IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FILED

MAR 22 2011

Office of the Clerk
Supreme Court
Court of Appeals

RICHARD PARTAIN — APPELLANT

VS. — NO. 2010-CP-0896-COA

STATE OF MISSISSIPPI — APPELLEE

# APPELLANT'S REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

RICHARD PARTAIN, MDOC #L0006
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Parchman, Mississippi 38738

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## ARGUMENTS

### I. RICHARD'S GUILTY PLEA WAS NOT VOLUNTARILY, AND INTELLIGENTLY MADE.

#### The Law

A plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Sections 14 and 26, Article 3, of the Mississippi Constitution of 1890. Sanders v. State, 440 So.2d 278, 283 (Miss.1983)(citing Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274, 279 (1969); Phillips v. State, 421 So.2d 476, 479 (Miss.1982).

The question of whether a plea of guilty was a voluntary and knowing one necessarily involves issues of fact. Advice received by the defendant from his attorney and relied upon by him in tendering his plea is a major area of factual inquiry. Id. 440 So.2d at 283 (citing, Chavez v. Wilson, 417 F.2d 584, 586 (9th Cir.1969)). For a guilty plea to be valid it must be entered into voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and 'likely consequences'". Carroll v. State, 963 So.2d 44, 46(¶8)(Miss.Ct.App.2007)(quoting Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005)). In Bradshaw, the United States Supreme Court held that, "[a] trial court must assure itself, during a plea hearing accepting a guilty plea, that 'a defendant understands the **nature and elements of the crime**' for which he is admitting guilt." Bradshaw v. Stumpf, 545 U.S.175, 183 (2005).

#### Facts

On August 12, 2008, just moments before the plea hearing, Richard was rushed and pressured by his attorney and the assistant district attorney to enter a plea of guilty to the charge of manslaughter by culpable negligence in

causing the death of a motorist, before the Circuit Court of Desoto County. C.P.38.* When Richard initially refused to enter a plea of guilty, his attorney presented an acknowledgement form for him to sign. C.P.20. Attorney Jefferson used this form as a bargaining tool to force Richard to enter a plea of guilty. Richard was presented with a dilemma between signing the acknowledgement form and receive thirty-three (33) years in prison, or, in the alternative, enter a plea of guilty by signing several standardize forms in hopes of receiving a lesser sentence.

The plea hearing transcript clearly shows that Richard lied under oath in an attempt to answer the court's questions as directed by Attorney Jefferson. See, Brief of Appellant pages 4 and 5. Richard was never advised, by the court nor his attorney, of the nature and elements of the crime for which he was admitting guilt. Moreover, Richard was without sufficient awareness of the relevant circumstances and likely consequences of his plea.

Analysis

The State, like the trial court, asserts the record from the guilty plea along with the "Petition To Enter a Guilty Plea" indicates that Richard's plea was voluntarily and intelligently entered with a factual basis for the plea. Appellee's brief page 7. The State continued by making reference to the assertions alleged in the standardize form for the entry of a guilty plea, which Richard was pressured into signing at the eleventh hour just prior to his plea hearing. Also, the State argues that the testimony given by Richard at the hearing should be given great weight. The State concludes that the record does not indicate any misleading or erroneous advice was provided to Richard. And, finally that the record shows that Richard understood the maixi-

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* In this Brief, C.P. refers to the Clerk Papers Page(s). The supplemental record is cited as Exhibit(s).

mum twenty year sentence, as well as the recommended twenty year sentence with five suspended **and 'restitution'** which he actually received. However, Richard would like for this Court to note that the State fails to argue that Richard understood the nature and elements of the crime for which he admitted guilt. Moreover, the record fails to establish that Richard was explained the nature and elements of the crime.

