

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO: 20143-CA-01285

**SHERAL LEE SMITH
Petitioner-Appellant**

v.

**STATE OF MISSISSIPPI
Respondent-Appellee**

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Sheral Lee Smith
Appellant

v.

CASE NO: 20143-CA-01285

State of Mississippi
Appellee

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/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Appellant – Sheral Lee Smith
2. Counsel for Petitioner – William B. Kirksey, Bruce L. Barker, Nathan H. Elmore
3. Counsel for Respondents – Michael Guest, DA 20th Dist., Lee Wilkins, ADA, 20th Dist.
4. Family of John Doe – alleged minor victim
5. Trial Counsel for State - Michael Guest, DA 20th Dist., Jacque Purnell, ADA, 20th Dist.
6. Trial Counsel for Appellant – John M. Colette, Matthew A. Baldrige
7. Circuit Court Judge William Chapman, 20th Judicial District, State of Mississippi

Date: 09/09/2015

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ARGUMENT

The Appellant hereby incorporates all arguments she has made in any pleading or document which this Honorable Court may consider, and makes the following arguments in addition to those, and in response to those made by the Appellee/State in its brief.

I. The State’s argument regarding Dr. McMichael is a red herring - Ms. Smith did not base any of the claims in her petition on error regarding Dr. McMichael or her attorney’s treatment of him.

The Appellee devotes considerable space in their brief reciting, and then responding to, a description made by Ms. Smith in her first affidavit regarding her treatment by her attorney over her pre-trial detention at the State Mental Hospital at Whitfield before her competency hearing, and the handling of the State’s expert witness, Dr. Reb McMichael, by her attorney.

The Appellant does not base her claims of deprivation of constitutional rights on these recitations of fact. They are supporting circumstances that help establish a pattern of neglect and insensitivity by trial counsel to his client, but the Appellant has been consistent that her claims are based on the fact that she was lied to, intimidated and coerced into making a guilty plea by her attorney, who told her that she would be going to trial that day (a similar warning was made

to her previously by the judge), and he would quit and she would have no representation at her trial and would be sent away for a very lengthy prison term. Further, the Judge's colloquy did nothing to correct these mistruths, as he did not inform her of her right to trial counsel, or that counsel would have time to prepare his case.

The Appellee's argument regarding Dr. McMichael is a red herring, although should this Court or the Circuit Court determine that his treatment of the Appellant while she awaited trial at Whitfield, and his failure to challenge Dr. McMichael are sufficient grounds for an ineffective assistance claim, the Appellant will accept such a ruling.

II. The State argues an erroneous standard of review to this Honorable Court in an effort to force the Appellant to prove her full case, although she appeals to this Honorable Court only for a review of the Circuit Court's denial of a hearing on her petition.

The Appellee argues in their brief that this Court may only disturb the lower court's findings if they are "clearly erroneous." This is not true. This is the standard of review used by this Honorable Court after a post conviction relief (PCR) petition has been denied *after an evidentiary hearing*. See, *Poss v. State*, 17 So.3d 167, 168 (Miss. App. 2009); *Johns v. State*, 926 So.2d 188, 194(¶ 29) (Miss.2006) (*citing Reynolds v. State*, 521 So.2d 914, 918 (Miss.1988)).

In the case at bar, Ms. Smith was denied an evidentiary hearing, which is the basis for her appeal. The proper standard for analysis is that of a civil 12(b)(6) motion *Billiot v. State*, 515 So.2d 1234, 1236 (Miss. 1987), *and progeny*. That is, if there is a genuine issue of material fact that the Petition meets the pleading requirements laid out in Miss. Code Ann. Sec. 99-39-11(2), and the claims made therein "substantially show denial of a state or federal right" then the Petitioner should be allowed her day in Court. *Id.* at 1237, *citing* Miss. Code Ann. Sec. 99-39-11.

Furthermore, the reviewing Court "take[s] the well-pleaded allegations of the complaint as true." *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991). (*String citations omitted*). However,

“where an affidavit is overwhelmingly belied by unimpeachable documentary evidence in the record such as, for example, a transcript or written statements of the affiant to the contrary to the extent that the court can conclude that the affidavit is a sham no hearing is required.” *Gable v. State*, 748 So.2nd 703, 706 (Miss. 1999), *quoting Wright v. State*, 577 So.2d 387, 390 (Miss.1991).

The Appellant must prove to this court that there is genuine issue of material fact whether she conformed to the pleading requirements in the statute and substantially alleged a denial of a state or federal right. The State appears to take no umbrage with the Appellant’s pleading. What remains, then is the State’s argument that the Appellant’s affidavits are overwhelmingly belied by unimpeachable documentary evidence – specifically the transcript of the plea colloquy.

III. The record shows that the Judge’s Plea Colloquy did not correct the falsehoods told Ms. Smith by her counsel in order to induce her plea; specifically it did not inform her of her basic right of representation at trial, which Counsel told her she would not have if she went to trial instead of taking a plea.

Regarding whether or not the colloquy had the curative effect intended is debated by the Appellant in her section regarding being instructed to lie to the court and being intimidated, in her original brief, and summarily re-iterated later herein, however, no colloquy can offer curative effect or be entered into knowingly, if it does not provide the Defendant with the knowledge of their basic rights *especially* where their attorney has misrepresented those rights to them only minutes prior.

