

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

DESMOND HYNES

APPELLANT

VS.

NO. 2007-CA-0681

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DESMOND HYNES

APPELLANT

VERSUS

NO. 2007-CA-0681-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

On or about September 4, 2003, a grand jury impaneled in the Circuit Court of Sunflower County returned an indictment charging Desmond Hynes, Eddie Hynes and Walter Murphy with possession of marijuana with intent to sell, barter, transfer or deliver, while they were in possession of a firearm (Count I), and conspiracy to sell cocaine (Count II). Desmond Hynes [hereinafter "Hynes"] and Murphy also were charged with sale or transfer of more than one ounce of marijuana (Count III). (C.P.21-22) Pursuant to a plea bargain, Hynes pleaded guilty to Count I; the state agreed to recommend a sentence of 20 years in the custody of the Mississippi Department of Corrections and the imposition of a fine of \$5,000 and the assessment of certain costs. The state also agreed to the dismissal

of Counts II and III. (C.P.23) On February 8, 2005, the court imposed sentence accordingly.¹

On August 28, 2006, Hynes filed in the circuit court a Motion for Post-Conviction Relief, alleging that his sentence was disparate to that of his co-indictees, and that he received ineffective assistance of counsel. (C.P.3-5) After the state filed its Answer to Motion for Post-Conviction Relief (C.P.12-13),² the court conducted a hearing on this motion. At the conclusion of that hearing, the court made findings of fact to the effect that the movant was not entitled to relief and entered its order accordingly. (C.P.15-16) (T.43-53) Aggrieved by the judgment rendered against him, Hynes has perfected an appeal to this Court.

¹As the assistant district attorney clarified in the state's Answer,

[O]n February 4, 2005, the Court held a sentencing hearing ... and sentenced the Defendant to 30 years in custody, a fine, costs and assessments. ...[O]n February 8, 2005, the Court decided to resentence the Defendant because of an error in listing a minimum on the plea petition and suggested that the State make an offer to Defendant. ... [T]he State then made the offer that the Defendant accepted and he was sentenced according to the plea offer.

(C.P.12)

²The state adopts that Answer here by reference.

SUMMARY OF THE ARGUMENT

No error has been shown in the circuit court's denial of Hynes's Motion for Post-Conviction Relief. The court's factual findings are not clearly erroneous, but are supported by the record. Moreover, the correct legal standards were applied. Accordingly, the judgment entered below should be affirmed.

PROPOSITION:

NO ERROR HAS BEEN SHOWN IN THE CIRCUIT COURT'S DENIAL OF HYNES'S MOTION FOR POST-CONVICTION RELIEF

Having conducted a hearing on Hynes's Motion for Post-Conviction Relief, the court denied it with findings of fact and conclusions of law. The court's factual findings will not be disturbed unless they are clearly erroneous. *Gatewood v. State*, 754 (Miss. App. 2008). Because the court applied the correct legal principles to findings supported by the record, the state respectfully submits that Hynes has failed to make demonstrate error in the court's judgment.

In its order denying relief, the court made the following findings and conclusions with respect to the first issue presented:

Counsel alleges that the sentence of this defendant is disparate to the codefendants in the criminal cause. The Court is of the opinion and finds that the sentence of Walter Murphy (who pled without enhancement by a firearm) is the same as the sentence for this Defendant. **The sentence for Eddie Hynes is two years less than this Defendant, however, he [Eddie Hynes] is entitled to consideration by the State because of his willingness to provide State's evidence.** That this Defendant pled guilty to the charge as laid in Count I of the indictment. That the State has and could produce evidence that this Defendant was in possession of a firearm at the time of the crime, either individually or while acting in concert with the others. That the sentence of Desmond Hynes is not disproportionate to the other codefendants. This issue is without merit.

(emphasis added) (C.P.15)

This finding of fact is amply supported by the testimony taken during the plea hearing and during the hearing on the motion for post-conviction relief.³ (Transcript of Plea Hearing, pp.9-13) (T.42-44) Furthermore, there is no requirement that co-indictees receive identical sentences. *Collins v. State*, 822 So.2d 364, 366 (Miss. App. 2002). The fact that Eddie Hynes received a lesser sentence as a result of his plea bargain with the state gives this movant no basis for complaint. *Maldonado v. State*, 796 So.2d 247, 262 (Miss. App. 2001). No error has been shown in the circuit court's disposition of Hynes's first claim.

With respect to the second ground for relief, the court made this finding and conclusion:

³Having heard argument on this point, the court stated the following into the record:

And the State has indicted prior that they were prepared to prove that one of the guns, one of the three guns, in fact, belonged to Hynes. When there is a plea, of course, the Court will ask the State for the underlying facts that if this case were to go to trial what the testimony would show, what they expect to prove from this, and they indicated that they believed that they could establish beyond a reasonable doubt that one of the guns belonged to him, even though I understand what you're saying, that Eddie Hynes turned State's evidence.

