

COPY
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARLOS MOORE

APPELLANT

FILED

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VS.

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

NO. 2007-CP-0434-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Carlos Moore claims in this appeal from a denial of post-conviction relief his court appointed attorney had a conflict of interest in representing him on his guilty plea because Moore's lawyer, or a lawyer in his law firm, also represented the person who informed on Moore.

Moore freely admitted during an evidentiary hearing this claim did not appear in his motion for post-conviction relief; rather, it was brought to light for the first time during the evidentiary hearing granted by the trial court.

CARLOS MOORE appeals from the denial of his motion for post-conviction collateral relief - essentially a motion to vacate guilty pleas - filed in the Circuit Court of Benton County, Henry L. Lackey, Circuit Judge, presiding.

Moore, who twice told the circuit judge during Moore's plea-qualification hearing, he was "satisfied" with what his lawyer had done for him (See exhibit folder), has changed his mind.

In a two (2) page order entered by Judge Lackey following an evidentiary hearing at which both Moore and Kent Smith, his lawyer, testified, Judge Lackey found as a fact that Moore stated,

under oath, both at the time of his sentencing and again at the hearing on his motion “ . . . that he understood what the recommendation as to sentence would be and that he was not contesting the fact that he was guilty of the crimes nor the sentence he received.” (C.P. at 36; appellee’s exhibit A, attached),

Judge Lackey also found as a fact that while either Kent Smith or his law firm represented John Cash at the same time he was representing Moore, Smith was not aware that Cash had any involvement whatsoever with Moore. Judge Lackey, implicitly, if not directly, held as a matter of law that Moore had failed to prove by a preponderance of the evidence he was entitled to any relief.

We respectfully submit a review of the record, including Moore’s petition to enter plea of guilty, the transcript of Moore’s plea-qualification hearing, Moore’s motion to vacate his convictions and set aside sentence, and the transcript of the evidentiary hearing, demonstrate that Judge Lackey’s findings were both judicious and correct. The trial court’s decision denying relief is neither clearly erroneous nor manifestly wrong; rather, it is supported by substantial credible evidence found in the record. **Brown v. State**, 731 So.2d 595, 598 (¶6) (Miss. 1999).

STATEMENT OF FACTS

On July 8, 2005. Carlos Moore, a twenty-five (25) year old male with a GED, entered negotiated pleas of guilty to robbery, jail escape, and motor vehicle theft. Law enforcement authorities had agreed to “cut him some slack” because he admitted committing some of the crimes charged. (R. 17)

In the wake of a plea-bargain agreement instigated by Moore’s lawyer whereby in exchange for a guilty plea other charges would not be pursued, Moore was sentenced to fifteen (15) years with eight (8) years suspended for strong-arm robbery, five (5) years for escape, and five (5) years for vehicle theft, “ . . . with all three of these sentences to run concurrent and with three years on post

release supervision.” (C.P. at 35-36; appellee’s exhibit A, attached)

Moore claims on appeal his lawyer, Kent Smith, the Public Defender of Marshall County, was ineffective based upon a conflict of interest. Specifically, Moore argues the conflict arose because either Kent Smith or a lawyer in Smith’s law firm also represented John Cash, the man who called law enforcement authorities and informed them of Moore’s whereabouts. Moore was arrested at the home of John Cash where he had been staying following his escape from the Benton County jail. (R. 20)

A copy of both the petition to enter plea of guilty and the guilty plea transcript has been included in the appellate record.

Eight (8) months after twice stating in open court under the trustworthiness of the official oath that his plea was both voluntary and intelligent and he was satisfied with what his lawyer had done for him (Page 5, 7 of State’s Exhibit 1), Moore changed his mind.

On March 28, 2006, Moore filed a pleading styled “Motion for Post-Conviction Relief to Vacate Conviction and to Set Aside Sentence.” (C.P. at 1-13) Moore assailed the voluntariness of his pleas and the effectiveness of his lawyer, Kent Smith, Marshall County Public Defender. (C.P. at 1-13)

By Moore’s own admission during an evidentiary hearing conducted on February 6, 2007, a conflict of interest claim was not listed in Moore’s motion for post-conviction. (R. 38)

The specific relief requested by Moore was vacation of his convictions via guilty pleas and the setting aside of his sentences.(C.P. at 1)

In his appeal to this Court, Moore claims a violation of his Sixth amendment rights because Kent Smith, his lawyer, had a conflict of interest. This argument is presented within the context of ineffective assistance of counsel.

SUMMARY OF THE ARGUMENT

Moore failed to prove by a preponderance of the evidence sufficient facts entitling him to post-conviction relief. John Cash did not testify, and there is no proof in the record that Cash was the man who turned Moore in.

While the law firm of Kent Smith did represent John Cash, there was no proof that Smith represented Cash personally or that there was any connection between the representation of Cash and the representation of Moore.

Moore admitted to Judge Lackey he was satisfied with the sentence he received and the charges he pleaded guilty to. Moore has failed to demonstrate how counsel's conflict of interest, if any at all, would have altered the outcome of his decision to plead guilty.