In regards to the State's contention that the plea hearing transcript and petition to enter a guilty plea indicates that Richard's plea was voluntarily and intelligently entered, it is critical to keep in mind that the very nature of the "involuntariness" claim made here takes us beyond the transcript of the plea hearing. Relevant facts on such a voluntariness issue will as a matter of common sense not be within that transcript. Sanders v. State, 440 So.2d 278, 284 (FN2)(Miss.1983). As recognized in Chavez v. Wilson, 417 F.2d 584 (9th Cir.1969):

> "[M]ost allegations that the plea was induced by lack of knowledge or by a broken promise, or by some other improper factor, involve facts outside the record." 417 F.2d at 586.

However, the record clearly supports Richard's claim of being pressured and rushed into entering a plea of guilty in the eleventh hour prior to his plea hearing. The record shows that on August 12, 2008, the trial court entered an Order of remand for both counts of the indictment. C.P.19. On the same date, the District Attorney filed a bill of information charging Richard with manslaughter by culpable negligence. C.P.38. On the same date, Richard was pressured by his attorney to sign a waiver of right to grand jury procedure and petition to proceed on information and to enter a plea of guilty. Also, on this same date, Richard was pressured by his attorney to sign a "Petition to Enter a Guilty Plea". Exhibit B. Richard was harried by these events all in the eleventh hour prior to his plea hearing and no one explained the nature

and elements of the crime for which he was admitting guilt.

Where a defendant pleads guilty to a crime without having been informed of the crime's elements,...the plea is invalid. Henderson v. Morgan, 426 U.S. 637 (1976). In Jones v. State, 936 So.2d 993 (Miss.Ct.App.2006), the defendant Jones pleaded guilty to the crime of sexual battery of a minor child under the age of fourteen. Id. at 994(¶2). Jones later filed a PCR petition claiming that his guilty plea was invalid because he was not informed of the elements of his charge. Id. at (¶3). The Court found that the trial court did not refer to the elements of the crime during the plea hearing, nor did the court ask counsel if the elements were explained to Jones. Id. at 996 (¶12). There, this Court found that a question existed as to whether Jones knowingly entered his plea and remanded the matter back to the trial court for a determination as to whether the elements had been explained to Jones prior to the trial court's acceptance of the guilty plea. Id. at 996-97 (¶¶13-23). Based on the law in Bradshaw v. Stumpf, 545 U.S. 175 (2005), and the decision rendered by this Court in Jones v. State, 936 So.2d 993 (Miss.Ct.App. 2006), Richard is entitled to a reversal and remand to the trial court to determine whether Richard knowingly entered his plea of guilty to the charge of manslaughter.

Assume arguendo, that this Court finds Richard understood the nature and elements of the crime of manslaughter. The plea hearing transcript indicates that Richard was without sufficient awareness of the relevant circumstances and likely consequences of his plea. Despite the fact, that the State contends Richard had no doubts that he committed the offense as charged. Also, that Richard understood the recommended twenty year sentence with five suspended and **restitution**. A review of the plea hearing transcript contradicts the

State's contentions. After Richard testified that he had sufficient awareness of the relevant circumstances of his charge, Attorney Jefferson intervened and advised the trial court that Richard could not recall the events of the alleged crime. Plea Hearing Transcripts, p.21. Thereafter, Richard confessed that he lied under oath in responding to the court's questions, and that he was basically following whatever Attorney Jefferson said. Plea Hearing Transcripts, p.21-22. Although great weight is given to statements made under oath and in open court during sentencing, as implied by the State. Mowdy v. State, 638 So.2d 738, 743 (Miss.1994). Richard was merely following the advice of his ineffective counsel when he committed perjury under oath. Therefore, the weight of Richard's statements under oath should be viewed with great suspicion and caution.

