IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CEARIC A. BARNES — APPELLANT

VS. — NO. 2007-CP-0705-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lincoln County, Mississippi and the summary denial of a motion for post conviction relief filed by Cedric Barnes.

STATEMENT OF FACTS

A Lincoln County grand jury indicted Cearic A. Barnes ("Barnes") and Jerrard T. Cook for the offense of capital murder. On June 10, 2003, pursuant to an agreement between the parties, the indictment was amended and Barnes pled guilty to the reduced charge of murder in Circuit Court cause number 02-250-MS-KS. The court, Honorable Keith Starrett, presiding, sentenced Barnes to life imprisonment in the custody of the Mississippi Department of Corrections.

On February 17, 2006 Barnes filed a motion for post-conviction relief; subsequently, on October 31, 2006, Barnes filed an Amended-Motion for Post-Conviction Relief. By order dated April 5, 2007 and filed April 25, 2007, Circuit Judge Michael M. Taylor summarily denied Barnes's amended motion for post-conviction relief. CP 31-32. Aggrieved Barnes appealed the order filed April 25, 2007 raising the issues of CP 33.

SUMMARY OF THE ARGUMENT

The order of the Circuit Court of Lincoln County dismissing Barnes's motion for post-conviction relief was properly denied.. Barnes was afforded effective assistance of counsel. His guilty plea was intelligently, voluntarily and knowingly made. There was a scrivener's error in drafting the order amending Barnes's indictment; however, the error was harmless and did not prejudice Barnes. The trial court was not obligated to inform Barnes during his plea that he could appeal his sentence. Barnes was not entitled to an evidentiary hearing on his motion for post-conviction relief. Barnes did not raise the issue of a competency hearing in his amended motion for post conviction relief; therefore he is procedurally barred from raising it on appeal.

ARGUMENT

In reviewing a trial court's decision to deny a motion for post-conviction relief, the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So2d 1148, 1150 (Miss.Ct.App.2002).

The record presented by Barnes does not contain the indictment, order amending indictment, plea, plea transcript or the petition to enter a plea in the underlying criminal murder case, being Circuit Court cause number 2002-250MS. Other than Barnes's brief , and the amended motion for post-conviction relief with attached exhibits, we have only the order denying relief on the petition for post-conviction relief. Material facts cannot be supplied by assertions and claims made in Barnes's brief alone; rather, facts and issues must be proven by the record. *Genry v. State*, 735 So.2d 186, 200 (Miss. 1999). The duty and task falls on Barnes of insuring the record, as opposed to Barnes's brief, contains sufficient evidence to support his assignment of errors. *Schuck v. State,* 865 So.2d 111 (Miss. 2003).

Barnes claims he "did all which was possible to make the record contain those portions which would support his claims on appeal." (Appellant's brief 26). The State submits he did not.

Barnes has not provided this Court with evidence to substantiate his claims on appeal. While he claims that his plea was involuntary, that he was provided ineffective assistance of counsel, and that the court failed to advise him of his right to appeal the sentence he has not provided this Court with a transcript of his plea hearing, or any supporting affidavits of witnesses who could testify as to the allegations of motion. "It is elementary that a party seeking reversal of the judgment of a trial court must present this Court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved." *Nelson v. State*, 919 So.2d 124, 126(¶ 6) (Miss.Ct.App.2005) (quoting *Hansen v. State*, 592 So.2d 114, 127 (Miss.1991)). "This Court 'must decide each case by the facts shown in the record, not assertions in the brief.' " *Id.* at (¶ 7) (quoting *Burney v. State*, 515 So.2d 1154, 1160 (Miss.1987)). In the absence of the record, the order of the trial court judge is entitled to a presumption of correctness. *Id.* (quoting *Branch v. State*, 347 So.2d 957 (Miss.1977)).

PROPOSITION I: Barnes was afforded effective assistance of counsel.

Barnes contends that his counsel was ineffective due to the following reasons: (1) his counsel coerced him into pleading guilty; (2) his counsel allowed him to plead guilty to the lesser charge of murder before the indictment was properly amended; (3) his counsel failed to investigate and interview witnesses; (4) his counsel failed to move for a competency hearing; and (5) his counsel failed to know the law or advise him of the law.

