

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN ANTHONY MAGYAR

APPELLANT

FILED

VS.

FEB 27 2008

NO. 2007-CA-0740

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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STATEMENT OF THE ISSUES

- I. Magyar knowingly, intelligently and voluntarily entered a plea of guilty to the charge of sexual battery.
- II. Magyar's Petition fails to establish a viable claim for ineffective assistance of counsel and he fails to prove either prong under *Strickland* and he does not provide factual affidavits or evidence to support his claims.
- III. Magyar's pleading and attachments do not meet the standard necessary to require a hearing.
- IV. Magyar is not entitled to a hearing on his claim that his trial counsel was ineffective.

SUMMARY OF THE ARGUMENT

Magyar knowingly, intelligently and voluntarily entered a plea of guilty to the charge of sexual battery. Magyar was clearly informed of his right to cross examine all witnesses during his plea hearing. He stated that he understood those rights on the record. Magyar's Petition fails to establish a viable claim for ineffective assistance of counsel and he fails to prove either prong under *Strickland* and he does not provide factual affidavits or evidence to support his claims. Magyar's pleading and attachments do not meet the standard necessary to require a hearing. Magyar is not entitled to a hearing on his claim that his trial counsel was ineffective. Magyar bases his claims on affidavits which are opinion and hearsay and do not provide any factual evidence to support his claims. Therefor, Magyar's claims were properly dismissed by the trial court without a hearing.

ARGUMENT

I. Magyar knowingly, intelligently and voluntarily entered a plea of guilty to the charge of sexual battery.

A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 115 (Miss.Ct.App.2002). However, when issues of law are raised, the proper standard of review is de novo. *Brown v. State*, 731 So.2d 595, 598 (Miss.1999).

On or about John Anthony Magyar was indicted for sexual battery, specifically,

that between the 17th day of November, 2004, and the 5th day of January, 2005, did here in Washington County unlawfully, willfully, feloniously engage in sexual penetration with Tara Lynn Chandler, a child under the age of 18, at a time when the said John Anthony Magyar was in the position of trust or authority over the said Tara Lynn Chandler, against the peace and dignity of the State of Mississippi.

Magyar argues that his guilty plea was not entered into voluntarily or intelligently.

Magyar claims that he was incorrectly advised by his attorney as to his right to confront the witness against him. A plea is considered "voluntary and intelligent" if the defendant knows the elements of the charge against him, understands the charge's relation to him, what effect the plea will have, and what sentence the plea may bring. *Alexander v. State*, 605 So.2d at 1172. During the trial court's examination of Magyar at the plea hearing, the trial court advised Magyar of his rights; stating,

Q. Before we go any further, I am going to

advise you of certain rights that you have under the laws of this state and the United States. In the first place, you have the right to a speedy public trial by a jury. At that trial you would have the right to cross-examine all the witnesses who testify against you. You have the right of confrontation, which means they must testify in your presence where you can observe them as they testify; that is, the witnesses. You have the right to issue subpoenas to compel the attendance of witnesses or the production of any other evidence. Do you know what a subpoena is?

A. Yes, Sir.

Q. You have the right to be represented by a lawyer at every critical stage of the proceedings against you. The law presumes you are innocent. This requires the State to prove beyond a reasonable doubt that you are guilty. You have the right to testify or the right not to testify. Your lawyer can advise you as to what he thinks you should do with regard to the testimony, but in the end you are the one who chooses whether you will testify or not. If you decide not to testify, then I would instruct the jury that they could draw no inference of guilt by the fact that you did not testify in your own case. If you did go to trial and you were convicted, you would have the right to appeal your case to the Mississippi Supreme Court. By entering a guilty plea to this charge, you are waiving or giving up all of the rights that I've just explained to you. *Do you understand your rights?*

A. Yes, Sir.

Q. *Do you understand that you are giving up the rights by entering a plea of guilty?*

A. Yes, Sir.

(Tr. 3,4)

Solemn declarations in court carry a strong presumption of verity. *Gable v. State*, 748 So.2d 703, 706 (Miss.1999).

