

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

DARIOUS CALVERT

FILED

APPELLANT

AUG 17 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

VS.

NO. 2007-CA-0604-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF ISSUES | 1 |
| STATEMENT OF FACTS | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | 3 |
| I. CALVERT ENTERED A KNOWING, VOLUNTARY, AND INTELLIGENT PLEA. | 3 |
| II. CALVERT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL. | 5 |
| CONCLUSION | 6 |
| CERTIFICATE OF SERVICE | 7 |

TABLE OF AUTHORITIES

STATE CASES

| | |
|---|----------|
| Brasington v. State, 760 So. 2d 18, 26 (Miss. Ct. App. 1999) | 3 |
| Grimes v. State, 812 So. 2d 1094 (Miss. Ct. App. 2001) | 3 |
| Hentz v. State, 852 So. 2d 70, 77 (Miss. Ct. App. 2003) | 4 |
| Noel v. State, 943 So. 2d 768, 770 (Miss. Ct. App. 2006) | 3 |
| Taylor v. State, 682 So. 2d 359, 364 (Miss.1996) | 4 |
| Vielee v. State, 653 So. 2d 920, 922 (Miss. 1995) | 5 |
| Wilson v. State, 760 So. 2d 862, 864 (Miss. Ct. App. 2000) | 6 |

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DARIOUS CALVERT

APPELLANT

VS.

NO. 2007-CA-0604-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

- I. CALVERT ENTERED A KNOWING, VOLUNTARY, AND INTELLIGENT PLEA.
- II. CALVERT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF FACTS

Darious Calvert was indicted by a Lee County Grand Jury for possession of methamphetamine with intent to sell, transfer, or distribute while possessing a firearm. C.P. 6. Because of the enhancement statute, Calvert faced a maximum sentence of sixty years imprisonment and up to a \$2,000,000 fine. However, after negotiations with Calvert's attorney, the State recommended a sentence of sixteen years with ten suspended, and a fine of \$5,000 with \$3,500 suspended in exchange for a guilty plea. C.P. 26. On August 18, 2006, Calvert pled guilty to the charge, and the trial court reluctantly followed the State's recommendation. C.P. 8, 35.

Calvert subsequently retained new counsel, and on December 6, 2006 moved to withdraw his guilty plea. C.P. 2-4. The Court denied Calvert's motion March 21, 2007. C.P. 48.

SUMMARY OF THE ARGUMENT

Calvert's claim that defense counsel coerced him into pleading guilty is contradicted by the transcript of the plea colloquy. Calvert testified that his plea was not the result of threats or promises. This Court has repeatedly held that where an appellant's post-conviction relief allegations are contradicted by his previous sworn testimony, summary dismissal of his post-conviction relief motion will be affirmed.

Calvert offers nothing more than bare assertions to support his claim of ineffective assistance of counsel. He argues that defense counsel should have filed a motion to suppress as well as other pretrial motions. However, the record is completely silent as to any factual scenario that would require the filing of a motion to suppress. Calvert also complains that defense counsel was unprepared and failed to communicate with Calvert prior to the plea hearing. Again, Calvert presents absolutely no proof of his contentions.

ARGUMENT

I. CALVERT ENTERED A KNOWING, VOLUNTARY, AND INTELLIGENT PLEA.

Calvert claims that his guilty plea was involuntary because his attorney allegedly informed him that he would withdraw from the case if he did not accept the State's offer and enter a guilty plea. Calvert's allegation, however, is contradicted by the transcript of the plea colloquy.

A trial court's denial of a motion for post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. **Noel v. State**, 943 So. 2d 768, 770 (¶5) (Miss. Ct. App. 2006). Additionally, "it is within the discretion of the court to permit or deny a motion for the withdrawal of a guilty plea." **Id.** (quoting UCCCR 8.04(A)(5)).

"A lawyer's persuading a defendant to plead guilty by every means at his disposal does not render the plea involuntary if that persuasion does not result from fear, violence, deception, or improper inducements." **Brasington v. State**, 760 So. 2d 18, 26 (¶38) (Miss. Ct. App. 1999)). There is no shortage of case law concerning a petitioner's claim that his plea was involuntary due to alleged threats made by defense counsel. Most recently, in **Cogle v. State**, the appellant alleged that his guilty plea was involuntary because his attorney threatened to withdraw as counsel if he did not enter the plea. **Cogle v. State**, No. 2006-CP-00744-COA (¶11) (Miss. Ct. App. May 22, 2007). Relying on **Grimes v. State**, 812 So. 2d 1094 (Miss. Ct. App. 2001), the Court found that Cogle's guilty plea was not coerced by the threat of his counsel to withdraw. **Id.** at (¶15) After examining the plea colloquy transcript, the Court found that the trial court fully advised Cogle of the consequences of entering a guilty plea, as well as the alternative, and thoroughly ensured the voluntariness of his plea. **Id.**

