IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GENARRO D. SHUMPERT — APPELLANT



VS. — NO. 2006-CP-2164

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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## STATEMENT OF ISSUES

**PROPOSITION ONE** Shumpert waived his right to trial and his right to appeal any errors in the aborted trial proceedings held prior to his guilty plea. Further, he is unable to meet the burden of showing he received ineffective assistance of counsel at trial or than he suffered any prejudice and the trial court was correct in denying his motion for post conviction relief.

**PROPOSITION TWO** Shumpert has waived his right to object to the trial court's denial of recusal. Further, the trial court did not abuse his discretion in declining to recuse himself.

## STATEMENT OF THE CASE

On or about April 16th of 2004 the Lee County Grand Jury returned indictments against the Appellant, Genarro Shumpert and Kenneth Lee Traylor for events occurring February 12, 2004. Shumpert and Traylor were charged with three counts of kidnapping, one count of aggravated assault, one count of burglary of a dwelling, one count of armed car jacking, three counts of armed robbery. There were three victims to the crime. According to the record at the sentencing hearing, Shumpert and Traylor went to the victims' home, captured them, abused them, stole their clothes and

abandoned them naked in a field.

Shumpert initially went to trial, a jury was selected and the State put on two witnesses. Shumpert then determined to plead guilty to all charges. At the plea hearing on February 22, 2005, he waived his right to trial and made an open plea with a recommendation from the prosecutor. Shumpert also agreed to testify in Traylor's trial. The trial court accepted Shumpert guilty plea to each of the nine charges finding that Shumpert knowingly, understandingly, freely and voluntarily entered each of the pleas of guilty. The court also made a finding that there was a factual basis for each guilty plea.

On September 21, 2005, Shumpert was sentenced to as follows:

| | |
|---|---|
| Count I | 30 years |
| Count II | 30 years |
| Count III | 30 years |
| Count IV | 20 years |
| Count V | 25 years |
| Count VI | 30 years |
| Count VII | 40 years |
| Count VIII | 40 years |
| Count IX | 40 years |

(T. 51)

All sentences were to run consecutively and the Trial Court imposed the 40 years in each of those sentences. (T. 51)

On August 31, 2006, Shumpert filed his Motion for Post-Conviction Collateral Relief. The trial court denied same on December 27, 2006. The instant appeal ensued.

## SUMMARY OF THE ARGUMENT

Shumpert argues that his plea was involuntary or coerced because of ineffective assistance of counsel during his trial. Specifically he argues that his attorney rendered ineffective assistance

by failing to object to an all white jury. Shumpert waived his rights to object to any errors at trial when he plead guilty. Thus, this assignment of error is without merit and the Trial Court's order denying Shumpert's Motion for Post Conviction Collateral Relief should be upheld. Further, even address this issue on its merits, Shumpert is unable to meet the burden of showing he received ineffective assistance of counsel at trial and the trial court was correct in dismissing his motion for post conviction relief. Shumpert does not submit any affidavits to support his contentions and his request for relief cannot stand based on his bare allegations. Defendants are not entitled to a jury of a particular racial composition. Shumpert cannot show that he has been in anyway prejudiced by his attorney's alleged failure to object to an all white jury since Shumpert pled guilty.

Shumpert has waived his right to object to the trial court's denial of recusal. He waived all rights to trial and all objections and direct appeals to the aborted trial proceedings that occurred before his guilty plea. His accusation that the trial judge ate at the victim's restaurant is not sufficient to cause a reasonable person, knowing all the circumstances to harbor doubts about the judges' impartiality. Further, it is unsupported in the record.[1]

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[1] The file reflects that Shumpert filed several motions with this Court to have the partial trial transcript included in the record. This Court's orders of May 16th in response to those motions held that the "[r]ecord has been filed in this appeal and contains the transcript of the criminal proceedings." The motions were dismissed as moot. The record forwarded to the State for purposes of this appeal does not appear to contain the transcript of the aborted trial proceedings that occurred prior to Shumpert's guilty plea. It is the State's position that Shumpert was not entitled to that record pursuant to *Lawrence v. State*, 2007 WL 1532556 (Miss. App. 2007) which held that the trial court acted within its discretion in denying the defendant's motion for production the transcript of his partial trial. Further, In *Fleming v. State*, 533 So.2d 505, 506 (Miss. 1989) , the court stated that where a prisoner has filed a proper motion pursuant to the Uniform Post Conviction Collateral Relief Act, and who motion has withstood summary dismissal under Section 99-39-11(2), then that individual may be entitled to trial transcripts and other relevant documents under the discover provision in section 99-39-15, upon good cause shown and under the discretion of the lower court. *Fleming*, 553 So.2d at. 506. Shumpert's motion failed to withstand summary dismissal at the trial court level, thus he is not entitled to an expanded record.