Every affiant testifies that trial counsel informed the Appellant that if she did not take the plea he would quit and that she would proceed to trial that day (CP 44-51). Her sister testified that trial counsel told her that she would go to trial without an attorney. (CP 47) Obviously, these threats is untrue; had he been allowed to withdraw the Court would have certainly postponed the trial to allow her time to obtain counsel and for that counsel to prepare a case. Even if the Court

had proceeded that day, she would have at least been represented with stand-in counsel – but that’s not what trial counsel told her. Unfortunately, that’s not what the trial Judge, Retired Judge Samac Richardson, told her during the plea colloquy, either.

In explaining her rights regarding the guilty plea itself, before discussing or otherwise mentioning trial rights, in the context of her rights at that specific time, he informed her that she has the right to an attorney at all critical stages of the proceedings, “that is why Mr. Colette is with you now, you don’t give up that right to an attorney when you plead guilty.” (CP 86). The plain language of the admonishment expresses that she has a right to an attorney at the proceeding where she is standing – for her guilty plea – and nothing more. A legal practitioner might be able to divine that she has a right to an attorney at trial from the language, but Ms. Smith was not a legal practitioner, and the legal practitioner that she had hired had just finished telling her that she would be alone at trial if she didn’t plead. Compounding the problem is the fact that the Judge never asked if she understood, and the clerk recorded no answer from her other than a “Nodded Head.” [CP 86]. Perhaps this is sufficient to signal affirmation if it is an emphatic horizontal nod. Such a question would be one for a finder of fact at a hearing.

In fact, the portion of the colloquy where he mentioned “at every stage of the proceeding...that’s why Mr. Collette is here, you don’t give that up when you plead guilty.” Is removed from, and comes *after* the Judge explains her trial rights. In a separate preceding section of the colloquy, he goes over the right to a speed and public trial, and that she can face her accusers in open court and cross examine them, that she can use the subpoena power and testify on her own behalf, or not, that she could challenge the makeup of the jury, that she had the right to the presumption of innocence, and that she had the right to appellate counsel if she lost. [CP 83-85]. The trial judge delved deeply into the fact that he would order Rankin County

to pay for her appellate counsel if Ms. Smith lost at trial, explaining it to her several different ways. He never once told her that she had the right to counsel at trial. *Expressio unius est exclusio alterius* has been a concept applied to statutory interpretation, contractual interpretation, and many other legal constructs, because it demands specificity so that no important term is left unspoken or misunderstood. The Appellant would offer that a Judge's explanation of constitutional rights to a person deliberating on sacrificing their liberty should merit as much thought and care.

This is not to blame the Retired Judge, he had no inkling of trial counsel's misstatements; but the innocence of the trial judge does not justify the denial of the right to be informed of all the rights waived (or at least be disabused of falsehoods concerning their basic rights) so that a defendant may make an educated, knowing, voluntary plea.

IV. The curative quality of the colloquy has no effect where counsel has advised his client to lie to the Court in order to receive a more lenient sentence.

The Appellee would have this Honorable Court believe that, aside from those instances where the trial Court failed to address a specific right, outlined above, Ms. Smith's right to a voluntary plea was safeguarded, because she answered 'yes' when instructed to by her attorney during the colloquy. This is not the position of Mississippi jurisprudence. The Supreme Court has recognized that attorneys tell their clients to "just say yes" during plea colloquies, even if that response is a lie (*See Sanders v. State* 440 So.2d 278, 285 (Miss. 1983)(superseded by statute on other grounds); *See Also Banana v. State*, 635 So.2d 851 (Miss. 1994), like in the case at bar. The Supreme Court has also recognized that if the defendant lies and says that their plea is uncoerced and voluntary, when in reality it is coerced, that plea is involuntary. *Id.*; *See also House v. State*, 754 So.2d 1147 (Miss. 1999), and *Kirksey v. State*, 728 So.2d 525 (Miss. 1999).

To simply dismiss the assertion that the defendant, feeling coerced might rely on her attorney's advice to essentially lie to the Court in making the colloquy with the court is to set up the colloquy as infallible – something the Mississippi Supreme Court has refused to do on multiple occasions (see above). As the *Sanders* Court noted, to find whether or not a defendant was coerced or misled, and whether or not she relied on the coercive or misleading statements of Counsel in making false responses to the colloquy is a matter of fact. Matters of fact should be resolved through hearing, as the Appellant requests from this honorable Court today.

V. Conclusion

The Appellee has offered no evidence or reasoning as to why the Appellant should not be entitled to an evidentiary hearing on her PCR petition, other than simply stating that simply because a colloquy was performed, her rights could not have been violated. As evidenced herein, and under the law herein cited, the Appellant shows how that an attorney who misrepresents the law to his client, and instructs his client on how to answer the colloquy to satisfy his own ends, rather than the defendant's or the Court's, can frustrate the Court's attempts to offer the defendant a knowing and educated (and therefore voluntary) opportunity to decide whether to plead guilty or proceed to trial. In this case the purposes of the colloquy were frustrated in several ways. Mississippi jurisprudence recognizes this, and affords Post Conviction evidentiary hearings for just such purposes.

WHEREFORE, for the foregoing reasons, this Court should reverse the decision of the lower Court, and find that Sheral Smith is entitled to post-conviction relief, and vacate her unconstitutionally obtained plea and conviction. In the alternative, this Court should, at a minimum, reverse the lower Court's decision to deny an in-court opportunity to Ms. Smith to prove her claims, and remand the case to the Circuit Court for additional proceedings.

Respectfully submitted this the 9th day of September, 2015.

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CERTIFICATE OF SERVICE

I, Bruce L. Barker, attorney for Appellant, do hereby certify that I have this day filed with the Court's electronic filing system, as well as mailed, via United States mail, postage prepaid, a true and correct copy of the foregoing copy of the BRIEF OF THE APPELLANT to:

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