 29, 37). We disagree. There was no physical evidence of forcible vaginal entry, trauma, no handcuff marks (TR. 131), no DNA exhibited in the hospital rape exam. (TR. 167-169). On the night of the alleged rape, the Complainant described her assailant as 180-190 pounds and 5'11" in height. (RE. "B"). However Officer Flanigan describes the Defendant on the day he is arrested as 150 pounds and 5'4". (RE. "D"). This is a colossal difference in the contemporaneous description of the assailant on the night of the rape versus the Defendant's actual observed physical attributes.

At the time of the alleged rape, the Defendant was still suffering, limping and healing from a gunshot wound to his leg near his groin. A fact never described by the Complainant in her initial reports to the police or doctor who examined her. The Complainant describes the house in which she was assaulted as belonging to her assailant's sister. On the night of the alleged assault, she describes the house as a ".....very, very, very small white house. It had

one bedroom" (RE "C"). Seventeen months later, at trial, the Complainant identifies a house located on a different street that is a larger two bedroom house. (TR, 182). Respectfully, this is not a case where guilt can be honestly categorized as clear. The conviction and life sentence rests 100% on the oral testimony of the complainant. There is not one piece physical evidence of rape.

In an instance where the conviction rests solely on the oral testimony and word of the Complainant, the broadest protection should be granted the accused in his cross-examination of the accuser. There are many questions that could have been asked by defense counsel if the line of questioning regarding his gunshot wound was not shut down by the court. How close were you to his leg when he pulled down his pants and asked you to perform oral sex? (See RE. "B"). Did you have an opportunity to see a wound dressing on his leg? When you called him on the nigh of the alleged rape to come pick you up at your dorm, did he ever mention to you that he was recovering from a gunshot wound? Did you have the kind of relationship where he might have told you he had been shot? Did you see him on crutches? These are a few questions that come to mind.

The law is clear.

> 'M.R.E. 611(b) allows wide-open cross-examination so long as the matter probed is relevant.' Zoerner v. State, 725 So.2d 811, 96-KA-00318-SCT (P 3) (Miss.1998) (citations omitted). M.R.E. 401 defines what is relevant evidence: 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Roebuck v. Massey, 741 So.2d 375, (Miss.App.,1999).

Part of the trial judge's ruling which shut down this line of questioning was that the information being solicited was not relevant. (TR. 149-150). The subject and focus of trial counsel's questions was the identification of the Defendant and identifying characteristics of the

Defendant at the time of the alleged rape. These issues are highly relevant and the trial court's ruling was in error. This error manifestly harmed the defense in this case by preventing the Defendant's ability to question his accuser about identifying physical characteristics that she certainly should have noticed if McLaurin was, in fact, her attacker.

III. The trial court failed to sustain McLaurin's objection to the State's comment on the failure of McLaurin to provide medical evidence of his healing gunshot wound to the leg thus permitting an unconstitutional comment on the Defendant's right not to testify or present evidence. This happened during witness testimony and again (without objection) in the state's closing argument.

In this assignment of error, the fundamental right violated was the right to be free from comments of the prosecutor for not presenting evidence in his case, an action frequently commented on by this Court. The prosecutor's comments suggest that the testimony of the defense witnesses regarding the Defendant being wounded and walking with unusual effort at the time of the alleged rape is diminished because of the lack of medical testimony. In this case, there was no legal requirement for expert medical testimony, though it would have been smart to call the doctor as a witness in the Defendant's case. The fact that the Defendant had been shot, was limping, and had a hole in his leg are issues that may be readily testified about without the aid of expert testimony.

Admittedly, in further research, both the State and the Defendant have failed to cite persuasive precedent; Ruffin v. State, 724 So.2d 942, (Miss.App.,1998). This case poses a very similar fact scenario as the case at bar. The appellant in Ruffin was, unfortunately, denied relief. The Court stated:

> ¶ 21. Under this assignment, Ruffin also complains that the prosecution improperly commented during closing on his failure to call certain witnesses, namely Sims, Hodges, and his mother. As seen above, no objection to these

comments was made at trial and therefore, this issue is procedurally barred. Ballenger v. State, 667 So.2d 1242, 1259 (Miss.1995) (citing Chase v. State, 645 So.2d 829, 835 (Miss.1994); Cole v. State, 525 So.2d 365, 369 (Miss.1987); Irving v. State, 498 So.2d 305 (Miss.1986); Cannaday v. State, 455 So.2d 713, 718-19 (Miss.1984)). Assuming an objection was involved, the comments complained of are fair and proper comments.

¶ 22. Generally, it is improper to comment on the failure of either party to call a witness equally accessible to both parties. Ross v. State, 603 So.2d 857, 864 (Miss.1992). However, when a defendant fails to call a witness more available to him and in a closer relationship to him, the prosecution is allowed to comment on the defendant's failure to call the witness. Id. In the case sub judice, the record reflects the fact that the prosecution had never even heard of Sims until Ruffin named him on the witness stand. Unquestionably, such a witness is not equally available to the prosecution, and therefore, the prosecution had every right to comment *948 on Ruffin's failure to call him. This same argument equally applies to Hodges and Ruffin's mother. Ruffin dated Hodges, and she was once his girlfriend. According to both his sworn statements, Ruffin gave out her address as his own, and undoubtedly was living with her. Both Hodges and Ruffin's mother are of such a close personal relationship with Ruffin they cannot be considered equally available to the State, and therefore, the prosecution could comment on their absence.

