

2016 - CP-787

IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

FILED

JUL 10 2017

TRIAL CASE NO. 2003-CR-01

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

TRAVIS SHANKS A/K/A TRAVIS

KEYCON SHANKS

VS.

STATE OF MISSISSIPPI

APPELLANT

SUP.CT.CASE NO. _____

APPELLEE'S

ORIGINAL

MOTION FOR REHEARING TO SUPPLEMENT THE
ORIGINAL MOTION FOR RECONSIDERATION.

COMES NOW, TRAVIS SHANKS, the defendant herein, Pro se Pursuant to M.R.A.P. Rule 40, and files this his motion for rehearing to supplement his original motion for reconsideration filed on or about the 22nd day of JUNE, 2017, of the decision handed down by this Honorable Court on May 23, 2017, and in support thereof, would respectfully show unto the court as follows:

1.] since the filing of the original motion for reconsideration this court has granted appellant an extension of time to allow to prepare and present his points of law and facts, which in his opinion, this court has over looked or misapprehended.

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2.] The appellant, asserts that the supplemental of his original motion for reconsideration for the motion of rehearing. Which established that these specific errors of laws and facts will cause a different outcome on this court findings on the merits should be granted.

3.] The appellant respectfully request a rehearing based on the misapprehension of law and facts issued in the opinion, wherein this court ruled that upon review of the record and relevant case laws that Shanks claims regarding due process and the voluntaries of his guilty plea lacks merits, notwithstanding any applicable procedural bars, where he failed to provide any evidence, other than his own assertions, to support his post-conviction claims for relief.

According to Sanders vs. State, 440 So.2d. 278 (1983). The true rule is stated in Boykin vs. Alabama 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed.2d. 274 (1969). Where a plea of guilty has been intelligently and voluntarily entered, it is sufficient to undergird an unassailable final judgment of conviction on the other hand, where the plea is involuntary any judgment of conviction entered thereon, is subject to collateral attack. In Sanders, the Mississippi Supreme Court stated that the question whether a plea of guilty was a voluntary and knowing and necessarily involves issue of facts.

FN.2 Our Supreme Court said: It is critical to keep in mind that the very nature of the "involuntariness" claim made here takes us beyond the transcript of the plea hearing defendant from his attorney and relied upon by him in tendering his plea a major area of factual inquiry. Quoting Chavez vs. Wilson 417 F.2d. 584, 586 [9th Cir. 1969] Especially, where defense counsel lies to the defendant regarding the sentence he will receive, the plea may be subject to collateral attack, where the defense counsel advises

the defendant to lie and tell the court that the guilty plea has not been induced by promises of leniency (where in fact it has), the plea may be attacked. Here,

In the case before court. The majority overlooked the fact, set forth in the appellant sworn statement of the specific facts within his personal knowledge when he stated: that he lied to the court at the plea hearing concerning the promise or inducement as a result of misrepresentation of his trial counsel telling him to answer the judge affirmative with yes or no. the appellant further repeated in his brief statement of facts that he lied to the court at the plea hearing because his attorney advised him to, when it was never explained to him the elements of deliberate design murder. Absence evidentiary hearing these facts remain outside the record.

Relevant facts on such voluntariness issue will as a matter of common sense not be within that transcript.

The Supreme Court further noted: [Most allegation that the plea was induced, by lack of knowledge or by a broke promise or by some other improper factor, involve facts outside the record. Chavez vs. Wilson. Supra, our laws is clear, that where the defendant receive any such advise of counsel, and relied on it, the plea has not been knowingly and intelligently made and is subject to collateral attack. See, Burgin vs. State 522 s.w.2d.159[mo. App. 1975]. Also the majority in its decision, in the case, overlooked and misapprehended the Mississippi Supreme Court decision is Baker, where the Mississippi Supreme Court stated : If as alleged, defendant guilty pleaded guilty under the mistaken "advice" that they could be subject to capital punishment if convicted at trial, this then is a factor which make appropriated a collateral attack, such allegation, if true, indicated that defendant were not fully aware of the implication of their plea nor of the true consequence of a trial by a jury. Such circumstance, if properly pleaded and supported by sufficient facts, makes out a case where relief ... may be appropriated. Baker vs. State 358 so.2d.at 403. [Emphasis Added]

It's obvious, the majority in the case overlooked this point of law embodied in a combined reading of these case that would have entitled the appellant to relied if he can establish his claims.

