IN THE

SUPREME COURT OF

THE STATE OF MISSISSIPPI

NO. 2007- CA153

CHARLES DOUGLAS OWENS
Appellant

v.

STATE OF MISSISSIPPI
Appellee

APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI

BRIEF FOR APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007- CA153

CHARLES DOUGLAS OWENS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Appellant: Charles Douglas Owens

Attorney: James L. Davis, III, for Appellant

Appellee: Mark Ward, A.D.A., Harrison County, Mississippi

Trial Court Judge: Honorable Kosta N. Vlahos

JAMES L. DAVIS, III, ATTORNEY
Attorney of Record for Owens

TABLE OF CONTENTS

TABLE OF CASES

Cases: **Page:**

Other:

STATEMENT OF THE ISSUES

I. THE TRIAL COURT WAS IN ERROR WHEN IT SUMMARILY DISMISSED APPELLANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING.

II. THE TRIAL COURT WAS IN ERROR WHEN IT SENTENCED THE APPELLANT TO A TERM OF YEARS WHICH EXCEEDED THE STATE'S RECOMMENDED SENTENCE WHICH THE APPELLANT HAD DETRIMENTALLY RELIED UPON PRIOR TO THE ENTRY OF HIS PLEAS.

III. THE TRIAL COURT WAS IN ERROR WHEN IT FOUND THE APPELLANT'S PLEA TO HAVE BEEN FREELY AND VOLUNTARILY ENTERED.

STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition in the Court Below

On March 17, 2003, Charles Douglas Owens was sentenced in Cause Number B-2402-02-187, Circuit Court of Harrison County, Mississippi, Second Judicial District to a term of 30 years on the charge of armed robbery and 10 years on the charge of aggravated assault to run consecutive for a total of 40 years to serve. Mr. Owens had entered his plea to the charges on February 4, 2003. He was represented at that time by the Hon. Jack Denton.

On March 27, 2003, a Motion to Reconsider or in the Alternative Withdraw Plea was filed by the Defendant. This Motion was never ruled upon by the Trial Court Judge.

On February 2, 2006, Owens filed a Petition for Post Conviction Relief in the Circuit Court of Harrison County, Mississippi, Second Judicial District, which was summarily dismissed by the Trial Court, without hearing, on December 29, 2006. This Petition was filed by the Hon. Jim Davis. Prior to the dismissal of Owens' Petition, his attorney had filed a motion to have him transported back to Harrison County pending a resolution of his Petition. This motion was denied by the Trial Judge on June 19, 2003.

Notice of Appeal was filed on January 17, 2007.

II. Statement of Facts:

[As no hearing was held on Owens' Petition there is no Record other than the Clerk's Papers which have been submitted to the Court and the transcript of the plea hearing held on

February 4, 2003, and the sentencing hearing held on March 17, 2003.]

SUMMARY OF LEGAL ARGUMENT

1. The trial court was in error when it summarily dismissed Owens' Petition for Post Conviction relief without an evidentiary hearing. Owens' Petition conformed to the requirements of Miss.Code.Ann. §99-39-9. Further, the Petition substantially indicated a denial of a state and/or federal right which necessitated that the trial court conduct an evidentiary hearing prior to ruling on said Petition.

2. The trial court sentenced the Appellant to a term of 40 years which exceeded the State's recommended sentence. The Appellant relied upon the State's recommendation prior to the entry of his guilty pleas. Not only did an agreement on sentencing exist between the State and the Appellant, but the trial court became involved in the plea negotiations by confirming with the Appellant that he had been advised of the recommended sentence, prior to the entry of his plea, and by the trial court's failure to advise the Appellant that it did not have to follow this recommendation. The Appellant detrimentally relied upon the State's recommendation and the acceptance of said recommendation by the trial court.

3. As the trial court failed to honor the sentencing recommendation made by the State, after it had entered into lengthy discussions with all participants as to the facts and evidence of the case, and its failure to question or even advise the Appellant that the trial court did not have to follow any recommendation made by the State, the Appellant's plea could not have been knowingly, freely or voluntarily entered.

LEGAL ARGUMENT

In the case at hand Appellant, Charles D. Owens, was sentenced by the trial court to a term of 30 years for the charge of armed robbery and 10 years for the charge of aggravated assault, the terms to run consecutively to each other for a total sentence of 40 years in Cause No. B-2402-02-187 in the Circuit Court of Harrison County, Mississippi, Second Judicial District on or about March 17, 2003.

