

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN ANTHONY MAGYAR

APPELLANT

VS.

NO. 2007-CA-0740

STATE OF MISSISSIPPI

APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUES

- I. 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 on his claim that his trial counsel was ineffective.

- II. Magyar knowingly, intelligently and voluntarily entered a plea of guilty to the charge of sexual battery. The sex offender registry is a collateral consequence of a guilty plea and the absence of knowledge beforehand does not render Magyar's plea involuntary.

ARGUMENT

- I. 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 on his claim that his trial counsel was ineffective.**

Magyar's Petition for Post-Conviction Relief did not meet the requirements of Mississippi Code Annotated § 99-39-9 (1972), as amended, and further does not trigger the need for a hearing. While affidavits were attached, they were not sufficient to require a hearing. A petitioners allegations alone are insufficient to require the trial court to conduct an evidentiary hearing.

As the Mississippi Court of Appeals noted, Magyar's affidavit is "substantially impeached" by the record of the plea transcript. 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. 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. 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 a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). Young's first contention is that his pleas were involuntary because he was improperly coerced into making a guilty plea by a promise of a lighter sentence. As this Court

stated in *Wright v. State*, “where an affidavit is overwhelmingly belied by unimpeachable documentary evidence in the record such as, for example, a transcript or written statements of the affiant to the contrary to the extent that the court can conclude that the affidavit is a sham no hearing is required.” *Young v. State*, 731 So.2d 1120 (Miss. 1999) (citing, *Wright v. State*, 577 So.2d 387, 390 (Miss.1991)).

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 offers no factual proof as to his claims of involuntary plea and ineffective assistance of counsel other than his own affidavit, which is largely impeached by the plea transcript. Magyar also presents an affidavit from his father which is entirely hearsay and 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) Magyar attempts to support his claim the he received in affective assistance of counsel with an affidavit by attorney Tommy Mayfield. Mayfield’s affidavit is purely opinion and does not provide any factual evidence to support Magyars claims. (RE 46-49) The affidavits Mayfield submits are insufficient to support a post conviction relief petition or to prove ineffective assistance of counsel.

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*.

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). Magyar is unable to provide any factual evidence or affidavits supporting his claim that his counsel's performance was inadequate, since the affidavits he provides contain only hearsay and opinion. Further, he cannot show that but for counsel's unprofessional errors, the result of the proceeding would have been different.

II. Magyar's plea was knowing, intelligent and voluntary, despite his claim that he was not advised that he would be required to register as a sex offender pursuant to Mississippi Code Annotated 43-33-25(1).

Magyar contends that his plea was involuntary because he was not informed of the requirement to register as a sex offender pursuant to Miss. Code Ann. 45-33-27 et seq. (1972), amended, stating: "In the plea colloquy and the guilty plea petition filed, there was no mention about the mandatory requirement that he register as a sex offender for life." (Appellant's Petition for Writ of Cert, p. 2) However, immediately after receiving Magyar's plea the Trial Judge did inform Magyar of the necessity of registering as a sex offender. (Tr. 34) At this point, it was Magyar's responsibility to inform the trial court that he had not been advised of the Sex Offender Registry requirements. At this point, the provisions of Rule 8.04 of the Uniform Rules of Circuit

and County Court Practice could have been utilized. There was a clear opportunity for Magyar to put the issue before the Trial Court while the Trial Court still had discretion to pass on the issue. Issues not presented to the trial judge are “procedurally barred and error, if any is waived.”

Manning v. State, 735 So.2d 323, 339 (Miss.1999).