Especially when the majority of the justice acknowledge that a defendant fundamental right to be free from compulsion to give evidence against himself were violated. Brook vs. State 209 miss. 150, 155 [miss. 1950]. In addition to recognizing in Mississippi four types of fundamental rights which have been expressly found to survive PCR Procedural bars. See, Boyd vs. state 155 so. 3d. 914, 918 (Miss. Ct. app. 2014) citing Rowland vs. State 42 so.3d.503, 506[miss. 2010].

This court also overlooked significant facts in the record relating to the appellant Shanks mental incompetency claim to plea guilty. This court opinion at 19, page 8, noted the appellant Shanks swore under oath in his guilty plea petition that he was mentally competent to make the plea and was not under the influence of drugs or alcohol or suffering from an mental illness. Nothing in the record to contradict that.

However, the plea hearing record at page 16, clearly show that during direct questioning by the judge at the plea hearing of the defendant Shanks. The judge asked defendant Shanks are you now under the influence of any types of drugs or alcohol. The defendant responded, no sir. The court again after the factual basis of the plea was stated, asked Shanks what you said in your petition is true? The defendant responded , yes sir. You shot Mr. Small five times outside the Package Store? Yes sir. Would you tell the court why you did that? The defendant : " I was on drugs at that time." The court: What kind of drugs? The defendant: "cocaine". See plea record, page 16, line 1 thru 21. See also, the defendant mother statement incorporated in the record. Also, Southwest Mississippi mental health child intake form that is also incorporated in the record which states his mother suspected substance abuse when he was diagnosed at the age of 14 with Oppositional defiant disorder(ODD).

The majority of the justice in its opinion acknowledged that once the trial court has reasonable ground to believe that the defendant is incompetent, the trial court must submit the defendant to a mental evaluation and then conduct a competency hearing. Sanders vs. State, 9 so. 3d. 1132, 1136[miss. 2009]. The records and exhibits incorporated in the record is reflected with the evidence that the defendants competency to plead guilty was questionable when came to whether the defendants has a rational as well as factual understanding of the proceedings against him. For instant, the record reveals Shanks came from a dysfunctional family, he became a substance abuser at age 14,he had serious behavioral problems that caused him to be terminated from public school and placed in a alternative school, education was very poor and he can barely read and write. He just turned 21 years of age when the crime of capital murder took place. It was obvious that his ability to consult with the court or his attorney was reasonable degree of rational understanding was limited. Although, this court in its opinion recognized the constitutional standard for competency, but affirmed trial court dismissal of the appellant PCR motion finding that he failed to present evidence beyond his own assertions to support his claim of incompetency.

Further this court in its opinion at 20, page 8, acknowledged that the court cannot consider "matter which were never presented or argued in the trial court and are not part of the record. The court in its opinion acknowledged that appellant Shanks in an effort to establish his incompetency, attaches to his appellate brief a number of exhibits that pur port to document his educational and mental health histories from 180 to the late 1990's but the majorities overlooked those critical facts set forth above in those exhibits that were presented to the court along with his PCR Motion Claims.

