

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID CLAUDE BUSBY

APPELLANT

VS.

NO. 2006-CP-1483-COA

STATE OF MISSISSIPPI

APPELLEE

FILED

JUN 07 2007

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SUPREME COURT
COURT OF APPEALS**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	2
THE ARGUMENT	3
I. AND II.	
THE TRIAL COURT COMMITTED NO ERR. APPELLANT HAD SUFFICIENT ASSISTANCE OF COUNSEL.	3
III.	
THE TRIAL COURT DID NOT ERR IN SUMMARILY DISMISSING THE PETITION WITHOUT AN EVIDENTIARY HEARING.	6
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984) 4, 5

STATE CASES

Alexander v. State, 759 So.2d 411 (Miss. 2000) 7

Billiot v. State, 655 So.2d 1, 12 (Miss.1995) 7

Burch v. State, 929 So.2d 394, 398 (Miss. App. 2006) 3, 8

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) 2, 3

Genry v. State, 735 So.2d 186, 201 (Miss. 1999) 2, 4

Hansen v. State, 592 So.2d 114, 153 (Miss. 1991) 2, 4

Horton v. State, 584 So.2d 764, 767 (1991) 5

Jenkins v. State, 607 So.2d 1171, 1183-84 (Miss. 1992) 2, 4

King v. State, 857 So.2d 702 (Miss. 2003) 6

Kirksey v. State, 728 So.2d 565, 567 (Miss.1999) 3, 6

Leverett v. State, 197 So.2d 889, 890 (Miss. 1967) 7

McFee v. State, 511 So.2d 130, 136 (Miss. 1987) 3, 4

Patterson v. State, 594 So.2d 606, 609 (Miss.1992) 7

Rochell v. State, 748 So.2d 103, 110 (Miss. 1999) 7

Shelton v. Kindred, 279 So.2d 642, 643 (Miss. 1973) 5

Stevenson v. State, 798 So.2d 599, 602 (Miss. App. 2001) 4

Stringer v. State, 627 So.2d 326, 329 (Miss. 1993) 4

Taylor v. State, 766 So.2d 830, 832 (Miss. App. 2000) 3, 6

STATE STATUTES

Miss. Code Ann. § 97-5-23 (1972)	1
Miss. Code Ann. § 99-39-11(2) (2000)	3, 8
Miss. Code Ann. § 99-39-23(7) (1972)	7

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APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal from the denial of Post - Conviction Collateral Relief Act of the Circuit Court of Clarke County, Mississippi, in which the Appellant, David Claude Busby, pled guilty and was sentenced for the felony crime of **LUSTFUL TOUCHING OF A CHILD**, Miss. Code Ann. § 97-5-23 (1972).

STATEMENT OF FACTS

The Appellant, David Claude Busby (Busby), was indicted on February 24, 2005, on charges of Sexual Battery in Clarke County Cause Number 2005-07. He was also indicted on June 30, 2004, in Wayne County Cause Number 04-175-K on a charge of Fondling of a child. The Appellant filed a Petition to Enter Plea of Guilty in Wayne County Cause Number 04-175-K on March 7, 2005, requesting to enter a plea of guilty to the charge of lustful touching of a minor in the blind or as an open plea. The Appellant also filed a Petition to Enter Plea of Guilty in Clarke County Cause Number 2005-07 on March 7, 2005, requesting to enter a plea of guilty to the charge of lustful touching of a minor in the blind or an open plea. The Court conducted the guilty plea hearings on

both of these charges at one time on March 7, 2005, in Wayne County. The Court conducted a sentencing hearing on May 10, 2005, in Clarke County, wherein the Court sentenced the Appellant to serve fifteen years in the custody of the Mississippi Department of Corrections, with eight years suspended, seven years to serve and five years reporting probation in each cause to be served concurrently.

SUMMARY OF THE ARGUMENT

I. AND II.

THE TRIAL COURT COMMITTED NO ERR. APPELLANT HAD SUFFICIENT ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record. The standard of performance used is whether counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct.

Uniform Circuit and County Court Rules 8.04 (A)(3) states that:

Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that a plea of guilty was voluntarily and intelligently made must appear in the records.

The State's response to Garner's cumulative error argument is found in Genry v. State, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. Jenkins v. State, 607 So.2d 1171, 1183-84 (Miss. 1992); Hansen v. State, 592 So.2d 114, 153 (Miss. 1991). However, where

“there was no reversible error in any part, so there is no reversible error to the whole.” McFee v. State, 511 So.2d 130, 136 (Miss. 1987).

