IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GEORGE DAVIS, JR. — APPELLANT

VS. — NO. 2007-CP-0578-COA

STATE OF MISSISSIPPI — APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. NO. 2007-CP-0578-COA

STATE OF MISSISSIPPI APPELLEE

SUPPLEMENTAL BRIEF OF APPELLEE

PROCEDURAL HISTORY:

On April 8, 2009, the appellee submitted a brief in the instant cause. That brief pointed out that in the appellee's view the trial court correctly found that Davis had no basis for being granted an out of time appeal, and that there was a lack of evidence of any ineffective assistance of counsel. See appellee's brief page 1-12.

On July 31, 2009, the court of appeals requested on its own motion that the appellee submit a supplemental brief in this cause. The supplemental brief requested briefing upon Davis' claim that he was allegedly erroneously advised. He was allegedly misadvised as to the portion of the twelve year sentence he would be required to serve. This was after he was found guilty of armed robbery of Sheraton Casino by a Tunica County jury. R. 225.

See Order entered by Court of Appeals in this cause. As stated in the Order:

> Specifically, the supplemental briefs shall address whether the appellant's claim that counsel erroneously advised him as to the portion of the twelve year sentence that appellant would actually have to serve states a claim upon which relief can be granted, that is, whether such claim, if proven, undermines the knowing and voluntary nature of the appellant's waiver of his right to appeal.

ARGUMENT

THIS ISSUE WAS WAIVED AND THERE IS A LACK OF EVIDENCE IN SUPPORT OF DAVIS' CLAIM FOR RELIEF.

Davis' claim of being allegedly "erroneously informed" about his sentence was included in his "Petition For An Out of Time Appeal." C.P. 216-229. That claim included allegedly having been "manipulated" by his guilty plea counsel into waiving his right to appeal. This claim was based allegedly upon his being led to believe that he would only serve some "three and a half to four years" for his armed robbery conviction since his sentence would not be mandatory. C.P. 220-221.

Davis and his guilty plea counsel, Mr. Richard Lewis, executed and filed "an affidavit" in which Davis stated he "understandably and without duress" waived his right to appeal or file a motion for a new trial. C.P. 228-229. This was executed and filed at the same time as Davis' judgement of conviction for armed robbery was entered. C.P. 207. This was on "June 27, 2005."

Davis in his pro se capacity had until "July 27, 2005" to revoke his waiver of right of appeal. See **Jones v. State**, 700 So. 2d 631, 632 (Miss 1997), and M. R. A. P. Rule 4(a). The record reflects that he did not do so. In his rebuttal brief, Davis admits there is "no claim and no evidence" in support of any claim that he revoked his waiver of his right to appeal. Rather he filed his pro se "Petition For An Out of Time Appeal" at a later date, on "March 20, 2006." C.P. 218.

Therefore, the appellee would submit that the record supports the trial court's ruling that Davis was not entitled to appeal his conviction for armed robbery. C.P. 260. **Fair v. State**, 571 So 2d 965, 967 (Miss. 1990).

The appellee would submit that the claim of being mislead was raised as grounds for ineffective assistance of counsel. C.P. 222-224. While it is possible to raise ineffective assistance in cases where there was no previous appeal, it would have to been filed as a motion for post

conviction relief. This would be under M. C. A. 99-39-5 (h) "That he is entitled to an out of time appeal."

In the instant cause, this claim of ineffective assistance was not raised in a petition for post conviction relief. It was raised as a petition wherein Davis claimed he had "an absolute right" to an out of time appeal. C.P. 216-229; Rebuttal brief page 5.

The Mississippi Supreme Court has held that one who is procedurally barred from filing for post conviction relief, is also barred from "merely claiming" ineffective assistance.

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that "merely raising a claim of ineffective assistance" where a defendant was time barred from filing for relief under the UPCCRA was not enough "to surmount the procedural bar." As stated:

> Bevel raises a claim of ineffective assistance of counsel. It is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant, that the defendant's fundamental constitutional rights were violated. However, this Court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court's failure to advise a defendant of maximum and minimum sentences does not implicate a "fundamental constitutional right" sufficient to except a case from the procedural bar of Sect 99-39-5.

The appellee would conclude that based upon this precedent, Davis should also be barred from raising ineffective assistance in a time barred unsupported petition for an out of time appeal.

The appellee would submit that not only was this issue of being mislead waived, it was also lacking in merit.

Davis' claim of being allegedly "erroneously informed" as to his sentence was included in his pro se "Petition For An Out of Time Appeal." C.P. 221. As stated by Davis:

That petitioner's attorney Richard B. Lewis (whom he entrusted with full and

> complete representation in his defense) erroneously informed or misinformed him that he would only be required to serve three and a half to four years of his twelve year sentence for aiding and abetting because the sentence was not mandatory. Morever, attorney Lewis also advised petitioner that he got a deal since he could have received a life sentence, and manipulated petitioner into signing a waiver withdrawing his right to perfect an appeal in this case. C.P. 220-221.

As previously stated in appellee's brief page 8, Davis' claim of being "misinformed" was not supported by an "oath", an "affidavit", or statement of "good cause why" it could not be obtained. This would be from any proposed "witnesses who will testify" in support of Davis' factual claims for relief. See M. C. A. Sect. 99-39-9 (1)(e)(f) and (3).

Additionally, Davis' pro se claims for relief on his sentence "contradicted" factual statements in his affidavit waiving his right to appeal. In that affidavit, Davis stated under oath that he understood that he was waiving his legal right to appeal. As stated "George Davis, Jr., fully understands his legal right...but does hereby understandably and without duress waive any and all rights to perfect an appeal." C.P. 201.

