

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

LAWRENCE KIRBY PAYNE

APPELLANT

FILED

VS.

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NO. 2007-CA-0330-COA

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

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
PROPOSITION I	
THE RECORD REFLECTS THAT PAYNE WAS TIME BARRED	
UNDER 99-395(2).	5
PROPOSITION II	
THE GUILTY PLEA HEARING TRANSCRIPT INDICATES THERE	
WAS NO MERIT TO PAYNE'S VARIOUS CLAIMS FOR RELIEF,	
INCLUDING HIS CLAIM OF INEFFECTIVE ASSISTANCE OF	
COUNSEL.	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington , 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984)	8, 10
--	-------

STATE CASES

Ahmad v. State , 603 So. 2d 843, 848 (Miss. 1992)	8
Bevel v. State , 669 So. 2d. 14, 17 (Miss. 1996)	7
Brooks v. State , 573 So. 2d 1350, 1352 (Miss. 1990)	7
Johnston v . State , 730 So. 2d 534, 538 (Miss. 1997)	10
Leatherwood v State , 473 So. 2d 964, 968 (Miss. 1985)	9
Lindsay v. State , 720 So. 2d 182, 184 (Miss. 1998)	9
McQuarter v. State , 574 So. 2d 685, 687 (Miss. 1990)	8
Mohr v. State , 584 So. 2d 426, 430 (Miss. 1991)	9
Nicolau v. State , 612 So. 2d 1080, 1086 (Miss. 1992)	8
Odom v. State , 483 So. 2d 343, 344 (Miss. 1986)	4, 5
Patterson v. State , 594 So. 2d. 606 (Miss. 1992)	7
Sims v State , 775 So. 2d 1291, 1293 (Miss App 1999)	8
Smith v State , 490 So. 2d 860 (Miss. 1986)	9
Stringer v. State , 454 So. 2d 468, 476-477 (Miss. 1984)	8

STATE STATUTES

Miss Code Ann. Sect 99-39-5(2)(Supp. 1985	5
Miss. Code Ann. Sect. 99-39-1	5

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STATE OF MISSISSIPPI

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PROCEDURAL HISTORY:

On October 20, 1989, Lawrence Kirby Payne, "Payne" pled guilty to conspiracy to commit murder as an habitual offender before the Circuit Court of DeSoto County, the Honorable George Carlson, Jr. presiding. C.P. 14-33. After advising and questioning Payne and his guilty plea counsel about Payne's understanding of the charges and the consequences of his plea, the trial court found that Payne's guilty plea was voluntarily and intelligently entered. C.P. 25-26. Payne was sentenced to serve a twenty year sentence without possibility of parole or early release. C.P. 12-13.

On October 27, 2006, Payne filed a motion for post conviction relief. C.P. 4-9.

On December 21, 2006, the trial court denied relief, finding both that Payne's motion was time barred but that it also was lacking in merit. C.P. 52-55. From that denial of relief, Payne filed notice of appeal to the Supreme Court. C.P. 60.

ISSUES ON APPEAL

I.

WAS PAYNE TIME BARRED UNDER M. C. A. §99-39-5(2)

II.

**WAS THERE ANY MERIT TO PAYNE'S CLAIMS FOR
RELIEF INCLUDING INEFFECTIVE ASSISTANCE?**

STATEMENT OF THE FACTS

On March 29, 1989, Payne was indicted for capital murder and conspiracy to commit capital murder with Ms. Susie Ann Balfour as an habitual offender by a DeSoto County Grand jury. C.P. 10-11.

On October 20, 1989, Payne pled guilty to conspiracy to commit murder before the Circuit Court of DeSoto County, the Honorable George Carlson, Jr. presiding. C.P. 14-33. Payne was represented by Mr. Robert Ryan and Mr. William Clayton. C.P. 14.

Mr. Payne was sworn in before the Circuit Court of DeSoto County. The trial court advised Payne of his constitutional right to a trial by a jury with right of cross examination and a right against self incrimination. C.P. 19-21. Payne acknowledged knowing that he was waiving these rights by pleading guilty. C.P. 21.