Magyar further argues that his plea was not voluntarily and intelligently given since he alleges that his attorney did not inform him that he would be required to register as a sex offender. The record reflects that Magyar was informed that he would need to register as a sex offender at his sentencing hearing. (Tr. 34) However, Magyar did not raise any objections or questions or move to withdraw his guilty plea. The court was not allowed an opportunity to pass on the issue during the plea and sentencing phase of Magyar's case. Magyar does not present any evidence other than his own bald claim that his attorney did not advise him that he would be required register as a sex offender if he pled guilty to sexual battery. The affidavit of Tommy Mayfield, which was submitted by Magyar in an attempt to fulfill the requirement that additional factual evidence or affidavits must support the charge of ineffective assistance of counsel in order to meet the appellant's burden, is not factual in nature and contains no factual statements supporting Magyar's claim of ineffective assistance of counsel. (RE 46-48) Each paragraph of the affidavit reflect that Mayfield had no independent or personal knowledge any facts related to Magyar's representation during the plea and sentencing. All documents were provided to Mayfield by Magyar's current counsel. Mayfield states that he has been requested to render an opinion as to whether Magyar received ineffective assistance of counsel. He then bases his opinion solely on information received from Magyar's counsel. The affidavit of Matthew Eichelberger, a former Assistant Public Defender is unsigned and unsworn. (RE 51) The affidavit submitted by Magyar's father, John Craig Magyar is completely hearsay and further it is hearsay of an opinion. (RE 55) There is no factual allegation in the affidavit that supports

Magyar's claim of ineffective assistance of counsel.

Magyar has attempted to comply with the requirement of additional factual evidence or affidavits without any regard to the substance of the law or the case. This issue is without merit and should be dismissed.

Mississippi Code Annotated Section 99-39-9 (Rev.2000) provides that motions for post-conviction relief should contain affidavits *which include facts and state how or by whom these facts will be proven.* *Dennis v. State*, 873 So.2d 1045 (Miss.Ct.App. 2004) *citing Laushaw v. State*, 791 So.2d 854 (Miss.Ct.App.2001) [emphasis added]. The Court in *Dennis v. State* rejected Dennis' claim of ineffective assistance of counsel where Dennis failed to provide affidavits or other evidence *that state the facts and evidence* to support his allegations.

While Magyar attaches documents in the form of an affidavits, it is not sufficient to meet the requirements of 99-39-9 or to meet Magyar's burden in his claim of ineffective assistance of counsel. The affidavit submitted is provided by Tommy Mayfield, who has no personal knowledge of the performance of Magyar's attorney prior to the plea hearing. His affidavit is based solely on what he was told by Magyar and provides opinion only. *At this point in the process, the only opinion that matters is the opinion of the Mississippi Court of Appeals.* Since Mayfield can provide no facts and no other affidavits containing facts relating to the performance of Magyar's attorney, Magyar has not met his burden for proving ineffective assistance of counsel. Further, he has not met his burden for going forward with his Post Conviction Relief claim, since he presents no factual evidence to support his claim.

During the plea colloquy, Magyar was informed of the charges against him, the effect of the plea, what rights he would waive if he pleaded guilty, and the possible sentence he could

receive. Magyar indicated that he understood everything that was explained. Magyar admitted to committing the sexual battery to which he pleaded guilty. Magyar stated that he was satisfied with his attorney, and he entered into the guilty plea of his own free will.

II. Magyar's Petition fails to establish a viable claim for ineffective assistance of counsel and he fails to prove either prong under *Strickland* and he does not provides a factual affidavit or evidence to support his claim.

To prove ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with the defendant. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). Under *Strickland*, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The defendant must plead both prongs of the above test with specific detail. *Brooks v. State*, 573 So.2d 1350, 1354 (Miss.1990). In cases involving post-conviction collateral relief, "where a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995).