He also stated that he did so "after conferring" with his counsel, and after having "numerous discussions" with his guilty plea counsel, Mr. Lewis. After doing so Davis stated that he "still desires to waive his right to appeal." C.P. 202.

This contradicted Davis' later statement in his "Petition For Out of Time Appeal" that allegedly "immediately after his conviction and sentence advised his attorney, Richard B. Lewis that he desired an appeal to the Mississippi Supreme Court. " C.P. 220.

In other words, Davis could not have "immediately" after his conviction advised his counsel to appeal, as claimed in his petition, and as stated in his sworn and witnessed affidavit , have "discussed this waiver fully" with his attorney. C.P. 202. The waiver was also signed and witnessed both by guilty plea counsel, and an assistant district attorney. C.P. 202.

They would therefore both be knowledgeable about Davis' claim of allegedly expressing a desire to appeal. His counsel would also of necessity know about whether or not he allegedly "misinformed" Davis as to the portion of his sentence he would serve after his jury conviction for armed robbery. C.P. 221.

Davis complained that trial counsel advised him although he could receive "a life sentence." he would only be required to serve "three and half to four years of his twelve year sentence." C.P. 221.

The statutory sentencing guidelines for a conviction for armed robbery is a maximum "life sentence" if fixed by the jury and a minimum of "not less than three years." M. C. A. Sect. 97-3-79.

This would indicate to the appellee that trial counsel was effective. The record reflects trial counsel was correct in advising Davis as to the sentence he could possibly receive if convicted by a jury. The record reflects that while the jury found Davis guilty of armed robbery, it did not agree upon a life sentence. This was for the armed robbery of Sheraton Casino in Tunica County. R. 225.

Additionally, while the statute for armed robbery does include a three year minimum sentence, Davis had no record support that his counsel or anyone else led him to believe that he would receive such a lenient minimum sentence. Davis had only his own self serving statement in his brief, and no affidavits , witnesses or other support for such a claim.

In **Mills v. State** 986 So.2d 345, 350 (¶14) (Miss. App. 2008), the Court found that Mills' answers under oath contradicted his assertions in his petition for post conviction relief. The court affirmed the trial court's denial of relief on a motion for post conviction relief.

> ¶14. We find that the record in today's case contradicts Mills's assertion that his counsel promised him that he would receive a maximum sentence of twenty-four months' imprisonment, but even if such a promise had been made, the trial court, during the plea qualification hearing, made it clear that the court would not be bound by the promise.FN2

In **Hurst v. State** 811 So.2d 414, 418 (¶15) (Miss. App. 2001), the Court found that Hurst was not entitled to relief. While Hurst claimed he "expected" a lesser sentence, there was no support for "any reliance upon a firm representation of a lesser sentence."

> ¶ 15. Though it could be argued that Hurst expected a lesser sentence because Walsh told him that the best he could expect was probation, precedent clearly distinguishes between the mere expectation of a lesser sentence and a reliance upon a firm representation of a lesser sentence. A mere expectation, though reasonable, is generally not sufficient to merit relief. **Myers v. State**, 583 So.2d 174, 177 (Miss.1991). Having reviewed the record, we find that the decision of the trial judge was not manifestly in error or contrary to the weight of the evidence, and we can therefore not reverse on the basis of this issue. **Foster**, 639 So.2d at 1281.

In his rebuttal brief Davis further explained how he was allegedly "mislead" as to his sentence. He was allegedly mislead as to "parole eligibility and ability to accumulate good time toward early release and withdrawal of his right to a direct appeal." Rebuttal brief page 3.

However, the appellee would submit that in keeping with the Supreme Court's decision in **Hurst, supra**, and **Myers, supra**, there is no record evidence that Davis was ever given any basis for "any reliance upon a firm representation of a lesser sentence." The lesser sentence Davis allegedly expected would include, according to his rebuttal brief, issues related to parole eligibility and good time.

In **Smith v. State** 580 So. 2d 1221, 1226 (Miss. 1991), the Supreme Court found that Smith had no "liberty interest" under the federal or state Constitutions to an early release from prison. In that case, Smith was found to have no right to a hearing. This was after he complained of being removed from a RID prison program. If Smith had successfully completed this disciplined program, he could have received an early release. However, after more than one violation of the department of corrections rules, prison officials removed him from the program and placed him in the general prison population.

As stated in **Smith**:

> The outcome of this case turns on whether section 47-7-47 creates a constitutionally protected liberty interest in the form of an expectation of an early release on probation. Our recent holding in **Harden v. State, supra**, compels a conclusion it does not.

In summary, the appellee would submit, in keeping with its prior submitted brief, there is a lack of evidence in the record for "any reliance upon a firm representation" by Davis as to any claim of a lenient sentence. While Davis may have hoped for a minimum sentence under the armed robbery statute, there is no evidence that this was a reasonable expectation. There was no evidence that anyone provided him with a reasonable basis for any such expectation.

Among the possible witnesses who could have testified on this matter would be his trial counsel for whom no affidavit was submitted. Neither was there any statement of "good cause why" his affidavit could not have been obtained in this cause. M. C. A. Sect. 99-39-9(1)(e).

In **Lindsay v. State**, 720 So. 2d 182, 184 (¶ 6) (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant's affidavit. In this case, we had no affidavit from Davis much less any other proposed knowledgeable witness. C.P. 218-229.

Therefore, the appellee would submit that not only was Davis' out of time unsupported

ineffective assistance claims waived, they were also lacking in merit, as found by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 **SUPPELMENTAL BRIEF FOR THE APPELLEE** to the following:

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This the 31st day of August, 2009.

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