

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

CHARLES DOUGLAS OWENS

FILED

APPELLANT

JUN 29 2007

VS.

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

NO. 2007-CA-0153-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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APPELLANT

SA

NO. 2007-CA-0153-COA

STATE OF MISSISSIPPI

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 the Second Judicial District of Harrison County, Mississippi, in which the Appellant, Charles Douglas Owens, pled guilty and was sentenced for the felony crimes of **ARMED ROBBERY**, Miss. Code Ann. § 97-3-79 (1972), and **AGGRAVATED ASSAULT**, Miss. Code Ann. § 97-3-7(2)(a) (1972).

§ 97-3-7(2)(a) (1972).

STATEMENT OF FACTS

Charles Douglas Owens (Owens), pled guilty and was sentenced for the felony crimes of **ARMED ROBBERY**, Miss. Code Ann. § 97-3-79 (1972), and **AGGRAVATED ASSAULT**, Miss.

Code Ann. § 97-3-7(2)(a) (1972).

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT COMMITTED NO ERROR WHEN IT SUMMARILY DISMISSED APPELLANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT HOLDING 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).

II.

THE SENTENCE WAS PROPER.

Kline v. State, 741 So.2d 944, 948 (Miss. App. 1999) held that the trial court did not have to follow recommendation, where the defendant was advised by trial court that it was authorized to impose any sentence within statutory limits.

III.

THE APPELLANT'S PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

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 voluntary 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.

North Carolina v. Alford, 400 U.S. 25, 40 (U.S. N.C. 1970) holds:

"Ordinarily, judgment of conviction resting on plea of guilty is justified by defendant's admission that he committed crime charged against him and his consent that judgment be

entered without trial of any kind. Guilty plea which represented voluntary and intelligent choice among alternatives available to defendant, especially where he was represented by competent counsel, was not compelled within meaning of Fifth Amendment merely because plea was entered to avoid possibility of death penalty. Standard of validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant."

THE ARGUMENT

PROPOSITION I.

THE TRIAL COURT COMMITTED NO ERROR WHEN IT SUMMARILY DISMISSED APPELLANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING.

Having reviewed Appellant's motion for post-conviction collateral relief, the case file, and the transcript of the plea hearing, in conjunction with the applicable legal authorities, the circuit court found that it should be summarily denied. (R. E. 158 - 161).

Furthermore, Owens fails to specially raise below or allege error(s) committed by the lower court; thus, this issue is barred. 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 Owens 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, Owens. 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 the Appellant'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 the Appellant'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).

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).

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

PROPOSITION II.

THE SENTENCE WAS PROPER.

The Appellant's signed Petition to Enter Guilty Plea stated that the maximum sentence allowable for Aggravated Assault is Twenty Years, and the maximum sentence allowable for Armed Robbery is Life without Parol. (R. E. 134).

Kline v. State, 741 So.2d 944, 948 (Miss. App. 1999) held that the trial court did not have to

follow recommendation, where defendant was advised by trial court that it was authorized to impose

any sentence within statutory limits. Following that analysis, the trial judge to Owens that: "there's a high probability that you would get a life sentence." (Tr. 17).

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

PROPOSITION III.

THE APPELLANT'S PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

In short, the record plainly belies Charles D. Owens instant claim that his plea was anything but voluntarily and intelligently (knowingly) made.

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 voluntary 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.

North Carolina v. Alford, 400 U.S. 25, 40 (U.S. N.C. 1970) holds:

"Ordinarily, judgment of conviction resting on plea of guilty is justified by defendant's admission that he committed crime charged against him and his consent that judgment be entered without trial of any kind. Guilty plea which represented voluntary and intelligent choice among alternatives available to defendant, especially where he was represented by competent counsel, was not compelled within meaning of Fifth Amendment merely because plea was entered to avoid possibility of death penalty. Standard of validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant."

The State contends that Moore did not have to admit to this crime because this was an "Alford Plea." Every element of an "Alford Plea" has been met and is satisfied. Alford held that one does not have

to say he is guilty to be and plead guilty.

Appellant intelligently, knowingly, and voluntarily signed the Petition to Enter Guilty Plea.

(R. E. 133 - 137). Owens stated in court: "It was my intentions from the beginning to move forward

and to pursue an agreement with the court to plead guilty. I'm pleading guilty because right is right

and wrong is wrong, and I made a mistake." (R. E. 180).

In short, there is no record evidence that the Appellant could not or did not understand, or lacked 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 Owens instant claim that his plea was anything but voluntarily and intelligently (knowingly) made.

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

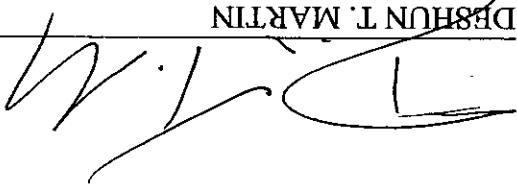
I, Deshun T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR THE APPELLEE to the following:

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