

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 BRIEF

ORAL ARGUMENT REQUESTED

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

IMHOTEP ALKEBU-LAN # [REDACTED]
P. O. BOX 31107
JACKSON, MISSISSIPPI 39286-1107
601-353-0450 TELEPHONE
601-353-2818 TELECOPIER
ialkebulan@aol.com

ATTORNEY FOR APPELLANT

IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00220-COA

OLIVER OTIS MCCRAY

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

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 the Supreme Court and Court of Appeals may evaluate possible disqualification or recusal:

- (a) Oliver Otis McCray
Appellant
- (b) Judge Lillie Blackmon Sanders
P.O. Box 1384
Natchez, MS 39121
- (c) Honorable Ronnie Harper
District Attorney
P.O. Box 1148
Natchez, MS 39121
- (d) Chokwe Lumumba
P.O. Box 31762
Jackson, MS 39286
Attorney for Appellant
- (e) Imhotep Alkebu-lan
P.O. Box 31107
Jackson, MS 39286
Attorney For Appellant

This the 2ND day of September 2011.



Imhotep Alkebu-lan

TABLE OF CONTENTS

	PAGE
Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Issues	1
Statement of the Case	1
Statement of the Facts	2
Issue:	
I. Whether the trial court committed reversible error when it denied McCray's Motion for Post-Conviction Relief	2
II. Whether McCray received ineffective assistance of counsel at his guilty plea	4
Conclusion	7
Certificate of Service	7

TABLE OF AUTHORITIES

CASES	PAGE
<i>Carr v. State</i> , 873 So.2d 991, 1003 (Miss. 2004)	5
<i>Carney v. State</i> , 525 So.2d 776, 780 (Miss. 1998)	5
<i>Chase v. State</i> , 699 So.2d 521, 526 (Miss. 1997)	5
<i>Cooper v. State</i> , 2009-CA-02031-COA (MSCA)	3, 4
<i>Fisher v. State</i> , 532 So.2d 992, 997 (Miss. 1998)	5
<i>John v. State</i> , 926 So.2d 188, 194 (¶29) (Miss. 2006)	2, 4
<i>Lindsay v. State</i> , 720 So.2d 182, 184 (Miss. 1998)	4
<i>Loden v. State</i> , 971 So.2d 548, 572-73 (¶59) (Miss. 2007)	2, 4
<i>Rowland v. State</i> , 42 So.3d 503, 506 (¶8) (Miss. 2010)	2, 4
<i>Spearman v. State</i> , 58 So.3d 30, 35 (¶16) (Miss. Ct. Apt. 2011)	3
<i>Strickland v. Washington</i> , 466 U.S. 678, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674, 693-95 (1984)	4
<i>Stringer v. State</i> , 454 So.2d 468, 476-77 (Miss. 1984)	4
 STATUTES	
U.S.C.A. 5 TH Amendment	6
Mississippi Constitution, Art.3 § 26	6
M.C.A. §97-3-73	1
M.C.A. §97-3-19	1
M.C.A. §97-37-5	1
M.C.A. §99-19-81	1
M.C.A. §99-39-23(7) (Supp. 2010)	3, 4

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MCCRAY'S MOTION FOR POST-CONVICTION RELIEF?**
- II. WHETHER MCCRAY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS GUILTY PLEA?**

STATEMENT OF THE CASE

On or about March 7th 2007, McCray was charged in the three count indictment with: Count I, Robbery, in violation of M.C.A. §97-3-73; Count II, Murder, in violation of M.C.A. §97-3-19; and Count III Possession of a weapon by a convicted felon, in violation of M.C.A. §97-37-5. McCray was further charged as an habitual offender within the meaning of M.C.A. §99-19-81.

On April 4, 2008, McCray entered a plea of guilty to the charges of Manslaughter in Count II and robbery in Count I. On April 7, 2008 McCray was sentenced to twenty (20) years for manslaughter and fifteen (15) years for robbery in the Mississippi Department of Corrections (MDOC) as a habitual offender. The sentences are to run consecutively. On April 14, 2008, McCray filed a Motion For Reconsideration of Sentencing. On June 4, 2008 a hearing was held on McCray's post-conviction motion. At the conclusion the hearing, the trial court denied McCray the relief requested.

On October 5, 2010, McCray filed in the trial court his Motion For Relief Under The Mississippi Uniform Post-Conviction Collateral Relief Act. On January 10, 2011, without a hearing, the trial court entered it Order Denying Post-Conviction Relief. McCray timely filed his Notice of Appeal to this Court.

