IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM JAMES LOGAN, JR. — APPELLANT

VS. — NO. 2006-KP-1790-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Covington County, Mississippi, in which the Appellant, William James Logan, Jr., was convicted and sentenced for the felony crime of **BURGLARY (two counts)**, Miss. Code Ann. § 97-17-23 (1972), and as a **HABITUAL OFFENDER**, Miss. Code Ann. § 99-19-81 (1972).

STATEMENT OF FACTS

On January 5, 2004, William James Logan, Jr., (Logan) broke into two homes in Covington County, Mississippi. These homes were located on Highway 35 South over there around Mount Olive. On January 5, 2004, about 11:15 a.m., Mrs. Ruby Benson and her husband were returning home from the doctor. They pulled into their driveway and noticed a vehicle on their premises. When they got out of the vehicle and started to the door of their home, Logan came out of the door with property belonging to them, got in his vehicle and left. He had broken into their home and stolen some jewelry and some money. They called 911 and reported the burglary. A few minutes later, around 11:30 a.m., Ms. Sue Wise returned to her home which was located a few miles north

of the Benson's home on Highway 35. When she pulled into her driveway, she noticed that the porch light was on. That was rather unusual, so she proceeded with caution. She noticed that her home, too, had been broken into. There were two piggy banks stolen and some jewelry was taken, but these were two distinctive piggy banks. One was a school bus piggy bank and the other one was a green piggy bank. Sue Wise called 911 and reported that burglary. The Appellant broke into her home first, came on down the road, and broke into Mrs. Benson's home. Logan ran out of the house, got in his vehicle and left. Responding to the first 911 burglary call, which was the Benson call, Covington County Deputies Wayne Harvey and Chris Newman left Collins and headed down Highway 84 West to investigate that burglary. They were on the lookout for a tan-colored Honda automobile with a Warren County tag that had been involved in that burglary. While traveling down Highway 84 West, and before they got to Highway 35, they noticed a vehicle matching that description as it passed them. It was headed east on 84 and they were headed west on 84. They turned around and followed this Honda automobile. Logan noticed that there were deputies behind him. The Appellant got out of his vehicle, and it was explained to him that his vehicle matched the description of the vehicle involved in the burglary. Logan jumped back into his vehicle and drove away while the deputies began to chase him. He drove down Highway 84 East and turned right onto Lake Mike Conner Road. He was pulled over again, and that's where he was apprehended. Deputy Chris Newman approached the defendant's vehicle and saw money and two piggy banks in the car. They also recovered somewhere around $2300 in cash that had been taken from the Benson home. (Tr. 3 - 7).

SUMMARY OF THE ARGUMENT

I. and IV are combined.

THE INDICTMENT WAS PROPERLY AMENDED.

Reid v. State, 910 So.2d 615, 624 (Miss. App. 2005) holds that an indictment which is substantially in the language of the statute is sufficient; so long as from a fair reading of the indictment, taken as a whole, the nature and cause of the charge against the accused are clear, the indictment is legally sufficient. Fuqua v. State, 938 So.2d 277 (Miss. App. 2006) holds that for an indictment to be sufficient, it must contain the essential elements of the crime charged.

Mississippi Uniform Circuit and County Court Rule 7.09 Amendment of Indictment:

> All indictments may be amended as to form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement (e.g., driving under the influence, Miss. Code. Ann. Section 63-11-30). Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

II. and V. are combined.

THE TRIAL COURT WAS PROPER IN ALLOWING EVIDENCE SEIZED DURING THE INVENTORY SEARCH.

Rankin v. State, 636 So.2d 652 (Miss. 1994) held that personal effects in arrestee's possession at place of detention, which were subject to search at time and place of arrest, may later be searched and seized without warrant at place of detention. U.S.C.A. Const. Amend. 4.

III., VII, and VIII are combined.

THE APPELLANT HAD EFFECTIVE 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. The record shows Appellant's counsel was well within the Garibaldi competency requirements.

VI.

IDENTIFICATION OF THE APPELLANT WAS WELL PROFFERED.

THE ARGUMENT

PROPOSITIONS I. and IV are combined.

THE INDICTMENT WAS PROPERLY AMENDED.

Logan alleges that the amendments to the indictment were prejudicial. (Appellant Brief 1). The State contends and the entire record proves that the amendments to the indictment were necessary and proper.

Reid v. State, 910 So.2d 615, 624 (Miss. App. 2005) holds that an indictment which is substantially in the language of the statute is sufficient; so long as from a fair reading of the indictment, taken as a whole, the nature and cause of the charge against the accused are clear, the indictment is legally sufficient. Fuqua v. State, 938 So.2d 277 (Miss. App. 2006) holds that for an indictment to be sufficient, it must contain the essential elements of the crime charged.

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The indictment was properly amended.

The indictment tracked the pertinent statutes. The indictment was proper.

