

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CLARENCE A. HARRIS

APPELLANT

FILED

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VS.

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

NO. 2007-CP-0719

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

- I. The Trial Court correctly dismissed Harris's Motion for Post-Conviction Relief without an evidentiary hearing.
- II. The Trial Court correctly dismissed Harris's claim of ineffective assistance of counsel.
- III. The Trial Court correctly denied Harris's motion for a continuance.

SUMMARY OF THE ARGUMENT

The Trial Court correctly dismissed Harris's Motion for Post-Conviction Relief without an evidentiary hearing. Since it was plain from the face of Harris's motion, exhibits and the prior proceedings in the case that Harris was not entitled to any relief, it was within the Trial Judge's discretion to dismiss the motion. The Trial Court correctly dismissed Harris's claim of ineffective assistance of counsel since Harris did not provide any evidence or documentation of his claim of ineffective assistance of counsel. The Trial Court correctly denied Harris's motion for a continuance since Harris moved for a continuance at the last minute before trial, alleging a

change in counsel. However, his new counsel had not made an entry of appearance and he was still represented by his original counsel. Therefore, the Trial Court was well within its discretion to deny Harris's motion for a continuance.

ARGUMENT

I. The Trial Court correctly dismissed Harris's Motion for Post-Conviction Relief without an evidentiary hearing.

The trial court summarily denied Harris's Motion for Post Conviction Relief without an evidentiary hearing, holding,

“The Petitioner filed a Post-Conviction Motion alleging that his counsel was ineffective and his guilty plea was involuntary because he had hired new counsel and had expected his trial date to be continued. The Court finds these claims to be without merit. Even though the Petitioner has supplied proof that he paid the Honorable Josh Stevens for representation in some proceeding, until Stevens made an appearance in the Petitioner's criminal case, the Petitioner was still legally represented by his former counsel, the Honorable Richard Burdine. The Court further finds that hiring of new counsel just prior to trial date is not grounds for a continuance in this district.”

(Appellant's Ex. 1)

When reviewing a lower court's decision to deny a petition for post-conviction relief, the Mississippi Court of Appeals has held that it will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised, the applicable standard of review is de novo.” *Graves v. State*, 822 So.2d 1089, 1090 (Miss. Ct. App. 2002) (citing *Pickett v. State*, 751 So.2d 1031, 1032 (Miss.1999); *Brown v. State*, 731 So.2d 595, 598 (Miss.1999)).

The issue of whether a trial judge erred in denying a motion for post-conviction relief without an evidentiary hearing is a question of fact. The right to an evidentiary hearing is not

guaranteed. The trial judge has discretion in allowing an evidentiary hearing and “[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.” Miss. Code Ann. § 99-39-11(2) (Rev.2000).

In his Motion for Post-Conviction Relief, Harris argued that he had obtained new counsel and his counsel had not had time to prepare for trial. As proof, he submitted a receipt for \$500.00 from the Law Office of Josh Stevens. (C.P. 7) However, there was nothing on the receipt to show that Mr. Stevens had been hired for Harris’s criminal trial, and Mr. Stevens did not make an entry of appearance. At the time of trial, Harris was still represented by Mr. Burdine. Petitioner alleged in his motion to before the trial court that he was dissatisfied with Burdine’s counsel, but did not submit any affidavits or other evidence to support his contention that he received in effective assistance of counsel.

The trial court clearly acted within its discretion in denying Harris’s Motion for Post-Conviction Relief without an evidentiary hearing. Therefore, this issue is without merit and the trial court should be affirmed.

II. The Trial Court correctly dismissed Harris’s claim of ineffective assistance of counsel.

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.

Harris does not provide any factual evidence or affidavits supporting his claim that his counsel's performance was inadequate. Further, he cannot show that but for counsel's unprofessional errors, the result of the proceeding would have been different.

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

Harris cites to the transcript of the guilty plea in the trial court to support his claim that he was entitled to an evidentiary hearing in his Motion for Post Conviction Relief. However, the transcript of the guilty plea is not included in the record. The Rules of Appellate Procedure obligate the appellant to examine the record and submit any proposed changes to the record or certify that the record is correct and complete. The rule states:

For fourteen (14) days after the clerk's notice of completion under

Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant's counsel shall deliver or mail the record to one firm or attorney representing the appellee, and shall append to the record (I) a written statement of any proposed corrections to the record, (ii) a certificate that the attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service. Counsel for the appellee shall examine the record and return it to the trial court clerk within fourteen (14) days after service, and shall append to the record (I) a written statement of any proposed corrections to the record, (ii) a certificate that the attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service. Corrections as to which counsel for all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper, enter an order under Rule 10(e), and return the record to the court reporter or the trial court clerk who shall within seven (7) days make corrections directed by the order.

Miss. R. App. P. 10(b)(5).

III. The Trial Court correctly denied Harris's motion for a continuance.

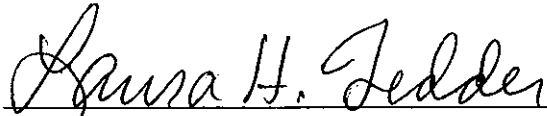

Motions for a continuance are within the sound discretion of the trial court. *Hardiman v. State*, 776 So.2d 723, 727 (Miss. Ct. App. 2000). The judgment of the trial court denying a motion for a continuance will not be reversed except for an abuse of discretion. *Id.* Harris alleges that Stevens had been retained to represent him at trial, but the proof is insufficient to show this, since the receipt presented to the trial court does not state that it was for representation in the case sub judice. Further, Harris had counsel present and ready for trial. Therefore, the judgment of the court below denying a continuance should be affirmed.

CONCLUSION

Harris'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

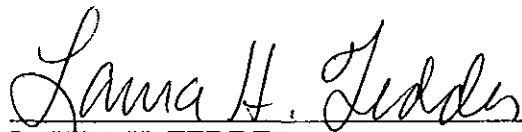
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable James T. Kitchens, Jr.
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This the 12th day of March, 2008.



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