

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-TS-00220-COA

OLIVER OTIS MCCRAY

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

APPEAL FROM THE
CIRCUIT COURT OF WILKINSON COUNTY, MISSISSIPPI
NO. 2010-0134

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ISSUES

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MCCRAY'S MOTION FOR POST-CONVICTION RELIEF?

STANDARD OF REVIEW

The Mississippi Supreme Court has explained the procedure of an appeal from summary dismissal of a motion for post-conviction relief as follows:

[R]eview of claim brought via formal post-conviction petition proceeds in a structural order whereby "[o]ur procedural posture is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim. Functionally, section 99-39-9 is substituted for the pleadings requirements of Rule 8(a) and (c), Miss.R.Civ.P." *Young v. State*, 731 So.2d 1120, 1122 (¶ 6) (Miss. 1999) (quoting *Myers v. State*, 583 So.2d 174, 175-76 (Miss. 1991)).

THE LAW

In *Ford v. State*, 708 So.2d 73, 75 (Miss. 1998) the Supreme Court stated that the lack of supporting affidavits does not in and of itself render a motion invalid where there are no witnesses to the allegations asserted by the appellant.

LEGAL ANALYSIS

Herein, there were no witnesses to the conversations between McCray and his trial counsel. Thus the lack of a supporting affidavit does not in and of itself render McCrays' motion for post-conviction relief invalid. The court abused its discretion to the extent that it denied McCray a hearing due to not supporting affidavits.

In his motion was post conviction relief McCray asserted that his plea was not made freely and voluntarily To the extent, evidence of this fact is supplied by the affidavit of McCray's grandmother. See Appendix. This affidavit is further evidence of the duress

McCray was the victim of at the time of his plea. If McCray had been granted a hearing on his motion he would have presented this evidence for the court to consider. As a result of the denial of a hearing and in the interest of justice, the Court should grant McCray's appeal and order the Circuit Court to schedule a hearing in this matter.

II. WETHER MCCRAY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS GUILTY PLEA

THE LAW

In *Ford v. State*, 708 So.2d 73, 75 (Miss. 1998) the Supreme Court stated that the lack of supporting affidavits does not in and of itself render a motion invalid where there are no witnesses to the allegations asserted by the appellant.

The State cites *Vielee v. State*, 653 So.2d 920 (Miss. 1995) which procedurally is not analogous to the situation here. After being found guilty by a jury of receiving stolen property and sentenced, Vielle appealed. During the interim of this appeal, Vielle filed a Motion To Stay Appeal And Allow Defendant To Proceed In The Trial Court on the issue of ineffective assistance of counsel.

LEGAL ANALYSIS

McCray's trial counsel's failure to investigate constituted ineffectiveness of counsel. If counsel had performed even a modicum of investigation he would have learned that someone, other than McCray kill the deceased Tony Porter. This fact would have altered the outcome of trial, *Nelson v. Hargott*, 989 F.2d 847 (5th Cir. 1993). If counsel had performed the investigation required of effective counsel this additional investigation would have significantly aided McCray's cause at trial. *Merritt v. State*, 517 So.2d 517, 518 (Miss. 1987).

As a result of McCray's counsel's ineffective assistance, this court must order a new trial herein.

CONCLUSION

For the foregoing reasons and authorities, and in the interest of justice, McCray request this Court grant him a new trial.

Respectfully submitted

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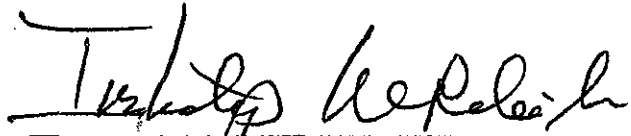
CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

Judge Lillie Blackmon Sanders
P.O. Box 1384
Natchez, MS 39121

La Donna C. Holland
Special Assistant Attorney General
P.O. Box 220
Jackson, MS 39205

This the 26th day of January 2012.



Attorney for Appellant

APPENDIX

STATE OF MISSISSIPPI
COUNTY OF WILKINSON

AFFIDAVIT OF FACT

BEFORE ME, the undersigned authority, personally appeared Odessa Hunter who, after first being personally known by me deposes and says:

1. My name is Odessa Hunter.
2. I'm the grandmother of the Petitioner Oliver Otis McCray.
3. Shortly after my grandson Oliver Otis McCray arrest in this matter he spoke to the Sheriff of Wilkinson, County. After speaking to the Sheriff, my grandson informed me that the Sheriff told him that if my grandson did not admit to killing Tony Porter Jr. the Sheriff would personally give my grandson the death penalty.

Further, Affiant sayeth not.

Odessa Hunter
Odessa Hunter

SIGNED AND ASCRIBED TO before me this the 19 day of January, 2012.

Thomas C. Gallwey Jr.
Notary Public, State of Mississippi

My Commission Expires:

01-01-2016