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

PROPOSITIONS II. and V are combined.

THE TRIAL COURT WAS PROPER IN ALLOWING EVIDENCE SEIZED DURING THE INVENTORY SEARCH.

Appellant alleges that the search of the vehicle was unreasonable. (Appellant Brief 7). This is not the case.

Rankin v. State, 636 So.2d 652 (Miss. 1994) held that personal effects in arrestee's possession at place of detention, which were subject to search at time and place of arrest, may later be searched and seized without warrant at place of detention. U.S.C.A. Const. Amend. 4.

The pertinent facts are that on January 5, 2004, about 11:15 a.m., Mrs. Ruby Benson and her husband were returning home from the doctor. They pulled into their driveway and noticed a vehicle on their premises. When they got out of the vehicle and started to the door of their home, Logan came out of the door with property belonging to them, got in his vehicle and left. He had broken into their home and stolen some jewelry and some money. They called 911 and reported the burglary. A few minutes later, around 11:30 a.m., Ms. Sue Wise returned to her home which was located a few miles north of the Benson's home on Highway 35. When she pulled into her driveway, she noticed that the porch light was on. That was rather unusual, so she proceeded with caution. She noticed

that her home, too, had been broken into. There were two piggy banks stolen and some jewelry was taken, but these were two distinctive piggy banks. One was a school bus piggy bank and the other one was a green piggy bank. Sue Wise called 911 and reported that burglary. The Appellant broke into her home first, came on down the road, and broke into Mrs. Benson's home. Logan ran out of the house, got in his vehicle and left. Responding to the first 911 burglary call, which was the Benson call, Covington County Deputies Wayne Harvey and Chris Newman left Collins and headed down Highway 84 West to investigate that burglary. They were on the lookout for a tan-colored Honda automobile with a Warren County tag that had been involved in that burglary. While traveling down Highway 84 West, and before they got to Highway 35, they noticed a vehicle matching that description as it passed them. It was headed east on 84 and they were headed west on 84. They turned around and followed this Honda automobile. Logan noticed that there were deputies behind him. The Appellant got out of his vehicle, and it was explained to him that his vehicle matched the description of the vehicle involved in the burglary. Logan jumped back into his vehicle and drove away while the deputies began to chase him. He drove down Highway 84 East and turned right onto Lake Mike Conner Road. He was pulled over again, and that's where he was apprehended. Deputy Chris Newman approached the defendant's vehicle and saw money and two piggy banks in the car. They also recovered somewhere around $2300 in cash that had been taken from the Benson home. (Tr. 3 - 7).

U.S.C.A. Const. Amend. 4 holds that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized, was not violated.

Paramountly, Deputy Chris Newman and Deputy Wayne Harvey had probably cause to stop

and search the vehicle of the Appellant.

Deputy Chris Newman testified:

On that day, I call your attention to about 11:30 o'clock in the morning, a.m., and ask you what were you doing at about that time?

A. Deputy Wayne Harvey and I were on our way to investigate a burglary that had occurred at a home on Highway 35.

Q. And where were you when you learned of the burglary?

A. We were at the Covington County Sheriff's Department here in Collins.

Q. In what direction did you go to investigate that burglary?

A. We travelled on Highway 84 West towards Highway 35 from the sheriff's department.

Q. Before you reached Highway 35, what, if anything, unusual did you see?

A. I saw a tan-colored Honda automobile with tinted windows pass us.

Q. And why was it unusual that you saw this particular vehicle?

A. We were on the lookout for that type and color automobile with a Warren County tag that had been involved in the burglary.

Q. At this time, did you know that the Wise home had also been burglarized?

A. No, sir. That call came a little later.

Q. And what did you and Deputy Harvey do after you saw this vehicle pass you?

A. We turned around and got behind it as it traveled down Highway 84 East.

Q. And did you and Deputy Harvey stop the vehicle?

A. Yes, sir.

Q. Whereabouts did you stop it?

A. About Burnham's store on Highway 84 East.

Q. And after the vehicle was stopped, did you notice the tag on the vehicle?

A. Yes, sir, I did.
Q. And what county was the tag from?
A. It was a Warren County, Mississippi.
Q. And what happened after you and Deputy Harvey stopped the vehicle?
A. Deputy Harvey asked the defendant to get out of the vehicle.
Q. Did the defendant get out of the vehicle?
A. Yes, sir.
Q. And what, if anything, did the defendant say at that time?
A. The defendant wanted to know the reason he had been stopped.
Q. And what was the defendant told as to the reason he was stopped?
A. He had been stopped because a vehicle matching the description of his vehicle had been involved in the burglary.
Q. And after the defendant was advised the reason as to why he was stopped, what if anything, did the defendant say?
A. He stated that he was running low on gas and needed to turn his motor off in his vehicle.
Q. And what did the defendant do then?
A. He jumped in his car and took off.
Q. And what did you and Deputy Harvey do?
A. We got in behind him and chased him.
Q. And where did you chase the defendant?
A. He went east on Highway 84. He took a right on to Lake Mike Conner Road.
Q. And as you chased him down Lake Mike Conner Road, did you ever lose sight of him?
A. Yes, sir.
Q. And how did you manage to find him?
A. As we were coming into the Williamsburg Community there on Lake Mike Conner Road and as we were passing the Mooney Furniture building, I looked back and saw the defendant's vehicle parked behind one of the buildings.
Q. And what did you and Deputy Harvey do then?
A. We turned our patrol car around.

