

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TYRONE HAIRSTON

APPELLANT

V.

NO. 2010-KA-0422-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Tyrone Hairston, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 20th day of October, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
ISSUE NO. 1: WHETHER HAIRSTON’S TRIAL COUNSEL WAS INEFFECTIVE PER SE BY VIRTUALLY CONFESSING GUILT DURING STATEMENTS TO THE JURY.	4
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Francis v. Spraggins</i> , 720 F.2d 1190, 1193 (11th Cir. 1983)	4
<i>Wiley v. Sowers</i> , 647 F.2d 642, 650 (6th Cir. 1981)	4
<i>Young v. Zant</i> , 506 F. Supp. 274 (M.D. Ga. 1980)	4

STATE CASES

<i>Barnes v. State</i> , 577 So. 2d 840, 843 (Miss. 1991)	4
<i>Commonwealth v. Lane</i> , 476 Pa. 258, 382 A. 2d 460, 461 (1978)	4
<i>Faraga v. State</i> , 514 So. 2d 295 (Miss. 1987)	4
<i>Williams v. State</i> , 791 So. 2d 895 (Miss App. 2001)	4
<i>People v. Carter</i> , 41 Ill. App. 3d 425, 354 N.E. 2d 482, 485 (1976)	4

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STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER HAIRSTON'S TRIAL COUNSEL WAS INEFFECTIVE PER SE BY VIRTUALLY CONFESSING GUILT DURING STATEMENTS TO THE JURY.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgement of conviction against Tyrone Hairston for the crime of grand larceny as an habitual offender and a resultant sentence of ten years without possibility of probation or parole following a jury trial commenced on February 10, 2010, Honorable James T. Kitchens, Circuit Judge, presiding. Tyrone Hairston is presently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

After the jury was impaneled, but outside of their presence, Tyrone Hairston informed the court that he wanted to plead guilty, and that he had so informed his attorney, while there was an offer from the prosecution still on the table. However, Hairston had refused the current offer.

Charles Pratt is Tyrone Hairston's second cousin. On January 16, 2008, Hairston was at Pratt's house with his girlfriend. He had been staying there for about a month. On that evening those present were enjoying imbibing together. (T. 77-78) Charles Pratt had recently received his income tax refund and had about \$1,600.00 in cash in his wallet. As Pratt became sated he retired to the sofa in his den to slumber. He was still wearing his pants, the back pocket of which contained Pratt's wallet. Upon awakening he found that his wallet no longer contained his \$1,600.00. Although Tyrone Hairston and his lady friend had been the only persons present when he had entered his repose, and they were now absent, he did not want to believe his cousin had taken his money. (T. 79-80) He waited, then called the police and told them the situation. And later that morning, the police informed him they had retrieved \$1,200.00 of his missing money. (T. 81)

Pratt denied that he had female companionship that night, and did not recall that either Warren Dickerson or Earl Harris had been among the merrymakers that evening. Charles Pratt, who had purchase the evenings beverages, did not instruct Hairston to take his wallet to protect it from Dickerson or Harris. (T. 82-83)

Police officer Spence Wallingford, was on the lookout for Tyrone Hairston's vehicle, and spotted it at The Plaza Motel. He and two other officers knocked on the door to Hairston's room and were greeted by a female. The officers question Hairston and his girlfriend separately, with Wallingford talking with Hairston. Officer Wallingford related that Hairston at first disclaimed any knowledge of the missing cash, but then agreed that he had taken the money and showed Wallingford the cash in a sunglass case within his duffle. (T. 85-92) He believed Hairston could have told him Hairston was just keeping the cash for his cousin Pratt, but did not remember. (T. 94)

Investigator Travis Robertson also went to the room at The Plaza Motel. Wallingford called to him and told him he had the money, \$1,200 and an additional \$400.00 that Hairston said belonged

to him. Robertson arrested Hairston, advised him of his Miranda rights and took a statement, which was read to the jury. (T. 105-107) In the statement, Hairston told Robertson he did not take Pratt's \$1,200.00 with the intent of keeping it, but instead he intended to return the money. (T. 107)

The State then rested and the defense made its motion for a directed verdict, which was denied. (T. 109-110) The Court informed Hairston of his right to testify, which Hairston chose to exercise. Prior to putting his client on the stand, Hairston's counsel gave an opening statement to the jury, where he told the jury that "sometimes you just don't have such a good set of facts" continuing that "apparently, he [Hairston] took the money." (T. 112)

