

IN THE COURT OF APPEALS 1/14/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01134 COA

MICHAEL HEARN A/K/A MICHAEL H. HEARN A/K/A MICHAEL HENRY HEARN

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROGERS J. DRUHET, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCROY

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT; SENTENCED TO SERVE TWENTY YEARS IN THE MDOC WITH ONE YEAR SUSPENDED AND FIVE YEARS ON PROBATION

BEFORE THOMAS, P.J., BARBER, AND McMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

Counsel for Hearn takes less than one page of his brief, two lines to be exact, to make the statement that "While I do not believe that any reversible error occurred during this trial I nevertheless request that this court review the transcript in order to determine whether the verdict is consistent with the evidence, and also sua sponte determine whether a clear reversible error occurred." Besides this declaration, counsel makes the general statement that Hearn is indigent and has the right to appeal. Hearn's brief contains neither argument nor supporting authority. Failure to cite to legal authority bars any consideration of the assigned error. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citing *Brown v. State*, 534 So. 2d 1019, 1023 (Miss. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Shive v. State*, 507 So. 2d 898, 900 (Miss. 1987); *Pate v. State*, 419 So. 2d 1324, 1326 (Miss. 1982)). Notwithstanding this procedural bar there was sufficient evidence to convict Hearn.

Our standard of review in determining the sufficiency of the evidence has been stated many times.

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Hearn's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. [The Supreme Court of Mississippi] [is] authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain, 625 So. 2d at 778 (citations omitted).

With this standard in mind, our focus turns on whether there was substantial evidence in the record for a jury to find Hearn guilty of aggravated assault. Although Hearn testified that he stabbed Mr. Dubose in self-defense, Mr. Dubose testified that it was Hearn that was the aggressor. Giving the prosecution the benefit of all favorable inferences that may be reasonably drawn from the evidence, one can infer that Hearn was guilty of aggravated assault. It was for the jury to determine whether Hearn was acting in self-defense or was the aggressor. We will not invade the province of the jury. Therefore, after considering the evidence in the light most consistent with the verdict, there is ample evidence upon which fair-minded and reasonable jurors could have found Hearn to be guilty beyond a reasonable doubt.

Hearn, pro se, filed a "statement of grounds" in response to his attorney's submitted brief, alleging that his attorney was ineffective. The "statement of grounds" filed by Hearn consists of cursory and conclusory allegations. A defendant has to show that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). It is required that the defendant prove both elements. *Brown v. State*, 626 So. 2d 114, 115 (Miss. 1993); *Wilcher v. State*, 479 So. 2d 710, 713 (Miss. 1985), *cert. denied*, 475 U.S. 1098 (1986). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.

Read v. State, 430 So. 2d 832, 841 (Miss. 1983).

This Court concludes that Hearn did not show that his counsel was constitutionally ineffective in his conclusory allegations. However, in so holding, Hearn has the "right to raise the ineffective assistance claim via appropriate post-convictions proceedings." *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990) (citing *Read*, 430 So. 2d at 841).

Lastly, we take note that Hearn's attorney, Mr. Rogers Druhet, III, stated that he felt there was no reversible error and after a review of the record, we agree. However, as Mr. Druhet noted, appointed trial counsel is to continue as the defendant's counsel on appeal unless otherwise relieved. Miss. Sup. Ct. R. 6(b)(1); Miss. Code Ann. §99-35-101 (1994). Mr. Hearn wanted to appeal and Mr. Druhet felt otherwise. Notwithstanding this disagreement, Mr. Druhet correctly followed Miss. Sup. Ct. R. 6(b)(1) and complied with Mr. Hearn's right to appeal.

THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF MICHAEL H. HEARN OF THE CRIME OF AGGRAVATED ASSAULT AND SENTENCE TO SERVE TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH ONE YEAR SUSPENDED AND FIVE YEARS PROBATION, AND FINE OF \$2,500, IS AFFIRMED. COSTS ARE TAXED TO LAUDERDALE COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.