IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-KA-00247-SCT

ANSEL BOSARGE, JR. AND EDDIE STEVE ELLIS

v.

STATE OF MISSISSIPPI

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-A

DATE OF JUDGMENT:	JANUARY 19, 1989
TRIAL JUDGE:	HON. ROBERT T. MILLS
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	ALBERT NECAISE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY	
NATURE OF THE CASE:	CRIMINAL - POST CONVICTION RELIEF
DISPOSITION:	AFFIRMED - 1/30/97
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE DAN LEE, C.J., PITTMAN AND ROBERTS, JJ.

ROBERTS, JUSTICE, FOR THE COURT:

STATEMENT OF THE CASE

Ansel Bosarge, Jr. was convicted in the Circuit Court of Jackson County, Mississippi, of one count of delivery of a controlled substance and one count of possession of a controlled substance with intent to distribute. Bosarge was sentenced as an habitual offender to sixty (60) years in prison without hope of parole for each of the two counts, those sentences to run consecutively.

Eddie Steve Ellis was convicted of one count of possession of a controlled substance with intent to distribute. Ellis was sentenced as an habitual offender to sixty (60) years without hope of parole in the custody of the Mississippi Department of Corrections.

On December 31, 1991, in ***Bosarge v. State***, 594 So. 2d 1143 (Miss. 1991), this Court unanimously affirmed the convictions and sentences of both Bosarge and Ellis. Bosarge and Ellis are presently

before the Court on a timely application seeking leave to proceed in the trial court claiming ineffective assistance of counsel.

DISCUSSION

Bosarge and Ellis had one counsel, George Shaddock, at trial and on direct appeal; therefore, this is the first effective, meaningful opportunity they have had in which to raise and present the claim of ineffective assistance of counsel. ***Wiley v. State***, 517 So. 2d 1373 (Miss. 1987); ***Perkins v. State***, 487 So. 2d 791 (Miss. 1986); ***Read v. State***, 430 So. 2d 832 (Miss. 1983).

As grounds for ineffective assistance of counsel Bosarge and Ellis raise several issues: (1) failure to make adequate preparations for trial, (2) advising Bosarge and Ellis not to accept plea bargains offered by State, (3) deficient performance at trial, and (4) conflict of interest resulting from counsel representing both Bosarge and Ellis. To support their contentions, both petitioners submitted sworn affidavits of specific facts within their knowledge. Additional affidavits of witnesses on Ellis' behalf were also submitted with the petition.

The two-prong test by which this Court considers a claim of ineffective assistance of counsel was established in ***Strickland v. Washington***, 466 U.S. 668 (1984). The ***Strickland*** test was used by this Court in ***Wiley v. State***:

> [F]irst, a defendant must show that counsel's performance was deficient by identifying specific acts and omissions. . .Secondly, a defendant must show that the deficient performance was prejudicial, that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.
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> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Wiley, 517 So. 2d at 1378-79.

The defense strategy seems to have been based on entrapment; however, defense counsel made very little effort prior to trial to gain testimony or evidence to support this theory. It appears from reading the transcript that Shaddock wanted to show that the marijuana involved in this case was supplied by the State's confidential informant, Duane Marks. While contending that Marks was a material witness whose testimony was needed at trial, Shaddock made no effort to locate Marks until the day of trial, although the defense had been granted a six months continuance precisely for that purpose. On direct appeal this Court recognized the lack of diligence on behalf of defense counsel in this regard, stating:

> The defendants got a continuance in July of 1988 because the informant was not available and spent six months doing nothing. They have had their one reasonable continuance, their one reasonable opportunity to employ their own resources to locate the informant. They did not file the motion at issue until the day before trial. There is nothing before us detailing the

> prosecution's efforts (or lack thereof) to produce Marks, and nothing suggests prosecutorial bad faith. More to the point, the record reflects substantial defense dilatoriness, such that we may not say the the [sic] Circuit Court abused its discretion when it denied the motion for a continuance.

Bosarge, 594 So. 2d at 1148.

Bosarge readily admitted selling the marijuana to an undercover officer. His only defense was entrapment. The undercover agent, Sandefer, testified that he did not know where the marijuana came from, but that it was not supplied to Marks by the State. Bosarge testified that the marijuana belonged to the confidential informant, Marks, and was hidden by Marks on the property where Ellis was arrested. The only person able to corroborate Bosarge's testimony was Marks, who had fled the state after Bosarge and Ellis were arrested. Shaddock's failure to try and locate Marks until the day of trial resulted in the petitioners having no defense.

Bosarge and Ellis allege a conflict of interests resulted in Shaddock defending them both. Bosarge claimed the defense of entrapment and testified to such at trial, while Ellis maintained his innocence throughout the proceedings, although he did not testify at trial. Bosarge also testified at trial that Ellis knew nothing of the marijuana found on property which the State claimed Ellis controlled.

Ellis claims that Bosarge's admission of his involvement allowed the jury to find him guilty by association. To support this contention Ellis points out that he was not present during any of the transactions between Bosarge and the undercover officer and that the only real evidence against him was that he was seen with Bosarge on the property where the marijuana was found.

Apparently, Shaddock did file a motion for severance on behalf of the petitioners on June 27, 1988. Neither the motion or a ruling thereon are in the clerk's paper's, although the motion for severance is listed on the docket sheet. There is no evidence that Shaddock made any other objection concerning the joint representation.