Magyar argues that because the Act contains a requirement that “notice of the registration requirements shall be included on any guilty plea forms and judgment and sentence forms provided to the defendant,” that notice of the requirements of the Act are also required for a plea to be knowing, intelligent and voluntary. However, the legislature is not vested with the authority to determine what makes a guilty plea knowing, voluntary and intelligent. This is a legislative requirement for a regulatory scheme that is included in order to ensure the effectiveness of the Act in its purposes. The purpose of the Act is to aid law enforcement in investigating sex crimes and apprehending sex offenders. The Act does not in any way stand to create notice expectations on behalf of offenders. It is not punitive in nature and, regardless of this statutory requirement, is merely a collateral consequence of conviction.

The Mississippi Court of Appeals correctly held that the requirement to register as a sex offender is a collateral consequence of a criminal conviction and is not a pre requisite to a constitutionally valid plea. The Supreme Court of the United States has held that Alaska’s mandatory Sex Offender Registration Act is civil in nature and non-punitive and does not constitute a retroactive punishment forbidden by the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84, 105-06, 123 S.Ct. 1140, 1154, 155 L.Ed.2d 164 (2003). Although the respondents in the case were convicted before the passage of the Alaska Act, they were covered by it. Previously convicted sex offenders who were required to register under the Alaska Act were certainly not

aware of the necessity of registration at the time of their convictions, whether by trial or guilty plea.

Convictions are a matter of public record and the registry is merely a regulatory way of sharing what is already public information. There is no disability to a registrant's liberty interests. Registrants are not prohibited from moving or from working. Any employer would find the same information by way of a background check. The Court in *Smith v. Doe* opined that the Alaska Act's "rational connection of a non-punitive purpose is a most significant factor in our determination that the statute's effects are not punitive. *Id.* at

Mississippi's Act, Section 45-33-25(1) of the Mississippi Code Annotated 1972, as amended, notes the high rate of recidivism posed by criminal sex offenders and states that the purpose of the act is to aid law enforcement in investigating sex crimes and apprehending sex offenders. The Legislature made the specific finding that "the system of registering criminal sex offenders is a proper exercise of the state's police power *regulating* present and ongoing conduct." Again, the Mississippi Sex Offender Registry Act is clearly regulatory and does not function as a punitive measure.

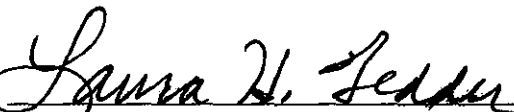
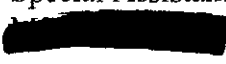
Magyar cites *People v. Zaida*, 147 Cal.App. 1470 (Cal.App.Dist.1 2007), for the proposition that a trial court has a duty to advise a defendant of the requirement to register as a sex offender upon conviction of a statutorily enumerated offense. However, *Zaida* is clearly distinguishable from the case at bar. The defendant in *Zaida* was appealing from the trial court's denial of his motion to withdraw his guilty plea. Once *Zaida* was fully informed as to the requirements of the sex offender registration act, he presented the issue to the trial court for consideration. In the case *sub judice*, Magyar received notice of the requirements of the Sex

Offender Registration Act on the day he was sentenced. At that time, there was still an opportunity to present the issue to the trial court for review. Further, his failure to react upon being so advised by the trial court is certainly indicative that he already knew of the act and its requirements. Magyar also cites a New Mexico case in which the defendant was not aware of the lifetime duration of the registration requirement. *State v. Edwards*, 157 P.3d 56 (NM 2007). Again, the case is distinguishable, since the district court was given an opportunity to rule on the issue.

CONCLUSION

The Mississippi Court of Appeals has correctly affirmed the Trial Court's dismissal of Magyar's Motion for Post Conviction Relief and the State urges the Mississippi Supreme Court to affirm the holding of the Court of Appeals.

Respectfully submitted,
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CERTIFICATE OF SERVICE

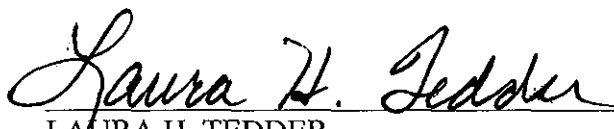
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 9th day of March, 2009.



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