In **Kirksey v. State**, the appellant also claimed that his plea was involuntarily made due to

alleged coercion by defense counsel. 728 So. 2d 565, 566 (¶6) (Miss. 1999). However, the supreme court found that Kirksey's supporting affidavits were in direct conflict with his sworn testimony at the plea hearing. **Id.** at 567 (¶9). "There should be a strong presumption of validity of anyone's statement under oath." **Id.** (quoting **Taylor v. State**, 682 So. 2d 359, 364 (Miss.1996)). The court found that Kirksey's plea was voluntarily made, as he was informed of the consequences of entering a guilty plea, including the minimum and maximum sentence and the constitutional rights he would forfeit. **Id.** The court also stated that Kirksey had every opportunity to inform the trial court of the alleged coercion during the plea hearing, yet swore that he was entering a plea of guilty freely and voluntarily and in the absence of any coercion or threats. **Id.** at 566,567 (¶¶3,9).

Calvert's allegation that his plea was involuntarily given is contradicted by Calvert's sworn testimony at the plea hearing. The trial court informed him of the minimum and maximum sentence, as well as the consequences of entering a guilty plea. C.P. 17-27. Like Cogle, Grimes, and Kirksey, Calvert testified that he was entering the plea freely and voluntarily and that no one had threatened or coerced him. C.P. 27. Calvert also had other opportunities during the hearing to inform the court of any alleged threats made by defense counsel. At one point, the court asked whether Calvert was satisfied with his attorney's performance, to which Calvert stated that he was. C.P. 28. Also, after having been informed of the consequences of entering a guilty plea, the trial court advised Calvert that if he had any questions or issues to discuss with his attorney before proceeding, they could take a brief recess and do so, but Calvert declined. C.P. 30. Like Kirksey, Calvert offered affidavits to support his claim. However, "claims by the petitioner, even if supported by affidavit, that are contradicted by the record of the plea acceptance hearing may be disregarded by the trial court." **Hentz v. State**, 852 So. 2d 70, 77 (¶21) (Miss. Ct. App. 2003) (citing **McCuiston v. State**, 758 So. 2d 1082 (¶9) (Miss. Ct. App. 2000)).

Because Calvert's claim is contradicted by his sworn testimony at the plea hearing, the trial court cannot be said to have abused its discretion in denying Calvert's motion to withdraw his guilty plea.

II. CALVERT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Calvert claims that he received ineffective assistance of counsel because his attorney failed to file a motion to suppress or any other pretrial motions and because of lack of preparation and communication with Calvert. Calvert offers nothing more than his bare assertions to support these claims. "This Court has implicitly recognized in the post-conviction relief context that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Vielee v. State**, 653 So. 2d 920, 922 (Miss. 1995) (citing **Brooks v. State**, 573 So. 2d 1350, 1354 (Miss. 1990)). There is simply no evidence in the record of defense counsel's lack of preparation, nor is there any evidence to show that a motion to suppress was necessary. Even the trial court recognized defense counsel's efforts.

Mr. Calvert, based on your record, you are fortunate I am going to follow the recommendation made by the State and not give you considerably more time, but I am going to follow the recommendation, although a person with your background, in my opinion, ought to get more, but your attorney has negotiated this in good faith. I am going to follow it.

C.P. 35.

Calvert also claims that he should have at least been afforded an evidentiary hearing on the issue of ineffective assistance. However, this Court has stated,

When there are potentially disputed issues of fact that would, if proven to exist, entitle the movant to relief, the mere assertion by the movant of the existence of those facts does not automatically entitle the movant to a hearing. Rather, as to those facts that may be the subject of legitimate dispute, the movant is required, by affidavit or otherwise, to demonstrate that there is, in actuality, competent evidence available tending to establish those facts that would entitle the movant to some form of relief.

Wilson v. State, 760 So. 2d 862, 864 (¶4) (Miss. Ct. App. 2000). Again, Calvert has offered absolutely nothing more than his own bare assertions to support his ineffective assistance claim. Calvert has wholly failed to show deficient performance, much less resulting prejudice.

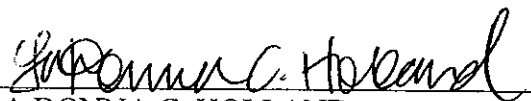
CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court's denial of Calvert's motion to withdraw his guilty plea.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, LaDonna C. Holland, 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 Paul S. Funderburk
Circuit Court Judge
Post Office Drawer 1100
Tupelo, MS 38803-1100

Honorable John R. Young
District Attorney
Post Office Box 212
Corinth, MS 38834

Robert Sneed Laher, Esquire
Attorney At Law
207 West Main Street
Tupelo, MS 38801

This the 17th day of August, 2007.



LADONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680