To survive summary dismissal, a collateral attack on a facially correct plea must include supporting affidavits of other persons. *Baker v. State*, 358 So.2d 401, 403 (Miss.1978). Magyar has not provided supporting affidavits which contain a factual basis for his assertion, thus, this issue to be without merit.

Magyar attempts to support his claim the he received in affective assistance of counsel

with an affidavit by attorney Tommy Mayfield. Mayfield is a former prosecutor and is now a criminal defense lawyer. The affidavit of a criminal defense lawyer is useless to this Court in determining this case. Magyar appears to be attempting to usurp the Court's role in the process by presenting Mayfield's opinion in affidavit form. Mayfield's affidavit is purely opinion and does not provide any factual evidence to support Magyar's claims. (RE 46-49) Magyar offers no factual proof as to his claims of involuntary plea and ineffective assistance of counsel other than his own affidavit. Magyar also presents an affidavit from his father which is entirely hearsay of an opinion and completely worthless in this matter. (RE 55) The affidavit Magyar presents from former Assistant District Attorney Eichelberg is unsigned and unsworn. (RE 51) The affidavit of Mayfield and Magyar's father along with Magyar's assertions are insufficient to support a post conviction relief petition.

Magyar argues that his previous counsel delayed in making his initial discovery request, failed to issue any trial subpoenas, untimely filed a defense witness subpoena and that his counsel's performance was deficient. This claim goes to the effectiveness of Magyar's counsel. Magyar fails to provide proof that he received ineffective assistance of counsel under the two part test established in *Strickland*.

Magyar further claims that his counsel did little to defend him, failed to conduct an adequate investigation, failed to interview potential witnesses provided by the defendant and failed to request funds to hire an investigator. Again, these claims go to the effectiveness of Magyar's counsel. Magyar fails to provide proof that he received ineffective assistance of counsel under the two part test established in *Strickland*.

To prove ineffective assistance of counsel, a defendant must show (1) that his counsel's

crime Magyar pled guilty to. The trial court correctly held that Magyar's claim that the failure of the trial court and defense counsel to advise him prior to his guilty plea that he would be required to obey the laws of the State of Mississippi, including the requirements of Miss. Code Ann. § 45-33-25, is without merit. There is no precedent in this jurisdiction requiring that a defendant be advised of § 45-33-25. Further, Magyar failed to object when the sex offender registration requirement was stated on the record during the sentencing hearing and cannot now be heard to complain on this issue.

III. Magyar's pleading and attachments do not meet the standard necessary to require a hearing.

As argued above, Magyar's pleading and attachments do not meet the necessary standard to require a hearing. Magyar cites *Jones v. State*, 949 So.2d 872 (2007) and *Mitchener v. State*, 2007 Miss. App. Lexis 596 (2007) as authority for his contention that his petition and affidavits are sufficient to entitle him to a hearing as to whether his trial counsel was ineffective. These cases, however are easily distinguishable from Magyar's case, since the affidavits in both cases involve affiants with personal knowledge of the conduct of the attorney. Jones' was present in the room and could testify via affidavit from her personal knowledge the facts regarding the conduct of Jones' attorney. Magyar provides no such factual affidavit. Mitchener attached the affidavits of witnesses that *supported his factual allegations*. *Mitchener v. State*, 964 So.2d 1188, 1190 (Miss.Ct.App. 2007). Mitchener provided the affidavit of his wife who had personal knowledge of the conduct of Mitchener's attorney. Her affidavit provided as follows:

In late September 2004, during a three-way call from Christine to Mitchener and his attorney, the attorney represented that if Mitchener entered an open plea of guilt, he would get probation. Christine Mitchener said she was hesitant, but the attorney assured

her that probation would be the sentence if Mitchener entered an open plea. Before the sentencing hearing, Mitchener's attorney called her and asked if Mitchener could live with her as a condition of his probation. During another conversation between Mitchener and his attorney, she heard the attorney again assure Mitchener he would get time served and probation. Christine Mitchener averred that Mitchener was so sure he would receive this sentence that he asked her to bring his truck to the sentencing hearing so that he could drive himself home. Christine Mitchener opined that if the attorney had not told Mitchener he would get probation, Mitchener would not have pled guilty.