Barnes asserted that if his counsel had notified him he was pleading guilty to murder in another jurisdiction (Adams County), he would not have entered his plea and would have been

acquitted at trial. Barnes did not plead guilty to committing a murder in Adams County as he claims his attorney allowed him to do. The heading of the subject order amending the indictment contains what is obviously a scrivener's error in listing "In the Circuit Court of Adams County" instead of "the Circuit Court of Lincoln County." The order was most likely prepared by Bill J. Barnett, Barnes's own attorney, since the Lincoln County District Attorney and the Lincoln County Circuit Court are not in the same judicial district as Adams County. While his attorney may have made a scrivener's error in drafting, it did not prejudice Barnes in any way.

Barnes does not provide any support for the allegation that his attorney coerced him into pleading guilty, failed to properly advise him or failed to move for a competency hearing. Barnes does not specify how his attorney failed to investigate or what witnesses he failed to interview.

There is no indication in the record other than the allegations made by Barnes in his brief that his trial attorney's performance was ineffective. To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with the defendant to show both prongs. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). Under *Strickland,* there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In cases involving post-conviction collateral relief, "where a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995).

Barnes failed to meet his burden of proof required to establish a prima facie showing of ineffective assistance of counsel. Having failed to show a deficient performance, this issue is without merit.

PROPOSITION II: Barnes's guilty plea was knowingly, voluntarily and intelligently made.

Barnes asserts his plea was unknowing, involuntary and unintelligently made because he was afraid of the death penalty and was only 18 years old at the time, therefore, he had no understanding of the court system. This Court held in *Roby v. State*, 861 So.2d 368 (Miss.App.2003) "The standard of review pertaining to voluntariness of guilty pleas is well settled: "this Court will not set aside findings of a trial court sitting without a jury unless such findings are clearly erroneous." *Weatherspoon v. State*, 736 So.2d 419, 421(¶ 5) (Miss.Ct.App.1999). The burden of proving that a guilty plea was involuntary is on the defendant and must be proven by a preponderance of the evidence. *Id.* at 422(¶ 8) (superceded by Miss.Code Ann. § 99-39-23 (Rev.2000)); *Terry v. State*, 839 So.2d 543, 545(¶ 7) (Miss.Ct.App.2002)." Barnes again fails to support his allegation with any evidence whatsoever. As Judge Taylor stated in his order filed April 25, 2007:

> 7. Barnes's fear of the death penalty was a just and reasonable fear rather than an irrational fear which prevented him from making a knowing and intelligent waiver of his rights. There was factual finding by the sentencing judge that Barnes understood and waived his rights. The finding will not be disturbed absent a showing that it was erroneous. The mere recital of the fact that the defendant was worried about being executed does not suffice to overturn the findings of the court.
> 8. The allegation that the indictment was amended in the wrong judicial district is also without merit.

(CP 31-32).

Under *Daughtery v. State,* 847 So.2d 284 (¶7) (Miss.App.2003) this issue is totally without merit.

PROPOSITION III: There was no reversible error in the order amending the indictment.

Barnes asserts that his guilty plea to murder must be set aside because the original indictment charging him with capital murder was amended in Adams County instead of Lincoln County after his guilty plea. (Appellant's brief 21). Also, Barnes claims the order amending the indictment failed to set out the elements of the crime. *Id.*

Appellee submits there was a simple scrivener's error in drafting the order *sub judice*. The court is listed as "In the Circuit Court of Adams County" instead of the "In the Circuit Court of Lincoln County." In all other respects the order properly lists Lincoln County. The copy of the order provided by Barnes indicates the order was filed in Lincoln County. (CP 28). Barnes did not plead guilty to a murder committed in Adams County nor did the guilty plea take place in Adams County. Barnes wholly fails to show how he was prejudiced by the scrivener's error or how the court committed reversible error.