Moreover, the plea hearing transcript indicates that Richard was not aware of the likely consequences of his plea. Richard was not advised by his attorney that he would likely receive a twenty (20) year sentence with restitution, if he accepted the State's recommendation of fifteen (15) years. As indicated in the plea hearing transcript, there was a dispute about the restitution to the victim's family. Plea Hearing Transcript, p.26-27. Richard presented evidence to the trial court that his liability insurance had already provided the victim's family with restitution. As a matter of common sense, Richard would not knowingly agree to pay more restitution as a part of his sentencing. Further, the acknowledgement presented to Richard by his attorney makes no mention of a twenty year sentence with restitution as a part of the sentence upon accepting the State's offer of fifteen years, which Richard ultimately plead for. C.P.20. Therefore, Richard was without sufficient awareness of the relevant circumstances and likely consequences of his plea.

Therefore, Richard's guilty plea was not a valid one. Carroll v. State, 963 So.2d 44 (Miss.Ct.App.2007). According to the above cited cases, this case must be reversed and remanded to the trial court to determine whether Richard's guilty plea was voluntarily, knowingly, and intelligently made.

## II. RICHARD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENTS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

### The Law

The Mississippi Supreme Court stated, "Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) furnishes the legal standards by which we consider a claim of ineffective assistance of counsel, whether that claim be asserted under the Sixth and Fourteenth Amendment to the Constitution of the United States or under Article III, § 26 of the Mississippi Constitution of 1890. Washington mandates a two-fold inquiry: (1) whether counsel's performance was deficient, and, if so, (2) whether the deficient performance was prejudicial to the defendant in the sense that our confidence in the correctness of the outcome is undermined." Neal v. State, 525 So.2d 1279, 1281 (Miss.1987). Also, "[a]n ineffective assistance claim by its very nature refers to the totality of counsel's pre-trial and trial performance." Id.

### Facts

On November 1, 2007, Richard was arrested, without an arrest warrant, and detained in the DeSoto County Jail. On November 28, 2007, Richard's preliminary hearing was postponed until December 28, 2007, because no attorney was present to represent him; however, following this postponement, no preliminary hearing was ever had. Exhibit G; Supplement of Volume,[2] page 43-44. On January 31, 2008, Richard was brought back before the court, the Honorable Robert P. Chamberlin presiding, for his arraignment. And, once again no attorney was present to represent Richard at his arraignment. Nevertheless, a pre-trial scheduling order was entered. Exhibit D; Supplement of Volume, page 40. Although this order states that Richard was being represented by the court-

[2] Also, in this brief, Supplement of Volume refers to the Supplement of Volume filed pursuant to the Court of Appeals order of January 14, 2011, in response to the appellant's motion for modification of the record.

appointed Attorney William Travis, there was no attorney present to even sign the order on the applicable space. Exhibit D; Supplement of Volume, page 40. Moreover, the court did not issue an order appointing attorney until February 5, 2008. Exhibit C; Supplement of Volume, page 41. Richard retained Attorney Jefferson Gilder, to represent him, in December of 2007. Exhibit G; Supplement of Volume, page 43-44. However, Attorney Gilder did not secure an order substituting attorney until February 15, 2008, about two (2) months after he was retained. Exhibit F; Supplement of Volume, page 45.

On February 12, 2008, Attorney Gilder filed a Petition for Writ of Habeas Corpus, seeking a bond reduction from $1,000,000.00; also, the petition was seeking a preliminary hearing. Exhibit G; Supplement of Volume, page 43-44. However, Richard's bond appeared to have already been reduced by the pretrial scheduling order dated January 31, 2008. Exhibit D; Supplement of Volume, page 40. Subsequently, on April 11, 2008, Attorney Gilder filed a Motion To Suppress, seeking to suppress all blood evidence. Exhibit I; Supplement of Volume, page 46-50. However, Attorney Gilder filed to seek a hearing and/or ruling on this Motion To Suppress. C.P., page 38. Moreover, the record indicates that Attorney Gilder failed to secure a hearing and/or ruling on the Petition for Writ of Habeas Corpus. Supplement of Volume, pages 2-3. Finally, for the sake of brevity, appellant incorporates by reference those additional facts asserted in Appellant's Brief. Brief of the Appellant, pages 3-14.