Mitchener at 1192.

Mrs. Mitchener's affidavit was completely factual, documenting the actual conduct of Mitchener's attorney. The affidavits Magyar attaches to his petition have no factual basis at all. They are purely opinion. Further, the affidavit of Magyar's father is hearsay. The affidavit of Magyar's former counsel, former assistant Public Defender Matthew Eichenberger is unsigned and unsworn.

Magyar's counsel notes in his brief that in *Myers*, the appellate court found that Myers Petition for post conviction relief sufficiently stated a claim for relief from an involuntary plea, and thus could not be dismissed on its face. Magyar cites the following facts from *Myers*:

Myers attached affidavits from his mother and his sister. *Id.* The mother's affidavit averred that she was present during the attorney's interview with Myers and that the attorney told Myers that if he pled guilty the judge would give him less than 12 years, but if he insisted on going to trial, he would get 23 years. *Id.* The sister's affidavit averred that she was present at the interview and that the attorney told Myers that the plea hearing would result in a sentence of less than 12 years. *Id.*

Appellant's Brief at p. 14 (citing, *Myers*)

The distinction between *Myers* and Magyar is evident from the cite above. Myers sister

and mother were witnesses to the attorney's conduct. They had personal knowledge of the attorney's actions. The affidavits support Myer's factual claims of ineffective assistance of counsel. In contrast, Magyar did not submit sufficient factual evidence or affidavits to support his claim of ineffective assistance of counsel. He was therefore not entitled to a hearing on his claim and the trial court correctly denied his request for a hearing.

IV. Magyar is not entitled to a hearing on his claims that his trial counsel was ineffective.

Magyar cites *Jones v. State*, 949 So.2d 872 (2007) and *Mitchener v. State*, 2007 Miss. App. Lexis 596 (2007) as authority for his contention that his petition and affidavits are sufficient to entitle him to a hearing as to whether his trial counsel was ineffective. These cases, however are easily distinguishable from Magyar's case, since the affidavits in both cases involve affiants with personal knowledge of the conduct of the attorney. Jones' was present in the room and could testify via affidavit from her personal knowledge the facts regarding the conduct of Jones' attorney. Magyar provides no such factual affidavit. Mitchener attached the affidavits of witnesses that *supported his factual allegations*. *Mitchener v. State*, 964 So.2d 1188, 1190 (Miss.Ct.App. 2007). Mitchener provided the affidavit of his wife who had personal knowledge of the conduct of Mitchener's attorney. Her affidavit provided as follows:

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Mrs. Mitchener's affidavit was completely factual, documenting the actual conduct of Mitchener's attorney. The affidavits Magyar attaches to his petition have no factual basis at all. They are purely opinion. Further, the affidavit of Magyar's father is hearsay. The affidavit of Magyar's former counsel, former assistant Public Defender Matthew Eichenberger is unsigned and unsworn.

Mitchener did not submit sufficient factual evidence or affidavits to support his claim of ineffective assistance of counsel. He was therefore not entitled to a hearing on his claim and the trial court correctly denied his request for a hearing.

CONCLUSION

Magyar's assignments of error are without merit and the verdict of the jury and the judgments of the trial court should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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:

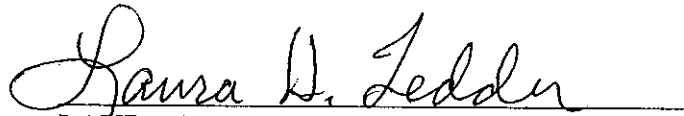
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This the 27th day of February, 2007.

A handwritten signature in cursive script, reading "Laura H. Tedder", written over a horizontal line.

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