The trial court determined that Payne understood the maximum 20 year sentence for conspiracy to commit capital murder, as well as that if he was shown to be an habitual offender that he would not be eligible for parole or early release. C.P. 23-25. Payne testified that he was satisfied with the services of his guilty plea counsel. C.P. 25. Payne admitted that he was guilty of the offense. C.P. 25. His guilty plea counsel admitted that they believed the prosecution would be able to establish the facts involved in the charge, which was that Susie Balfour shot and killed a police officer, who

was in the process of arresting Payne after a robbery. C.P. 18-19.

By advising and questioning Payne and his guilty plea counsel, the trial court determined that he had not been promised anything for his guilty plea or been coerced into pleading guilty. C.P. 24.

After advising and questioning Payne and his guilty plea counsel about Payne's understanding of the charges and the consequences of his plea, the trial court found that Payne's guilty plea was "freely and voluntarily" entered "with a full understanding of the consequences." C.P. 25-26. The prosecution presented documentary evidence showing that Payne had been previously convicted of robbery on two separate occasions. C.P. 26-27. The documents were certified and authenticated copies under the hand and seal of the Circuit clerks who kept the original orders and judgments of conviction. C.P. 27.

Payne was sentenced to serve a twenty year sentence without the possibility of parole or early release. C.P. 12-13.

On October 27, 2006, Payne filed a motion for post conviction relief. C.P. 4-9. There were no affidavits or statement of good cause for why they could not be obtained in support of any of Payne's claims for relief.

On December 21, 2006, the trial court denied relief, finding both that Payne's motion was time barred and that it also was lacking in merit. C.P. 52-55. From that denial of relief, Payne filed notice of appeal to the Supreme Court. C.P. 60.

SUMMARY OF THE ARGUMENT

1. The record reflects that Payne was time barred. **Odom v. State**, 483 So. 2d 343, 344 (Miss. 1986). Payne plead guilty to conspiracy to commit murder on October 20, 1989. C.P. 14. His judgment of conviction was entered on that date. C.P. 12-13. He filed his motion for post conviction relief on “October 27, 2006.” C.P. 4. This is much more than three years after entry of his judgment of conviction on October 20, 1989. C.P. 13.

There was also no statement of either newly discovered evidence or of an intervening decision which would have provided a basis for an exception to the time bar provided by M. C. A. §99-39-5(2).

2. The transcript of Payne’s guilty plea hearing indicates that Payne’s claims for relief are lacking in merit. There was no affidavit or statements of good cause for why they could not be obtained filed in support of Payne’s claims for relief. C.P. 4-9. Payne admitted that he had not been promised anything or coerced into pleading guilty. C.P. 24. Payne admitted he knew that twenty year sentence for conspiracy to commit murder and that he was in fact guilty of entering into a conspiracy with Ms Balfour to have her shoot a uniformed officer to prevent him from being arrested. C.P. 25. Payne admitted under oath that he was satisfied with the advise and services of his guilty plea counsel. C.P. 25.

There was therefore neither evidence of “deficient performance” or of “prejudice” to Payne’s defense as a result. This issue is also lacking in merit.

Factual issues related to proving Payne guilty of the charge were waived when Payne pled guilty voluntarily and intelligently.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT PAYNE WAS TIME BARRED UNDER 99-395(2).

The record reflects that Payne was time barred. Payne pled guilty to conspiracy to commit murder on "October 20, 1989." C.P. 14. His judgment of conviction was entered on that date. C.P. 12-13. He filed his motion for post conviction relief on "October 27, 2006." C.P. 4. This is some seventeen years later; much more than three years after entry of his judgment of conviction on October 20, 1989. C.P. 13.

There was also no statement from Payne of either "newly discovered evidence" or of an "intervening decision" which would have provided a basis for an exception to the time bar provided by M. C. A. §99-39-5(2).

In **Odom v. State**, 483 So. 2d 343, 344 (Miss. 1986), the court stated under the Uniform Post Conviction Collateral Relief Act, a prisoner only has three years to apply for relief. Unless, his case falls under the exceptions provided, which are for newly discovered evidence or for a relevant intervening decision, he is time barred after three years.

