IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEVIN SOWELL — APPELLANT

VS. — NO. 2007-CP-0122

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-CP-0122**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On January 31, 2006, Kevin Sowell plead guilty to possession of cocaine as an habitual offender under M.C.A. §99-19-81 before the Circuit Court of Tate County, the Honorable Andrew Baker presiding. C.P. 25-26. Sowell's plea was accepted as voluntarily and intelligently entered. Sowell was found guilty and given a five year sentence with three years of post release supervision in the custody of the Mississippi Department of Corrections. C.P. 26.

On September 21, 2006, Sowell filed a Motion for Post Conviction relief. C.P. 5-23. On December 29, 2006, the trial court denied relief. C.P. 25-27. From that denial of relief, Sowell filed notice of appeal. C.P. 28.

ISSUES ON APPEAL

I.

WAS SOWELL'S INDICTMENT PROPERLY AMENDED?

II.

WAS SOWELL GIVEN DUE PROCESS WHEN HIS INDICTMENT WAS AMENDED?

III.

WAS SOWELL GIVEN EFFECTIVE ASSISTANCE OF COUNSEL?

IV.

WERE OTHER ISSUES INCLUDED ON APPEAL WAIVED AND LACKING IN MERIT?

STATEMENT OF THE FACTS

On July 29, 2005, Sowell was indicted for possession of cocaine, and driving under the influence of an intoxicating substance on May 15, 2005 in Tate County. R. E. 7.

On October 31, 2005, the State filed a motion to amend the indictment to charge Sowell as an habitual offender under M. C. A. §99-19-83. The trial court on September 1, 2005 entered an Order amending the indictment.

Included in plea negotiations was a reduction of Sowell's habitual offender status from M. C. A. §99-19-83 to 99-19-81 which does not carry a life sentence. Other issues included dismissing count II for DUI, as well as running an additional pending charge concurrent. C.P. 18-19,.

On January 31, 2006, the state agreed to reduce the habitual portion of the indictment to M. C. A. §99-19-81 and to allow Sowell to plead guilty to count I. Count II for DUI was retired to the file. After advising and questioning Sowell and his counsel about Sowell's understanding of the constitutional rights he was waiving by pleading guilty, the trial court found that Sowell's guilty plea was voluntarily and intelligently entered. Sowell was sentenced to serve a five year sentence with three years of post release supervision. C. P. 26.

On September 21, 2006, Sowell filed for post conviction relief. C.P. 5-23. Sowell claimed improper indictment because it was not amended by a grand jury, lack of due process related to this amendment, and ineffective assistance of counsel for failure of his counsel to object to or prevent the amendment to reflect that Sowell was "an habitual offender." C.P. 5-23.

On December 12, 2006, the trial court denied relief. C.P. 25-27. The trial court found that there was a lack of evidence in support of any of Sowell's claims. His motion was denied without the benefit of a hearing under M. C. A. § 99-39-11(2). C.P. 25.

SUMMARY OF ARGUMENT

1. The record reflects that Sowell's indictment was properly amended to reflect his status as an habitual offender. Under Mississippi's Uniform Rules, "URCCC," Rule 7.09 allows amendments to indictments to reflect habitual offender status based upon prior felony convictions. This does not require a new indictment by a grand jury, which is the basis of Sowell's complaint. The record reflects no altering of the charges as stated in Sowell's indictment and no surprise given notice and a record showing no surprise at a public hearing.

2. The record reflects that there was no violation of Sowell's rights to due process. Sowell had notice that his indictment would be amended to reflect his habitual offender status, given his prior convictions. In addition, the record reflects that his guilty plea was based in part upon the prosecution accepting through plea negotiations his habitual status as being under M. C. A. § 99-19-81 rather than M C A § 99-19-83. The prosecution also allowed Sowell to plead guilty to count I and retire Court II, which was to his benefit in terms of a reduced sentence. Sowell's claims of being found guilty of count 2 for DUI are contradicted by the record. Count 2 was dismissed. Sowell plead guilty to count 1, possession of cocaine, and was sentenced accordingly.

When given an opportunity, Sowell did not challenged the accuracy or authenticity of the documentation establishing his prior felony convictions. C.P. 18-19. The record reflects that certified copies of Sowell's prior felony convictions were included in the file to which the trial court, the state and his counsel had access before sentencing. C.P. 18-19.

3. The record reflects no evidence of either "deficient performance" or of "prejudice" to Sowell's defense. This would be as a result of his guilty plea counsel's actions on his behalf. Mr. Franks can not be faulted for failing to object to an amendment to Sowell's indictment without the benefit of grand jury action. This would have been a futile gesture. As a result of Mr. Franks

representation, Sowell is enjoying the benefits of a reduced sentence. He should not be heard to complain.