The State would further assert that Barnes's criticism of this defect was effectively waived by his entrance of a guilty plea. *Smith v. State*, 806 So.2d 1148, 1150 (Miss.App.,2002). "A valid guilty plea ... admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant." *Brooks v. State*, 573 So.2d 1350, 1352 (Miss.1990).

Barnes also asserts the amended indictment fails to set forth the elements of the crime of murder. (Appellant's brief at 22). Barnes was indicted for capital murder and entered a plea to the reduced charge of murder. (CP 27-29). The original indictment adequately lists the elements of the crime of capital murder, as required; and murder is a lesser included offense of capital murder. The subject order amends the indictment it does not replace it. Clearly, the order amending the

indictment contained a harmless clerical or scrivener's error and was sufficient. Therefore, this allegation of error is without merit.

PROPOSITION IV: The trial court was not obligated to notify Barnes during the plea that he had a right to appeal his sentence.

In this assignment of error, Barnes first argues that he was denied due process of law because the trial court failed to advise him that he had a right to appeal his sentence. Barnes then asserts the trial court incorrectly advised him there was no right to appeal the sentence. (Appellant's brief at 24, 25).

The State submits that while it is true that a defendant may appeal the sentence resulting from a plea of guilty independently of the plea itself, there is no corresponding requirement that the circuit court notify the defendant of that right during the plea process. *Elliott v. State*, 993 So.2d 397 (Miss.App.,2008).

Again, Barnes fails to provide any support for the allegation that the court incorrectly advised him or any meaningful argument. See *Doss v. State*, 956 So.2d 1100 (Miss.App.,2007). This assignment of error is without merit.

PROPOSITION V: The trial court did not err in failing to include the transcript of the plea proceedings in the appellate record.

Barnes asserts it is his responsibility to make the record contain the documents which support the claims he raised. (Appellant's brief at 25). Appellee agrees and asserts he failed to do so. The burden is upon the defendant to make a proper record of the proceedings. *Schuck v. State*, 865 So.2d 1111 (Miss. 2003).

Barnes states "this Court previously sent this case to the trial court to reconstruct the record.

The trial court never reconstructed the record. ... Appellant did all which was possible to make the record contain those portions which would support his claims on appeal." (Appellant's brief at 26). It is the State's position that the Circuit Clerk of Lincoln County complied with the order of this Court by reconstructing the civil post-conviction relief file, being Circuit Court cause number 2006-059LT, and gave notice of completion of the record in accordance with appellate rules. (CP 51-54). If Barnes was dissatisfied with the record prepared by the circuit clerk he had an opportunity to correct it but he did not.

Barnes asserts the trial court erred in failing to include the plea transcript in the record. (Appellant's brief at 25). Barnes proceeded with this appeal in forma pauperis. (CP 36, 37). The trial court was not obligated at this stage of the proceedings to provide a free copy of the transcript of the plea proceeding. In *State v. Fleming*, 553 So.2d 505, 506 (Miss. 1989), the Supreme Court held if a prisoner files a proper motion pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, and his motion withstands summary dismissal under section 99-39-11(2) (Rev.2007), then he:

> may be entitled to trial transcripts or other relevant documents under the discovery provisions of § 99-39-15, upon good cause shown and in the discretion of the trial judge. If the prisoner's request for transcripts or other documents is denied, and his overall petition is ultimately denied, then he may appeal the denial of his petition for collateral relief pursuant to § 99-39-25[,] which provides that final judgments entered under the Act may be reviewed by [the appellate court] on appeal brought by either the State or the prisoner.

This assignment of error is without merit.

PROPOSITION VI: Barnes's sixth issue is procedurally barred.

Barnes asserts he was denied due process of law by the contravention of Rule 9.06 of the Mississippi Uniform Rules. It is well settled that issues not raised below may not be raised on

CERTIFICATE OF SERVICE

I, Lisa A. Blount, 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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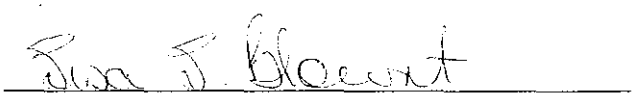
This the 7th day of August, 2009.



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