Q. And as you were turning your patrol car around, what did the defendant do?
A. The defendant pulled out and took off towards Highway 84.
Q. And what did you and Deputy Harvey do?
A. We got in behind him and chased him.
Q. And where did the defendant go as you and Deputy Harvey chased him?
A. The defendant turned right and headed down Highway 84 East towards Collins.
Q. And did he stay on Highway 84?
A. No, sir. Just before Collins he took the ramp onto U.S. 49 South.
Q. And where did he go?
A. Once he took the ramp, he just pulled over and he was arrested.
Q. Do you remember who arrested him?
A. No, sir. By that time, there were several other officers assisting us, and I don't remember which one made the actual arrest.
Q. And at the time the defendant was being apprehended, did you have an opportunity to see inside the defendant's vehicle?
A. Yes, sir. I didn't know if there was anyone else in it so I approached the vehicle.
Q. And when you got to the vehicle, what, if anything, did you see inside the vehicle?
MR. McINTOSH: To which we are going to object, Your Honor, until a proper predicate is laid.
THE COURT: Overruled. He can answer it.
BY MR. BOWEN:
Q. When you got to the vehicle, what, if anything, did you see inside that vehicle?
A. I saw some gold colored coins as well as some change, and I saw two piggy banks.
Q. Did you recover the money and the piggy banks?
A. Yes, sir.
Q. At this time, were you aware that Sue Wise's home had also been burglarized?
A. Yes, sir. That call came to us over the radio during the pursuit.

Q. Okay. Other than the change and the gold colored coins, did you recover any other money?
A. Yes, sir, about $2300.
Q. And what did you do with the $2300?
A. I returned that to the owner.
Q. And who was the owner?
MR. McINTOSH: To which we object, Your Honor, as being a supposition.
THE COURT: Well, you need to establish the basis of his knowledge, Mr. Bowen, as to how he knew who the owner was.
BY MR. BOWEN:
Q. How did you establish the ownership of that $2300?
A. The information would have been relayed to us by dispatch of the items that were taken from each home. Because again, they were relaying updated information to us as we were involved in this pursuit.
MR. McINTOSH: If Your Honor please, I'm still going to object. There was no dispatch to them at any time saying $2300 had been taken. (Tr. 84 - 88).

The record and all of the evidence point to the Appellant as being the perpetrator.

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

PROPOSITIONS III., VII, AND VIII are combined.

THE APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

In Issue III, the Appellant asserts that his right to counsel was violated when the State persuaded him to waive arraignment and enter a plea and agree to a continuance and also waive rights to a speedy trial without appointment of counsel. (Appellant Brief 15). Nothing in the record neither proves nor supports this allegation. Logan goes on to essentially state that Attorney Oby T. Rogers and Dan McIntosh provided him with ineffective assistance of counsel. Nothing in the record proves or supports this allegation.

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. The record shows Appellant's counsel was well within the Garibaldi competency requirements.

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). Logan 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*.

Moreover, Logan contends that he was denied effective assistance of counsel by way of counsel's failure to be abreast of the proceedings and applicable law; however, nothing in the record evinces this allegation.

This issue brought by Logan is therefore lacking in merit. Logan has failed to show deficiency in his attorney or as a result prejudice.

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

PROPOSITION VI.

IDENTIFICATION OF THE APPELLANT WAS WELL PROFFERED.

The record and all of the evidence point to the Appellant as being the perpetrator. The direct eye witness, Ruby Benson, stated the below in her testimony.

1 Q. I call your attention to approximately

11:15 o'clock a.m. on January 5, 2004, and ask you if you had an occasion to see the defendant, William James Logan?

A. Yes, sir.

Q. And where did you see him?

A. He was coming out of my house.

Q. And what was he doing when you saw him?

A. He had a money box in his hands coming out.

Q. He had a money box?

A. Yes, sir.

Q. Whose money box was it?

A. It was Earl's.

Q. Your husband's?

A. Yes, sir.

Q. What did the defendant do when you saw him coming out of the house?

A. He come on out and got in his car and backed out. (Tr. 41).

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

CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

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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 G. Evans
Circuit Court Judge
Post Office Box 545
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This the 10th day of September, 2007.

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