



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CP-01753-COA

GLENN M. KELLY

APPELLANT

FILED

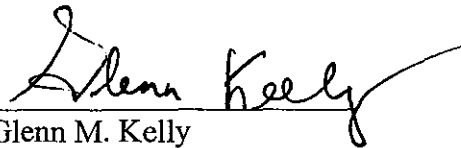
V.

JUN 14 2010
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLANT

BY: 
Glenn M. Kelly
6770 N. Chapel Hill
Bolton, MS 39041

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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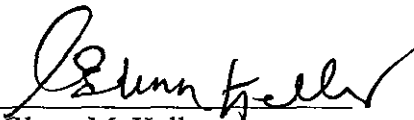
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Glenn M. Kelly, certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Glenn M. Kelly, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable W. Swan Yerger, Circuit Court Judge.
4. Honorable Robert Smith, Assistant District Attorney.

Respectfully Submitted,

BY:



Glenn M. Kelly
6770 N. Chapel Hill
Bolton, MS 39041

Appellant

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STATEMENT OF ISSUES

ISSUE ONE

Whether trial court erred in failing to grant relief where claims adequately set forth grounds of case and prejudice for failing to raise issues at plea proceedings.

ISSUE TWO:

Whether trial court erred in failing to vacate the conviction on grounds of due process of law violation.

ISSUE THREE:

Whether trial court erred in failing to conduct evidentiary hearing.

STATEMENT OF INCARCERATION

The Appellant is presently not incarcerated. Appellant is at Liberty pursuant to early supervised released where he, as a result of this conviction and sentence, continues to be considered as a sex offender under sever restrictions and supervisions on his liberty.

STATEMENT OF CASE

Appellant was charged with the offense of statutory rape, MCA §97-3-65, in the Circuit Court of the Second Judicial District of Hinds County, Mississippi. The case was subsequently transferred to the First Judicial District of Hinds County, Mississippi. This charge was based

upon an alleged sexual action with Candance Richardson, a female under the age of 18. The indictment alleged that this action was committed knowingly and intentionally by Glenn Kelly.

On May 21, 2008, a plea hearing took place. Glenn Kelly, upon advice of his attorney, entered a plea of guilty. Glenn Kelly continued to maintain his innocence by continuously advising his attorney that he was not aware of the age of Candance Richardson and that she told him she was 18 years of age. Appellant firmly asserted that he did not knowingly and intentionally commit any crime.

Appellant was subsequently sentenced to a term of 5 years imprisonment in the custody of the Mississippi Department of Corrections. The court subsequently suspended 4 years and 363 days of said sentence with one day to serve.

The court also identified and imposed provisions that Appellant register as a sex offender which registration will effect appellant permanently and throughout petitioner's life.

During pre-trial, plea proceedings, and at sentencing, the Appellant was represented by counsel.

The Appellant submits that his detention is unlawful and argues to this court, as argued to the trial court that:

- I. The Petitioner's claims adequately set forth grounds of cause and prejudice for failing to raise these claims at trial or on direct appeal.
- II. Petitioner's conviction must be vacated on the ground that there is new evidence which conclusively demonstrates Appellant did not knowingly and intentionally commit such offense where he was misled and deceived by the victim who now asserts and admits what Appellant has stated from the start, that Appellant was told she was above the age of 18.
- III. The Appellant is entitled to an evidentiary hearing on these matters.

STANDARD OF REVIEW

The correct standard of review in this appeal is the direct appeal standard where Appellant has appealed the sentence imposed upon him rather than the plea and conviction.

In the instant case the law dictates that the sentence of law where timeliness of sentence caused it to be fundamentally unfair and clearly an abuse of discretion. Incarceration imposed Miss. Code Ann. 47-7-34(2).

SUMMARY OF ARGUMENT

In order to succeed in a post-conviction motion under Mississippi law, a appellant must show that the adjudication of a claim in a Mississippi court resulted in a conviction or sentence that was obtained in violation of the Constitution or laws of the United States. Miss. Code Ann §99-39-1, *et. seq.* The Constitution, as the framework from which all Federal law springs, must not be violated as applied to the Appellant.