## ARGUMENT

**PROPOSITION ONE** Shumpert is unable to meet the burden of showing he received ineffective assistance of counsel at trial and the trial court was correct in dismissing his motion for post conviction relief.

Shumpert alleges that he was denied ineffective assistance counsel. To prove ineffective assistance of counsel, Shumpert bears the burden of showing that there were deficiencies in his counsel's performance and that the deficiences prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel's performance was within a wide range of reasonable professional assistance. Moody v. State, 644 So.2d 451, 456 (Miss. 1994). Shumpert alleges that he was prejudiced by his attorney not objecting "to an all white jury." Shumpert plead guilty. There is no merit to claim based on a trial to which he waived his rights. Further, Shumpert cannot make a valid claim for ineffective assistance of counsel if the only proof he has concerning deficient performance is his own statement. *Vielee v. State*, 653 So.2d 920, 922 (Miss. 1995). It is not ineffective assistance of counsel for an attorney to advice his client that he recommends a guilty plea over proceeding to trial if it is his reasoned opinion that there is little chance of success at trial.

The record "clearly belies" the allegations made in Shumpert's motion for post-conviction relief and there is not merit to his claims. Shumpert has raised no meritorious issue in his motion for post conviction relief that would overcome his own sworn statements during the guilty plea, as reflected in the transcript.

The standard of review pertaining to the voluntariness of guilty pleas is well settled: "this Court will not set aside findings of a trial court sitting without a jury unless such findings are clearly erroneous." *Weatherspoon v. State*, 736 So.2d 419, 421 (Miss. Ct. App. 1999). The burden of proving that a guilty plea is involuntary is on the defendant and must be proven by a preponderance

of the evidence. *Id.* at 422. A plea is considered voluntary and intelligent if the defendant is advised about the nature of the charge against him and the consequences of the entry of the plea. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992). The trial court questioned Shumpert thoroughly regarding his understanding of the charges against him, his constitutional rights, and the effects of the guilty plea. He also signed a petition to plead guilty.

Shumpert now asserts that he was coerced into pleading guilty due to "the implied incentive by the Court for the defendant's cooperation with the State in providing testimony against co-defendant Kenneth Lee Traylor". The record, however, reflects that Shumpert made an open plea with no plea bargain agreement. There was no agreed recommendation for sentencing, however, the State made a recommendation for sentencing on the record, as follows:

> As to Count I, the kidnapping, we recommend that this defendant be given a term of 30 years to serve with the Mississippi Department of Corrections. As to Count II, kidnapping, we request, recommend that he be given a term of 30 years to serve with the Mississippi Department of Corrections. As to Count III, we recommend that he be given a term of 30 years to serve with the Mississippi Department of Corrections. As to Count IV, the aggravated assault, we recommend that he be given a term of 20 years to serve with the Mississippi Department of Corrections. As to Count V, the burglary and larceny of the building, we recommend that he be given a term of 25 years to serve with the Mississippi Department of Corrections. As to the car jacking, Count VI, we recommend that he be given a term of 30 years to serve with the Mississippi Department of Corrections. As to the armed robber, Count VII, we recommend that he be given a term of 45 years to serve with the Mississippi Department of Corrections. As to Count VIII, armed robbery, we recommend that he be given a sentence of 45 years to serve with the Mississippi Department of Corrections. And, as to Count IX, we recommend that he be, another armed robbery, we recommend that he be given 45 years to serve with the Mississippi Department of Corrections. My calculations are that's a total or 285 years if run consecutively or concurrently, Your Honor.
>
> For a little background in this case, Your Honor, there is, as you've heard and can see on the indictment, an indictment against co-defendant Kenneth Traylor. In Mr. Shumpert's confession, he not

only implicated himself, but he implicated and told Mr. Traylor's part in these crimes. Without a case against Traylor, we feel like we do not have to have Mr. Shumpert's testimony to convict him. However, if he should agree and testify truthfully according to his statement as to the events here, we would ask the Court to take that into consideration in the sentences in this case as to whether or not they run consecutively or whether or not some of them run concurrently or if some of the sentences are suspended or not. But we still feel like he deserves a heavy sentence, at least in the term of a great number of years to serve for the crimes which he has committed. (T. 40-42)