III.

THE TRIAL COURT DID NOT ERR IN SUMMARILY DISMISSING THE PETITION WITHOUT AN EVIDENTIARY HEARING.

The State contends as was held in Burch v. State, 929 So.2d 394, 398 (Miss. App. 2006) that the trial court may summarily dismiss a PCR “[i]f 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....” Miss. Code Ann. § 99-39-11(2) (2000).

The court’s order is not subject to reversal “absent a finding” that it “was clearly erroneous.” Taylor v. State, 766 So.2d 830, 832 (Miss. App. 2000), citing Kirksey v. State, 728 So.2d 565, 567 (Miss.1999).

THE ARGUMENT

I. AND II.

THE TRIAL COURT COMMITTED NO ERR. APPELLANT HAD SUFFICIENT ASSISTANCE OF COUNSEL.

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The State's response to Busby's cumulative error argument is found in Genry v. State, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. Jenkins v. State, 607 So.2d 1171, 1183-84 (Miss. 1992); Hansen v. State, 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." McFee v. State, 511 So.2d 130, 136 (Miss. 1987).

Furthermore, this Court is charged with a review of the totality of counsel's performance and the demonstration of resulting prejudice. Stringer v. State, 627 So.2d 326, 329 (Miss. 1993). Mere allegations are insufficient.

In Stevenson v. State, 798 So.2d 599, 602 (Miss. App. 2001), the Court's standard for the determination of ineffective assistance of counsel is as follows:

The standard for determining whether or not a defendant was afforded effective assistance of counsel was set out in the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984). Before counsel can be determined to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by his counsel's mistakes... Under Strickland, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different. A reasonable probability is sufficient to undermine confidence in the outcome. Strickland. 446 U.S. at 684, 104 S. Ct. at 2068.

There is no indication in the record other than the allegations of the Appellant that performance of the counsel fell below the standards as defined by Strickland. In fact the record supports the exact opposite.

On appeal this Court must confine itself to what actually appears in the record, and unless provided otherwise by the record, the trial court will be presumed correct. Shelton v. Kindred, 279 So.2d 642, 643 (Miss. 1973). Busby has not presented a claim procedurally alive "substantially showing denial of a state or federal right" and as is apparent from the face of the motion and from the prior proceedings, he was not entitled to any relief. Horton v. State, 584 So.2d 764, 767 (1991).

Clearly, judging on the totality of the performance of counsel there was no merit to the Appellant's claim that he was denied effective assistance of counsel. Counsel is required to be competent and not flawless.

The substantive principles of law relative to this issue are found in the familiar case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was not only deficient, but that said deficient performance prejudiced the defense. The State submits that it simply cannot be maintained from the record in this case that counsel's assistance was ineffective, and that ineffective assistance should have been apparent to the trial court, which would then have had the duty to declare a mistrial or to order a new trial *sua sponte*.

The trial court below stated:

The Petitioner chose to go forward with the guilty plea hearing. The Court then found on the record that the Petitioner had "entered a free, voluntary, intelligent plea of guilty." Transcript of Guilty Plea Hearing p. 18. The Petitioner did not object during the hearing that his counsel failed to inform him that he would have to go into custody that day. His sole complaint was to the Court in the form of a statement that it was his understanding that he could remain out on bond pending sentencing.

The Transcript of Guilty Plea Hearing and the Sentencing Hearing belie the assertions of the Motion for Post Conviction Collateral Relief that state that the Petitioner received ineffective assistance of counsel. The Transcript shows that the Court took the time and the effort to ensure that the Petitioner truly did want to enter his guilty plea that day and that he did in fact do so freely, knowingly and intelligently. (R. E. 32 - 33).

Below is what the trial court said regarding when the Appellant should start serving his

prison sentence:

The sole issue raised by the Petitioner's Motion for Post Conviction Collateral Relief is that his counsels' failure to advise him that he would have to go into custody on the day his guilty plea hearing somehow resulted in his receiving ineffective assistance of counsel. This Court cannot fathom how such a defect if it did in fact occur would have affected Petitioner's decision one way or another. He either wanted to plead guilty that day or he did not. The Court went over the Petitioner's rights with him in detail during the guilty plea hearing. The Court was within its discretion in deciding to have the Petitioner placed into custody on the day of the guilty plea hearing. (R. E. 30).