Tyrone Hairston took the stand. He began with his present employment at Columbus Marble Works. On the evening in question he was staying with his cousin Charles Pratt. That evening there was a "get together" at Pratt's house with Erma Harris, and Warren Dickerson in attendance. The group were drinking and watching the game. (T. 114-115) Pratt had gone to the liquor store a couple of times, and had become very drunk. (T. 115-117) Hairston felt Pratt was becoming obnoxious and decided to leave. He got his clothes and took Pratt's money and went to the Plaza. His intent in taking the money was to protect it from being stolen and to return it the next day. (T. 119) Hairston's attempt to explain that Pratt had a previous occasion where money was stolen was objected to by the State as hearsay, and then withdrawn by defense counsel. (T. 120-121)

The State elicited that by the time Hairston took the money, "Earl and Warren, had already left." (T. 123) Hairston hid the money in the glasses case within his duffle so that it would not be stolen while at the motel. Hairston was the only witness called by the defense.

In rebuttal the State showed that Pratt had never had money stolen before, and that Hairston initially denied taking the money. (T. 130-133) Thereupon, the state finally rested. The defense instruction for a directed verdict was refused and the case went to the jury.

Again, during closing argument, counsel for defendant conceded that “ well it’s undisputed that he took the money...” (T. 145)

SUMMARY OF THE ARGUMENT

While it was certainly undisputed by the end of the trial that Tyrone Hairston took his cousin’s money, counsel should never say as much to the jury.

ARGUMENT

ISSUE NO. 1 : WHETHER HAIRSTON’S TRIAL COUNSEL WAS INEFFECTIVE PER SE BY VIRTUALLY CONFESSING GUILT DURING STATEMENTS TO THE JURY.

It has been held in a line of cases that “ no attorney representing a client who has pleaded guilty should concede in his oral argument to a jury that his client was in fact guilty of the crime charged in the indictment. “ *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), citing *Wiley v. Sowers*, 647 F.2d 642, 650 (6th Cir. 1981); *Francis v. Spraggins*, 720 F.2d 1190, 1193 (11th Cir. 1983); *Young v. Zant*, 506 F. Supp. 274 (M.D. Ga. 1980), aff’d 677 F.2d 792, 797, n. 10 (11th Cir 1982); *People v. Carter*, 41 Ill. App. 3d 425, 354 N.E. 2d 482, 485 (1976); *Commonwealth v. Lane*, 476 Pa. 258, 382 A. 2d 460, 461 (1978). The same case concludes that such argument may yet, while errant, have some scant tactical purpose, such as gaining sympathy either from the jury, or in sentencing. As Hairston was indicted (via amendment) as an habitual, sympathy in sentencing was moot. Thus the sole question remains, was there any tactical advantage derived in this particular circumstance from admitting guilt in argument.

As seen in *Faraga, Id.*, and *Williams v. State*, 791 So. 2d 895 (Miss App. 2001), conceding guilt may be arguably strategic, where counsel is conceding guilt to the lesser charge of two or more charges. This is not the case here, where Hairston was faced with but one charge. In such an instance, all counsel can accomplish is to become an additional “witness” against his client. *Barnes v. State*,

577 So. 2d 840, 843 (Miss. 1991) Instead, this is the equivalent of stipulating to adverse evidence; but not using it to “poke holes” in the State’s case. *Robertson v. State*, 921 So. 2d 348 (Miss. App. 2005), rehearing denied Aug. 2, 2005, Cert. Denied Feb. 16, 2006.

Counsel for Tyrone Hairston may have been confronted with not “such a good set of facts” (T. 112), but it is respectfully urged that such does not justify a concession that Hairston committed the elements of the crime. While guilt may have been clear, counsel should not be permitted to pile on, where such serves no arguable purpose. Accordingly, Appellant urges this Honorable Court reverse the judgement of conviction entered in the lower court.¹

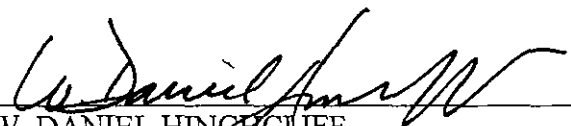
CONCLUSION

Appellant respectfully submits that premised upon the foregoing argument that the judgement of conviction entered in the lower court be reversed and this matter be remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


W. DANIEL HINCHCLIFF
STAFF ATTORNEY

¹Appellant request this issue be preserved for purposes of post-conviction proceedings should this Court not be persuaded in his direct appeal.

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Tyrone Hairston, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
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Honorable Forrest Allgood
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This the 20th day of October, 2010.


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