

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENNETH DEWAYNE DAVIS

APPELLANT

VS.

FILED
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SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0544

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

Proposition One

Davis failed to show ineffective assistance of counsel and the trial court correctly denied his motion for post conviction relief.

Proposition Two

Davis's plea was voluntarily and intelligently given and the trial court correctly denied his motion for post conviction relief.

Proposition Three

Court conducted hearing properly pursuant to Rule 8.04 of the Uniform Rules of Circuit and County Court Practice

Proposition Four

The trial court was not required to grant an expansion of the record and conduct an evidentiary hearing on Davis's Post Conviction Motion and correctly denied said motion.

SUMMARY OF THE ARGUMENT

Davis failed to show ineffective assistance of counsel and the trial court correctly denied his motion for post conviction relief. Davis's plea was voluntarily and intelligently given and the trial court correctly denied his motion for post conviction relief. The record clearly showed that the trial court fully informed the defendant of the consequences of the pleas, maximum and minimum sentences and the Defendant's constitutional rights with regard to trial by jury, the

right to confront and cross examine adverse witnesses and the right against self incrimination. The record further showed that Davis represented to the Trial Court that no one had coerced or threatened him to induce his guilty pleas. Davis testified that he was satisfied with his attorney's performance and that he had not been promised anything to induce him to plead guilty. All of these solemn declarations by Davis in court and under oath carry a strong presumption of verity in the post conviction pleading. Davis's allegation in his Motion for Post Conviction Relief are completely unsupported and are insufficient to overcome this presumption. Therefore the trial court was correct in summarily dismissing the Motion for Post Conviction Relief without an evidentiary hearing or expanded record. Court conducted the hearing properly pursuant to Rule 8.04 of the Uniform Rules of Circuit and County Court Practice, clearly informing Davis of his constitutional rights to trial by jury, the right to confront and cross examine adverse witnesses and the right against self incrimination. The trial court was not required to grant an expansion of the record and conduct an evidentiary hearing on Davis's Post Conviction Motion and correctly denied said motion, since the evidence presented by Davis in support of the motion was insufficient to overcome the presumption of verity of his solemn testimony to the trial court.

ARGUMENT

Proposition One

Davis failed to show ineffective assistance of counsel and the trial court correctly denied his motion for post conviction relief.

Davis complains that his trial counsel was ineffective. This Court has held

that a valid guilty plea has been entered unless the trial court's decision was clearly erroneous. *Hamlin v. State*, 853 So.2d 841, 843 (Miss. Ct. App. 2003). A plea is considered "voluntary and intelligent" if the defendant is informed of the nature of the charges against him and the consequences of entering a guilty plea. *Id.* Brooks has the burden of proving that his guilty plea was involuntary and he must prove this by a preponderance of the evidence *Wilcher v. State*, 921 So. 2d 400, 401 (Miss. Ct. App.

2006).

Brooks v. State, 953 So.2d 291 (Miss. Ct. App. 1007)

Further, in the context of a guilty plea, Davis must show that his counsel's performance fell below the minimal range of competence expected of attorneys in criminal cases *and* that but for that substandard performance, he would have insisted on going to trial. *Alexander v. State*, 603 So. 2d 1170, 1173 (Miss. 1992).

Motions arguing ineffective assistance of counsel must allege with specificity and detail that (1) counsel's performance was defective and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 104 S. Ct. 1052 (1984). Defendants must prove that but for their counsel's deficient performance, the outcome would have been different. The defendant carries the burden of proof and the court will weigh the counsel's deficiencies under the totality of the circumstances standard. *Epps v. State*, 926 So. 2d 242, 244 (Miss. Ct. App. 2005).

Davis fails to present any evidence that his counsel was ineffective or, as he more clearly suggests, in a conspiracy with the prosecution. Without any evidence, Davis cannot meet his burden. The trial court correctly denied Davis's motion summarily, without hearing or expanded record.

Proposition Two

Davis's plea was voluntarily and intelligently given and the trial court correctly denied his motion for post conviction relief.

A plea is considered "voluntary and intelligent if the defendant knows the elements of the charge against him, understands the charges relation to him, what effect the plea will have and what sentence the plea may bring. *Alexander v. State*, 603 So. 2d 1170, 1173 (Miss. 1992). Solemn declarations in court carry a strong presumption of verity. *Gable v. State*, 748 So.2d 703, 706. 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).

At the sentencing hearing Davis testified that his attorney had explained to him and he understood the nature of both offenses charged against him. (T. 32) Davis testified that he understood the rights he would have at trial if he chose not to plead guilty and he testified that he understood the potential penalties for each offense. (T. 32,) Davis also testified that he was satisfied with the advice and counsel of his attorney and that he was making his plea freely. (T. 33) The record clearly reflects Davis's understanding of the nature of the charges against him, his rights at trial, his satisfaction with his counsel's representation and his intelligent and voluntary plea of guilty to both charges, as follows:

The Court: Has your lawyer explained to you, Mr. Davis, do you fully understand the nature of both of these offenses, sale of more than an ounce of marijuana and also conspiracy to commit the offense of capital murder.

The Defendant: Yes, sir.

The Court: And has he explained all the law relating to these offense to you.

The Defendant: Yes, sir.

The Court: Do you understand the nature of these offenses and all the law relating to these offenses.

The Defendant: Yes, sir.

The Court: Have you made sure that your lawyer knows all the facts and circumstances surrounding both of these cases.

The Defendant: Yes, sir.

The Court: And he's explained to you all the possible defenses.

The Defendant: Yes, sir.

The Court: Now, are you satisfied with the advice and help and

assistance that your attorney has provided for you.

The Defendant: Yes, sir.

The Court: No problems with your attorney; is that right.

The Defendant: No, sir.

