

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALEJANDRO AQUIRRE MORENO

FILED

APPELLANT

JUN 18 2007

VS.

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

NO. 2006-CP-1859

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**ALEJANDRO AQUIRRE MORENO
A/K/A ARTURO EURIQUEZ MORENO**

APPELLANT

vs.

CAUSE No. 2006-CP-01859-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Lamar County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner was indicted on 3 March 2005 for the felonies of DUI manslaughter and two counts of DUI mayhem. (R. Vol. 1, pp. 2 - 3).

On 5 August 2005, the prisoner filed a petition to enter a guilty plea to the charges set out in the indictment. (R. Vol. 1, pp. 4 - 7). The petition was taken up that same day, and the usual colloquy then ensued, albeit with the services of an interpreter for the benefit of the prisoner. (R. Vol. 1, pp. 14 - 37). The prisoner's pleas were accepted and he was convicted of the charges set out in the indictment and sentenced thereon. (R. Vol. 1, pp. 8 - 11).

On 20 September 2006, the prisoner filed a motion in post - conviction relief. He asserted six grounds for relief, including a claim of ineffective assistance of counsel concerning

his attorney, Ed Pittman. (R. Vol. 1, pp. 46 - 56). Relief was denied on this motion, without an evidentiary hearing, on 21 September 2006. (R. Vol. 1, pp. 142 - 145). The prisoner then filed a notice of appeal on 20 October 2006. (R. Vol. 2, pg. 146).

STATEMENT OF ISSUES

DID THE CIRCUIT COURT ERR IN DISMISSING THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where it plainly appears from the motion and papers related to his conviction that he is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Rev. 2000). This Court will not disturb a Circuit Court's decision in this regard unless its decision is clearly erroneous. *Jones v. Sate*, 949 So.2d 872 (Miss. Ct. App. 2007). The Circuit Court was clearly correct in dismissing the prisoner's motion.

The prisoner's first issue in the Circuit Court and here is that the State violated the proscriptions against double jeopardy by indicting him for the felonies of "DUI manslaughter" and "DUI mayhem". The prisoner admits that he killed one person and injured two other persons in consequence of a car accident. The prisoner further admits that he was drunk at the time of the accident and that he was driving the car that collided with the other.

The Circuit Court, citing *Blockburger v. United States*, 284 U.S. 299 (1932), correctly found that, while the offenses arose from a single incident, they were not one offense, for purposes of double jeopardy. The court went on to note the different elements of the offenses. (R. Vol. 1, pp. 143 - 144). The court was correct in its analysis, and we adopt it here. Manslaughter and mayhem are distinctly different crimes. As for the two counts of mayhem, there were two victims, thus resulting in two felonies of mayhem. Double jeopardy is not a kind of “blue light special” in which an accused, having the foresight or fortune to commit two or more felonies at the same time or in close proximity in time, gets two or more offenses for the price of one. *Wright v. State*, 540 So.2d 1, 5 (Miss. 1989).

The next issue the prisoner sets out is a claim that his attorney was a municipal judge for the City of Hattiesburg, had something to do with the setting of the prisoner’s bond, and yet also represented the prisoner. (Brief for the Appellant at 6 - 7). We do not find that this complaint was raised in the mass of paper filed in the Circuit Court. Consequently, the issue cannot be raised here. *Plummer v. State*, No. 2005-CP-01885-COA (Miss. Ct. App., Decided 20 March 2007, Not Yet Officially Reported). There is, in any event, nothing at all in the record to support the contention.

The prisoner then says that his attorney was ineffective for having failed to assert a speedy trial issue. The prisoner was advised of his right to a speedy trial. (R. Vol. 1, pg. 21). The prisoner’s plea of guilty acted as a waiver of any purported speedy trial violation. *Epps v. State*, 926 So.2d 242 (Miss. Ct. App. 2005). It was the prisoner’s decision to enter pleas of guilty despite the fact that there might have been defenses available to him. (R. Vol. 1, pg. 33). In any event, the prisoner, in his post - conviction relief filing in the Circuit Court, failed to assert facts in support of a speedy trial claim.

As for the balance of the ineffective assistance of counsel claims presented here, some, it appears, were not alleged in the filing in Circuit Court. None of them were supported by anything more than the prisoner's say - so. An ineffective assistance of counsel claim will not be regarded as a well - pleaded claim where it is supported by nothing more than a prisoner's affidavit. *Elliot v. State*, 939 So.2d 824 (Miss. Ct. App. 2006). We also note that the prisoner professed himself well satisfied with his attorney's performance in the course of the plea colloquy. (R. Vol. 1, pg. 21). This statement, made under oath, is a sufficient rebuttal to the post - conviction claims to the contrary.

The prisoner then claims that his plea was involuntary. He says that he proclaimed his innocence in the course of the plea. This claim does not appear to have been raised in the Circuit Court; it may not be raised here. As a factual matter, while it is true that the prisoner did at one point say something to the effect that he was not guilty, when the State described the evidence it would present against him, the prisoner admitted the truth of the State's evidence. It appears that the only thing the prisoner wished to contest was whether he ran from law enforcement. Otherwise, he admitted that he was driving while drunk, and that he was drunk when the accident occurred. (R. Vol. 1, 28 - 32).

The prisoner then says that he was not informed of the minimum and maximum sentences available. He was. (R. Vol. 1, pg. 25). The prisoner was also informed of the elements of the charges against him, including the "DUI mayhem" charges. (R. Vol. 1, pp. 7; 33).

The prisoner claims that the State failed to establish that the mayhem victims sustained permanent injuries. The State, however, was only required to establish a factual basis for the pleas. It was not required to establish a case beyond a reasonable doubt as to every element of the crimes, given the fact that the prisoner was pleading guilty. *Lawson v. State*, 882 So.2d 783

(Miss. Ct. App. 2004). The prisoner waived any alleged insufficiency in this respect by his pleas of guilty.

The prisoner then complains that he was not given a proper *Miranda* warning at the time of his arrest. This complaint was waived by the pleas of guilty. *Garner v. State*, 864 So.2d 1005 (Miss. Ct. App. 2004).

The prisoner then complains that his attorney was not present at the time of sentencing. The attorney was present. (R. Vol. 1, pp. 39 - 40).

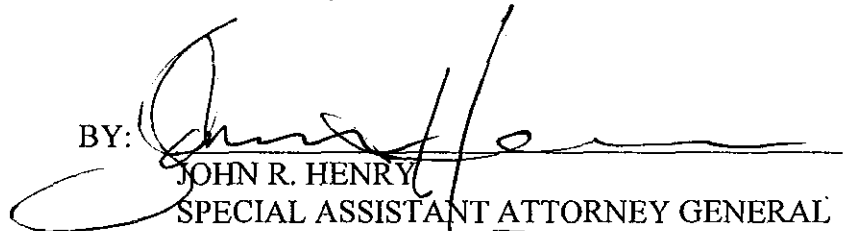
CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

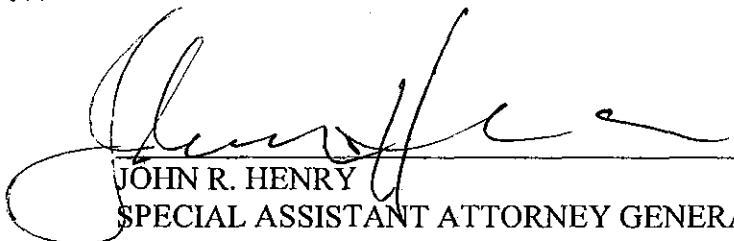
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 18th day of June, 2007.


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