ISSUE I.

THE PETITIONER'S CLAIMS ADEQUATELY SET FORTH GROUNDS OF CAUSE AND PREJUDICE FOR FAILING TO RAISE THESE CLAIMS AT PLEA PROCEEDINGS OR ON APPEAL.

The purpose of a post-conviction proceeding is to bring to the trial court's attention material facts not known at the time of judgment. Foster v. State, 687 So.2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S.C.T. 2488 (1997). Other issues which were either presented through direct appeal or at trial may be procedurally barred in a motion for post-conviction relief. In the instant matter, the Appellant's claims rest upon facts outside of the record, making their inclusion in any trial or appellate motion improper. Moreover, the facts were not available to appellant at the time of the plea since the witness was a prosecution witness, was hostile to

Appellant, and not willing to cooperate in the claim. Said evidence was not available nor discoverable at the time of or before the plea proceedings.

Miss. Code Ann §99-39-7 (2001) provides that a petition for post-conviction relief is a motion in the original cause, except where the conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Mississippi has a three year time limitation on filing for post-conviction relief. This petition is properly before the court as the issues presented have not previously been raised at trial or on appeal and have resulted in the deprivation of the Appellant's constitutional rights. This petition is timely filed in that his conviction became final on or about May 21, 2008.

The Appellant seeks to vacate and set aside his conviction and sentence due to errors of constitutional magnitude which became available after the proceedings and after affidavit was provided. Such errors were the causative result of Appellant's conviction and sentence and the plea of guilty entered by Appellant. As indicated herein, both cause and prejudice are present in this case justifying that the issues be decided upon their merits.

ISSUE II.

APPELLANT'S CONVICTION MUST BE VACATED ON THE GROUND THAT HE WAS DENIED DUE PROCESS OF LAW

The Fifth Amendment to the United States Constitution guarantees that every criminal defendant is entitled to due process of law before any conviction of crime. The Supreme Court has held that such right is fundamental.

The idea that laws and legal proceedings must be fair. The Constitution guarantees that the government cannot take away a person's basic rights to 'life, liberty or property, without due process of law.' Courts have issued numerous rulings about what this means in particular cases.

The Fourteenth Amendment prohibits the deprivation of liberty or property without

due process of law. A due process claim is cognizable only if there is a recognized liberty or property interest at stake. Board of Regents v. Roth, 408 U.S. 564, 69 (1972).

The Sixth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, see *In re Oliver*, 333 U.S. 257, 273-74 (1948), guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges against him. In order to determine whether a defendant has received constitutionally adequate notice, the court looks first to the information. James v. Borg, 24 F.3d 20, 24 (9th Cir.), cert. denied, 115 S. Ct. 333 (1994). 'The principal purpose of the information is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense.' *Id.*

The Fourteenth Amendment prohibits the deprivation of liberty or property without due process of law. A due process claim is cognizable only if there is a recognized liberty or property interest at stake. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

Due process is best defined in one word--fairness. Throughout the U.S.'s history, its constitutions, statutes and case law have provided standards for fair treatment of citizens by federal, state and local governments. These standards are known as due process. When a person is treated unfairly by the government, including the courts, he is said to have been deprived of or denied due process.

The Appellant, at the point in which the plea of guilty was entered, did not want to enter into the plea agreement as evidenced by the fact that when he arrived at court he continued to maintain his innocence to his attorney. As the affidavit of the witness asserts, defense counsel did not ask her whether she actually advised Kelly that she was over 18. Counsel merely told Kelly to plead guilty. Had counsel properly informed the appellant about all the facts of the plea agreement and corresponding sentence, Appellant would have foregone the plea agreement and gone to trial.

The controlling case law in Mississippi states that where a defendant enters a guilty plea, the key question is whether "there is a reasonable probability that had counsel's assistance been effective, [defendant] would not have pled guilty, but would have insisted on going to trial." Bell

v. State 751 So.2d 1035, 1038 (P14) Miss. 1999). As has already been shown the Appellant would have taken a different route and gone to trial had he known that the witness would have told the truth. Because the judge gave him only the option of agreeing to the plea agreement or going to trial that day, the Appellant had no choice but to accept the agreement. Had counsel been effective and apprised the Appellant of this requirement beforehand, the appellant would not have entered into the agreement.