The Court: After a full discussion of your case with your attorney, Mr. Davis, whose decision is it to plead guilty to these offenses.

The Defendant: Yes, sir.

The Court: Whose decision was it to plead guilty to both defenses.

The Defendant: Me, Your Honor.

The Court: Has anyone promised you anything or has there been any hope of reward to get you to plead guilty.

The Defendant: No, sir.

The Court: Has there been any force or intimidation used against you to compel you to plead guilty.

The Defendant: No, sir.

The Court: Are you pleading guilty because you are guilty of both these offenses.

The Defendant: Yes, sir.

The Court: No other reason.

The Defendant: Yes, sir.

The Court: Sir.

The Defendant: Couldn't hear you.

The Court: No other reason; is that correct.

The Defendant: No, sir.

(T. 7-9)

These statements on the record carry a strong presumption of verity which cannot be overcome by Davis's completely unsupported accusations. *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999) There is no evidence anywhere in the record to support Davis's Motion to Vacate Judgment and Sentence and supporting brief filed with the trial court do not contain supporting affidavits of other persons. Therefore, the court correctly summarily dismissed the motion without at hearing. *Baker v. State*, 358 So. 2d 401, 403 (Miss. 1978).

Proposition Three

Court conducted hearing properly pursuant to Rule 8.04 of the Uniform Rules of Circuit and County Court Practice.

Davis alleges that the hearing was not sufficient pursuant to Rule 8.04 of the Uniform Rules of Circuit and County Court Practice. However, the trial court carefully and specifically questioned Davis to ensure that he understood the nature of the crimes with which he was charged, the nature and consequences of the plea, and the maximum and minimum penalties provided by law; and that he understood that by pleading guilty he waived his constitutional rights of trial by jury, the right to confront and cross examine adverse witnesses, and the right against incrimination. (T. 2-9)

The records reflects that the trial court established a factual basis for both charges. Regarding the Davis's guilty plea to the charge of conspiracy to commit capitol murder, the record reflects the following exchange:

The Court: I want you to listen carefully to the state's attorney. She will explain what the evidence will be against you in both of these cases, what their case in chief will be, what evidence they seek to prove at trial. I want to make sure that the state's version of this case is the truth before we proceed. Okay? Listen carefully.

Ms. Buckley: In cause number 2005-0119CR E State of Mississippi v. Kenneth Davis, the state would be ready to proceed

with the lesser included offense of conspiracy to commit the crime of capitol murder. The state would be prepared to show that on or about the 18th day of November, 2004, here in Copiah County, that Serrell Belton, Tiki Harris, Jamar Watts and Fred Shannon willfully, unlawfully, feloniously and without the authority of law knowing planned with deliberate design to kill and murder one Corey Johnson. The facts would show that the conspiracy involved a certain amount of money being exchanged for the killing of Mr. Johnson, and I believe Mr. Davis would agree that not only he, but Serrell Belson had certain reasons or certain disagreements with Mr. Johnson.

The Defendant: Yes, ma'am.

Ms. Buckley: This would be in violation of Mississippi Code annotated section 97-1-1 and Mississippi Code annotated 97-3-19(2)(d), that being the conspiracy portion of the capitol murder indictment. This, I believe, is the only [omission] capital murder charge that would in fact include a lesser included offense of conspiracy because it was a murder for hire type situation. . . .

The Court: All right. Is that correct, Mr. Davis?

The Defendant: Yes, sir.

(T. 9-10)

The prosecutor read into the record the specific facts of the conspiracy to commit capitol murder and the charge of sale of more than an ounce of marijuana, specifically identifying the agent to whom the sale was made, the date and place of the sale, the witnesses to the crime and the positive identification of the substance as marijuana in the amount of 49.5 grams. Immediately after this statement of facts by the prosecution, the trial court asked Davis "Is that true?", to which Davis replied, "Yes, sir." (T. 13, 14) This is more than a mere assent to a general statement of guilt, this was an averment that each fact stated was true and more than satisfies the requirements of Rule 8.04 of the Uniform Circuit and County Court Rules.

Proposition Four

The trial court was not required to grant an expansion of the record and conduct an evidentiary hearing on Davis's Post Conviction Motion and correctly denied said motion.

Section 99-39-11 of the Mississippi Code Annotated of 1972 (as amended) provides that "[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. Because the defendant has not submitted any supporting affidavits challenging the voluntariness of his plea, that issue is without merit and was correctly dismissed by the trial court with no hearing. The trial properly summarily dismissed the claims ineffective assistance of counsel due to alleged threats and coercion, lack of factual basis for the guilty pleas and failure to conduct a proper hearing pursuant of Rule 8.04 of the Uniform Circuit and County Court Rules, since the Davis's Motion for Post Conviction Collateral Relief. The record clearly showed that the trial court fully informed the defendant of the consequences of the pleas, maximum and minimum sentences and the Defendant's constitutional rights with regard to trial by jury, the right to confront and cross examine adverse witnesses and the right against self incrimination. The record further showed that Davis represented to the Trial Court that no one had coerced or threatened him to induce his guilty pleas. Davis testified that he was satisfied with his attorney's performance and that he had not been promised anything to induce him to plead guilty. All of these solemn declarations by Davis in court and under oath carry a strong presumption of verity in the post conviction pleading. Davis allegation in his Motion for Post Conviction Relief are completely unsupported and are insufficient to overcome this presumption. Therefore the trial court was correct in summarily dismissing the Motion for Post Conviction Relief without an evidentiary hearing or expanded record.

CONCLUSION

The State respectfully submits that arguments Davis's arguments are without merit. Accordingly, the trial court's dismissal of Davis's Motion for Post Conviction Relief 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:

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This the 27th day of August, 2007.



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