

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**VERNELL SAGO**

**APPELLANT**

**VS.**

**FILED**  
**OCT 05 2007**  
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SUPREME COURT  
COURT OF APPEALS

**NO. 2006-CP-1881**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE COURT OF APPEALS OF MISSISSIPPI**

**VERNELL SAGO, A/K/A VARNELL SAGO,  
A/K/A VERNALL SAGO**

**APPELLANT**

**VERSUS**

**NO. 2006-CP-01881**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

On or about August 1, 2005, Vernell Sago pleaded guilty in the First Judicial District of the Circuit Court of Hinds County to a charge of business burglary and was sentenced to a term of five years in the custody of the Mississippi Department of Corrections with two years' supervised probation upon release. (C.P.24) On February 17, 2006, Sago filed in the circuit court a motion for post-conviction collateral relief, which was dismissed summarily on October 12, 2006. (C.P.2, 47) Aggrieved by the judgment entered against him, Sago has perfected an appeal to this Court.

**SUMMARY OF THE ARGUMENT**

No error has been shown in the circuit court's summary dismissal of Sago's motion.

**PROPOSITION:**

**NO ERROR HAS BEEN SHOWN IN THE CIRCUIT COURT'S  
SUMMARY DISMISSAL OF SAGO'S MOTION FOR POST-  
CONVICTION COLLATERAL RELIEF**

In the motion filed below, Sago raised four grounds for post-conviction collateral relief: 1) that the court had erred in granting the state's motion to amend the indictment to charge him with business burglary rather than house burglary; 2) that the court erred in sentencing him to two years' supervised probation, because as a convicted felon he was not eligible for probation; 3) that his plea had been made involuntarily; specifically, that it had been induced by his counsel's promise of a lighter sentence; and 4) that his counsel rendered ineffective assistance. (C.P.3) The circuit court dismissed this motion with findings and conclusions set out below in pertinent part:

THIS CAUSE came on to be heard on the *pro se* Petitioner, Vernell Sago's, Motion for Post-Conviction Relief, ... together with all motions, exhibits and prior proceedings in the case relating to the judgment under attack, and it plainly appears from the face of the motion in the present case that the Petitioner, after careful deliberation, is not entitled to the relief requested. Specifically, the Court finds:

1. The amendment of the indictment from house burglary ... to business burglary... is without error as alleged by the Petitioner. Upon entering a plea of guilty, the Petitioner waives any alleged flaws in the indictment. *Matthews v. State*, 761 So.2d 934 (Miss. Ct. App. 2000).

2. The Court did not commit reversible error in sentencing Petitioner to five years to serve and two years supervised probation upon release when the Defendant is a previously convicted felon. While Miss. Code Ann. § 47-7-33 limits the power of the Court to suspend the imposition or execution of a sentence, and place the defendant on probation when the defendant has been convicted of a felony on a previous occasion, in this instance, the error benefits the Petitioner in the form of a lenient sentence which is harmless. *Chancellor v. State*, 809 So.2d 700 (Miss. Ct. App. 2001). The

right to be free from illegal sentences applies to sentences where the defendant suffers a greater sentence than the luxury of a lesser sentence. *Id.*

3. The Petitioner's claim that his entry of a guilty plea was involuntarily made is without merit. The Petitioner has the burden of proving by a preponderance of the evidence that his plea of guilty was entered involuntarily, and his burden of proof cannot be met by simply showing "a mere expectation of hope, however reasonable, of a lesser sentence." *State v. Santiago*, 773 So.2d 921 (Miss.2000). Additionally, pursuant to Rule 8.04 of the U.R.C.C.C., a plea bargain is merely a recommendation to the Court for a particular sentence and is not binding upon the Court.

4. The evidence provided by the Petitioner is insufficient to make a showing of ineffective assistance of counsel under the stringent two-prong standard provided in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

(emphasis added) (C.P.47-48)

This ruling is not subject to reversal absent a finding that it is clearly erroneous. *Noel v. State*, 943 So.2d 768, 770 (Miss. App. 2006). The state submits the court's ruling embodies a correct interpretation of the pertinent statutes and case law. No error has been shown in the court's conclusion. The circuit court properly found that this motion was facially devoid of merit and dismissed it without a hearing.