A plea of guilty is binding only if it is entered voluntarily and intelligently. **Myers v. State**, 583 So.2d 174, 177 (Miss. 1991). A plea of guilty is voluntary and intelligent when the defendant is informed of the charges against him and the consequences of his guilty plea. **Alexander v. State**, 605 So.2d 1170, 1172 (Miss. 1992).

He was.

Moore was not denied the effective assistance of counsel during his guilty pleas because counsel's performance was neither deficient nor did any deficiency prejudice Moore. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State**, 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State**, 736 So.2d 500 (Ct.App.Miss. 1999).

Contrary to any claims suggesting otherwise, Moore failed to establish by a "preponderance of the evidence" he was entitled to any relief. Miss.Code Ann. §99-39-23(7); **McClendon v. State**, 539 So.2d 1375 (Miss. 1989); **Todd v. State**, 873 So.2d 1040 (Ct.App. Miss. 2004).

ARGUMENT

MOORE FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE SUFFICIENT FACTS ENTITLING HIM TO POST-CONVICTION RELIEF.

During the evidentiary hearing Moore testified that after his escape from the Benton County jail he was living in the home of a man named John Cash. (R. 35) According to Moore, Cash telephoned law enforcement authorities and turned him in. (R. 35)

Moore argues he received ineffective assistance from Kent Smith, his lawyer, because Smith operated under a “potential conflict of interest” in his representation of Moore. (Brief of Appellant at 4) According to Moore, either Mr. Smith or a member of Smith’s law firm, also represented John Cash who Moore claims had been charged with robbery. (R. 18) Moore laments: “Attorney Kent Smith didn’t steer Moore in any other route of choices in the court other than to plead guilty.” (Brief of Appellant at 3)

Moore opined at the evidentiary hearing that “[i]t was never decided whether [Smith] would uphold the law as defense counsel on my behalf or would he work more favorable in freeing John Cash.” (R. 36)

Moore makes these arguments within the context of ineffective assistance of counsel.

Both Moore and Kent Smith, his lawyer, testified at the evidentiary hearing.

Regrettably, John Cash did not.

Contrary to Moore’s suggestion on page 4 of his brief, there is no proof in the record that Cash expected any type of reward for turning in Carlos Moore.

We think Judge Lackey reached the right result for several reasons.

First, during the evidentiary hearing, Moore admitted that a conflict of interest claim was not

listed in his motion for post-conviction relief. (R. 21, 38) This detracts from the validity of his complaint which appears to have been an afterthought.

Second, Moore failed to prove by a preponderance of the evidence that Cash was the person who turned him in. Investigator Marion testified he did not remember telling Moore that "... John Cash was the one who indeed called Crime Stoppers on [him]." (R. 19-20)

Cash did not testify during the hearing nor did Moore produce Cash's affidavit.

In addition to this, Kent Smith, while admitting his firm represented John Cash, denied he had informed Moore either before or after Moore entered his guilty pleas that he was representing John Cash as well. Smith also denied he discussed the "business" of John Cash with Moore. (R. 33)

Smith testified he did "... know that my law firm has or does represent John Cash just like I represented you. I don't know what the charges are, but I do know that I have or do represent John Cash." (R. 31-32)

BY THE COURT: Mr. Smith, do you know whether or not Mr. Cash is the one that was an informant or informed Crime Stoppers about Mr. Moore's involvement?

BY MR. SMITH: Your Honor, I have never heard that before today. (R. 32)

* * * * *

[BY MR. SMITH:] In trying to respond further to your questions, and certainly if Mr. Moore has some follow-up, that would never come up during a conversation that I would have with the defendant or with law enforcement because if there was not some kind of search warrant or some issue that I was challenging to him being in jail or something that he brought up regarding his innocence as opposed to freely admitting his guilt, I wouldn't know or care about how he got arrested or whether it was reported, and so that just is not something that I would ever ask or have access to. I can tell you that going through their files, and they literally let me flip through

their files with them to review the stuff, there was no notation or message or note or did I see any payment, you know, for like paying a tip or reporting fee. There was nothing in their files that would have led me to believe that any body reported him or caused him to be picked up. Trying to explain it, you know, in 16 years of doing this, I've never gotten into Crime Stoppers or anything like that. It just never comes up, so that's the first time I heard it today. (R. 33-34)

Third, Moore failed to show how a conflict of interest would have affected his decision to plead guilty to the crimes charged. During the evidentiary hearing Moore stated he was not denying he was guilty of the crimes charged (R. 32) and asserted he had no problem with the sentence imposed or pleading guilty to the charges. (R. 39-40) Moore was satisfied with the sentences he received. (R. 40-41)

In a motion for post-conviction relief, the burden is on the prisoner to prove by a preponderance of the evidence he is entitled to relief. Miss.Code Ann. §99-39-23(7).

