



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DOUGLAS MILLER

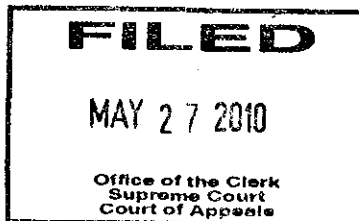
APPELLANT

VS.

NO. 2009-CP-1907-COA

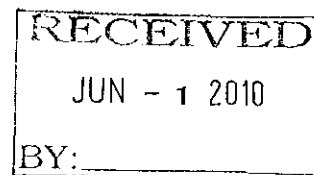
STATE OF MISSISSIPPI

APPELLEE



REPLY BRIEF FOR APPELLANT

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NO. 2009-CP-1907-COA

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APPELLEE

APPELLANT'S REPLY BRIEF

Comes Now Appellant Douglas Miller, and files his response to the Brief for Appellee filed by the State of Mississippi urging this court to affirm the Conviction and Sentence and grant the State an affirmance of the trial court's decision so as to allow the State to continue to hold Appellant on this conviction and sentence without any further proceedings.

STATEMENT OF JURISDICTION

Appellant would assert that the statement of the jurisdiction presented by the Appellee is proper and agreed upon.

STATEMENT OF ISSUES

Appellant would assert that the trial court was not correct in its ruling and determination on the issue presented to that court and that the trial court was incorrect in failing to grant post conviction relief on this issue.

STATEMENT OF THE CASE

Appellant would assert that the course of proceedings and statement of facts presented by the Appellee Brief are sufficient to set out the facts and matters found in the record and, therefore provides a reasonable description of what occurred during the course of the case. Appellant would agree with this presentation of the statement of the case.

The State has alleged and argued that Appellant is barred from raising the 4th Amendment issue on appeal on appeal because it is argued for the first time on appeal. While this issue was not specifically addressed in the post conviction motion, Appellant would present that this is a constitutional issue which should be allowed on appeal where it is not a trial error but a plain error being presented.

REPLY ARGUMENT

Douglas Miller suffered Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim the complaining party must satisfy the well-established two prong test. First the party must show that counsel's performance was objectively deficient. Then the party must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985).

In the case at bar, Appellant's counsel absolutely failed to assert Appellant's right to a fair trial where counsel advised Miller to enter pleas of guilty and actually deceived Miller into pleading guilty. Defense counsel never raised any issue nor attempted to test Defense Counsel, counsel was incompetent. The state has not presented any argument or facts to refute Appellant's assertions on appeal. A plea of guilty was self-serving and in the best interest to the court appointed attorney where he would receive the same amount of pay for a plea of guilty as he would for a trial on the merits. The state argues that the record belies Appellant's claims. This is simply not correct. The record supports Miller's claims since there is no showing in the record that defense counsel filed any motion to challenge any issue presented to him by Miller. Miller was subjected to ineffective assistance of counsel. Leatherwood v. State, 473 So.2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case" remanding for reconsideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law.)

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's conviction in such a way as to mandate a reversal of convictions as well as the sentences imposed. Defense counsel was charged with knowing the law and being familiar with the record and evidence.

In Jackson v. State, 815 So. 2d 1196 (Miss. 2002), the Supreme Court held the following in regards to ineffective assistance of counsel:

Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the Appellant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the Appellant of a fair trial. Hiter v. State, 660 So.2d 961, 965 (Miss.1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim. Cole v. State, 666 So.2d 767, 777 (Miss.1995).

[7] [8] [9] ¶ 9. Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the Appellant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss.1988).

Appellant Douglas Miller respectfully ask this court to review the facts of this case with the decisions rendered in Naylor, Jones, Powell, Berry, and Nathanson, and reverse the convictions and remand to the trial court for a trial on the merits.

In Ward v. State, 708 So.2d 11 (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See **Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also **Herring v. Estelle**, 491 F.2d 125, 128 (5th Cir.1974) (stating that a lawyer who is not familiar with the facts and law

relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the **Strickland** analysis); **Leatherwood v. State**, 473 So.2d 964, 969 (Miss.1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the Appellant's case; remanding for consideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law).

Appellant would again stress to the Court that to successfully claim ineffective assistance of counsel, the Appellant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668,687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840,841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss.1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).


The Mississippi Supreme Court have visited this issue in decision after decision. A clearly distinguishable decision on such issue would be the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the Appellant. Id. Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), reversed in part, affirmed in part, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The Appellant must show that there is a reasonable probability that for his attorney's errors, Appellant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Douglas Miller has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. The state never refuted such claim in it's brief and this Court should take that into account and reverse and remand with directions that the pleas of guilty be vacated and set aside and a new trial granted in this matter.

CONCLUSION

Miller would respectfully ask this Court to reject the state's argument and find that the trial court erred in it's holding and that the decision of the trial court should be vacated and further proceedings ordered.

Respectfully submitted,

By: 
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CERTIFICATE OF SERVICE

This is to certify that I, Douglas Miller, Appellant pro se, having this date delivered a true and correct copy of the above and foregoing Appellant's Reply Brief, to:

Honorable Jim Hood
Attorney General
P. O. Box 220
Jackson, Ms 39205

Honorable Lee J. Howard
Circuit Court Judge
P. O. Drawer 1044
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Honorable Forrest Allgood
District Attorney
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This, the 27 day of May 2010

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