Moreover, a guilty plea must be made knowingly, voluntarily, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969). See Bryant v. Cherry, 687 F.2d 48 (4th Cir.1982) cert denied 459 U.S. 1073. In order to plead voluntarily, a defendant must know the direct consequences of his plea, including the actual value of any commitments made. Mabry v. Johnson 104 S.Ct. 2543, 2547 (1984).

The U.S. Supreme Court has ruled that a plea must be found to be involuntary if it was based upon promises or threats which deprived it of a voluntary character. Machibroda v. United States, 386 U.S. 487, 493, (1962). "The validity of a guilty plea hinges on whether it was a voluntary and intelligent choice among alternative courses of action open to the defendant." Banks v. United States, 920 F.Supp. 688 (E.D.Va1996).

When looking at whether or not a plea should be set aside, three areas of the plea negotiation should be evaluated. This test was set forth in the case of United States v. Ribas-Dominicci, 50 F.3d 76 (1st Cir. 1995). According to that court, "violations of any of the three core concerns--absence of coercion, understanding of the charges, and knowledge of the consequences of the guilty plea--mandate that the plea be set aside." Id. at 78.

In the instant case, the Appellant was not free of coercion, as the judge gave him a "do or die" option, either agree to the plea agreement as it was written or go to trial that day.

In sum, Appellant's plea of guilty to the specific crime charged in the indictment was not voluntary in character, and was therefore not voluntary. See Machibroda, 368 U.S. at 493. Because the plea was forced and not "a voluntary and intelligent choice among alternative courses of action," the plea was not constitutionally valid. See Banks, 920 F.Supp. 688. Because the plea was forced and made without knowledge of the consequences, it must be vacated. See Bibas-Dominicci, 50 F.3d at 78. Consequently, Appellant prays that this court vacate his guilty plea. The Court should also consider that, from the affidavit of the state's own witness, appellant was actually innocent.

As the Appellant received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, the Appellant submits that his conviction and subsequent sentence must be vacated and this matter be set for rehearing consistent with the findings of this court and the constitutional principles of fair play and substantial justice.

ISSUE III.

THE APPELLANT IS ENTITLED TO AN EVIDENTIARY HEARING ON THESE MATTERS

The Mississippi Supreme Court has held "a post-conviction collateral relief petition which meets basic requirements sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief." Marshal v. State, 680 So.2d 794, 794 (Miss. 1996).

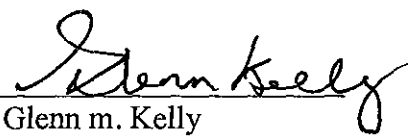
In the instant case, the Appellant asserts that he was deprived the effective assistance of counsel, a claim that can best be supported by the introduction of evidence not currently in the record. If the facts as claimed by the Appellant are taken as true, there can be little doubt that he is entitled to relief in this matter. Therefore, the Appellant requests an evidentiary hearing to

review the issues. The revocation proceedings conducted in this case was illegal where trial court was without lawful authority to conduct such proceedings since court had initially sentenced Appellant to time served which made any post release supervision null and void.

CONCLUSION

Appellant Kelly respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the decision rendered by the trial court and render this case on the grounds and claims asserted by the brief. In the alternative Appellant urge that this case be sent back for an evidentiary hearing.


Respectfully submitted:

By: 
Glenn m. Kelly
6770 N. Chapel Hill
Bolton, MS 39041

CERTIFICATE OF SERVICE

This is to certify that I, Glenn M. Kelly, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205; Honorable W. Swan Yerger, Circuit Court Judge, P. O. Drawer 327, Jackson, Ms 39205; Honorable Robert Smith, District Attorney, P. O. Box 22747, Jackson, Ms 39205.

This, the 14, day of June, 2010.


Glenn m. Kelly
6770 N. Chapel Hill
Bolton, MS 39041

Appellant