4. Any additional appeal issues not raised with the trial court were waived. **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988). They are also lacking in merit. A separate hearing is not required where an inmate pled guilty before the trial court with the benefit of counsel. **Keys v. State**, 549 So. 2d 949, 951 (Miss. 1989). There is no requirement that the certified copies of an inmates prior offenses be provided for appeal purposes where there was no challenge to the accuracy or authenticity of those documents at the inmates guilty plea hearing.. C.P. 18-19.

Nor was there any challenge to their accuracy or authenticity made in Sowell's motion for post conviction relief. Motion, page 5-23.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS SOWELL'S INDICTMENT WAS PROPERLY AMENDED.

In Sowell's Motion with the trial court, he complains that his indictment for possession of cocaine and driving under the influence of a substance that impaired his ability was improperly amended. It was amended to reflect that he was "an habitual offender." Sowell believes that the indictment was improper because it was not amended by a Tate County Grand Jury. Motion page 5-23.

To the contrary, the record reflects that Sowell's indictment was properly amended to reflect his status as an habitual offender. Mississippi Uniform Rules, "URCCC," Rule 7.09 allows "amendment of indictments" to reflect habitual offender status based upon prior felony convictions. As stated in rule 7.09:

> Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement. Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

In the trial court's order denying relief, he points out that while only a grand jury can amend an indictment where the amendment is to "the substance of the offense charged ," such was not the case in the instant cause. Sowell's indictment was amended only to reflect his "habitual offender" status which qualified him for enhanced punishment, given his prior felony convictions. The trial court also found that there was no evidence of any surprise to Sowell since he was notified of a motion to amend his indictment early in the proceedings against him.

The State agreed to reduce M. C. A. § 99-19-83 habitual to M. C. A. § 99-19-81

> habitual at the sentencing hearing. Sowell can not argue he was surprised in that he had been charged as a M. C. A. § 99-19-83 habitual early on in the proceedings. C.P. 26.

In **Gray v. State**, 926 So. 2d 961, 974 (¶ 39) (M. C.A. 2006), the Court of Appeals relied upon **Willie v. State**, 876 So. 2d 278, 279 (¶ 3-4) (Miss. 2004) for pointing out that amendments to reflect habitual offender status are permissible.

> Additionally, it is clear that amendments may be made to an indictment in order to reflect a defendant's status as an habitual offender. **Willie v. State**, 876 So. 278, 279 (¶ 3-4) (Miss. 2004) (citing Rule 7.09 of the Mississippi Uniform Rules of Circuit Court.)

The record reflects that Sowell's indictment was amended to reflect his habitual status qualifying him for enhanced punishment. There was no change as to the substance of the charges against him. Under Rule 7.09 of the URCCC , it is not necessary to have a new indictment issued by a grand jury. It can be amended by court order to reflect habitual offender status. Sowell's habitual offender indictment was reduced in the presence of Sowell and his counsel. C.P. 18-19. Therefore, this was done at his guilty plea hearing by mutual agreement of the parties. Sowell was aware of this agreement and knew that he would benefit from its terms.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS NOTICE AND A HEARING ON SOWELL'S AMENDED INDICTMENT

In Sowell's motion he also complains about violation of his "due process" rights. These violations were related to his complaint about having his original indictment amended to reflect his habitual offender status. He claims that his counsel, the State as well as the trial court did not give him proper opportunity to object to the amending of his indictment. Motion page 5-23.

To the contrary, the record reflects that the state filed a motion to amend Sowell's indictment for possession and driving under the influence of an intoxicating substance. C.P. 25. This was to reflect habitual offender status, given two prior felonies, one of which was a crime of violence. The trial court issued an Order granting that amendment. C.P. 25-26.

However, as part of the plea negotiations between Sowell's counsel and the prosecution, the state agreed to accept the reduction of Sowell's habitual offender status from M. C. A. § 99-19-83 to 99-19-81. C.P. 18-19. This enabled Sowell to avoid a harsher sentence which could have included a life sentence.

Additionally, since the record reflects that the reduction in Sowell's habitual offender status occurred during his guilty plea hearing, Sowell was present and was fully apprised of what his counsel was seeking to accomplish on his behalf. C.P. 18-19.. Sowell stated under oath at that hearing that he was aware and approved of the plea agreement negotiated on his behalf by his guilty plea counsel, Mr. James Franks. C.P. 19.

As stated in the trial court's order denying relief:

> The State agreed to reduce the M. C. A. § 99-19-83 habitual to a M C A § 99-19-81 habitual at the sentencing hearing. Sowell can not argue that he was surprised in that he had been charged as a M. C. A. 99-19-83 habitual early on in the proceedings. C.P. 26.

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is a presumption that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, 'There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court.' **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

The Appellee would submit that the record reflects the trial court did not err in finding a lack of evidence of any violation of Sowell's due process rights. Sowell acknowledged knowing and approving the beneficial terms of the plea bargain agreement negotiated on his behalf by his counsel. C.P. 19.

This issue is also lacking in merit.