Ruffin at 947-48.

Should the Court find Ruffin to be persuasive, the Defendant would still pose that the actions of trial counsel in failing to object to the prosecutor's statements is part of the cumulative ineffective record as the issues are potentially not preserved for consideration here.

Additionally, should Ruffin and its line be persuasive, it is further evidence of trial counsel's ineffective preparation of the defense by failing to tender the physicians name in discovery and secure his testimony or medical records for trial.

IV. Defendant was prejudiced by the trial court's failure to conduct a balancing test on the admissibility of alleged prior criminal acts of McLaurin brought through witness Officer Lowrey, witness Williams and witness Chappelle.

Consistent with each of the other assignments of error, the State argues waiver of the issue by failure of defense counsel to timely object or request a balancing test. However, the State does not address that the trial court ruled, on its own at the start of the trial, that evidence of other crimes and bad acts would not be permissible. (TR. 93-95). The scenario at present involves more than just a failure to object by defense counsel. It turns on a trial judge issuing an order for the conduct of the attorneys before testimony in the case begins. The trial court took no affirmative steps to enforce its own pre-testimony ruling that prior crimes or bad acts of the defendant we not going to be permissible. (TR. 93-95).

The State alleges that the Defendant does not specify the objectionable testimony of witnesses Williams and Chappelle. The objectionable testimony is as follows:

During the cross examination of Williams, the mother of the Defendant's child, a new-born at the time of the alleged rape, the prosecutor presented and questioned Williams with an affidavit alleging domestic violence allegedly filed against the Defendant by Williams in 1997. This is evidence of other crimes that had been prohibited by the trial court before testimony was taken in the case. (TR. 230-231). Additionally, Williams was asked if she knew James Chappelle, a U.S. Probation Officer who the prosecutor identified as a probation officer with a clear indication that he was supervising the Defendant on an unrelated case. (TR. 231-232, 267-269). Chappelle was later called as a witness and identified him self as a probation officer who had received statements about threats that had been allegedly been made by the Defendant to witness Williams. However, Chappelle had never heard Rachelle Williams voice before and

could not establish that it was in fact Williams who called him on the phone to report the alleged threats by the Defendant to Williams. (TR. 266-267).

All of this testimony prejudiced the Defendant as it allowed the jury to hear and consider the fact that the Defendant had been accused of domestic violence, was already on federal probation and had made unsubstantiated threats to a witness in the rape trial. The trial court should have enforced its prior order prohibiting evidence of other crimes. The result was immeasurable damage to the Defendant by being revealed to be on probation and making alleged threats that were reported to the probation officer by a person he could not identify as a potential witness in the rape case. This error requires reversal.

V. The state's lineup and photo array procedures were so suggestive as to unconstitutionally taint the identification of the Defendant.

Defendant believes that the photo lineup was a designated to be a part of the trial record. Counsel is attempting to verify the inclusion of the photo line-up as part of the trial record. (TR. 2, Exhibit S-3) . However, if it is not, the Defendant will move to have the record amended to include this exhibit.

Since the State has not addressed the substance of the Defendant's assignment of error, Defendant stands on his argument in his brief and will have no objection to a reply from the State if in fact the photo array has been omitted as part of the official record, but is later supplemented.

VI. The Defendant Deserves a New Trial Based on Cumulative Error Coupled With Ineffective Assistance of Counsel.

Genry v. State, the case cited by the State, does not involve an allegation of ineffective assistance. Genry v. State, 735 So.2d 186 (Miss.,1999). In Genry, only very stock, run of the

mill appeal issues were cited. Those were failure to suppress a defendant's statement, error in admitting DNA evidence, and an allegation that the statue prohibiting parole on sex crimes was unconstitutionally vague. Id at ¶75.

The State's precedent is distinguishable in that the errors alleged in Genry had no cumulative effect creating jury prejudice towards the defendant. The errors cited in the case at hand touched the jury in such a way as to prevent him from receiving a trial that was fair, impartial and not based on the jury's prejudice or factors outside of innocence or guilt in the instant case. Defendant believes he has established errors in the process of the trial that taken as a whole, deprived the Defendant of a fair and unbiased decision by the jury.

CONCLUSION

McLaurin has established that trial counsel made grave errors that effected the jury's decision making process and denied him a fair trial. The court committed errors that resulted in prejudice to the Defendant resulting in a finding of guilt that was very likely based on factors other than the actual testimony of the complainant. There was no physical evidence of rape in the case. Allowing a life sentence for rape to stand based on both the unfair process and the slim quality of the evidence that was had in the lower court diminishes the checks and balances in place that protect justice for victims and accused.

Respectfully, Mr. McLaurin requests a new trial, or, in the alternative, a remand for further factual inquiry and hearing on the issues of ineffective assistance of counsel.

Respectfully submitted.

SHAWN McLAURIN

BY: 

J. CHRISTOPHER KLOTZ

CERTIFICATE OF SERVICE

This is to certify that I, J. Christopher Klotz, Attorney for Defendant, have this day mailed by United States mail, postage prepaid, a true and correct copy of the Appellants Reply Brief in the Out of Time Direct Appeal of Shawn McLaurin to the following:

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This the 19 day of June, 2009.

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