IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BARRY D. WARE — APPELLANT

VERSUS — 2017-CA-00711

STATE OF MISSISSIPPI — APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF ATTALA COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

LOWREY & FORTNER P.A.
Attorneys at Law
Thomas M. Fortner MSB #5441
Valerie M. Andrews MS #105413
525 Corinne Street
Hattiesburg, MS 39401
601.582.5015
601.582.5046 (Fax)

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND AUTHORITIES CITED

Cases

Constitution and Statutes

REQUEST FOR ORAL ARGUMENT

The Appellant, Barry Ware, submits that oral argument would be beneficial to the Court in its deliberations because the opinion of the trial court in this case clearly shows a misunderstanding of the issues involved. A variety of decisions in similar post-conviction collateral relief cases has left both the bench and the bar engaging in misapprehensions and misunderstandings of the appropriate legal requirements to ensure that criminal defendants understand the true consequences of entering a guilty plea in a felony case.

Additionally, it appears in this case that the trial court is unclear or uncertain about what is required to be considered in an evidentiary hearing of a post-conviction collateral relief motion. Oral argument would be beneficial in aiding this Court in identifying misunderstandings or the lack of clarity in previous appellate decisions in this area and in instructing the trial courts.

ARGUMENT

1. **Mr. Ware was affirmatively misinformed regarding his eligibility for parole, and the trial court abused its discretion and showed bias when determining credibility of witnesses.**

The Appellee argues that the trial court adequately determined the credibility of the witnesses at the evidentiary hearing. Appellee then stated that any evidence of bias should be excused as being the judge's way of "expounding upon issues of credibility." (See Appellee Brief, page 17). The trial judge was clearly biased against Mr. Ware; that bias was not evidence of him considering credibility; that bias was evidence of him abusing his discretion in determining credibility; and that bias should not be excused as a proper exercise of judicial discretion.

In its conclusion, the trial judge stated:

> It is the opinion of this court that after sitting in prison for nearly three (3) years while learning the prison lingo, and after becoming aware of the case of *Thinnes v. State,* 196 So.3d 204 (Miss. Ct. App. 2016), that Ware tailored the facts in this case to meet the facts in *Thinnes*, and then hired the prevailing attorney in *Thinnes* to represent him in this matter.

No fair, unbiased judge would ever engage in such unsubstantiated speculation in order to deny relief. In so speculating, the trial judge was grasping at straws in its attempt to embrace a clearly false conclusion i.e., that a reasonable man would plead guilty to a crime that carried a more onerous and punitive sentence than the crime for which he stood indicted. The Appellant did not create the facts or the evidence; he was charged with murder; his attorney convinced him to plead guilty to second degree murder; and he is worse off than had he gone to trial and been convicted.

The Appellee claims that the trial judge correctly concluded that Mr. Ware was not affirmatively misinformed about his parole eligibility because Pam and Barry Ware's "specifics

were not consistent." (See Appellee Brief, page 8). However, in *Readus v. State,* the Mississippi Court of Appeals found that although the defendant and his mother had different understandings about the amount of time the attorney said the defendant would serve (specifically, one said 6 months and the other believed it was 6 years), the Court found that this did not invalidate their claims because both claimed that the defendant's "lawyer instilled an expectation of a far more lenient sentence than [the defendant] actually received." 837 So.2d 209, 214 (Miss. Ct. App. 2003). Mr. Ware's assertion that his attorney told him he would be eligible for parole in two years, and Mrs. Ware's assertion that Ware's attorney told her he would be eligible for parole in three to five years, does not invalidate their claims that they were both expecting a far more lenient sentence than the defendant actually received.

Further, the trial court claimed to carefully consider "the **pleadings,** the testimony and evidence presented at the hearing" in reaching its conclusion. (C.P. 75-83, R.E. 60-69). However, the trial court clearly failed to consider all of the pleadings including the attached affidavits. First, the trial court concluded that "neither Pam Ware nor Mitchell Hedgepeth testified that the contents of their conversation with [District Attorney] Evans was ever relayed to Barry Ware" and that "[t]here was absolutely no testimony that [Mrs. Ware and Mr. Hedgepeth's] discussions with Evans played any role in Barry's decision to plead guilty." (C.P. at 78). However, the affidavits of Pam Ware, Barry Ware and Mitchell Hedgepeth contain sworn statements that provide proof that Mrs. Ware and Mr. Hedgepeth did in fact relay their conversation with District Attorney Doug Evans to Mr. Ware. (C.P. 18-19, 43-46, R.E. 16-17, 41-44). Further, Mr. Ware provided a sworn statement that he relied on that information when he decided to plead guilty. (C.P. 18-19, R.E. 16-17). The trial judge stated: "it would be improvident to further analyze the discussions conducted between Evans, Pam Ware, and

Mitchell Hedgepeth." (C.P. 78, R.E. 63). How could it ever be 'improvident' for a trial judge to consider all of the evidence in a case before making a final decision? The trial court clearly abused its discretion when it failed to consider all of the evidence and prejudicially concluded that the court could not further analyze a substantial amount of the evidence presented by Mr. Ware.

