STATEMENT OF THE ISSUES

2011-CP-1260 RT

DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WHERE THE COURT FAILED TO FIND A FACTUAL BASIS FOR HIS PLEA?

AS WELL AS THE COURT FAILURE TO INFORM SCRUGGS OF THE ELEMENTS OF THE REDUCED CHARGE OF SIMPLE MURDER?

SUMMARY OF THE ARGUMENT

THAT THE CIRCUIT COURT DID ERR IN DENYING RELIEF ON HIS MOTION WHERE THE COURT FAILED AND THE RECORD FAILED TO SHOW A FACTUAL BASIS FOR SCRUGGS PLEA AND FAILED TO ADVISE HIM OF THE ELEMENTS OF THE REDUCED CHARGE OF SIMPLE MURDER.

ARGUMENT

Appellant herein after referred to as Scruggs agree - that the standard of review is that this Court would not disturb a denial unless it was clearly erroneous and that questions of -- law were to be reviewed de novo. States Brief at p. 5.

Scruggs would argue that said denial of his initial filing was both clearly erroneous and contrary to the rule of law. his claims are not barred by any failure to raise them in the trial court as will be shown. His claims has merit.

First Scruggs will address whether his current claims - is time barred as having never been raised in the trial court. There are cases whereby a prisoner is not subjected to this particullar bar.

Ordinarily, failure to object or raise a claim at trial results in a procedural bar on appeal. **unless** failure of the court to consider the claim amounts to plain error. Sanders v. State, 678 So. 2d 663, 670 (Miss. 1996) ("As a rule, the Supreme

Court only addresses issues on **plain error** review when the error of the trial court has impacted upon a fundamental right of the defendant. In this case the trial court's failure and the record fails to show a factual basis for the plea and the court failed to perform its duty to fully inform Scruggs of the elements of the reduced crime of simple murder amounts to plain error. Austin v. State, 734 So. 2d 234 (Miss. App. Ct 1999),See Hunter v. State, 684 So. 2d 625, 636 (Miss. 1996)(Failure to inform of the elements of the crime is **"fundamental' error"), in** a plea contex See, Henderson v. Morgan, 96 S. Ct. 2253 (1976).

Contrary to the States assertion at page 9 of its brief that the factual basis claim was not before the trial court is disputed by the record. See (R.p. 439) (T.p. 99). The trial court stated that before it could accept a plea of guilty **must** determine the plea is voluntarily and intelligently made and that there is a factual basis for the plea. Appellant as a Pro litigant is entitled to broad interpretation of claim. See Bledso v. Johnson, 188 F. 3d 250 (5th Cir. 1999) Both the legal theory and facts on which the claim rests was presented to the trial court nothing is significantly different. In order for a plea to be constitutionally valid there must be a factual basis, and put another way if there's no factual basis or the court fail to inform a defendant of the elements of the crime he is pleading guilty to that plea of guilty would be constitutionally infirm. **Henderson v. Morgan, supra.** Cf. McCandless v. Vaughn, 172 F.3d 255 (3rd. Cir. 1999).

Again (R.p. 439) (T.p. 99) disputes the State's assertion in its brief at p. 6 that the trial judge never had an opportunity to rule on these claims. Therefore as discussed above the sole issues on this appeal the trial court had an opportunity to rule and did rule on them. Thus Scruggs argue for these reasons as discussed above his claims are not procedurally barred.

The State's brief at p. 10 claim Scruggs PCR filed in the trial court September 25, 2009, was too late. (R.p.at 9). What the State fail to consider is that Scruggs is in prison and not out on bond where he can walk down to the court house and walk in or email from home electronically. (R.p. at 9) also shows the mailing date as the 24 day of August, 2009 as the date he placed his motion in prison officials hand for mailing. Scruggs argues that under the **mail box rule** when he placed his motion in prison officials hand on the 24 day of August 2009, the law says it was filed on that date, and is timely under the mail box rule.

Scruggs argues and shows that the State in its response at (R. p. 89) to Scruggs PCR motion did not assert the above filings were too late as an affirmative defense and by not raising it prior to the entry of the Final Judgement has waived the procedural default argument. Cupit v. Whitley, 28 F.3d 532 (5th cir. 1994).

On page 5 of the States brief, Scruggs rebutt any such alleged incorporation by Judge Chamberlin into the present record for the purpose of supplying the required factual basis relied upon by the court.

What actually happen is the record (Id) of the plea colloque (T.p. 127 starting at line 8.

