

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDERICK D. LOCKHART

APPELLANT

VS.

FILED

NO. 2007-CP-0523

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SUPREME COURT
COURT OF APPEALS**

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 ISSUES

Defendant, Frederick Lockhart [hereinafter "Lockhart"], raises seven issues on appeal. For simplification purposes, the State of Mississippi combined these issues as follows:

- I. LOCKHART WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.
- II. LOCKHART'S PLEA WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.
- III. LOCKHART IS PROCEDURALLY BARRED FROM RAISING ALL OTHER ISSUES AS THEY WERE NOT ADDRESSED IN HIS MOTION FOR POST-CONVICTION COLLATERAL RELIEF.

STATEMENT OF FACTS

On October 11, 2004, Lockhart pled guilty to Burglary of a Dwelling. His counsel was present with him at the plea hearing during which Lockhart stated that he understood the charges against him, his plea, and the rights he was waiving by entering a guilty plea. (See generally Record p. 50 - 74). After a sentencing hearing on November 15, 2004, Lockhart was sentenced to twenty-five years in the custody of the Mississippi Department of Corrections and a \$10,000 fine. (Record

p. 37 - 49).

On May 19, 2006, Lockhart filed a Motion to Vacate and Set Aside Sentence in which he claimed that his counsel was ineffective and that his plea was not voluntary as he was not adequately informed of his rights. (Record p. 2 -12). The trial court denied his motion and entered its "Order Denying Motion for Post-Conviction Collateral Relief" explaining its reasons for denying Lockhart's Motion in detail. (Record p. 16 - 36). Lockhart appeals.

SUMMARY OF ARGUMENTS

Lockhart was not denied of effective assistance of counsel. Further, Lockhart stated under oath that he was satisfied with the assistance given him by his attorney.

Lockhart's plea was valid in that it was knowingly, intelligently, and voluntarily made. All other issues raised by Lockhart are procedurally barred as they were not raised in his Motion for Post-Conviction Collateral Relief.

ARGUMENTS

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)).

I. LOCKHART WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Lockhart claims that "the court error in overlooking the fact that the defense attorney was in fact ineffective with his assistance and performance during plea negotiations." (Appellant's Brief p. 1). The standard of review for such claims is as follows:

Claims of ineffective assistance of counsel are judged by the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-part test set out in *Strickland* is whether counsel's performance was deficient and, if so, whether the deficiency prejudiced the defendant to the point that "our confidence in

the correctness of the outcome is undermined." *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987). This standard is also applicable to a guilty plea. *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). A strong but rebuttable presumption exists that "counsel's conduct falls within a broad range of reasonable professional assistance." *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). To overcome this presumption, the defendant must show that "but for" the deficiency a different result would have occurred. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Richardson v. State, 769 So.2d 230, 234 (Miss. Ct. App. 2000).

Lockhart argues that his counsel was ineffective in that "he was in fact coerced by his attorney, Mr. Earl Pat Jordan, Jr., to take an open plea to an offense that he never committed or never knew the true nature of said offense." (Appellant's Brief p. 3). However, as set forth in detail later in this Brief, Lockhart testified at his plea hearing that he understood the charges against him and he admitted to doing the crime. (Record p. 31 -32). Furthermore, when asked if he was coerced into making the plea, Lockhart stated that he was not. (Record p. 72). Additionally, Lockhart was given an opportunity during his plea hearing to voice any concerns he had about the quality of the assistance of his counsel:

Q: Have you had a chance to go over your case with your attorney, Pat Jordan?
A: Yes, sir.
Q: Are you satisfied with the help and assistance he has given you?
A: Yes, sir.

(Record p. 72).

In *Richardson, supra*, this court noted that the Mississippi Supreme Court previously "held that when the trial court questions the defendant and explains his rights and the effects and consequences of the plea on the record, the plea is rendered voluntary despite advice given to the defendant by his attorney." *Id.* (citing *Roland v. State*, 666 So.2d 747, 750 (Miss.1995)). Just as the defendant in *Richardson*, Lockhart's rights were explained to him by the judge and he had every opportunity to voice any concerns he had about the plea or about his counsel's assistance and/or

change his mind about the plea, but chose not to. Furthermore, Lockhart failed to show how his attorney's alleged deficient performance prejudiced his case. Thus, Lockhart's first issue is without merit.

II. LOCKHART'S PLEA WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

Lockhart also claims that his plea was not voluntarily made as he was not advised of the nature of the charges against him. (Appellant's Brief p. 1). A defendant may collaterally attack the validity of a guilty plea with a motion for post-conviction relief. *Garner v. State*, 944 So.2d 934, 942 (Miss. Ct. App. 2006) (citing Miss. Code Ann. §99-39-5(1)(f) (Supp. 2006)). The petitioner has the burden of proof by a preponderance of the evidence that the plea was not knowingly and voluntarily made. *Id.* (citing Miss. Code Ann. §99-39-23(7) (Supp. 2006)). In order for a guilty plea to be deemed voluntary, the defendant must be advised of the nature of the charges against him and understand the consequences of entering a guilty plea, including the minimum and maximum penalties he faces. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992); URCCC 8.04(A)(4)(b)).