The Appellant subsequently filed a Petition for Post Conviction relief on February 2, 2006, alleging that the trial court[1] sentenced him (Owens) to a term of years which exceeded the sentencing recommendation made by the State. The Petitioner would submit that in entering his plea of guilty to the charges presented in the Indictment, he detrimentally relied upon the sentencing recommendation made by the State.

I. THE TRIAL COURT WAS IN ERROR WHEN IT SUMMARILY DISMISSED APPELLANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING.

Miss.Code.Ann. §99-39-5 states the various grounds upon which a prisoner may file a petition for post conviction relief. Two of the permissible grounds are as follows:

> (f) That his plea was made involuntarily; ...
>
> (i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or

[1]The Honorable Kosta N. Vlahos, retired December 31, 2006.

remedy; ....

While the Appellant's petition for post conviction relief does not use the exact verbiage contained within subparagraph (i) above, paragraph 4.[2] of his petition does address the grounds for relief found in both subparagraphs (f) and (i) of Miss.Code.Ann. §99-39-5.

Standard of Review:

"The [Trial] Court upon examination of the application has the authority to dismiss it outright if 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." *Myers v. State*, 583 So.2d 174,176 (Miss.1991); See, *Young v. State*, 731 So.2d 1120,1122 (¶8) (Miss.1999); See, MCA §99-39-11(2). However, "[t]he appellate court adheres to the principle that a post-conviction collateral relief petition which meets basic pleading requirements is sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Taylor v. State*, 682 So.2d 359,366 (Miss.1996); *Harveston v. State*, 597 So.2d 641,643 (Miss.1992). "[I]f the application meets [the] pleading requirements and presents a claim procedurally alive substantially showing denial of a state or federal right, the petitioner is entitled to an in court opportunity to prove his claims." *Myers v. State*, 583 So.2d 174,176 (Miss.1991); See, *Gable v. State*, 748 So.2d 703,705 (¶3) (Miss.1999); See, *Washington v. State*, 620 So.2d 966,968

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[2]"The Defendant's plea should be set aside and vacated because it was coerced, involuntary, and the product of plea negotiations and plea bargaining that the Court unfortunately was involved with ...." [C.P.8]

(Miss.1993).

The standard of review for the summary dismissal of a petition for post conviction relief is one of *de novo* review of the record to determine if the petitioner has:

> failed to demonstrate "a claim procedurally alive 'substantial[ly] showing denial of a state or federal right, ...'"

Young v. State, 731 So.2d 1120 at 1122 (Miss.1999) citing to *Myers v. State*, 583 So.2d 174 at 176 (Miss.1991) (quoting *Billiot v. State*, 515 So.2d 1234 at 1237 (Miss.1987)).

The Appellant attached to his petition as an exhibit the entire transcript of the motion to withdraw, plea and sentencing hearings. The addition of this transcript left no doubt as to what was said, or not said, during these hearings. Further, the Appellant did not present any allegations in his petition which were belied by the transcript. Nor, was it necessary for the Appellant to attach witness affidavits to his petition as there were no witnesses needed to his support the allegations contained within his petition - all necessary evidence was contained within the pages of the hearings transcript which he attached to his petition. *Lewis v. State*, 776 So.2d 679,682 ¶16 (Miss.2000).

If this Court finds that the Appellant presented a claim in his petition that is procedurally alive which substantially shows that he has been denied a state and/or federal right, it must find that the Appellant is entitled to an in-court opportunity to prove his claim. *Williams v. State*, 669 So.2d 44 (Miss.1996); *Gable v. State*, 748 So.2d 703 (Miss.1999).

The Petition for Post Conviction Relief:

In *Williams v. Castilla*, 585 So.2d 761 at 764 (Miss.1991) this Court noted that it

would "take the well-pleaded, fact-specific allegations of the complaint as true." The petition filed in the *Williams* case was in the nature of a habeas corpus action. However, this Court found that the review of the petition was more in line with a post conviction relief petition and applied the provisions of the Act[3]. The facts of Williams' petition indicated that while he was on parole he was arrested and tried for several criminal acts - for which he was acquitted. However, following his arrest for these charges his parole was revoked. He remained in custody following his acquittal on the new charges. Even though the record in *Williams*, supra. indicated that he had other infractions which could possibly result in a parole violation, this Court found that "taking as true the facts as alleged, it is certainly not plain on the face of the complaint that Williams is entitled to no relief." 585 So.2d at 765.