Joint representation is not prohibited per se, but defendants have a right to conflict-free representation. ***Armstrong v. State***, 573 So. 2d 1329, 1331 (Miss. 1990); ***Stringer v. State***, 485 So. 2d 274, 275 (Miss. 1986). In the case of criminal defendants, duplicitous representation "breeds unique dangers of which a court must be conscious." ***Armstrong***, 573 So. 2d at 1331; ***Wheat v. United States***, 486 U.S. 153, 160 (1988). A conflict between the defendants may prevent an attorney from doing certain things that could benefit one client because of a possible detriment to the other. *See* ***Armstrong***, 573 So. 2d at 1332. *See also* ***Holloway v. Arkansas***, 435 U.S. 475 (1978). "Once actual conflict is shown, prejudice is presumed." ***Sykes v. State***, 624 So. 2d 500, 503 (Miss. 1993); ***Armstrong***, 573 So. 2d at 1333.

In the case *sub judice* Bosarge was tried for delivery of marijuana and possession with intent to distribute. Ellis was only tried for possession with intent to distribute. Bosarge also admitted he knew the marijuana was hidden or at least that it was supposed to be hidden on the property the State claimed to be under Ellis' control. Both Bosarge and Ellis claim that Ellis knew nothing about the marijuana. Since Bosarge claimed that the marijuana belonged to the confidential informant, Marks, and was hidden on the property by him, Ellis claims he was unable to argue his theory that Bosarge had free access to the property and could have hidden the marijuana there without Ellis' knowledge.

This was a plausible alternative theory; however, the failure by the attorney to present that theory was a judgment call of trial strategy, not ineffective assistance of counsel. It appears that the attorney was trying to present a consistent factual situation that incorporated both defendants' stories (i.e. Bosarge knew the drugs were to be hidden, while Ellis did not, and that Bosarge was entrapped by the police).

The other alleged conflict between the two defendants was that Bosarge claimed entrapment, while Ellis maintained his complete innocence. It was incumbent upon their counsel to try and make it clear to the jury that Ellis was not involved in the delivery of the marijuana and convince them that he had no knowledge of the marijuana found on the property. Defense counsel had to try and convince that same jury that Bosarge's participation was a result of entrapment by the authorities. These differing theories do not rise to the level of a conflict. Bosarge testified that Ellis did not know of the drugs, and that he was entrapped. There is not anything between those two theories that is contradictory.

Bosarge and Ellis had differing theories that were **not** conflicting **nor** codependant on each other. Where there is a showing of a conflict between the theories or interests of multiple defendants, in this case Bosarge and Ellis, prejudice must be presumed. *See* ***Sykes***, 624 So. 2d at 503. In this case the theories of the defendants were separate and distinct, not inconsistently codependant such that a conflict might result. Where there is no conflict, there is no prejudice absent some showing by the defendants. The defendants have failed to show how they were prejudiced by the tactical strategies of their counsel at trial.

The petitioners argue a complete lack of pre-trial investigation by attorney Shaddock. As evidence of this they state that the owner of the property where the marijuana was found and Ellis was arrested was never interviewed or called to testify. The petitioners do not show how this prejudiced either of them in any way, as they are required to do under the second prong of the ***Strickland*** test. Therefore, this assignment of error is without merit.

Bosarge claims that Shaddock met with him on only two occasions for about ten minutes both times. Ellis claims that Shaddock conferred with him very briefly on only three occasions. They go on to claim that the information they provided to Shaddock at these meetings was not acted upon. The petitioner's do not say what information they gave to Shaddock nor how they were prejudiced by his failure to act upon it. Without a showing of prejudice, the petitioners have not met their burden under ***Strickland***. This assignment of error is without merit.

Attached to the petition were a number of affidavits of potential witnesses which Ellis argues should have been called to testify at trial. The affidavits are primarily character references on behalf of Ellis and statements that the land where Ellis was arrested was used by him for hunting and as a military-type survival camp. Shaddock's failure to call these witnesses at trial can be considered merely a strategic decision.

Bosarge and Ellis list several other grounds to support their contention of ineffective assistance of counsel. However, the petitioners have failed to meet the two-pronged ***Strickland*** test on these remaining issues.

CONCLUSION

Bosarge's and Ellis' application to seek post-conviction relief in the Jackson County Circuit Court is denied based on a failure to meet both the requirements of ***Stickland***, and a failure to show prejudice in their claims of ineffective assistance of counsel.

APPLICATION FOR POST CONVICTION RELIEF DENIED.

LEE, C.J., PITTMAN, McRAE, SMITH AND MILLS, JJ., CONCUR. BANKS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY PRATHER AND SULLIVAN, P.JJ.

BANKS, JUSTICE, DISSENTING:

Once again I am constrained to note that we misperceive our task when we treat petitions for leave to file post-conviction relief claims for ineffective assistance of counsel as if the question of performance and prejudice are for determination by this Court. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996); *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990) (Evidentiary hearing on the merits of an effective assistance of counsel issue conducted by lower court). This should be a trial court function in the first instance. Our task is to determine whether there is a colorable claim. I believe that there is one here and I would permit it to be filed in the trial court. *See Foster v. State*, 95-DP-00750-SCT (Miss., May 16, 1996) (Banks, J., dissenting); *Conner v. State*, 94-DP-01210-SCT (Miss., June 26, 1996) (Banks, J., dissenting).

PRATHER AND SULLIVAN, P.JJ., JOIN THIS OPINION.