## Analysis

In addressing appellant's claim of ineffective assistance of counsel, the State sole argument is based upon Attorney Gilder's performance on August 12, 2008, the date of Richard's trial and/or plea hearing. The State contends that Richard received the effective assistance of counsel, merely because of his responses to the trial judge's questions at the plea hearing. And, be-

cause of those responses, the State contends that this issue is lacking in merit. Appellee's Brief, pages 12-16. The State cites certain acknowledgements in the plea hearing transcripts, made by Richard, in support of their arguments. However, the State would like for this Court to overlook the fact that Richard's plea hearing testimony was predicated on Attorney Gilder's advice as to how he should respond to the trial judge's questions.

> Q. **Mr. Partain, do you understand and recall the events which bring you before this Court today?**
>
> A. **Yes, sir.** (Emphasis by appellant).
>
> Q. Do you have any disagreements with anything the State says they could prove at your trial if your case went to trial?
>
> A. No, sir.
>
> **BY MR. GILDER: Your Honor, for the record, he doesn't recall the events of the day. His knowledge is based on the affidavits and the discovery that's been provided in this case and my investigation.**
>
> BY THE COURT: (Continuing)
>
> Q. **Well, which is it, Mr. Partain, the answer you gave me or what Mr. Gilder just said?**
>
> A. **What Mr. Gilder said, sir. (Emphasis added by appellant).**
>
> Q. So do you or do you not remember what happened?
>
> A. I don't remember what happened, sir. Supplement of Volume, pages 21-22.

Clearly, the record indicates that Richard was relying heavily upon Attorney Gilder's advice on how to respond to the trial judge's questions.

The Mississippi Supreme Court has recognized the significant and substantial relationship between the criminal defense lawyer and his client in Myers v. State, 583 So.2d 174 (Miss.1991) stating:

> "[T]he relationship of the accused to his lawyer provides a critical factual context here. As he stands before the bar of justice, the indicted defendant often has few friends. The one person in the world, upon whose judgment and advise, skill and experience, loyalty and integrity that defendant must be able to rely, is his lawyer. This is as it should be. **Any rational defendant is going to**

> **rely heavily upon his lawyer's advise as to how he should respond to the trial judge's questions at the plea hearing.** He may also rationally rely on his lawyer's advice what the outcome of the plea hearing will be." (emphasis added).

Id. at 178. Also see, Hayes v. State, 944 So.2d 121, 124 (¶10)(Miss.Ct.App. 2006); and Hannah v. State, 943 So.2d 20 (¶8)(Miss.2006). Here, however, the position Richard was placed in is distinguishable. Richard entered into a plea of guilty because he felt that there was no other alternative because Attorney Gilder's deficient performance in the pre-trial proceeding had already prejudiced his defense.

First, Richard was not merely denied the effective assistance of counsel at his preliminary hearing and arraignment, he was denied the assistance of counsel altogether. On November 28, 2007, Richard's preliminary hearing was postponed until December 28, 2007, because no attorney was present to represent him. The purpose of a preliminary hearing is to explore whether there is probable cause to believe that the defendant has committed an offense. Hogan v. State, 730 So.2d 100(¶3)(Miss.Ct.App.1998). The indictment by a grand jury removes the purpose of the hearing and none need thereafter be conducted. Id. Richard was indicted on January 15, 2008. Supplement of Volume, page 39. Nevertheless, following this indictment, Attorney Gilder filed a Petition for Writ of Habeas Corpus on February 12, 2008, seeking a preliminary hearing and bond reduction. Supplement of Volume, page(s) 43-44. A review of this petition establish that Attorney Gilder had not investigated Richard's case and was not appraised on the circumstances. In this petition, Attorney Gilder alleged that Richard was incarcerated on the 28th of October, 2007. However, Richard was not arrested and incarcerated until November 1, 2007. C.P., page 33. Also, Richard's bond was already reduced on January 31, 2008, at his arraignment, prior to the filing of this petition. Supplement of Volume, page 40. This is

one example of Attorney Gilder's deficient performance, which prejudiced the defendant. Richard was held in custody thinking that his bond had not been reduced based on the information provided to him by Attorney Gilder.

