



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-1776-COA

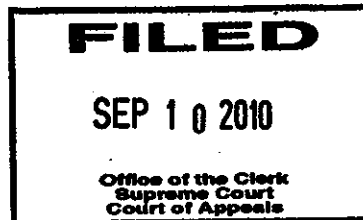
CHRISTOPHER LASHON JOHNSON

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE



APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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ATTORNEY FOR APPELLANT

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ARGUMENT

I. The trial court reversibly erred in denying Johnson's Motion for Post-Conviction Relief.

The Law

The standard of review after an evidentiary hearing in post-conviction relief cases is well-settled. When reviewing a lower court's decision to deny a petition for post-conviction relief this court will not disturb the trial court's factual finding unless they are found to be clearly erroneous. *Brown v. State*, 731 So.2d 595, 598 (Miss. 1999)(citing *Bank of Mississippi v. Southern Mem'l Park, Inc.*, 677 So.2d 186, 191 (Miss. 1996)).

In making that determination, this court must examine the entire record and accept that evidence which supports or reasonably tends to support the finding of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's finding of fact. *Mullins v. Ratcliff*, 515 So.2d 1183, 1189 (Miss. 1987) (quoting *Cotton v. McConnell*, 435 So. 2d 683, 685 (Miss. 1983)). That includes deference to the circuit judge as the "sole authority for determining credibility of the witnesses." *Mullins*, 515 So.2d at 1189 (citing *Hall v. State ex rel. Waller*, 247 Miss. 896, 903, 157 So.2d 781, 784 (1963)).

However, where questions of law are raised, the applicable standard of review is *de novo*. *Brown v. State*, 731 So.2d 595, 598 (Miss. 1999). Christopher Johnson's ("Johnson") burden of proof in the circuit court was by a preponderance of the evidence. Miss. Code Ann. § 99-39-23(7) (2007).

The Facts

All of Johnson's witnesses at the evidentiary hearing herein testified for the State at his trial., Sheryl Cousin ("Cousin"), testified that Johnson may have had another object in his hand other than a gun at the time she heard shots being fired. The object could have been a cell phone.

Sheryl's father, Warren G. Cousin, Jr. ("Cousin Jr."), was the State's first and main witness at Johnson's trial. At the evidentiary hearing, Cousin Jr. testified he saw Johnson shoot a first shot in the air. That shot did not hit anyone. After Johnson fired the first shot, Cousin Jr. heard other shots. Cousin Jr. could not say that Johnson fired the other gun shots. Other people at the car show could have fired the other gun shots.

Perry McAllister ("McAllister") was Johnson's final witness. McAllister testified that he's nearsighted and did not have his glasses on during the incident in question. McAllister saw a white guy and a black guy wrestling over a gun approximately 50 yards away. McAllister saw the white guy at Johnson's trial. McAllister did not know who the black guy was.

Analysis

Each of Johnson's witnesses at the evidentiary hearing, who were all State witnesses at trial, testified to events that would have given Johnson's trial jury reasonable doubt of his guilt. Cousin depicted a scene where Johnson may have had a cell phone instead of a gun in his hand at the time of the shooting. This testimony is given added weight where Johnson voluntarily submitted to a gun residue test shortly after the shooting. The test result were negative that he had recently fired a gun.

Cousin Jr., the State first and main witness at Johnson's trial, could not say Johnson fired the multiple shots after seeing Johnson fire the first shot in the air. The first shot did not hit anyone. Cousin Jr. testimony presented the probability that others at the car show had guns and were shooting. Where others at the car show had guns and were shooting reasonable doubt existed Johnson shot the deceased.

Finally, McAllister testimony creates reasonable doubt the jury could have relied on. The white guy he saw struggling over a gun was at Johnson's trial. This witness was therefore available to testify but was not called as a witness. More importantly, Johnson was not the black guy wrestling over the gun.

There was reasonable doubt of Johnson's guilt. The trial court was clearly erroneous in denying the petition for post-conviction relief. In the interest of justice, this Court must order that Johnson be granted a new trial.

II. The trial court should have granted Johnson's Motion to Recuse.

The State's reliance on Miss. Code Ann. §99-39-11 is misplaced. This section of the Mississippi Uniform Post-Conviction Collateral Relief Act is entitled Judicial examination of original motion; dismissal; filing answer.

The applicable provision is Miss. Code Ann. §99-39-7, Filing motion in trial court; filing motion to proceed in trial court with supreme court. This section provides in pertinent part:

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until

the motion shall have first been presented to a quorum of the justices of the supreme court of Mississippi, convened for said purpose either in term-time or in vacation, and an order granted allowing the filing of such motion in the trial court.

Johnson was convicted after a jury trial. His conviction was affirmed on appeal. Johnson's original petition for post-conviction relief was therefore filed in the supreme court not the trial court. The supreme court directed the trial court to conduct an evidentiary hearing.

The trial court, therefore, did not have the option of dismissing Johnson's petition. By the trial court stating it would not "summarily dismiss" the motion and ordering the State to file an answer, the trial court indicates by inference that but for the supreme court's order it would have summarily dismissed the motion.

The trial court made this statement before hearing any of the superior court ordered evidence. The trial court had therefore come to the conclusion that based on Johnson's petition alone, the motion was without merit. The subsequent evidentiary hearing was thereafter nothing more than a pro forma validation of his former merit less belief. A reasonable person knowing all the circumstances would harbor doubts about the trial court's impartiality.

In the interest of justice, this Court must find the trial court should have granted Johnson's motion for recusal.

CONCLUSION

For the foregoing reasons and authorities, this court must grant Johnson a new trial. Johnson presented evidence at the evidentiary hearing that a jury would harbor a reasonable doubts of his guilt. In the alternative, Johnson should be granted a new

evidentiary hearing before a new, unbiased judge. Based on the pleadings alone, the trial court determined Johnson's motion was without merit. As a result, Johnson did not receive a fair and impartial evidentiary hearing. The resulting Order denying the petition for post-conviction relief was to be expected.

Respectfully submitted,

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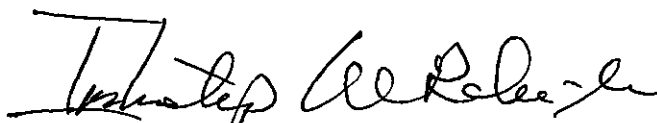
CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the forgoing was hand delivered and/ or mailed first class, postage prepaid, to the following individual

Judge Thomas J. Gardner, III
P.O. Drawer 1100
Tupelo, MS 38802-1100

Scott Stuart
Special Assistant Attorney General
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Assistant Attorney General
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This the 10TH day of September 2010.


Imhotep Alkebulan