We would also point out that in dismissing the petition, the trial judge erroneously applied the three year statute of limitations provided for under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss. Code Ann. Sect. 99-39-1 et seq (Supp 1985). This act applies prospectively from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three years from April 17, 1984, to file their petition for post conviction relief. Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss Code Ann. Sect 99-39-5(2)(Supp. 1985), which states:

A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi or, in case no appeal is taken, within three years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a

guilty plea, within three years after entry of the judgement of conviction. Excepted from this three year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise, excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

The Appellee would submit that the record reflects that Payne was time barred for failing to file his motion within three years of his entry of judgment of conviction. There was no claim for exception to the bar. This issue is lacking in merit.

PROPOSITION II

THE GUILTY PLEA HEARING TRANSCRIPT INDICATES THERE WAS NO MERIT TO PAYNE'S VARIOUS CLAIMS FOR RELIEF, INCLUDING HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In his motion, Payne claims that he received ineffective assistance of counsel. Payne argues in his appeal that Susie Balfour was more involved in the slaying of the police officer than he was. He also thinks that his sentence should not have been enhanced by other convictions. He believes some of the prior convictions occurred after the charges filed in the instant cause. Appellant's brief page 4-9.

To the contrary, claiming ineffective assistance of counsel for one not filing a motion within three years after entry of judgment of conviction. does not keep that claim alive on appeal

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance where a defendant was time barred from filing for relief under "the UPCCR Act" was not enough to constitute an exception to the statute of limitations. As stated:

Bevel raises a claim of ineffective assistance of counsel. It is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant, that the defendant's fundamental constitutional rights were violated. However, this Court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court's failure to advise a defendant of maximum and minimum sentences does not implicate a "fundamental constitutional right" sufficient to except a case from the procedural bar of Sect 99-39-5.

In addition, the record of the guilty plea hearing indicates that the dates of the previous convictions and sentences was in February, and March , 1989. C.P. 26-27. Whereas, Payne was sentence to his twenty year term for conspiracy to commit murder on October 20, 1989. .

In **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990), the Court stated that a guilty plea admits "all elements of a guilty charge" and operates as waives of all non-jurisdictional defects

contained in an indictment. Therefore, Payne waived having the prosecution prove each element of the conspiracy to commit murder charge beyond a reasonable doubt to a jury of Payne's peers.

Brooks, in the wake of his guilty pleas, assails allegedly defective indictments. A valid guilty plea, however, admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.

In **Sims v State**, 775 So. 2d 1291, 1293 (Miss App 1999), the court found no requirement that the enhancing conviction must have been entered before the crime occurred for which the sentence is to be pronounced. The only requirement is that the enhancing conviction precede the new conviction.

For Payne to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Payne must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" his defense. The burden of proving both prongs rests with Payne. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Payne must show that there is "a reasonable probability" that but for the errors of his counsel, the sentence of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his guilty plea counsel, the result of Payne's guilty plea would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence

for holding that there is “a reasonable probability” that Mr. Ryan and Mr. Clayton erred in advising and assisting Payne in pleading guilty to conspiracy to commit murder. The record reflects that Payne admitted that he was “satisfied with the services” ,advise, and counsel provided by his guilty plea counsel. C.P. 25. The prosecution had stated the charge which included Balfour shooting and killing an officer who was arresting Payne. C.P. 18-19. Payne’s guilty plea counsel believed the prosecution could prove this beyond a reasonable doubt. C. P. 19. And Payne told the trial court he was pleading guilty to the conspiracy to commit murder because he was guilty of having committed this offense. C.P. 25.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991): Under the first prong, the movant ‘must show that the counsel’s performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ The defendant must prove both prongs of the test. Id. 698.

Payne bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel’s performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, “that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit.” **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986). The record reflects no affidavits were filed with Payne’s motion. C.P. 4-9. There is no affidavit from his guilty plea counsel who is being accused of incompetence. There is also no statement of good cause for why it could not be obtained.

In **Johnston v. State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

The Appellee would submit that there was a lack of evidence of either deficient performance by Payne's guilty plea counsel, or of any prejudice to any defense he had to the charges in the instant cause.

This issue is also lacking in merit.

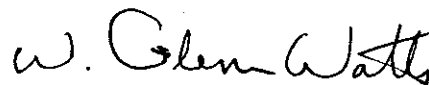
CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 11th day of September, 2007.



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