

2010-CA-01730 7

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Circuit Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This, the 13th day of October, 2011.



ROBERT D. EVANS, MSB 

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STATEMENT OF THE ISSUES

1. DEFENDANT WAS GIVEN INEFFECTIVE ADVISED BY COUNSEL; THAT IF DEFENDANT HAD NOT BEEN GIVEN THIS INEFFECTIVE ADVISE HE WOULD NOT HAVE PLEAD GUILTY TO KIDNAPPING.
2. THE COURT ERRED IN ALLOWING DEFENDANT TO PLEAD GUILTY TO KIDNAPPING AS THE FACTS OF THIS PARTICULAR CASE MADE SUCH CRIME AN IMPOSSIBILITY.

STATEMENT OF THE CASE

Thomas was indicted by the September 2005 Washington County Grand Jury for Murder. On or about May 18, 2007 he plead guilty to the lesser included offense of manslaughter (RE., p.36). Under a Bill of Information, he also plead guilty to kidnapping (RE., p.35).

On May 14, 2010, Thomas filed his Motion for Post Conviction Collateral Relief (RE., p.1) which was denied by the lower Court on October 7, 2010 (RE., p.57).

STATEMENT OF THE FACTS

1. On June 7, 2005, the victim, Kimberly Norton Thomas (hereinafter "Kimberly") was in the backyard of her home located at 2440 Turin Street, Greenville, Mississippi, with her two minor children, Maryah and Trenton Thomas. The petitioner, Forrest Thomas, III (hereinafter Thomas), was the biological father of these children. Thomas and Kimberly were divorced and an active restraining order was on file at the time of this incident. Kimberly was talking on the telephone with a friend, while supervising her children in the backyard playing in a swimming pool. Thomas arrived at Kimberly's resident, jumped the backyard fence and shot her point blank in the head with a shotgun while her children watched. Thomas then took both children from Kimberly's residence to his mother's home.

2. Thomas was indicted by the September 2005 Washington County Grand Jury for Murder in Cause No. 2005-322. On or about May 18, 2007, days before pending trial, Thomas plead guilty to the lesser-included offense of Manslaughter with a twenty (20) year sentence and a Bill of Information in Cause No. 2007-199 for Kidnapping with a fifteen (15) year sentence to run consecutive, for a total of thirty-five (35) years RE., p.38-39).

SUMMARY OF THE ARGUMENT

1. Under the Bill of Information and the crime of Kidnapping, due to the fact that the custodial mother was deceased and the children taken were the defendant's children, defendant cannot be guilty of kidnapping.
2. Defendant's counsel was ineffective and improperly advised defendant that due to the fact that the children were not taken against the will of their mother, her being dead, that plea would not stand under future appeal¹. Had not the defendant been told this by his counsel, he would not have plead guilty to kidnapping.

ARGUMENT

DEFENDANT WAS GIVEN INEFFECTIVE ADVISED BY COUNSEL; THAT IF DEFENDANT HAD NOT BEEN GIVEN THIS INEFFECTIVE ADVISE HE WOULD NOT HAVE PLEAD GUILTY TO KIDNAPPING.

Counsel for defendant, in recommending he plea guilty of kidnapping, informed the defendant that the plea could be taken care of in a Post Conviction Petition, due to the fact that the taking of the children could not be "against the will of the mother" as she was deceased at the time (See Affidavits, RE., p. 3, 14&16). Had not defendant's counsel told defendant this information, defendant would not have plead guilty. Defendant's counsel was also ineffective in allowing

¹
Post Conviction Relief

defendant to plea to a crime which would have been impossible for the State to prove.

Further, at the sentencing hearing, when, the Court inquired of his plea to kidnapping, the following excerpts show defendant wanted to question the plea, only to be interrupted by counsel. Said excerpts show as follows:

The Court: In Cause No. 2007-199, and that the bill of information, the charge of kidnapping, what is the factual basis?

Ms. Merchant: That on or about the 7th day of June, 2005, in Greenville, Washington County, Mississippi, Forrest Thomas, III, did willfully, unlawfully and feloniously, without lawful authority, kidnap or forcibly seize and confine Trenton Thomas and Maryah Thomas, with intent to secretly confine or imprison them *against the will of their mother*, Kimberly Norton Thomas, . . .

The Court: Okay. Mr. Thomas, are those the facts for the charge in that case?

The Defendant: *May I?*

The Court: Yes

Mr. Walls: His question was - - I explained to him . . . (RE., p.26, l.15-25; p.27, l.1-9) *emphasis added*

This, such facts show that the advice by counsel was ineffective and as a result, defendant plead to a crime he would not have plead to absent the erroneous advice.

THE COURT ERRED IN ALLOWING DEFENDANT TO PLEAD GUILTY TO KIDNAPPING AS THE FACTS OF THIS PARTICULAR CASE MADE SUCH CRIME AN IMPOSSIBILITY.

The pertinent aspect in the Bill of Information to which defendant plead and §97-3-53 Miss. Code Annot. is “against the will of their mother”.

Finding a case in point became fruitless. However, *Hemphill v. State*, 127 Miss. 805, 90 So.

488, (1921) can be used as an analogy. *Hemphill* was convicted of kidnapping. *Hemphill* was appointed guardian over the victim. After his appointment he left his ward in the custody of the step-father of the ward; later *Hemphill* returned and against the will of the said ward as well as that of his step-father forcibly took the ward into his custody. The Supreme Court concluded under the uncontradicted evidence, *Hemphill* was not guilty of kidnapping.

Another case, although not on point, is *State v. Powe*, 107 Miss. 770, 66 So. 207 (1914). *Powe* was indicted for kidnapping and the lower court dismissed same and the State appealed. The indictment charged the *Powe* led, took, carried, and enticed away the child from her mother, who was legally entitled to her custody and possession. *Powe* was the father of the child. The lower court held that *Powe* could not be criminally liable on the charge of kidnapping his own child when the child's custody was in the mother solely by virtue of an agreement between the parents.

Granted, and it is conceded, that there was a Chancery Court Order giving custody of the two children in this case to the mother and victim of the manslaughter. Due to the fact that Forrest Thomas, III was the natural father of the two children and the mother was deceased, it could not be possible that it be against her will.

CONCLUSION

For this defendant's plea to kidnapping to stand, his plea had to be voluntary and he had to be properly advised by counsel and fully understand the consequence of entering a guilty plea. Here, defendant was advised to enter a plea on a charge, under the uncontradicted facts, the State could not prove as a matter of law. He was further advised that his plea to kidnapping could be taken care of in a later proceeding.

This plea was not voluntary nor was defendant properly advised of the consequences. It was just the opposite.

Respectfully submitted, this the 13th day of October, 2011.



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CERTIFICATE OF SERVICE

I, Robert D. Evans, Attorney for Appellant, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document to:

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