

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

MICHAEL TRICE

APPELLANT

VS.

FILED

NO. 2007-CP-0041

JUL 19 2007

**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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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL TRICE

APPELLANT

vs.

CAUSE No. 2007-CP-00041-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an order of the Circuit Court of Lee County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

STATEMENT OF FACTS

The prisoner was indicted for sale of cocaine on 19 October 2004. (R. Vol. 2, pp. 129 - 130). On 6 February 2006, the prisoner appeared before the Circuit Court of Lee County to enter a plea of guilty. After the plea colloquy, the prisoner's plea was accepted and he was convicted and sentenced for his felony. (R. Vol. 2, pp. 121 - 127).

Following the usual practice of the denizens of the Department of Corrections, the prisoner filed a motion in post - conviction relief. (R. Vol. 1, pp. 2 - 82; Vol. 2, pp. 83 - 91). In this tedious filing, the prisoner asserted some five grounds for relief. (R. Vol. 1, pp. 4 - 5).

The Circuit Court denied relief on the prisoner's motion, finding that the transcript of the guilty plea clearly belied the prisoner's claims in post - conviction relief. (R. Vol. Pp. 143 - 144).

Like night following day, this appeal has followed.

STATEMENT OF ISSUES

DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

We bear in mind the standard of review applicable to an appeal from a denial of relief in a post - conviction relief action. *Pace v. State*, 770 So.2d 1052 (Miss. Ct. App. 2000).

The first claim raised by the prisoner in the Circuit Court was the usual ineffective assistance of counsel claim. As best as we can tell, the following four claims were intended to be specific claims of ineffective assistance of counsel. They appear to be renewed here.

The prisoner says his plea was prompted by threats and promises of lenity by certain law enforcement personnel. There may nor may not be a claim that the attorney somehow violated a plea agreement. While there is buried in the mass of paper filed by the prisoner an affidavit by some relative of his, that relative only related what the prisoner supposedly told him. (R. Vol. 2, pp. 115 - 120). Consequently, there is nothing here in support of the prisoner's contentions beyond his own allegations.

On the other hand, the prisoner told the Circuit Court, under oath, during the plea colloquy, that his plea was free and voluntary and that no one had put any pressure on him or

forced him in any way to plead guilty to the charge. (R. Vol. 2, pp. 122;125). He further stated, under oath, that his attorney had properly advised him and that he was satisfied with his attorney's representation. (R. Vol. 2, pp. 125 - 126). Insofar as the plea agreement is concerned, the prosecutor stated the agreement in the record and that prisoner acknowledged, under oath, that it was the one he thought the State would make. (R. Vol. 2, pg. 125). In view of these considerations, the trial court cannot be said to have committed error by refusing to grant an evidentiary hearing and in denying relief on the prisoner's motion. *Tenner v. State*, 868 So.2d 1067 (Miss. Ct. App. 2004).

There is no indication in the record, beyond the prisoner's claims, that the attorney inaccurately advised the prisoner concerning early release or other such matters.

The next claim is that the prisoner's right to a speedy trial was violated. However, since the prisoner waived his right to trial by his plea of guilty, he necessarily waived his right to a speedy trial. *Jones v. State*, 747 So.2d 249 (Miss. 1999).

The prisoner then suggests that the indictment exhibited against him was forged. This is so, says he, because while the indictment indicates that it was returned by the November, 2004, term of the Grand Jury, it was filed in October of that year. (R. Vol. 2, pp. 139 - 140). How this difference in dates suggests or proves that the indictment was "forged" is a matter the prisoner has left to the imagination of the Court.

The record does not indicate why an indictment returned by the November Grand Jury was filed in October. Perhaps the November Grand Jury was empaneled in October. However, we find nothing defective in the indictment. In any event, there is nothing whatsoever to demonstrate that the indictment was "forged" or fraudulent. The indictment set out the elements of the crime the prisoner committed; it was not essential to have the statute cited. By the plea of

forced him in any way to plead guilty to the charge. (R. Vol. 2, pp. 122;125). He further stated, under oath, that his attorney had properly advised him and that he was satisfied with his attorney's representation. (R. Vol. 2, pp. 125 - 126). Insofar as the plea agreement is concerned, the prosecutor stated the agreement in the record and that prisoner acknowledged, under oath, that it was the one he thought the State would make. (R. Vol. 2, pg. 125). In view of these considerations, the trial court cannot be said to have committed error by refusing to grant an evidentiary hearing and in denying relief on the prisoner's motion. *Tenner v. State*, 868 So.2d 1067 (Miss. Ct. App. 2004).

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The record does not indicate why an indictment returned by the November Grand Jury was filed in October. Perhaps the November Grand Jury was empaneled in October. However, we find nothing defective in the indictment. In any event, there is nothing whatsoever to demonstrate that the indictment was "forged" or fraudulent. The indictment set out the elements of the crime the prisoner committed; it was not essential to have the statute cited. By the plea of

guilty, the prisoner waived any non-jurisdictional defects in the indictment. *Reeder v. State*, 783 So.2d 711 (Miss. 2001).

The final claim raised is a long diatribe asserting that the State failed to disclose exculpatory evidence, that the prisoner's attorney failed to read materials given in discovery, and so forth. What the prisoner actually attempts to do, however, is claim that the evidence that could have been admitted against him was insufficient to allow a guilty verdict.

The prisoner waived trial by is guilty plea. He may not be heard now to assert that the evidence would have been insufficient to support a guilty verdict. Beyond this, the prisoner admitted that he sold cocaine during the plea colloquy, and this under oath.

As for the exculpatory evidence claim, this appears to concern a video tape. Yet, elsewhere in this pile of paper submitted by the prisoner, he admits having viewed a video tape of the sale. It thus does not appear that the State failed to disclose exculpatory evidence.

As for the attorney's alleged failure to file motions, the prisoner does not trouble himself to indicate what motions might have been filed and what motions would have had any likelihood of success. As for speedy trial, the prisoner does not trouble himself to explain how such a motion would have successful, nor does he trouble to explain how any delay prejudiced his defense. The lack of prejudice and the fact that the prisoner admits that he did not demand a speedy trial would have made it exceedingly unlikely that a motion would have been successful. *Hersick v. State*, 904 So.2d 116 (Miss. 2004).

CONCLUSION

The Order denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

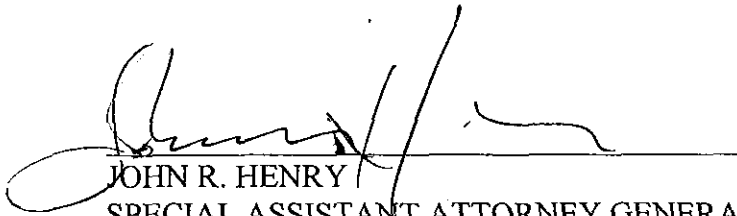
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 19th day of July, 2007.


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