STATEMENT OF THE FACTS

In his certified Motion For Relief Under The Mississippi Uniform Post-Conviction Collateral Relief Act, McCray asserted that his indictment was defective and thus the trial court lacked jurisdiction to accept his guilty plea. The indictment McCray received was not signed by the Foreman of the Grand Jury. The Circuit Clerk also failed to sign the indictment. Additionally, McCray asserted that he received ineffective assistance of counsel. His counsel did not object to the defective indictment McCray received. Counsel also failed to perform any investigation of the charges against McCray. In his Motion, McCray reserved the right to supplement the allegations of the petition at any time.

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

STANDARD OF REVIEW

In considering the denial of a Motion for Post Conviction Relief, this court reviews the trial court's findings of fact for clear error, *Rowland v. State*, 42 So.3d 503, 506 (¶¶8) (Miss. 2010). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." *John v. State*, 926 So.2d 188, 194 (¶¶29) (Miss. 2006). This Court accepts as true any evidence, together with the reasonable inference that may be drawn from that evidence, which supports the trial court's findings. *Loden v. State*, 971 So.2d 548, 572-73 (¶¶59) (Miss. 2007). As to credibility issues, we defer to the circuit judge who is the "sole authority for determining credibility of the witnesses." *Id.* at 573 (¶¶59). When reviewing questions of law, our standard is de nove. *Rowland*, 42 So.3d at 506 (¶¶8). The PCR movant has the burden to show by a preponderance of the evidence

that he is entitled to relief. Miss. Code Ann. §99-39-23(7) (Supp. 2010). *Cooper v. State*, 2009-CA-02031-COA (MSCA).

Whether an indictment is defective is an issue of law. *Spearman v. State*, 58 So.3d 30, 35 (¶16) (Miss. Ct. Apt. 2011).

THE FACTS

If McCray had been granted a hearing, he would have established the indictment he received was defective. See Exhibit "A". The indictment McCray received was not signed by the Foreman of the Grand Jury that indicted him. Additionally, the Circuit Clerk's signature was also absent.

ANALYSIS

McCray's guilty plea could not have been freely and voluntarily entered into where the indictment he received was defective. As to McCray, the Circuit Court lacked jurisdiction over him because the indictment was defective. Moreover, McCray was not aware of the charges against him because of the defective indictment. Where one does not know the charge(s) against him, he cannot knowingly enter a plea of guilty. Likewise, one cannot enter a plea freely and voluntarily.

When the State provided McCray with a defective indictment, the State was an accomplice to McCray's not knowing the charges brought against him. Likewise, as a result of the State's action, McCray's guilty plea was not freely and voluntarily entered into.

As a result, McCray was to be granted a new trial where he will know the charges against him.

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

STANDARD OF REVIEW

In considering the denial of a Motion for Post Conviction Relief, this Court reviews the trial court's findings of fact for clear error, *Rowland v. State*, 42 So.3d 503, 506 (¶8) (Miss. 2010). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." *John v. State*, 926 So.2d 188, 194 (¶29) (Miss. 2006). This Court accepts as true any evidence, together with the reasonable inference that may be drawn from that evidence, which supports the trial court's findings. *Loden v. State*, 971 So.2d 548, 572-73 (¶59) (Miss. 2007). As to credibility issues, we defer to the circuit judge who is the "sole authority for determining credibility of the witnesses." *Id.* at 573 (¶59). When reviewing questions of law, our standard is de nove. *Rowland*, 42 So.3d at 506 (¶8). The PCR movant has the burden to show by a preponderance of the evidence that he is entitled to relief. Miss. Code Ann. §99-39-23(7) (Supp. 2010). *Cooper v. State*, 2009-CA-02031-COA (MSCA).

In evaluating an ineffective assistance of counsel charge, this court applies the two pronged test set forth in *Strickland v. Washington*, 466 U.S. 678, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674, 693-95 (1984) and adopted by this Court in *Stringer v. State*, 454 So.2d 468, 476-77 (Miss. 1984). McCray must show: (1) that his counsel's performance was deficient, and (2) that this alleged deficiency prejudiced his defense. *Lindsay v. State*, 720 So.2d 182, 184 (Miss. 1998) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064-2065, 80 L.Ed.2d at 693-95). The burden of proving both prongs lies on McCray, who is faced

with a rebuttable presumption that trial counsel is competent and his performance was not deficient. *Chase v. State*, 699 So.2d 521, 526 (Miss. 1997). Additionally, McCray must show that there is a reasonable probability that, but for the errors of his counsel, the judgment would have been different. *Fisher v. State*, 532 So.2d 992, 997 (Miss. 1998). Finally this court must determine whether trial counsel's performance was both deficient and prejudicial to the defense based upon the "totality of the circumstances." *Carr v. State*, 873 So.2d 991, 1003 (Miss. 2004) (citing *Carney v. State*, 525 So.2d 776, 780 (Miss. 1998)). If this court finds that a ineffective of counsel charge chiefly fails under the prejudicial prong, then we may proceed directly to this part of the test. See *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")

THE FACTS

If McCray had been granted a hearing, he would have established he received ineffective of counsel. McCray's guilty plea was not freely and voluntarily entered into where: (1) the indictment McCray received was defective; (2) counsel did not object to the defective indictment McCray received; (3) counsel did not perform any investigation of the charges against McCray; (4) McCray's counsel promised McCray that he would receive, at most, a twenty year sentence.