> BY THE COURT: .... GIVE A BRIEF STATEMENT of what the State would be able to show at a trial on the reduced charges of murder should the case did, in fact go to trial.
>
> BY MR. CHAMPTION: Your Honor, basically I'm going to rely on the proof that's already before the Court.

The trial court Ordered the trial testimony of the trial to be transcribed and made a part of the record as this Court would not have access to these proceedings unless they are a matter of record. (R.309) ... Therefore, the trial court sua sponte issues an Order instructing the Court Reporter to transcribe only the trial testimony on August 31, 2006, and make it a part of the record. This was for the purpose of supplimenting the plea colloque record for the State's factual basis. None of this was ever done as the record shows.

Finally, a factual basis for a plea may be established by the admission of the defendant. Templeton v. State,725 So. 764 (Miss. 1998) However, the admission must contain factual statements constituting a crime or be accompanied by independent evidence of guilt. This Court has held that a factual basis is not established by the mere fact that a defendant enters a plea of guilty. Lott, 597 So. 2d at 628. Cf. Corley v. State, 585 So 2d 765 (Miss. 1991).

In **Corley**, The Court found a factual basis for the defendant's guilty plea where the District Attorney recited during the

plea hearing the facts the State's case would show if the matter proceeded to trial. The Court held that:

> **What Rule** 3.,3(2) require is that, before it may accept the plea, the circuit court have before it, inter alia, substantial evidence that the accused did commit the legally defined offense to which he is offering the plea what facts must be shown are a function of the definition of the crime and its assorted elements.

This prerequisite is missing in the instant case leaving this Court to speculation. On this record the law says a factual basis cannot be implied from the fact that thedefendant entered a plea of guilty. **Austin** supra. In this case there is absolutely nothing in the petition to plead guilty or the plea colloquy that establishes a factual basis for the reduced murder charge. There's only Scruggs answering "yes, sir""to various questions by the court, and this Court has previously said that does not establishe a factual basis. Cf. Carter v. State,775 So. 2d 91 (Miss. 1999). In **Carter and lott**, the defendant actually told the court what happened during the crime. The dissent in **Carter** offers insight into this requirement.

A factual basis is not established when the record does not include the stipulation by the parties of the proof to be offered although the trial court had denied a directed verdict without the missing testimony the State claim would support a factual basis this Court can only speculate and cannot find a factual basis with the confidence the law require.

At (T.p. 99) of the trial courts Order, attached to the

States brief Notes that Scrubbs had filed an amendment to his motion adding the case of **N.C. v. Alford** and some additional argument about the evidence.

The State would argue that because Scruggs pled guilty, he is in fact guilty. What Scruggs is actually guilty of is self-preservation. Scruggs was on trial for capital murder. By exercising his Constitutional rights and insisting on a trial, he jeopardized his very life. It is common practice in capital cases for the State to make a plea offer of life imprisonment. it is even more common for trial counsel to persuade defendants to take such a plea. A defense attorney will consider it a win if his client avoids the death penalty.

Although current Writwriter for Scruggs is without benefit of the trial transcript, it would appear that for all intents and purposes Scruggs plea was a best interest plea. **Harding v. State, NO. 2008-CA-01216-COA (Miss. Ct. App. 2009).** While this writer cannot state with certainty and doubts there is any language in the plea colloquy to support said contentions, this Court has stated that it has found "no rule of law that requires a defendant to state on the record at a plea hearing that entering the plea is because it is in the pleader best interest." Id. While Scruggs may not have protested his innocence, he did face the death penalty upon trial, evidence of guilt against him in the form of codefendants testimony (which is now being recanted), and risk the denial of his plea if he did not affirmatively answer the trial court's questions as to guilt.

In other words, a capital defendant is unlike any other defendant. The only chance he has to exonerate himself carries the ultimate risk, his life. It is unjust to fault a man for wanting to live.

CONCLUSION

There is no way on this record for this Court to have the confidence the law require for reviewing whether the trial court actually found a factual basis and neither the plea colloquy nor the PCR record set out a factual basis for the plea and because the trial court's finding based on denying a directed verdict is not supported by any reviewable record Scruggs pray this Court find that the trial court failed to establish a factual basis for the plea and that the judgement of the trial court of Desoto County should be reversed

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ricky Scruggs, Appellant, pro se, do hereby certify that I have caused a true and correct copy of the foregoing Appellant's **Reply Brief** to be mailed to the parties shown below.

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This Reply brief is being mailed in compliance with the 14 days noticed in the briefing scheduled.

This the 14 day of November, 2011.

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