

COPY
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KERRY L. MORGAN

APPELLANT

VS.

NO. 2007-CP-0428

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	2
THE ARGUMENT	2
PROPOSITION I.	
DENIAL OF DUE PROCESS DID NOT OCCUR.	2
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

STATE CASES

Alexander v. State, 759 So.2d 411 (Miss. 2000)	3
Billiot v. State, 655 So.2d 1, 12 (Miss.1995)	3
Burch v. State, 929 So.2d 394, 2006 WL 1320494 (Miss. App. 2006)	4
Kirksey v. State, 728 So.2d 565, 567 (Miss.1999)	2, 3
Leverett v. State, 197 So.2d 889, 890 (Miss. 1967)	3
Patterson v. State, 594 So.2d 606, 609 (Miss.1992)	3
Rochell v. State, 748 So.2d 103, 110 (Miss. 1999)	3
Taylor v. State, 766 So.2d 830, 832 (Miss. App. 2000)	2, 3

STATE STATUTES

Mississippi Code Ann. § 99-39-11(2) (2000)	4
Mississippi Code Annotated § 97-17-70 (1972)	1
Mississippi Code Annotated § 97-3-7 (2)(b) (1972)	1
Mississippi Code Annotated § 99-19-81 (1972)	1
Mississippi Code Annotated § 99-39-23(7) (1972)	3

showing that a plea of guilty was voluntarily and intelligently made must appear in the records.

The court's order is not subject to reversal "absent a finding" that it "was clearly erroneous." Taylor v. State, 766 So.2d 830, 832 (Miss. App. 2000), citing Kirksey v. State, 728 So.2d 565, 567 (Miss.1999).

Appellant fails to specially raise below or allege real error(s) committed by the lower court; thus, this issue is barred. Furthermore, he overlooks the fact that this Court is an **appellate** court. In the recent case of Alexander v. State, 759 So.2d 411 (Miss. 2000), at ¶ 35, the Supreme Court quoted from the case of Leverett v. State, 197 So.2d 889, 890 (Miss. 1967), in holding, in pertinent part, as follows:

"The Supreme Court is a court of appeals, it has no original jurisdiction, it can only try questions that have been tried and passed upon by the court from which the appeal is taken."

Accord: Patterson v. State, 594 So.2d 606, 609 (Miss.1992).

The State assumes *arguendo*, however, that Morgan intended to argue that the lower court committed reversible error in failing to find that his post-conviction motion had merit. Such an argument must surely fail. The burden is not on the State, but on the one who is challenging the guilty plea, viz., Morgan. Pursuant to Section, Mississippi Code Annotated § 99-39-23(7) (1972), as amended, of the Mississippi Uniform Post-Conviction Collateral Relief Act:

No relief shall be granted under this chapter unless the prisoner proves by a preponderance of the evidence that he is entitled to such.

Accord: Rochell v. State, 748 So.2d 103, 110 (Miss. 1999); Billiot v. State, 655 So.2d 1, 12 (Miss.1995). If the prisoner loses in the lower court, he must show on appeal that the lower court's ruling is clearly erroneous. Rochell v. State, *supra*, 748 So.2d at 109.

Accordingly, it was Morgan's burden in the lower court to show that he was entitled to the relief he requested. He made no such showing. Similarly, it is Morgan's burden on appeal to show that the lower court's ruling on his motion is clearly erroneous. He makes no such showing.

The State contends as was held in Burch v. State, 929 So.2d 394, 2006 WL 1320494 (Miss. App. 2006) that the trial court may summarily dismiss a PCR “[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…” Miss. Code Ann. § 99-39-11(2) (2000).

The **SENTENCING ORDER POST RELEASE SUPERVISION (REPORTING)** sets forth the complete conditions encompassing the terms of post conviction release. (R. E. 57 - 60). The **ORDER REVOKING POST RELEASE SUPERVISION SENTENCE** sets forth the complete rationale encompassing the revocation of post conviction release: “That the Defendant has violated the good behavior conditions of his post release supervision as follows: a.) Failure to pay assessments, as ordered and b.) Committing new crimes; to-wit: On or about November 8, 2004 the Defendant committed the crime of Uttering Forgery. On or about November 10, 2004 the Defendant committed the crime of Uttering Forgery. On or about November 15, 2004 the Defendant committed the crime of Attempt to Uttering Forgery. On or about November 19, 2004 the Defendant committed the crime of Uttering Forgery.” (R. E. 95 - 96).

This issue brought by the Appellant is therefore lacking in merit.

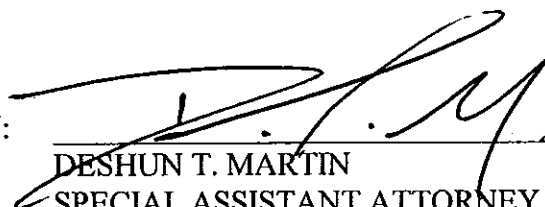
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deshun . Martin, 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 27th day of August, 2007.



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