ANALYSIS

McCray's counsel performance was deficient where there was no objection raised to the defective indictment McCray received. As a result of counsel's deficient

performance, McCray was prejudiced where he was not informed that his indictment was defective and that the Circuit Court lack jurisdiction over him. As a result of counsel's deficient performance, McCray was not aware of the charges against him. Additionally, McCray was prejudiced when he was denied his Fifth Amendment and State constitutional right to be charged by indictment.

McCray's counsel failed to investigate the charges against McCray. Unfortunately for McCray, his counsel performed no investigation of the charges against McCray. If counsel had performed the minimum of investigation of the charges against McCray, he would have learned that McCray was not guilty. McCray was prejudiced by his counsel's failure to investigate where his counsel did not know the full extent of the extenuating facts pointing to McCray's innocence. If counsel had fulfilled his constitutional duty to provide McCray with effective assistance of counsel, by investigating the charges against McCray, there is a reasonable probability that McCray would have gone to trial and the judgment would of the jury have been different.

Counsel's performance was deficient when he promised McCray that he would receive a twenty (20) year sentence. This promise prejudicially induced McCray to plead guilty when he was not guilty. If McCray had known his counsel did not conduct any investigation of the charges against him he would not have plead guilty. Additionally, if McCray had known he would receive a thirty five (35) year sentence he would not have plead guilty.

As a result of McCray's counsel deficient performance, McCray is entitled to a new trial

CONCLUSION

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

Respectfully submitted

OLIVER OTIS MCCRAY

By:



Imhotep Alkebu-lan
P.O. Box 31107
Jackson, Mississippi 39286-1107
601-353-0450 Telephone
601-353-2818 Telecopier
alkebulan@aol.com

ATTORNEY FOR APPELLANT

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

Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205

This the 2nd day of September 2011.



Attorney for Appellant

EXHIBIT "A"

INDICTMENT

Criminal Action Number 07-KR-013-S

THE STATE OF MISSISSIPPI

CIRCUIT COURT

COUNTY OF WILKINSON

FEBRUARY 2007 TERM

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of the said County, elected, empaneled on February 12, 2007, sworn and charged as required by law to inquire in and for said County, in the name and by the authority of the State of Mississippi, upon their oath, present that

OLIVER OTIS MCCRAY

late of the County aforesaid, in said County, on or about the 26th day of January, 2007

COUNT I: did willfully, unlawfully and feloniously make an assault on Tony Porter and take a sum of money being the personal property of Tony Porter from his person and against his will,

COUNT II: did wilfully, unlawfully, feloniously and with deliberate design to effect death, kill and murder one Tony Porter, a human being

COUNT III: did then and there willfully, unlawfully, feloniously have in his possession a deadly weapon, namely a firearm, when he, the said Oliver Otis McCray was a convicted felon having been convicted on April 11, 2006, in Cause # 05-KR-022-S in the Circuit Court of Wilkinson County, Mississippi, for the crime of Receiving Stolen Property and was sentenced to serve a term of five (5) years in the Mississippi Department of Corrections.

At said time and place, Oliver Otis McCray was a habitual offender within the meaning of Mississippi Code Annotated § 99-19-81, in that he was convicted on October 31, 2000, in the Circuit Court of Wilkinson County, Mississippi, in Cause Number 00-KR-023-S of the crime of Grand Larceny and was sentenced to serve a term of three (3) years in the Mississippi State Department of Corrections, and the said Oliver Otis McCray was also convicted on April 11, 2006, in the Circuit Court of Wilkinson County, Mississippi, in Cause Number 05-KR-022-S of the felony crime of Receiving Stolen Property and was sentenced to serve a term of five (5) years in the Mississippi State Department of Corrections;

contrary to the form of the statute in such cases made and provided, against the peace and dignity of the State of Mississippi.

OFFENSES:

COUNT I: ROBBERY

(136)

SECTION NUMBER: 97-3-73

COUNT II: MURDER

SECTION NUMBER: 97-3-19

COUNT III: POSSESSION OF A WEAPON BY A CONVICTED FELON

SECTION NUMBER: 97-37-5

Walt Brown

Ronnie L. Harper, District Attorney
Walt Brown, ADA

A TRUE BILL

Kelly Suzanne Olive
Kelly Suzanne Olive, Foreperson of the Grand Jury

WITNESS: Reginald Jackson

FILED and RECORDED the _____ day of March 2007.

Mon Cree Allen, Circuit Clerk

Deputy Clerk