*The Trial Court then conducted an examination as follows:*

Q. Mr. Shumpert, do you understand that the State has made a recommendation, and I understand that that is not part of any plea bargain. The State is telling me what they would like me to do with you. Did you expect the state to make any recommendation that might in any way be considered favorable to you?
A. At some point in time, yes, sir.
Q. You think they may do that. You heard what the District Attorney says. You heard that.
A. Somewhere down the line, yes, sir.
Q. All right. You understand that I am not bound by what they are recommending for you, and I have a free reign to impose the maximum sentence in every one of these charges, whatever they might be.
A. Yes, sir.
Q. Do you understand that?
A. Yes, sir, I understand.
Q. Now, do you understand that anything that I might have said is not any indication that I'm going to do anything in particular; that I'm going to be lenient or harsh or whatever? Do you understand that?
A. Yes, sir, I understand.
Q. All right. Has anyone put any pressure on you, forced you in anyway or told you that you had to plead guilty to these charges.
A. Yes, sir.

(T. 42, 43)

Shumpert's argument that he was induced to plead guilty by a promise of leniency if he would testify against his co-defendant, Kenneth Lee Traylor, is clearly contradicted by his testimony

on the record that he understood that there was no plea bargain and that the Trial Court could accept the State's recommendation or not. The Trial Court clearly iterated that there was no promise of leniency in exchange for Shumpert's testimony against Traylor.

In *Lawrence v. State*, 2007 WL 1532556 (Miss. App. 2007) the defendant was unable to show that his defense counsel rendered ineffective assistance, even though the defendant claimed that counsel told him that if he entered a guilty plea to murder he would get a sentence of twenty years. The Court in *Lawrence* stated:

> The test for ineffective assistance of counsel is well known and requires a showing of deficiency in the performance of counsel and prejudice to the defendant. Strickland v. Washington, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Stringer v. State, 454 So.2d 468, 476-77 (Miss.1984). To bring a successful claim for ineffective assistance of counsel, pursuant to the court's ruling in Strickland, the defendant must prove that his attorney's overall performance was deficient and that this deficiency deprived him of a fair trial. Strickland, 466 U.S. at 689; Moore v. State, 676 So.2d 244, 246 (Miss.1996) (citing Perkins v. State, 487 So.2d 791, 793 (Miss.1986)). We must be mindful of the "strong but rebuttable presumption that an attorney's performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic." Covington v. State, 909 So.2d 160, 162 (Miss.Ct.App.2005) (quoting Stevenson v. State, 798 So.2d 599, 602 (Miss.Ct.App.2001)). To overcome this presumption, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Woodson v. State, 845 So.2d 740, 742(¶ 9) (Miss.Ct.App.2003).
>
> Lawrence asserts that were it not for counsel's recommendation, Lawrence would have continued with the trial. There is nothing in the record to support this contention. Furthermore, there is ample evidence to support the lower court's finding that Lawrence knew and understood that by entering a plea of guilty to the charge of murder there was but one sentence the court could impose, that being a term of life imprisonment. Lawrence attested on his petition to enter his guilty plea that he knew and understood the consequences of entering such plea, as well as testifying in open court to the same. Solemn declarations in open court by the defendant carry a strong

presumption of verity. Roland v. State, 666 So.2d 747, 750 (Miss.1995) (citing Baker v. State, 358 So.2d 401, 403 (Miss.1978)).

Further, Shumpert has provided no evidence of his own to support this allegation. He has failed to meet his statutory burden of proof required to establish a prima facie showing. Shumpert is required to show that his counsel's performance was deficient and that the defendant was prejudiced by his counsel's mistake. His own sworn testimony shows otherwise. Since Shumpert cannot show deficient performance, this issue is without merit.

Shumpert also argues that his counsel's alleged deficiencies during the trial forced him to plead guilty. Specifically, he alleges that he was prejudiced by his counsel's failure to object to an all white jury. However, Shumpert clearly understood that in pleading guilty, he was waiving his right to appeal any errors at trial. The record contains the following testimony by Shumpert:

> Q. Do you understand that if you continue with the trial of your case and the jury found you guilty or convicted you of all or any number of the charges in this case, you would have the right to appeal any conviction or convictions to the Supreme Court of this State?
>
> A. Yes, Sir.
>
> Q. Do you understand that if you enter pleas of guilty here today and I accept those pleas, you will have not righ to appeal the conviction in this case?
>
> A. Yes, Sir.
>
> (T. 30)

Shumpert has therefore waived his right to appeal any alleged errors in the trial proceedings that took place prior to his guilty plea. Had Shumpert continued with trial and been convicted, he would have had the right to a direct appeal in which he could have raised this issues of ineffective assistance of counsel and a challenge to the composition of the jury. However, that is not the case,

and this issue is without merit.