Finally, in reaching its conclusion that Mr. Ware's former attorney was "more believable," the trial court relied on the following testimony from Mr. Ware's attorney:

> I am getting old but I know one thing – the 30 for 30 term, I've never used. That's a term that people in prison use. My office has *never* indicated to anybody 30 to 30. We just don't get into that mathematical issue. So I did not. And we didn't know.

(C.P. 78, R.E. 63, Tr. 67) (emphasis added). The trial court found this testimony to be compelling because based on its experience, "inmates, not attorneys use terminology such as 30 for 30, earned time credit, and trustee status." (C.P. 79, R.E. 64). Obviously, the trial judge, the defense attorney and the district attorney have never read Miss. Code Ann. § 47-7-3 in which our state legislature uses the term "earned time credit" and discusses what 30 for 30 and trustee status entails. And then later, when Ware's PCR attorney questioned Mr. Ware's former attorney about why he never advised his clients about 30 for 30, earned time, and parole and why he did not research the relevant statutes, the same attorney replied:

> Well, maybe I shouldn't use the term never. I mean, you know, there are times when people will say, Well, how much do I have to do on this? And I generally say I have no idea. It's up to the parole board.

(Tr. 79). In this case, nothing was ever up to the parole board. Second degree murder and murder result in parole ineligible sentences. If he advised Ware (as he did) that he could be paroled at the discretion of the parole board, then he induced an involuntary, unintelligent plea. Mr. Ware is aware that trial judges have the authority to determine the credibility of the witnesses before

them in an evidentiary hearing on a PCR motion. *Thomas v. State*, 175 So.3d 525 (Miss. Ct. App. 2015). **However**, this discrepancy in Mr. Ware's former attorney's testimony coupled with the trial court's show of bias towards Mr. Ware in prejudging the case from the outset and ignoring a substantial amount of evidence before him, demonstrates an abuse of discretion on the part of the trial judge in his determination of credibility of the witnesses. The trial court abused its discretion in this case.

2. **Mr. Ware was affirmatively misinformed regarding conditional release.**

In response to the Appellant's argument concerning conditional release, the Appellee states, "Ware would like this Court to find that a criminal defendant pleading guilty must be informed of every facet of the law and every possibility under the law in order for his plea to be valid." Appellant agrees. Under the Mississippi Constitution and the Constitution of the United States, every defendant has the right, when pleading guilty, to do so **voluntarily, intelligently and knowingly.** *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). ("[T]he Constitution insists that the defendant enter a guilty plea that is voluntary and make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'").

Barry Ware pled guilty believing that he would be eligible for parole, and that if he went to trial and lost, he would be spending the rest of his life in prison with no chance of release. He believed those things because that is what his attorney told him. Ware's attorney, by giving him erroneous advice about the consequences of his plea and the consequences of going to trial, affirmatively misinformed him and caused him to enter a plea unintelligently and unknowingly. In addition, Mr. Ware unintelligently waived his fundamental right to trial. Mr. Ware made it very clear, both in court and in his affidavit, that he would not have agreed to plead guilty had he

known his sentence would be day for day, and he would have gone to trial had he known about the mere possibility of conditional release on a life sentence for murder.

Ware's attorney, John Collette readily admitted that he failed to advise Mr. Ware that he could petition the sentencing court for conditional release after 21 years if he had gone to trial and lost. (Tr. pg. 69). When Ware's PCR counsel asked Mr. Colette why he failed to advise Mr. Ware of conditional release, Mr. Colette stated, "I don't think it came up." (Tr. pg. 69). Ware's PCR counsel then asked, "[t]hat's a consequence of pleading guilty or going to trial and getting found guilty of first-degree murder. Correct?" to which Mr. Colette replied, "[m]aybe, yes sir." *Id.* The truth is that it was Mr. Collette's job and obligation to make sure that the discussion of those issues does 'come up' when advising his client.

PCR counsel asked Ware ". . . [w]hat did Mr. Colette tell you would or could happen to you if you went to trial and were found guilty of first-degree murder?" (Tr. pg. 29). Mr. Ware replied, "[t]hat I would be in prison for the rest of my life." *Id.* Mr. Ware goes on to explain that he was never advised he could petition the court for conditional release at age sixty-five (65) if he had lost at trial and was sentenced to life for First Degree Murder. *Id.* Ware's PCR counsel then asked, **"[i]f you had known that if you went to trial for first-degree murder and was found guilty, you would get a life sentence but could petition the Court for conditional release at age 65, would you have gone to trial?"** to which Mr. Ware replied, **"[y]es."** (Tr. pg. 33). Counsel then followed up and asked, **"[w]ould you have – but for the advice of Mr. Collette, would you have plead guilty to second-degree murder in front of this judge?"** to which Mr. Ware replied, **"[n]o."** *Id.* Clearly, Mr. Ware pled guilty based on trial counsel's grossly erroneous advice.