It's not uncommon when you have multiple defendants one of them would flip, and it's not uncommon that the State would make an offer, a lesser offer. So in that issue number one, the Court finds for the State.

(T.43)

That Counsel for Defendant was ineffective particularly in her handling of the plea. The Court finds that the Defendant was well aware of what he was doing when entering his plea and finds several instances in the transcript of the plea that he understood that he was pleading guilty to the charge as laid in the indictment. Any confusion may have been the result of two Assistant District Attorneys handling the first and second pleas. The Court has considered the other aspects of ineffective assistance of counsel and finds that they do not meet the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). This issue is without merit.

(C.P.16)

Again, the state submits this finding has support in the record and is legally sound. First, during the plea hearing, Hynes testified that no one had promised him anything or threatened or coerced him to plead guilty; that he was aware of the minimum and maximum penalties for the offense charged; that his attorney had fully discussed with him all of the facts and circumstances surrounding his case; and that she had advised him of all possible defenses in the event he elected to proceed to trial; and that he was satisfied with the advice and help his attorney had given him. (Transcript of Plea Hearing, 6-9)⁴ During the sentencing hearing conducted on February 8, 2005, the court stated that the 30-year sentence imposed four days earlier would be set aside on the ground of mistake. (Transcript of Sentencing Hearing, 49-50 [pp. 13-14]) The court then conducted this questioning of Hynes:

Q. And you do have a choice. No one is making you

⁴In ruling on this issue from the bench, the court appropriately quoted extensively from these transcripts. (T.47-49) Such statements carry a strong presumption of verity and are entitled to great weight. *Thomas v. State*, 883 So.2d 1197, 1199 (Miss. App. 2004).

accept the State's offer. Do you understand that?

A. Yes, ma'am.

Q. Do you clearly understand that?

A. Yes, ma'am.

Q. Do you have any questions about that?

A. No, ma'am.

Q. What does Desmond want to do? Now what your mother wants you to do, not what your wife wants you to do, not what your attorney wants you to do, what does Desmond want to do?

A. Fifteen years. The twenty, suspend five.

Q. You want to accept the offer?

A. Yes, ma'am.

(emphasis added) (Transcript of Sentencing Hearing, 51-52 [pp. 15-16])

In light of the foregoing, the state submits the record amply supports the conclusion that Hynes freely and voluntarily entered his plea with full knowledge of the consequences, that he was satisfied with the services of his counsel, and that he received the sentence for which he bargained. No error can be shown in the court's disposition of his second ground for relief.

Finally, regarding the final claim, the court's order contains the following disposition:

That Edward J. (Josh) Bogen should have recused himself because at one point he represented all three defendants and Aelicia Thomas was ineffective for failing to request his recusal. **The Court finds that based on what is before the Court today, the Court cannot say that Bogen has committed any infraction to the prejudice of Desmond Hynes. *Stringer v. State*, 485 So.2d 274 (Miss.1984).** The

Court also finds that Aelicia Thomas was not ineffective for failing to request the recusal of Hynes. This issue is without merit.

(emphasis added) (T.16)

At the conclusion of the hearing on this motion, counsel for Hynes had argued that attorney Bogen had a duty to recuse himself from representing any of the co-indictees once Eddie Hynes turned state's evidence. (T.49) The assistant district attorney responded as follows:

Your Honor, under the case of *Stringer v. State*, 485 So.2d 274 [Miss.1986], the Mississippi Supreme Court said, "We hold the possibility of conviction is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." That would be Ms. Thomas in this case.

"It is the opinion of this Court that the petitioner in this case has also failed to show any actual conflict of interest or prejudice as a result of the joint representation of multiple defendants."

Counsel has not shown any adverse prejudice as it affects this particular defendant and Ms. Thomas' representation. The fact that Mr. Bogen represented them all at one time is of no import because he got off of the case when he had a conflict of interest. Up until that point, they were all three sticking together, and there was no conflict of interest. But as soon as the conflict arose, Mr. Bogen got off the case.

This Court did the right thing in appointing Ms. Thomas and Mr. Mallette to represent the other two co-defendants, and there is no prejudice shown to this defendant.

(emphasis added) (T.50-51)

The court did not err in accepting the state's argument. There simply was no proof that attorney Bogen's initial representation of all three co-indictees resulted in prejudice to Hynes's case. Hynes's third claim was properly denied.

CONCLUSION

The state respectfully submits Hynes's Motion for Post-Conviction Relief was properly denied. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

A handwritten signature in cursive script, appearing to read "Deirdre McCrory".

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 Betty W. Sanders
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Honorable Joyce I. Chiles
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This the 14th day of February, 2008.


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