Judgements of the trial courts come to the [appellate] court clothed with a presumption of correctness, and it is the burden of the appellant to overcome that presumption. King v. State, 857 So.2d 702 (Miss. 2003).

Contrary to Appellant's suggestion otherwise, we respectfully submit that this is not a proper case for application of the doctrine of either "cumulative" or "plain" error. Nothing in the record evinces any error. Busby alleges that errors on a constitutional magnitude occurred during his plea negotiation, plea hearing, and sentencing; however, nothing in the record points to this as a matter of fact, the record points the opposite way. (Appellant Brief 6). The record shows a clear and conscious trial court methodically caring for the rights of Busby.

These issues brought by the Appellant are therefore lacking in merit.

III.

THE TRIAL COURT DID NOT ERR IN SUMMARILY DISMISSING THE PETITION WITHOUT AN EVIDENTIARY HEARING.

The court's order is not subject to reversal "absent a finding" that it "was clearly erroneous." Taylor v. State, 766 So.2d 830, 832 (Miss. App. 2000), citing Kirksey v. State, 728 So.2d 565, 567 (Miss.1999). Having reviewed Busby's motion for post-conviction collateral relief, the case file, and the transcript in conjunction with the applicable legal authorities, the circuit court found that it should be summarily denied.

Appellant contends that he was denied due process because his plea conviction lacked sufficient factual basis to demonstrate guilt of knowledge, voluntariness, and intelligence to plead guilty because he alleges that he would have gone to trial had he known that he would have to surrender himself that day. (Appellant Brief 9). The Court was within its discretion in deciding to have the Petitioner placed into custody on the day of the guilty plea hearing. (R. E. 30). Busby knew this and agreed to it. The Court was within its discretion in deciding to have the Petitioner placed into custody on the day of the guilty plea hearing. (R. E. 30).

Furthermore, he overlooks the fact that this Court is an **appellate** court. In the recent case of Alexander v. State, 759 So.2d 411 (Miss. 2000), at ¶ 35, the Supreme Court quoted from the case of Leverett v. State, 197 So.2d 889, 890 (Miss. 1967), in holding, in pertinent part, as follows:

"The Supreme Court is a court of appeals, it has no original jurisdiction, it can only try questions that have been tried and passed upon by the court from which the appeal is taken." Accord: Patterson v. State, 594 So.2d 606, 609 (Miss.1992).

The State assumes *arguendo*, however, that Busby intended to argue that the lower court committed reversible error in failing to find that his post-conviction motion had merit. Such an argument must surely fail. The burden is not on the State, but on the one who is challenging the guilty plea, viz., Busby. Pursuant to Section, Mississippi Code Annotated § 99-39-23(7) (1972), as amended, of the Mississippi Uniform Post-Conviction Collateral Relief Act:

No relief shall be granted under this chapter unless the prisoner proves by a preponderance of the evidence that he is entitled to such. Accord: Rochell v. State, 748 So.2d 103, 110 (Miss. 1999); Billiot v. State, 655 So.2d 1, 12 (Miss.1995). If the prisoner loses in the lower court, he must show on appeal that the lower court's ruling is clearly erroneous. Rochell v. State, *supra*, 748 So.2d at 109.

Accordingly, it was Busby's burden in the lower court to show that he was entitled to the

relief he requested. He made no such showing. Similarly, it is Busby's burden on appeal to show that the lower court's ruling on his motion is clearly erroneous. He makes no such showing.

The State contends as was held in Burch v. State, 929 So.2d 394, 398, (Miss. App. 2006) that the trial court may summarily dismiss a PCR “[i]f 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” Miss. Code Ann. § 99-39-11(2) (2000).

In short, there is no record evidence that the Appellant could not or did not understand, lack knowledge, of the legal proceedings in this case. The lower court questioned him extensively regarding his knowledge of both the crimes charged and the consequences of pleading guilty to those crimes. In short, the record plainly belies Busby’s instant claim that his plea was anything but voluntarily and intelligently (knowingly) made.

For these reasons and the reasons stated in Propositions I and II, the state submits the circuit court properly denied Busby’s motion without a hearing.

This issue brought by the Appellant is therefore lacking in merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deshun T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert Walter Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, MS 39302

Honorable E. J. (Bilbo) Mitchell
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This the 7th day of June, 2007.



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