

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEFFERY D. COOPER

APPELLANT

VS.

NO. 2007-CP-0865

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court did not err in reducing the charge in the indictment from capital murder to murder, non-capital, and Cooper waived indictment to the charge of armed robbery. The trial court correctly ruled that this issue is procedurally time-barred and barred as a successive writ.
- II. The trial court did not err in sentencing Cooper to twenty years for armed robbery and to life in prison for murder. Further, the trial court correctly ruled that this issue is procedurally time-barred and barred as a successive writ.
- III. Cooper is unable to meet either prong of Strickland and cannot show that he received constitutionally ineffective assistance of counsel. Further, the trial court correctly ruled that this issue is procedurally time barred and barred as a successive writ.

STATEMENT OF THE FACTS

On or about June 29, 1993, Jeffrey Cooper was indicted for capital murder by the Chickasaw County Grand Jury. (C.P. 202) On January 24, the trial court entered an order reducing the charge in Cause Number OK93-014 from capital murder to murder, non-capital. (C.P. 206) Cooper pled guilty to the reduced charge of murder. (C.P. 189, 205, 207-215) Further, Cooper was arraigned on information filed by the District Attorney on a charge of armed robbery. (C.P. 191, 195) Cooper waived indictment and entered a plea of guilty to the charge of armed robbery. (C.P. 197, 199, 207-215) For the crime of murder, the trial court sentenced Cooper to a term of life in the custody of the Mississippi Department of Corrections. (C.P. 215) For the crime of armed robbery, the trial court sentenced Cooper to a term of 20 years to run consecutively with the life sentence for murder, a mandatory sentence under the provisions of Section 47-7-3 (1)(d) of the Miss. Code of 1972, as amended, and that the defendant shall not be eligible for parole or early release until he shall have served ten (10) years of this sentence. (C.P.

200, 215)

Cooper filed an initial Petition for Post Conviction Relief. After an evidentiary hearing, the trial court denied the Petition in an order entered August 12, 1996. (C.P. 184) Cooper then filed documents entitled "Application for Out of Time Appeal" and "Notice of Out of Time Appeal". In an order dated October 13, 2002, the trial court ruled that Cooper was not entitled to any requested relief since he had previously filed a Motion for Post Conviction Relief which was denied by the court on August 7, 1996. (C.P. 186) On or about January 18, 2007, Cooper filed a Petition for Writ of Habeas Corpus. On September 26, 2007, the circuit court entered an order setting a hearing on the Petition. On October 3, 2007, the trial court held a hearing on the Petition and subsequently ruled that the Petition was barred by the three year statute of limitations and as a successive writ. (C.P. 153, Tr. 2-5) Cooper filed a notice of appeal on October 15, 2007 and the instant appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court did not err in reducing the charge in the indicted from capital murder to murder, non-capitol and Cooper waived indictment to the charge of armed robbery. Cooper was indicted for capitol murder and the trial court correctly accepted Cooper's guilty pleas for murder, a lesser included offense of capital murder, and for armed robbery on information filed by the District Attorney. Because armed robbery is not a lesser included offense of simple murder, there is no double jeopardy violation. Further, the trial court correctly ruled that this issue is procedurally time-barred and barred as a successive writ. The trial court did not err in sentencing Cooper to twenty years for armed robbery and to life in prison for murder. Further, the trial court correctly ruled that this issue is procedurally time-barred and barred as a successive

writ. Cooper is unable to meet either prong of Strickland and cannot show that he received constitutionally ineffective assistance of counsel. Cooper filed a Plea Petition in which he stated that he was satisfied with the services of his counsel and testified at the plea hearing that he was satisfied with the services of his counsel. Further, the trial court correctly ruled that this issue is procedurally time barred and barred as a successive writ.

ARGUMENT

- I. The trial court did not err in reducing the charge in the indicted from capital murder to murder, non-capitol and Cooper waived indictment to the charge of armed robbery. Further, the trial court correctly ruled that this issue is procedurally time-barred and barred as a successive writ.**

Cooper's motion is procedurally barred as an impermissible second attempt to obtain post-conviction relief, as it does not fall within any of the enumerated statutory exceptions. Furthermore, Cooper's motion is time-barred because it was filed beyond the statutory three-year time limit. Mississippi appellate courts will not overturn a denial of a motion for post-conviction relief without a showing that an exception to the successive-writ bar exists. *Johnson v. State*, 962 So.2d 87, 89 (Miss.Ct.App.2007).

Mississippi appellate courts will not disturb a lower court's dismissal of a motion for post-conviction relief unless it is clearly erroneous. *Williams v. State*, 872 So.2d 711, 712(2) (Miss.Ct.App.2004). However, when questions of law are raised the standard of review is de novo. *Id.* This assignment of error is without merit and the circuit court's dismissal of Cooper's motion for post-conviction relief should be affirmed.

