

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUNIOR KIMBLE

FILED

APPELLANT

VS.

JUN 09 2007

**OFFICE OF THE ATTORNEY GENERAL
STATE OF MISSISSIPPI
COURT OF APPEALS**

NO. 2007-CP-0152

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

**JUNIOR KIMBLE
A/KA/ JUNIOR LEE KIMBLE**

APPELLANT

vs.

CAUSE No. 2007-CP-00152-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, in separate indictments filed on 20 October 2005, was charged with the sexual battery of two victims. (R. Vol. 1, pp. 32 - 33; 36 - 37). On 14 August 2006, the prisoner withdrew his plea of not guilty as to one of the indictments and entered a plea of guilty. His plea of guilty was accepted and he was convicted of sexual battery and sentenced to a term of twenty years imprisonment with ten years suspended upon terms. There were other penalties imposed, but those are not relevant to this appeal. (R. Vol. 1, pp. 38 - 39).

On 28 November 2006, the prisoner filed a "Motion to Vacate Judgment and Sentence" in the Circuit Court. In this filing, the prisoner alleged that his attorney was ineffective because: (1) the attorney allegedly told the prisoner that he would get life sentences for sexual battery if he

did not enter a guilty plea; (2) that the trial court failed to see to it that a factual basis existed for the guilty plea; and (3) that the attorney was ineffective for having failed to notice that the indictment was allegedly fatally defective. The prisoner attached affidavits from his mother and a "lady friend." In these affidavits, the mother and "lady friend" stated that the prisoner told them that his attorney told him that the prisoner would get life sentences if he refused to plead guilty. (R. Vol. 1, pp. 3 - 16).

The Circuit Court treated the prisoner's filing as a motion in post - conviction relief and denied relief on the motion without an evidentiary hearing. In this Order, the court noted that the plea hearing transcripts clearly demonstrated that the prisoner's claims in post - conviction relief were without merit. (R. Vol. 1, pp. 40 - 41).

STATEMENT OF ISSUES

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

SUMMARY OF ARGUMENT

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

ARGUMENT

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

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where it plainly appears that the prisoner is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Rev. 2000). The prisoner has failed to demonstrate that the Circuit Court erred in its determination that he plainly was not entitled to relief.

The prisoner did not ensure that the transcript of the guilty plea was made a part of this record. Nonetheless, as the Circuit Court's Order shows, one was available and reviewed by the court. The court found that the transcript clearly contradicted the prisoner's post - conviction claims. The ruling by the Circuit Court is presumed to be correct in this Court. Since the prisoner has failed to show that the Circuit Court failed to determine that there was a factual basis for the guilty pleas, this Court has no basis to find that the Circuit Court failed to so find. While the prisoner would attempt to avoid this result, it was his duty to see to it that the record here contained the transcript of the guilty plea.

It is the prisoner's burden to demonstrate error on the part of the Circuit Court. *Smith v. State*, 572 So.2d 847 (Miss. 1990). This he has failed to do. The allegations he presents here are unsupported by the record. The affidavits he attached to his pleadings contain nothing but hearsay – both the mother and the lady friend simply stated in their affidavits what the prisoner supposedly told them. Those affidavits carry no weight, certainly none so as to have required an evidentiary hearing. They certainly do not constitute “first hand knowledge.” The prisoner's own statements in the post - conviction relief motion were insufficient to require an evidentiary hearing. *Ross v. State*, 936 So.2d 983 (Miss. Ct. App. 2006).

As for the prisoner's claim that his attorney told him that he would get a life sentence if he did not plead guilty to sexual battery, there was nothing presented to the Circuit Court in support of this claim beyond the prisoner's say - so. This was insufficient. In any event, given the prisoner's age, any significant sentence imposed within the limits provided by statute might well mean that the prisoner will die in the penitentiary. The sentences imposed were not life sentences and were well within the limit provided by statute.

As for the claim that the indictment was not signed by the foreman of the Grand Jury,

there are signed and unsigned indictments made a part of this record. We do not know why this came to be. (R. Vol. 1, pp. 32 - 33; 36 - 37). In any event, even had one or more of the indictments lacked the signature of the foreman, this lack would not have made the indictments fatally defective. A valid guilty plea acts as a waiver to such a defect. *Garrette v. State*, 763 So.2d 177 (Miss. Ct. App. 2000). As for the claim of ineffectiveness, the prisoner has failed to show any prejudice arising from any lack of a foreman's signature.

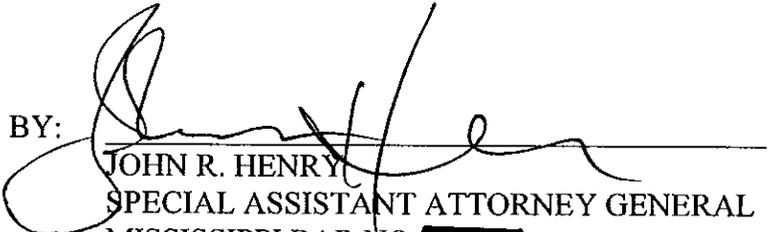
CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

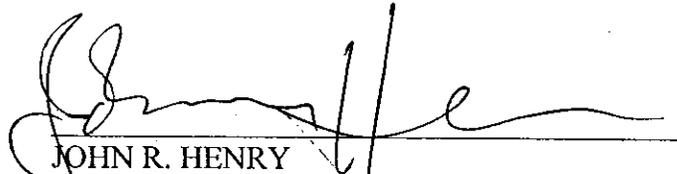
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 8th day of June, 2007.


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