The most critical of Attorney Gilder's ineffective assistance was the filing of the Motion to Suppress. This motion was filed on April 11, 2008, by Attorney Gilder. This motion was filed seeking the suppression of the blood, which was an essential element to the charge in Count 1 of the indictment. Supplement of Volume, page 39. In this motion, Attorney Gilder alleged some very vital points which, if heard, may have had the blood suppressed during a trial in Count 1 of the indictment. However, as a result of ineffective assistance of counsel, this motion was never heard. There is nothing in the record showing that this motion was ever brought to the attention of the trial court prior to trial. In Taylor v. State, 744 So.2d 306 (Miss.Ct.App. 1999), this Court stated, "[t]he party filing a motion has the duty to bring the motion to the attention of the trial judge and request a hearing on it." Id. at 318(¶45)(citing Lambert v. State, 518 So.2d 621, 623 (Miss.1987); and, Billiot v. State, 454 So.2d 445, 456 (Miss.1984). The failure of Attorney Gilder to seek a ruling on this motion was clearly an unprofessional error of a substantial gravity, and but for this error, Richard surly would not have entered a guilty plea. Cole v. State, 918 So.2d 890, 894(¶10)(Miss.Ct.App. 2006)(citing Strickland v. Washington, 466 U.S. 668, 687(1984)).

The State also contends that because Richard had no affidavits in support of his claims, his ineffective assistance claim must fail. In support of this proposition, the State cites Lindsay v. State, 720 So.2d 182, 184(¶6) (Miss.1998). Appellee's Brief, page 14. Although Miss.Code Ann. §99-39-9 do require affidavits from those witnesses that will testify in support of a petitioner's claims, where applicable, the inquiry does not end there. The

Mississippi Supreme Court stated in Ford v. State, 708 So.2d 73 (Miss.1998) that, "[t]he fact that there were no affidavits **does not in and of itself render the motion invalid.** The statute states affidavits are required of those witnesses that will testify. Thus, if there are no witnesses to the allegations asserted by the appellant, **there is no requirement for supporting affidavits**. Rather, the appellant may attest to the facts that he intends to prove through his petition. Thus, [a] motion for Post-Conviction Relief is not properly denied based solely on the fact that there are no supporting affidavits." Id. at 75(¶11)(emphasis added). Here, Richard has cited parts of the record and convincing arguments in support of his claims. Therefore, this case is distinguishable from that of Lindsay, supra.

Finally, the State contends that Richard added additional errors that his guilty plea counsel allegedly committed, which were not presented to the trial court. The State cites Gardner v. State, 531 So.2d 808-809(Miss. 1998) in support of the proposition that issues not raised with the trial court in a Post Conviction Relief motion could not be raised for the first time on appeal to this court. While it is true that issues not raised in the trial court, can not be raised for the first time on appeal before this court. Taylor v. State, 744 So.2d 306, 316-17(¶¶37&38)(Miss.Ct.App.1999)(citing Crenshaw v. State, 520 So.2d 131, 134(Miss.1988); Howard v. State, 507 So.2d 58, 63(Miss.1987). However, the State fails to allege which specific errors where not presented to the trial court. Appellee Brief, page(s) 15-16.

Appellant raised the issue of ineffective assistance of counsel in the trial court in his Motion for Post Conviction Relief. C.P., pages 7-13. Although appellant's motion filed in the trial court was not drafted by someone skilled in litigation, the issue of ineffective assistance of counsel was pre-

sented and ruled upon by the trial court. C.P., page(s) 37-42. In denying relief on appellant's pro se motion for post conviction relief, the trial court stated:

> "...this Court, consistent with case law, has considered Partain's PCR motion pursuant to MRCP 56. Partain has been given the benefit of every reasonable doubt concerning the existence of any material fact issue. In considering the entire court files in this cause and numbers CR2008-634CD and CR2008-65CD, which include, inter alia, Partain's PCR pleadings, annexed exhibits, all records, correspondence, and transcripts of hearings, and also considering all prior proceedings had and conducted in the criminal causes, the Court concludes that it appears beyond doubt that Partain can prove no set of facts in support of his claims which would entitle him to relief. Accordingly, the relief requested in Partain's PCR motion will be denied and the motion dismissed with prejudice." C.P., page(s) 41-42.