“Only where it is reasonably probable that but for the attorney’s errors, the outcome of the trial would have been different, will we find that counsel’s performance was deficient.” **Davis v. State**, 849 So.2d 1252, 1256-57 (Miss. 2003, quoting from **Holly v. State**, 716 So.2d 979, 989 (Miss. 1998); **Holly v. State** citing **Dickey v. State**, 662 So.2d 1106, 1109 (Miss. 1995); **Read v. State**, 536 So.2d 1336, 1339 (Miss. 1988).

Moore was not denied the effective assistance of counsel during his guilty pleas because counsel’s performance, contrary to Moore’s position, was neither deficient nor did any deficiency actually prejudice Moore. **Strickland v. Washington**, *supra*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State**, 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State**, 736 So.2d 500 (Ct.App.Miss. 1999).

Kent Smith described the plea bargain placed on the table as follows: “[I]t was an exceptional

deal.” (R. 25)

A defendant bears the burden of proving both prongs of the **Strickland v. Washington** [citation omitted] standard and faces a rebuttable presumption that trial counsel’s conduct is within the wide range of reasonable conduct and that decisions made by counsel are strategic.

“To rebut this presumption the defendant must show that, but for counsel’s unprofessional errors [in this case counsel’s alleged conflict of interest], the result of the proceedings would have been different.” **Wynn v. State**, Cause No. 2006-KP-00776-COA decided September 4, 2007, ¶11, slip opinion at 5-6 [Not Yet Reported].

Mr. Smith fully explained his role in the decision-making process during the evidentiary hearing. (R. 21-30) There can be no doubt that Moore’s negotiated pleas were both voluntary and intelligent.

The obvious benefits from counsel’s plea negotiations include an agreement that another motor vehicle charge and a misdemeanor trespass charge would be retired to the files and not pursued. (Page 9 of State’s Exhibit 1) The recommended duration of Moore’s sentence was reduced considerably as a result of Mr. Smith’s discussions with the office of the district attorney. (R. 24, 27, 29)

We note with interest that during the plea-qualification hearing Moore twice acknowledged he was satisfied with what his lawyer had done for him. *See* pp 5, 7 of plea-qualification transcript in exhibit envelope.

“When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. Beyond that, he must show that those errors proximately resulted in his guilty plea and that but for counsel’s errors he would not have entered the plea.” **Reynolds v. State**, 521 So.2d 914, 918 (Miss. 1988).

In **Drennan v. State**, 695 So.2d 581 (Miss. 1997), we find the following language:

* * * When reviewing claims of ineffective assistance of counsel, this Court utilizes the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Schmitt v. State*, 560 So.2d 148, 154 (Miss. 1990), this Court held “[b]efore counsel can be deemed to have been ineffective, it must be shown (1) that counsel’s performance was deficient, and (2) that the defendant was prejudiced by counsel’s mistakes.” (Citations omitted). One who claims that counsel was ineffective must overcome the presumption that “counsel’s performance falls within the range of reasonable professional assistance.” *Id.* (Quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). In order to overcome this presumption, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (695 So.2d at 586)

Counsel's performance was not deficient and unprofessional. As stated, had Moore gone to trial before a jury, as opposed to pleading guilty, Moore could have been subject to additional prosecutions and a far greater sentence. Counsel, by negotiating a plea bargain agreement, mitigated the time Moore was to serve.

Indeed, Moore testified during the evidentiary hearing he was satisfied with his sentence.

We quote:

Q. [BY DISTRICT ATTORNEY:] So the plea that you got which in essence was seven years to serve with 15 years over your head, three years’ post-release supervision that was gone over with you by your lawyer, by the judge, you don’t have a problem with that part of it?

A. I didn’t have a problem with that part of it.

Q. And pleading guilty to the charge?

A. No, sir.

* * * * *

Q. - - Let me stop you there. You’re satisfied with the sentence that you got?

A. Yes.

Q. You're satisfied with the charges that you plead guilty to?

A. Yes.

Q. You're satisfied with those things?

A. Yes.

Q. You don't want to get back on the docket facing these charges and facing a trial, do you, because you could get something a whole lot more than what you have now? Is that true?

A. That's true. (R. 40-41)

Moore, has failed to demonstrate how counsel's alleged conflict of interest would have altered the outcome of Moore's decision to plead guilty.

In short, Moore, who told Judge Lackey on several occasion he was not "here to deny these charges" (R. 17, 32), has failed to demonstrate his lawyer's performance was deficient as a result of any conflict of interest and that the deficient performance prejudiced the defendant.

CONCLUSION

Carlos Moore failed to prove by a preponderance of the evidence the facts upon which he relied for relief. He has failed to demonstrate any deficiency in counsel's performance or any prejudice to his admittedly free and voluntary pleas of guilty.

In the wake of a plea bargain agreement, Moore got a real meal deal. (R. 29) We concur with Judge Lackey that Moore was not entitled to post-conviction relief and that his motion to vacate his pleas and set aside sentence was without merit.

Appellee respectfully submits the judgment entered in the lower court denying Moore's motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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 10TH day of SEPTEMBER 2007.



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