Taking the facts as alleged in the Appellant's petition as true, the State agreed that it would recommend a total sentence of 25 years if the Appellant entered guilty pleas to both counts of the Indictment. The Appellant then entered his pleas in accordance with this agreement. In addition, the trial court specifically queried the Appellant's attorney to see if he had advised the Appellant of the recommended sentence. At no point in the proceedings did the trial court advise the Appellant that it did not have to follow any sentencing recommendation made by the State.

On December 29, 2006, the trial court entered an Order which summarily dismissed the Appellant's petition for post conviction relief. [R.E.7] The only basis upon which a trial

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[3]Mississippi Uniform Post-Conviction Collateral Relief Act, Miss.Code.Ann. §99-39-5.

court may summarily dismiss a post conviction petition, prior to an Answer by the State, is when it is clear upon the face of the petition itself or the exhibits or material from prior proceedings that there are no facts upon which the petitioner could not prevail. *Robertson v. State*, 669 So.2d 11 (Miss.1996).

In Appellant's case, the trial court's Order summarily dismissing his petition for post conviction relief fails to address the allegation of Appellant's detrimental reliance upon the State's sentencing recommendation, which was placed before the trial court on more than occasion. Nor, does this Order address the fact that all of the particulars necessary for a finding that the entry of a guilty plea by a defendant was freely and voluntarily done were not addressed by the trial court.

The Appellant would submit that the trial court was in error when it summarily dismissed his petition without a hearing as an evidentiary hearing was required so that it could be determined whether or not the Appellant relied, to his detriment, upon the sentencing recommendation made by the State prior to the entry of his guilty pleas.

II. THE TRIAL COURT WAS IN ERROR WHEN IT SENTENCED THE APPELLANT TO A TERM OF YEARS WHICH EXCEEDED THE STATE'S RECOMMENDED SENTENCE WHICH THE APPELLANT HAD DETRIMENTALLY RELIED UPON PRIOR TO THE ENTRY OF HIS PLEAS.

During the trial court's hearing on the motion to withdraw filed by the Hon. Jack Denton, Appellant's then attorney of record, not only did the trial court extensively examine

and discuss the documents contained within the court's file, but there was also a lengthy colloquy with the Assistant District Attorney Mark Ward, Mr. Denton, and the Appellant regarding the facts of the case and the evidence which would be presented at a trial of the matter. During the course of this exchange the prosecutor advised the trial court that the State's sentencing recommendation would be 25 years and that the State would not extend a lesser recommendation. [T.10] During further discussion as to the basis for Mr. Denton's motion to withdraw the trial court made the following statements to the Petitioner:

> You know your defense, and I'm not trying to get you to tell the Court your defense if you have one, but if those are the only facts that go to the jury even Jesus Christ might make a ruling in favor of guilty much less you. And the book says you have to render unto Caesar that which is Caesar. The Lord may forgive you, like he forgave the thief, but the thief still suffered the punishment of crucifixion and death by crucifixion, and the Lord forgave him in heaven. But we're not there.

After making additional comments concerning the basis for the motion to withdraw, the trial court further stated:

> You, more than anyone else, knows what happened on that day. And if you want to be – if you want to pursue this with honesty and integrity than you need to reflect upon it. And what you might be looking at is horrendous, but I think the people on earth would think, if you're guilty of these acts, I'm not saying you are, I would think that what you did is horrendous. And to give anything less to you would cause somebody else to maybe believe that they can do the same thing for that lesser punishment. We have to deter you but we have to deter others.

The trial court then went on to discuss the likelihood that based upon what had been stated thus far about the facts of the case, that a jury would wonder if the Appellant was playing games, considering the horrendous nature of the facts and how the victim almost lost

his life. The trial court concluded this statement by saying that "... there's a high probability that you would get a life sentence." [T.17] Following this observation, the trial court went on to tell the Petitioner about an individual in Nevada who thought he could play games and tried to have his attorney removed on the eve of trial only to find himself at trial without an attorney and who was ultimately sentenced to death. [T.17-18] After discussing the issues involved with resetting the Appellant's case for trial the trial court judge directed the Appellant and Mr. Denton to visit with one another before the court ruled upon the motion to withdraw.