PROPOSITION III

THE RECORD REFLECTS THAT SOWELL WAS GIVEN EFFECTIVE ASSISTANCE OF COUNSEL.

Sowell believes that he did not receive effective assistance of counsel. He did not receive effective assistance because he thinks his counsel should have objected and attempted to prevent the state and the trial court from amended his indictment. He also complains that his counsel was "in collusion" with the prosecution in indicting him as an habitual offender. Motion, page 5-23.

To the contrary, the record reflects, in keeping with the trial court's order denying relief, that there was a lack of evidence of any deficient performance by Mr. James Franks. As stated under Proposition I, amendments to reflect "habitual offender" status need not be issued by a grand jury. Indictments can be amended after notice where the original charges are not altered.

The record reflects that Mr. Franks was effective in his representation of Mr. Sowell and in his negotiating a reduced sentence with the prosecution. As stated in the Court's Order denying relief.

> The Court finds after a review of this file and the file in the criminal cause which is the basis of this petition, CR 2005-43BT, Sowell also has not proven ineffective assistance of counsel based upon the requirements of **Strickland v. Washington**, 80 L. Ed. 2d 674 (1984) and **Moody v. State**, 644 So. 2d 451, 456 (Miss. 1994). C.P. 26-27.

For Sowell to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Sowell must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" his defense. The burden of proving both prongs rests with Sowell. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Sowell must show that there is "a reasonable probability" that but for the errors of his counsel, the sentence of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**,, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of Mr. Franks, the result of Sowell 's guilty plea would have been different.

Appellee would submit that based upon the record we have reviewed and cited, there is a lack of evidence for holding that there is a reasonable probability that Mr. Franks erred in assisting Sowell in pleading guilty to possession of cocaine as a M. C. A. § 99-19-81 habitual offender.

Mr. Franks negotiated a plea agreement which was greatly beneficial to Mr Sowell. Sowell's habitual offender status was reduced which avoided a possible life sentence, and an additional indicted charge was dismissed. In addition, a pending future charge was allowed to run concurrent with his sentence in this cause. C.P. 19.

> As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991): Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Sowell bears the burden of proving that both parts of the tests have been met. **Leatherwood v. State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v. State**, 490 So. 2d 860 (Miss. 1986). The record reflects no affidavits from Sowell's counsel, Mr. Franks, who is being accused of incompetence and conflict of interest by the inmate.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. **Earley**, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

The Appellee would submit that the trial court correctly found that Sowell had not established in his motion any support of his claim of ineffective assistance of counsel. Mr. Franks can not be faulted for failing to object to an amendment to Sowell's indictment without grand jury action. Under URCCC rule 7.09 and the precedents of the Mississippi Supreme Court this is permissible as long as the original charges are not altered and the defendant is not unfairly surprised.

The record reflects that as a result of Mr. Franks representation, Sowell is enjoying the benefits of a reduced sentence. He should not be heard to complain.

This issue is also lacking in merit.

PROPOSITION IV

ISSUES NOT RAISED WITH THE TRIAL COURT ARE WAIVED ON APPEAL.

In Sowell's appeal brief he includes some related but separate issues that were not addressed as separate issues with authority before the trial court. See Appellant's brief page 4 and Motion, page 8.

In **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

> The issue regarding the constitutionality vel non of Sect. 97-1-1, M.C.A. (1972), was not raised in Gardner's motion for post conviction relief and may not be raise now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983)

In **Keys v. State**, 549 So. 2d 949, 951 (Miss. 1989), the Supreme Court found that a separate hearing on an inmate's habitual offender status was not required where he had pled guilty and had been previously indicted as an habitual offender.

The record reflects that the trial court entered an order amending Sowell's indictment to reflect his "habitual offender" status. C.P. 25. This was under M C A § 99-19-83. This was done after notice to Sowell and his counsel prior to the guilty plea hearing.

Included in the plea negotiations, was a reduction of Sowell's habitual offender status. That habitual offender status was reduced as part of a plea bargain agreement. It was reduced to habitual under 99-19-81 which does not carry a life sentence. C.P. 18-19.

When given an opportunity to challenge the accuracy or authenticity of any of the documentation before the trial court, Sowell did not do so. C.P. 18-19.

To the contrary, he stated under oath that he understood the plea bargain and accepted its

terms. C.P. 18-19. There is a presumption that the trial court's Order was correct, and that Sowell's "habitual offender" status had been previously adequately established by appropriate documentation. **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987)

The Appellee would submit that these related were waived as well as lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons sited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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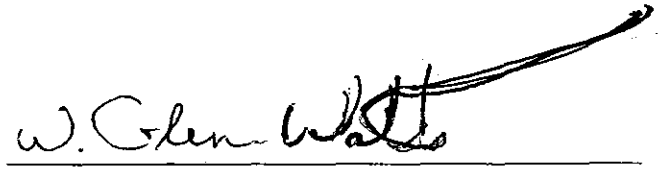
This the 2nd day of June, 2007.



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