Also, the majorities overlooked the fact that trial court had an opportunity to address the appellant claims to determine whether he complied with procedural requisites tat entitle him to a hearing. The

majorities overlooking the fact that this court inquiry is controlled by the provisions of sections 99-39-9 of Mississippi code annotated. The appellant motion and affidavit meet these tests. Section 99-39-11, adopts a manifestly-without-merit standard. The Mississippi Supreme Court acknowledged Blackledge vs. Allison, 431 u.s. 63, 91 s.ct. 1621, 52 L. Ed.2d 136(1997), manifest without merit standard in Baker vs. State 358 so. 2d. 401 (miss. 1978),

In Baker, our supreme said,

We agree with the spirit of Blackledge that there should not be a Per'se rule prohibiting collateral attack on a plea in all circumstances simply because the transcript on it reflects recitation of voluntariness and awareness of the consequence. Id at 403.

Later in the opinion, the Baker court repeated this premise we agree that a Per'se rule excluding collateral attack on pleas facially correct, is not warranted.

Blackledge recognizes the enforcement of a Per'se rule runs afoul of notions of fundamental fairness, Blackledge correctly observes that no court could fairly adopt a per'se rule excluding all possibility that a defendant representation at the time his guilty plea was accepted were so much the product of such factor as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment Id at 75.

4.] The majorities in Shanks decision overlooked a serious point of law adopted by our supreme court, in Baker vs. State, supra, citing Blackledge vs. Allison, the enforcement of a Per'se rule that prohibited collateral attack on a plea in all circumstance simply because the transcript on its fact reflects recitation of voluntaries and awareness of the consequences.

Further the majorities overlooked important fact and point of law to deny relief for a fundamental – rights violation brought to this court attention in a successive PCR that ignore the serious due-process concerns underlying the fundamental –right exception. That is the constitutional right not to be tried or convicted while incompetent. In Droe vs. Missouri , 420 u.s. 162, 172, 95 s. ct. 896, 43 l. ed. 2d. 103 (1975). The appellant Shanks second PCR motion alleged a violation of his fundamental right not to be convicted while incompetent. In recognition of this principle, our Supreme Court has on numerous occasion reviewed errors affecting fundamental rights raised by successive pleadings. Grayson vs. State,

118 so. 3d. 118 (Miss. 2013) (effective assistance of counsel). Recently Mississippi Supreme Court reviewed errors (similar to Shanks), affecting fundamental right. Smith vs. State 149 so. 3d. 1027 2014).

Finally, this overlooked an important point of law after acknowledge that this court can't consider matter which were never presented or argued in the trial court and are not part of the record.(opinion at 19, page 8). There were evidence before the trial court that appellant Shanks had mental problems before the plead of guilty that required evidentiary hearing, his mother discussed with his attorney his mental problems prior to the plea and Shanks stated that he was on cocaine when the crime was committed. These records also were included in his PCR motion for consideration on his incompetency claim and on appeal. The majority overlooked the fact that these records still may be submitted to the trial court at evidentiary hearing pursuant to section 99-39-23 (4) of the Mississippi Code Annotated of 1984.

Also, the majority misapprehended the standard of review when the trial court may summarily dismiss a motion for PCR. If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief (section 99-39-11(2)). On appeal from the summarily dismissal of a motion for PCR, this court determines whether the motion presents "a claim procedurally alive substantially showing of denial of a state or federal right. Gable vs. State, 748 so.2d.703, 704[Miss. 1999].

Wherefore premise considered, appellant respectfully requests that the court review its finding upon such reconsideration, reverse and remand for an evidentiary hearing on appellant Shanks, incompetency and ineffectiveness of counsel claims.

Respectfully Submitted,



Mr. Travis Shanks #L5339

MSP/ Unit-28

Parchman, Miss. 38738

Certificate Of Service

This is to certify that I, Travis Shanks, the appellant herein, have this day cause to be mailed postage prepaid, through the inmates internal mailing system, a true and correct copy of his motion for rehearing to foregoing persons:

Hon. Muriel B. Ellis, Clerk
Mississippi Court of Appeals
Post Office Box 249
Jackson, Miss 39205

Hon. Jim Hood, State Attorney
State Of Mississippi
Post Office Box 220
Jackson, Miss 39205

This the 16th day of July, 2017

Respectfully Submitted,

Travis Shanks
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