Shortly after Mr. Denton and the Appellant returned to the courtroom it was determined that Mr. Denton would not proceed with his motion to withdraw, and that, the Appellant would enter a pleas of guilty to the charges in the Indictment. During the course of the plea hearing the following exchange occurred:

> The Court: Mr. Denton, in truth and in fact you represented to him that the State had, according to the letter which I read during the colloquy that I had with you on the motion to withdraw, the letter indicated that you had communicated to him that the State was recommending 25 years?
>
> Mr. Denton: Yes, sir.
>
> The Court: And you knew that at the time that you made this plea?
>
> Mr. Owen: Yes, sir, Your Honor.
>
> The Court: You may approach the bench.
>
> Mr. Denton: Thank you. I apologize for that.
>
> The Court: Okay.

The Court: What's the recommendation? [T.35] I see it here now. Sentence deferred pending PSI and sentencing hearing.

By Mr. Ward: Judge, I don't know – the recommendation is 25 years on the armed robbery, 20 years on the aggravated assault to run concurrently. [T.36]

On a later date during the course of the sentencing hearing, the State once again reminded the trial court that the sentencing recommendation was 25 years. [T.44]

It should be noted that while the trial court did discuss with the Appellant if he understood the constitutional rights that he was waiving by entering a plea, as well as, going over the maximum and minimum sentencing range with the Petitioner and the fact that the Petitioner would not be eligible for parole for the first ten years of the armed robbery sentence, at no time during either the plea hearing or the sentencing hearing did the trial court discuss with, or comment to, the Appellant the "disclaimer" that the trial court was not bound to accept the State's recommendation and could impose the maximum sentences for the offenses pled to.

Numerous opinions issued by both the Mississippi Supreme Court and the Court of Appeals address the topics which must be addressed by a trial court with a defendant when the latter is attempting to enter a guilty plea to a charged offense. These topics are more specifically set forth in Rule 8.04 of the Uniform Circuit and County Court Rules.

In addressing the question of whether or not a trial court is bound by a sentencing recommendation made by the prosecution the appellate Courts have taken note of whether or not the trial court specifically advised the defendant that the trial court was not bound by

any sentencing recommendation made by the State, and whether or not, the defendant responded in the affirmative or the negative to this question.

For instance, in *Noel v. State*, 943 So.2d 768,770 ¶7 (Miss.App.2006) the Court found a lack of detrimental reliance by the defendant due to the fact that the defendant had been specifically questioned by the trial court if he understood that it did not have to follow any recommendation made by the State to which the defendant responded affirmatively that he understood this. This same finding[4] is also found in *Morris v. State*, 917 So.2d 799,800 ¶¶7-8 (Miss.App.2005).

Conversely this Court has found that when the trial court fails to advise the defendant that it does not have to follow the State's recommendation, the trial court has obligated itself to do so. In *Salter v. State*, 387 So.2d 81,82 (Miss.1980) the trial court entered into a discussion with the State concerning the State's sentencing recommendation. As part of this discussion the trial court stated that it would *nol pros* certain cases rather than pass them to the files as the State wanted to as part of the recommendation. In addition to altering the part of the State's recommendation the trial court failed to advise the defendant that the recommendation made by the State was not binding upon the trial court.

The finding in *Salter*, supra. is discussed by the Court in *Martin v. State*, 635 So.2d 1352 (Miss.1994) wherein Martin argued that the holding in *Salter*, supra. was controlling to the facts in his particular case. The Court found differently, stating that the facts in *Salter*,

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[4]"The court then asked whether Morris was aware that the court did not have to accept the State's recommendation. Morris answered in the affirmative." *Morris*, 917 So.2d at 800, ¶7

supra. were factually distinguishable in that the trial court in *Salter* "participated in the plea bargaining process. He did not tell the defendant that he was not bound by the prosecutor's sentence recommendation." *Martin*, 635 So.2d at 1355.

The Appellant would submit that the facts of his case are in line with those found in *Salter*, supra, and based upon the established precedent of this Court it should find that he detrimentally relied upon fact that the State would recommend, and that the trial court would sentence him to a total sentence of 25 years in exchange for his pleas of guilty to the offenses contained within the indictment.