With respect to the first claim for relief, the state contends the circuit court properly concluded that the challenge to the amendment of the indictment had been waived. "[A] valid guilty plea admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment or information against a defendant." *Truitt v. State*, 958 So.2d 299, 300 (Miss. App. 2007), quoting *Reeder v. State*, 783 So.2d 711, 720 (Miss.2001).

Moreover, *Ford v. State*, 911 So.2d 1007 (Miss. App. 2005), demonstrates that Sago's claim is substantively meritless as well. In that case, the defendant originally was charged with burglary of a dwelling, but pleaded guilty to an amended indictment charging him with burglary of a building other than a dwelling. Having held that Ford's challenge to the indictment had been waived by his guilty plea, this Court went on to find that the amendment was one of form rather than substance and thus did not prejudice the defendant. The state submits *Ford* is directly on point here. For these reasons, no error can be shown in the court's summary dismissal of Sago's first claim for relief.

Regarding the second argued ground for relief, the state submits the circuit court correctly found that it was facially devoid of merit. "[T]here is no prejudice suffered when a defendant receives an illegally lenient sentence." *Ausbon v. State*, 959 So.2d 592, 595 (Miss. App. 2007) . As the court aptly noted, "The law which relieves defendants from the burden of an illegal sentence applies to situations where the defendant is forced to suffer a greater sentence rather than the luxury of a lesser sentence " *Chancellor v. State*, 809 So.2d 700, 702 (Miss. App. 2001). The circuit court did not err in summarily dismissing Sago's second claim for relief.

With respect to the third and fourth claims for relief, the court found that Sago had failed to sustain his burden of showing that he was entitled to a hearing on his challenges to the voluntariness of his plea and the assistance of his counsel.

The state reiterates that the circuit court's judgment comes before this Court cloaked with the presumption of correctness. "Our law presumes that the judgment of the trial court is correct, and the appellant has the burden of demonstrating some reversible error to this Court." *Buice v. State*, 751 So.2d 1171, 1173 (Miss. App. 1999) (upholding denial of

motion for post-conviction relief), citing *Pierre v. State*, 607 So.2d 43, 48 (Miss.1992). Likewise, the appellant, the "party seeking reversal of the judgment of a trial court[,] must present this Court with an adequate record to show that reversible error has been committed." *Crawford v. State*, 716 So.2d 1028, 1040 (Miss.1998). "The result of appellant's failure to present a full record here is that the "presumption of correctness stands un rebutted." *McKnight v. State*, 738 So.2d 312, 316 (Miss. App. 1999), quoting *Smith v. State*, 572 So.2d 847, 849 (Miss.1990). See also *Jones v. State*, 878 So.2d 254, 256 (Miss. App. 2004) (argument rejected where appellant failed to "include in the appellate record any documentary support" therefor).

Having failed to sustain his duty to provide a transcript of his guilty plea proceeding, Sago cannot show error in the court's findings. See *Truitt*, 958 So.2d at 300. The court's order dismissing this motion states affirmatively that the court reviewed motions, exhibits and prior proceedings in this case and determined that the motion for post-conviction collateral relief was facially devoid of merit. There is nothing in this record to refute that ruling, which is presumed to be correct. Accordingly, the judgment entered below should be affirmed.

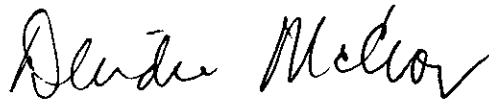


**CONCLUSION**

The state respectfully submits that no error has been shown in the circuit court's dismissal of Sago's motion for post-conviction collateral relief. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL  
STATE OF MISSISSIPPI**



BY: DEIRDRE McCRORY  
SPECIAL ASSISTANT ATTORNEY GENERAL

## CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 5th day of October, 2007.

  
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