

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TYRONE HAIRSTON

APPELLANT

VS.

NO. 2010-KA-0422

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS

NO. 2010-KA-0422-COA

STATE OF MISSISSIPPI

APPELLEE

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STATEMENT OF THE CASE

Procedural History

Tyrone Hairston was convicted in the Circuit Court of Lowndes County on a charge of grand larceny and was sentenced to a term of ten years in the custody of the Mississippi Department of Corrections. (C.P.122) Aggrieved by the judgment rendered against him, Hairston has perfected an appeal to this Court.

Substantive Facts

Charles Pratt testified that on January 16, 2008, his second cousin and housemate Tyrone Hairston and Hairston's "lady friend" were "[s]itting around drinking, talking." Mr. Pratt had \$1600 cash in his wallet when he "went to sleep" on his sofa. When he woke up the next morning, he noticed the cash was missing. He notified the police, who

apprehended Hairston and retrieved \$1200 from him. (T.76-81)

Acting on "a lookout" for Hairston's vehicle, Officers Spence Wallingford and Travis Robertson of the Columbus Police Department knocked on the door of a hotel room. "A female" answered the door. Hairston also was inside the room. The pair were separated and read their *Miranda* rights. Ultimately, Hairston admitted that he had taken his cousin's money. He turned the cash over to Officer Wallingford. (T.85-88)

Officer Robertson testified that Hairston told him that he intended to give the money back to Mr. Pratt. (T.108)

Hairston testified that he took the wallet for safekeeping because "Mr. Pratt was really intoxicated," and that he (Hairston) wanted to keep "somebody else from getting it at the time." (T.116-17)

SUMMARY OF THE ARGUMENT

The state submits Hairston cannot show on this record that he was deprived of the effective assistance of counsel. By no stretch of the imagination was his trial lawyer's performance so deplorable as to require the court to grant a mistrial or new trial *sua sponte*.

PROPOSITION ONE:

HAIRSTON CANNOT SHOW ON THIS RECORD THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE

The sole argument presented on this appeal is that Hairston's trial counsel rendered constitutionally ineffective assistance. Hairston faces formidable hurdles, outlined as follows:

The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466

U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:

The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**

Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.

In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland*. First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.

(emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss. App. 1999).

Because this point is raised for the first time on direct appeal, Hairston encounters

an additional obstacle: the pertinent question

is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance. "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**

(emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Townsend v. State*, 933 So.2d 986, 989 (Miss. App. 2005); *Walker v. State*, 823 So.2d 557, 563 (Miss. App. 2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss. App. 2000).

Hairston has not begun to show that his lawyer's performance was so deplorable as to require the court to declare a mistrial on its own motion. Although no further discussion should be required, the state submits for the sake of argument that Hairston has not overcome the presumption that his attorney's stance was trial strategy. *Forrest v. State*, 47 So.3d 1194, 1196 (Miss. App. 2010). The defendant was apprehended in possession of the cash in question. He asserted that he had taken it for safekeeping, and that he intended to return it to Mr. Pratt. Defense counsel had little or nothing else with

which to work. Hairston cannot overcome the presumption that his trial counsel's position was strategic. For these reasons, Hairston's proposition should be denied.

CONCLUSION

The state respectfully submits that the argument presented by Hairston has no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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