III. THE TRIAL COURT WAS IN ERROR WHEN IT FOUND THE APPELLANT'S PLEA TO HAVE BEEN FREELY AND VOLUNTARILY ENTERED.

This Court has stated that the constitutional standard for determining the voluntariness of a guilty plea is the following:

1. It is essential that an accused have knowledge of the critical elements of the charge against him;

2. The effects of a guilty plea to the charge; and,

3. What might happen to him in the sentencing phase as a result of having entered the plea of guilty.

Reeder v. State, 783 So.2d 711,717 (¶20) (Miss.2001); *Smith v. State*, 636 So.2d 1220,1225 (Miss.1994).

Further, the Court has held that "[a] plea is voluntary and intelligent only where the defendant is advised concerning the nature of the charge against him and the consequences

of the plea."*Banana v. State*, 635 So.2d 851,854 (Miss.1994); *Alexander v. State*, 605 So.2d 1170,1172 (Miss.1992). "Where the record is silent as to evidence showing that these rights were known and understood by the defendant, there can be no presumption of waiver of such rights by him." *Gunter v. State*, 841 So.2d 195,197 (¶4) (Miss.App.2003); *Fields v. State*, 840 So.2d 796,798 (¶3) (Miss.App.2003); *Boyd v. State*, 797 So.2d 356,361 (¶9) (Miss.App.2001) *citing to*, *Boykin v. Alabama*, 395 U.S. 238,242, 89 S.Ct. 1709,1711-12, 23 L.Ed.2d 274 (1969).

The Appellant would submit that his plea should not be found to have been knowing, freely and voluntarily entered when the trial court sentenced him to a term of years in excess of the State's recommendation when the trial court not only failed to specifically advise him that it did not have to follow the sentencing recommendation made by the State.

CONCLUSION

In *Presley v. State*, 792 So.2d 950,955 ¶21 (Miss.2001) the Court stated that "[a] plea agreement is basically a binding contract between the prosecutor and the defendant that, if the defendant does a, b, and c, the prosecution will do d, e, and f." The Appellant, Charles D. Owens, knew in advance of the entry of his guilty pleas that the State was going to recommend a sentence of 25 years to serve if he pled guilty. The State, fulfilled its obligation not only once but each time that it reminded the trial court of the recommendation. The Appellant likewise fulfilled his part of the bargain by entering a plea of guilty to each of the two counts contained within the Indictment. However, the trial court after having

become involved in the plea bargaining and then failing to advise the Appellant that it did not have to follow the State's recommendation did not fulfill its part of the bargain.

"The U.S. Supreme Court has held that when a plea bargain rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled." *Lewis v. State*, 776 So.2d 679,681 (¶13) (Miss.2000); *State v. Adams County Circuit Court*, 735 So.2d 201,204 (¶7) (Miss.1999); *Wright v. McAdory*, 536 So.2d 897,901 (Miss.1988), *citing to, Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495,499, 30 L.Ed.2d 427 (1971). "The state, whether it be through the prosecutor, the trial judge [*when the latter is participating in the plea agreement*], or both, is bound by its plea-bargain agreement with a defendant who pleads guilty pursuant to the agreement." *Lewis,* 776 So.2d at 681 (¶13); *Adams County*, 735 So.2d at 204 (¶7); *Salter v. State*, 387 So.2d 81,83 (Miss.1980)

The Appellant would submit that this Court should remand this matter back to the trial court for an evidentiary hearing to determine whether or not the Appellant detrimentally relied upon the sentencing recommendation of 25 years made by the State, or that this Court should remand this matter back to the trial court for sentencing in conformity with the State's recommendation of 25 years to serve.

RESPECTFULLY SUBMITTED this the 13 day of June, 2007.

CHARLES DOUGLAS OWENS, Appellant

BY: _____

JAMES L. DAVIS, III,
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, James L. Davis, III, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief, to the office of Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205; to Judge Lisa Dodson at her usual office address located within the Harrison County Courthouse, Gulfport, MS; and to the Office of the District Attorney, located within the Harrison County Courthouse, Gulfport, MS 39501.

This the 13 day of June, 2007.

JAMES L. DAVIS, III