

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TOMMY L. LEWIS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

FILED
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0261-COA

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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Battery of a child under the age of fourteen, being his daughter. (R.63-65) In an open plea petition filed on September 13, 2002, Lewis requested that he be allowed to enter a plea of guilty to one count of Unlawful Touching of a Child for Lustful Purposes. (R.66-71) In said petition Lewis acknowledged his guilt of the crime charged as well as the constitutional rights he would be waiving by pleading guilty, and that he knew the possible sentence for Unlawful Touching was two to fifteen years imprisonment and/or a fine of \$1,000.00 to \$5,000.00. In exchange for the guilty plea, the State agreed to remand the remaining three charges to the file. The State did not recommend a sentence to the trial court. Both sides fully complied with the terms of the plea agreement at the plea hearing held in open court that same day, September 13, 2002. The trial court accepted the plea and sentenced Thompson to fifteen years with three years suspended, leaving twelve years in the custody of the Mississippi Department of Corrections, and five years post-supervision release. (R 72-72)

SUMMARY OF THE ARGUMENT

The trial court did not commit error in denying Lewis' Motion for Post-Conviction-Relief.

ARGUMENT

I.

LEWIS' MOTION FOR POST-CONVICTION RELIEF IS TIME BARRED.

Lewis' Motion for Post-Conviction Relief was untimely filed and therefore procedurally barred. Lewis entered a guilty plea with the trial court on September 13, 2002, and filed his Motion for Post-Conviction Relief with said court on September 21, 2005. Pursuant to *Mississippi Code Annotated* § 99-39-5(2), in the event of a guilty plea, a motion for post-conviction relief that raises issues of an involuntary guilty plea and ineffective assistance of counsel, shall be filed with the trial court within three years after entry of conviction.

II.

WAS LEWIS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Procedural bar aside, Lewis claims ineffective assistance of counsel. Lewis contends that his counsel, Donald Rafferty, was deficient in his duties because he failed to inform Lewis of the consequences of a plea agreement. Lewis claims that Rafferty never informed him of the minimum and maximum sentence he could receive. Lewis offers only his allegations and no other proof to show that his attorney was deficient.

The plea petition Lewis signed informed him of the rights he was waiving and of the minimum and maximum sentences for Unlawful Touching of a Child. The petition also states Lewis was satisfied with the advice and counsel given by his attorney. Further, Lewis states in his affidavit that prior to the plea hearing “... Mr. Rafferty read the plea to my family and myself.” ®. 17)

Lewis next contends that his attorney was deficient because he did not attempt to suppress Lewis’ statements to Ms. Laurie, a Department of Human Services (DHS) worker, and failed to adequately investigate the charges against him. Lewis’ only evidence to support this argument is a partial investigative report by Gulfport Police Detective Conerly, which is attached to his motion. The report reflects that Lewis, in a non-custodial interview with the DHS worker and Detective Conerly, admitted that he had engaged in inappropriate behavior with his daughter. Lewis was not “in custody” at the time and therefore not entitled to *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed.2d 694 (1966)

Lewis fails to meet the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984), in proving that his counsel was ineffective.

CONCLUSION

The trial court did not commit error in denying Lewis' motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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 Lisa P. Dodson
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
Post Office Drawer 1180
Gulfport, MS 39502

Tommy L. Lewis, #L3101
Stone County Correctional Facility
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This the 29th day of February, 2008.



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