Even if Shumpert had not waived the claim of ineffective assistance of counsel as to the trial proceedings prior to his guilty plea, he would not be able to meet the criteria set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.2025, 80 Led.2d 674 (1984). To prove ineffective assistance of counsel, Shumpert must demonstrate that his counsel's performance was deficient and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.2025, 80 Led.2d 674 (1984). Shumpert must overcome a strong presumption that his counsel rendered adequate assistance. Id. At 689. To show prejudice, Shumpert must show that there is a reasonable probability that but for his counsel's unprofessional errors, the outcome would have been different. *Woodson v. State*, 845 So.2d 740, 742 (Miss. Ct. App. 2003).

Shumpert cannot overcome the strong presumption that his attorney rendered adequate assistance. Shumpert was not entitled to a jury of any particular racial composition and therefore cannot show that his counsel was deficient in failing to object to an all-white jury. Defendants are not entitled to a jury of any particular composition, *Le v. State*, 913 So.2d 913 (Miss. 2005) [citations omitted]. An all white jury is not per se prejudicial. The test of fairness regarding a jury's composition is the "fair cross-section requirement. The fair cross section requirement is not violated merely because an all-white jury is not representative of the black community in a certain area. Yarborough v. State, 911 So.2d 951 (Miss. 2005) A defendant is not entitled to a given percentage of jury members of his own race. *Gathings v. State*, 822 So.2d 266 (Miss. 2002). Shumpert objects only to the make-up of the jury and makes no challenge to the method by which the jury was chosen.

Further, since Shumpert did not exercise his right to trial by jury all the way to its conclusion, he is unable to demonstrate that any alleged deficiency in his counsel's performance prejudiced him in any way. He cannot show any proof that the his counsel's failure to object to the jury's

composition affected his right to a fair trial when no trial occurred and no verdict was reached. He cannot show any proof that a different result would have occurred.

**PROPOSITION TWO** Shumpert has waived his right to object to the trial court's denial of recusal. Further, the trial court did not abuse his discretion in not recusing himself from Shumpert's trial

Shumpert argues that the judge should have recused himself prior to trial "due to the personal relationship he had with [the] victims by eatting (sic) at there (sic) establishment." There is nothing in the record provided to counsel for the State of Mississippi in this cause to show that the trial court judge had any relationship with the victims in this case. However, assuming *arguendo*, hat the trial court did eat in a restaurant owned by the victims, that is not enough to show that the judge abused his discretion in not abusing himself.

Further, this issue was apparently raised during the trial which was aborted when Shumpert made the decision to plead guilty. Shumpert has waived all his rights to appeal any aspect of that trial as demonstrated by the record in the plea hearing. Therefore, he has waived his right to appeal the issue of recusal.

The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application.

On review of a denial of a motion to recuse, this Court "will not order recusal unless the decision of the trial judge is found to be an abuse of discretion." URCCR Rule 1.15; *Hathcock v. S. Farm Bureau Cas. Ins. Co.*, 912 So.2d 844, 847 (iss.2005). "The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application." *Tubwell v. Grant*, 760 So.2d 687, 689 (Miss.2000). When a judge is not disqualified under the constitutional or statutory provisions, the decision is left up to each individual judge and is subject to review only in a case of manifest abuse of discretion. Id.

When reviewing whether a judge should have recused himself, this Court uses an objective test: "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *King v. State*, 821 So.2d 864, 868 (Miss. Ct. App.2002). The challenger has to overcome the presumption "that a judge, sworn to administer impartial justice, is qualified and unbiased." Id. This presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption. Bredemeier v. Jackson, 689 So.2d 770, 774 (Miss.1997).

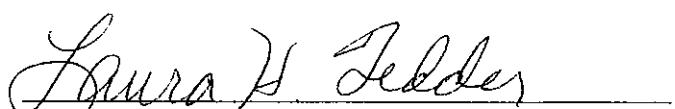
The accusation that the trial judge ate at the victim's restaurant is not sufficient to cause a reasonable person, knowing all the circumstances to harbor doubts about the judges' impartiality.

## CONCLUSION

The State respectfully submits that Shumpert's arguments are without merit. Accordingly, the trial court's dismissal of Shumpert's Motion for Post Conviction Collateral Relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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## CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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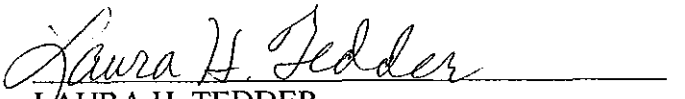
This the 14th day of September, 2007.



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