Moreover, this Court has previously held that where the appellant is proceeding pro se, the Court takes that fact into account so that meritorious complaints are not lost because inartfully drafted. Ford v. State, 708 So.2d 73, 75-76(¶12)(Miss.1998)(citing Moore v. Ruth, 556 So.2d 1059, 1061 (Miss.1990). In Hannah, our supreme court reminded us again that courts should not hold pro se litigants to exacting standards of pleading: "[W]here, as here, a prisoner is proceeding pro se, we take that fact into account and, in our discretion, credit not so well pleaded [sic] allegation, so that a prisoner's meritorious complaint may not be lost because inartfully drafted." Hannah v. State, 943 So.2d 20(¶8) n.1 (Miss.2006). Accordingly, Richard's claims are properly before this Court for review.

This Court is required to measure the alleged deficiency within the totality of circumstances. Hiter v. State, 660 So.2d 961, 965 (Miss.1995); Carney v. State, 525 So.2d 776, 780 (Miss.1988). When considering the above, along with the Brief of the Appellant, Appellant has overcome the strong but rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance, and is entitled to relief.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 647 (1984).

ISSUE III. THE TRIAL COURT'S FACTUAL FINDINGS WERE CLEARLY ERRONEOUS AND REQUIRE REVERSAL AND REMAND FOR AN EVIDENTIARY HEARING ON ISSUES I & II.

The Law

Under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. §99-39-1 et seq. (Supp.1990), we consider on appeal from ... dismissal of petitioner's claim whether the application presents "a claim procedurally alive 'substantial[ly] showing denial of a state or federal right.'" If so, the petitioner is entitled to an in-court opportunity to prove his claims. Neal v. State, 525 So.2d 1279, 1281 (Miss.1987). In Neal our supreme court stated, "we are considering whether Neal's showing in his application for post-conviction relief and attached affidavits, coupled with the record made at his trial, render it sufficiently likely that he received ineffective assistance of counsel that we should order an evidentiary hearing regarding the matter. Put otherwise, on the papers and record before us, can we say with confidence that at any evidentiary hearing Neal will not be able to show that he has been denied effective assistance of counsel? If his application fails on either of the two prongs of Washington, we must terminate the proceedings here." Id.

Facts

In his appeal brief, appellant made a clear factual argument illustrating the erroneous factual findings of the trial court on the motion for post-conviction. Appellant hereby incorporates that argument here in full content as alleged in his appeal brief.

Analysis

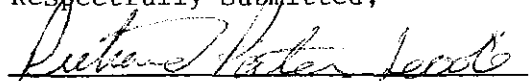
Appellant notes that the State has failed to specifically address the

issue of the erroneous findings by the trial court in regards the blood test. Appeal Brief, page(s) 18-19. Therefore, appellant has made claims procedurally alive substantially showing the denial of a state or federal right. Thus, appellant is entitled to an in-court opportunity to prove his claims. Neal v. State, 525 So.2d 1279, 1281 (Miss.1987).

## CONCLUSION

The trial court's denial of relief with prejudice should be reversed and remanded for an evidentiary hearing on the issues in I and II supra.

Respectfully submitted,



Richard Partain, pro se

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CERTIFICATE OF SERVICE

This is to certify that I, Richard Partain, have this day caused to be mailed, via, Inmate Legal Assistance Program, U.S. Postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF to the following:

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Honorable Robert P. Chamberlin
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This the 22nd day of March, 2011.

Richard Partain, MDOC #L0006
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