Lockhart was advised of the nature of the charges against him. The trial court stated in its Order Denying Motion for Post-Conviction Collateral Relief as follows:

The Court also went through great pains to ascertain the factual basis for the entry of the Petitioner's plea of guilty. The Court questioned the Petitioner at length regarding his acts and intent on the night of the burglary. Transcript p. 24-27. The Petitioner stated that all he did was climb in through an open window and pass out from being intoxicated. He did admit that he stole some money that was laying on some dresser clothes on a dresser. Transcript p. 27. He also admitted that he did have to raise the window to enter the house. Transcript p. 27.

(Record p. 23).¹ The Order also reflects that the following exchange took place at the plea hearing:

- Q: Do you understand that burglary of a dwelling requires - -
A: Yes, sir.
Q: Listen to me a minute - - requires the state to prove two elements: number one, that you broke into, forcibly entered a dwelling house. That means you either kicked the door in or you opened the door by turning the knob or you lifted up the window or you busted out the window or you did something by force to get inside. And number two, that once you got in there, you intended to commit some crime once inside. It might be stealing property. It might be vandalizing the place. It might be assaulting an occupant or fighting with an occupant once you get in. But those are the two elements of burglary. Do you understand that?
A: Yes, sir.
Q: From what I hear you saying, you didn't do either one.
A: Well, I lifted the window up, yeah.
Q: You lifted the window?
A: Yes, sir. It had bars on it.
* * *
Q: Okay. But you had to actually lift the window up to open it to get in?
A: Yes, sir.
Q: Did you intend on committing any crime once you got inside?
A: At the time, no, sir. I was under the influence. I was heavily intoxicated. I just wanted to rest, lay down. I didn't take anything out of it other than some money that was laying around.
Q: You didn't take anything other than some money that was laying around?
A: Yeah, that was it.

(Record p. 31 - 32).

Moreover, the following exchange also took place during Lockhart's plea hearing:

- Q: Finally, Mr. Lockhart, let me ask you some similar questions. I know you've been through this process before of pleading guilty: right?
A: Yes, sir.
Q: You're familiar with it?
A: Yes, sir.
Q: You're 43 years of age now; is that right?
A: Yes, sir.
Q: You have a tenth grade education?

¹ Several pages of the transcript of the guilty plea hearing were missing from the record. Thus, the State, in some instances, relied on excerpts from the hearing that were quoted in the Order Denying Motion for Post-Conviction Collateral Relief entered by the trial court.

A: Yes.
 Q: Can you read and write okay?
 A: Yes.
 Q: Are you right now under the influence of any drugs or alcohol or anything like that?
 A: No, sir.
 Q: Do you have a clear mind and understand what's going on?
 A: Yes, sir.
 * * *
 Q: Frederick, has anybody tried to force you into pleading guilty or make you do this in anyway?
 A: No, sir.
 Q: Is this what you want to do under all the circumstances?
 A: Yes, sir.

(Record p. 68 and 72). This Court has previously held that “[g]reat weight is given to statements made under oath and in open court during sentencing.” *Ward v. State*, 879 So.2d 452, 455 (Miss. Ct. App. 2003) (quoting *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999)). See also *Hearvey v. State*, 887 So.2d 836, 840 (Miss. Ct. App. 2004) (holding that “where the defendant’s claims are in contradiction with the record, the trial judge may rely heavily on statements which were made under oath.”) and *Pleas v. State*, 766 So.2d 41, 43 (Miss. Ct. App. 2000).

While Lockhart contends in his Brief that he was not aware of the nature of the crime for which he was charged, his testimony at the plea hearing reflects otherwise. Accordingly, this issue is without merit.

III. LOCKHART IS PROCEDURALLY BARRED FROM RAISING ALL OTHER ISSUES AS THEY WERE NOT ADDRESSED IN HIS MOTION FOR POST-CONVICTION COLLATERAL RELIEF.

Lockhart raises five additional issues on appeal that were not raised in his Motion for Post-Conviction Collateral Relief. Thus, he is procedurally barred from raising them on appeal. *Welch v. State*, 958 So.2d 1288, 1292 (Miss. Ct. App. 2007). As such, Lockhart’s third, fourth, fifth, sixth, and seventh issues are without merit.

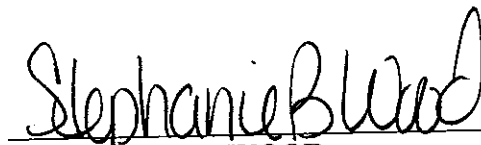
CONCLUSION

As Lockhart's guilty plea was valid and voluntarily given, the State of Mississippi respectfully requests that this Honorable Court affirm the trial court's denial of post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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 28th day of August, 2007.



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