The plea Mr. Ware accepted will require him to serve thirty (30) years, day for day, without any possibility for early release. **Rather than being able to petition his sentencing court for release at age 65 after serving twenty-one (21) years, he must serve a full thirty (30) years until he turns 75.**

Again, Mr. Ware's attorney purposefully or ignorantly misadvised him as to the law when he affirmatively misinformed Mr. Ware that if he went to trial and lost, he would get a life sentence without any possibility for early release. Mr. Ware's attorney had a duty to give Mr. Ware accurate advice on **all** the possible consequences of pleading guilty **or** proceeding to trial. He did the opposite, and Mr. Ware cannot be said to have entered a knowing, intelligent or voluntary guilty plea. Further, it was made abundantly clear at the evidentiary hearing that Mr. Ware relied heavily if not exclusively on that wrongful advice when he decided to plead guilty to Second-Degree Murder instead of going to trial. Therefore, the trial court incorrectly concluded that Mr. Ware voluntarily, intelligently and knowingly entered his guilty plea.

3. Mr. Ware's trial counsel was constitutionally ineffective.

To prove ineffective assistance of counsel, a defendant must demonstrate: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show that counsel's performance was deficient to the level of constitutional ineffectiveness, Mr. Ware would need to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sylvester v. State*, 113 So.3d 618, 626 (Miss. Ct. App. 2013).

Appellee claims that Appellant's ineffective assistance of counsel claim concerning conditional release is "nonsensical"; however, Appellant has clearly met the *Strickland* test. The facts surrounding this issue are not in dispute. The trial court found, "[i]t is not disputed that Mr.

Colette failed to advise Ware that if he was convicted of Murder that he could petition the court for conditional release pursuant to Miss. Code Ann. § 47-5-139(1)(a) once he reached the age of 65 and had served at least fifteen (15) years in prison." (C.P. 79, R.E. 64).

Because of Mr. Ware's age of 44 years, he will serve more time on his Second-Degree Murder guilty plea conviction and sentence than he might have served if he had been convicted and sentenced for First Degree Murder at trial. Had Mr. Ware's attorney not affirmatively misinformed Mr. Ware, he could have proceeded to trial, been convicted as charged, and possibly been better off than pleading guilty as he did. This clearly constitutes deficient performance on behalf of Mr. Ware's attorney.

Further, Mr. Ware was prejudiced by his attorney's deficient performance. The result of the proceeding would have been different if it weren't for counsel's mistaken advice because Mr. Ware stated under oath that he would have gone to trial had he known about the possible petition for conditional release and had he known that a sentence for Second Degree Murder was day for day and parole ineligible. Ware's PCR counsel asked Mr. Ware, "[i]f you had known that if you went to trial for first-degree murder and was found guilty, you would get a life sentence but could petition the Court for conditional release at age 65, would you have gone to trial?" to which Mr. Ware replied, "[y]es." (Tr. pg. 33). Further, and most importantly, Mr. Ware then testified that he would not have pled guilty if it weren't for counsel's mistaken advice surrounding his eligibility for conditional release if he were convicted at trial and counsel's mistaken advice that Second Degree Murder was a parole eligible crime. *Id.* Mr. Ware has met the *Strickland* test for ineffective assistance of counsel because he has shown both deficient performance and prejudice to his case. *Strickland v. Washington*, 466 U.S. 668.

CONCLUSION

Mr. Ware respectfully requests this honorable Court to grant the relief sought in his PCR, vacate his conviction and sentence and remand the matter to the trial court for placement back onto the trial docket.

RESPECTFULLY SUBMITTED THIS, the 1st day of March 2018.

/s/ Thomas M. Fortner
Thomas M. Fortner, Esq.
LOWREY & FORTNER, P.A.
525 Corinne Street
Hattiesburg, MS 39401

CERTIFICATE OF SERVICE

I, Thomas M. Fortner, certify that on this day I electronically filed (and mailed by United States Postal Service) the foregoing *Appellant's Reply Brief* with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Judge Joseph H. Loper
Circuit Court Judge
P.O. Box 616
Ackerman, Mississippi 39735

Doug Evans, Equire
District Attorney
P.O. Box 1262
Grenada, Mississippi 38902-1262

Jim Hood, Esquire
Attorney General for State of Mississippi
550 High Street, Suite 1200
Jackson, Mississippi 39205-5025

THIS, the 1st day of March 2018.

/s/ Thomas M. Fortner
Thomas M. Fortner, Esq.
LOWREY & FORTNER, P.A.
525 Corinne Street
Hattiesburg, MS 39401