The record reflects that the trial court entered its Order Reducing Charge amending the indictment for capitol murder to simple murder. (C.P. 206) Further, in the plea hearing, Cooper

waived indictment for the armed robbery trial and submitted his plea of guilty to that charge.

(C.P. 208, 209)

In *Grayer v. State*, 519 So.2d 438 (Miss. 1988), Grayer urged that his 1970 conviction was unlawful because it was entered upon a plea of guilty to a crime for which he had not been indicted. The Mississippi Supreme Court opined:

To be sure, our law declares void and of no effect a plea of guilty to a crime separate and distinct from the crime charged in the indictment and not a constituent offense thereof. *Box v. State*, 241 So.2d 158, 159 (Miss.1970). For example, a person indicted for manslaughter could not enter an enforceable plea of guilty to the crime of embezzlement. Our Constitution requires indictment by a grand jury before a prosecution may be had. Miss. Const. Art. 3, § 27 (1890). In such a hypothetical case, there would have been no grand jury indictment for the offense of embezzlement. On the other hand, reduced charges are of the essence of the plea bargaining process. No one questions enforceability of a plea entered to a lesser included constituent offense to that charged in the indictment.

Grayer v. State, 519 So.2d 438 (Miss. 1988)

In a footnote, the court elaborated:

By way of analogy, we consider heat of passion manslaughter a lesser included offense to the charge of murder, even though that particular form of manslaughter contemplates proof of a fact inconsistent with the principal charge of murder. See *Isom v. State*, 481 So.2d 820, 824-25 (Miss.1985). Similarly, negligent homicide while intoxicated, Miss.Code Ann. § 63-11-30 (Supp.1987) is a lesser included offense to culpable negligence manslaughter, Miss.Code Ann. § 97-3-47 (1972), even though driving while intoxicated is not a necessary element of the latter offense. [Citation omitted]

Grayer v. State, 519 So.2d 438, FN2, (Miss. 1988)

Under this reasoning, simple murder is clearly a constituent offense of capitol murder and the defendant can plead guilty to the constituent offense without the necessity of reindictment. Further, the trial court entered an agreed order reducing the charge from capitol murder to murder. (C.P. 206) Cooper clearly waived indictment as to the separate charge of armed robbery. (C.P. 208) This issue is without merit and should be dismissed.

II. The trial court did not err in sentencing Cooper to twenty years for armed robbery and to life in prison for murder. Further, the trial court correctly ruled that this issue is procedurally time-barred and barred as a successive writ.

Cooper's motion is procedurally barred as an impermissible second attempt to obtain post-conviction relief, as it does not fall within any of the enumerated statutory exceptions. Furthermore, Cooper's motion is time-barred because it was filed beyond the statutory three-year time limit. Mississippi appellate courts will not overturn a denial of a motion for post-conviction relief without a showing that an exception to the successive-writ bar exists. *Johnson v. State*, 962 So.2d 87, 89 (Miss.Ct.App.2007). The circuit court's dismissal of Jones's motion for post-conviction relief should be affirmed.

Cooper alleges that the trial court sentenced him twice for armed robbery in violation of the double jeopardy clause. Cooper bases this argument on the premise that armed robbery is a lesser included offense in the charge of capital murder. However, Cooper pled guilty to simple murder and not to capitol murder. (C.P. 206) Cooper was indeed indicted for capitol murder with the underlying offense of armed robbery pursuant to Miss. Code Ann. 97-3-19 (2)(e) (1972, as amended). But on January 24, 1994, Cooper pled guilty to simple murder and armed robbery. Armed robbery is not an underlying felony for a charge of simple murder. Therefore, there can be no double jeopardy where Cooper pled guilty to simple murder and armed robbery. Miss.

Code Ann. 97-3-19 (1) (1972, as amended).

III. Cooper is unable to meet either prong of Strickland and cannot show that he received constitutionally ineffective assistance of counsel. Further, the trial court correctly ruled that this issue is procedurally time barred and barred as a successive writ.

Cooper's motion is procedurally barred as an impermissible second attempt to obtain post-conviction relief, as it does not fall within any of the enumerated statutory exceptions. Furthermore, Cooper's motion is time-barred because it was filed beyond the statutory three-year time limit. We will not overturn a denial of a motion for post-conviction relief without a showing that an exception to the successive-writ bar exists. *Johnson v. State*, 962 So.2d 87, 89(¶ 12) (Miss.Ct.App.2007). Therefore this issue is without merit, and the circuit court's dismissal of Cooper's motion for post-conviction relief is denied.

Cooper alleges that he received ineffective assistance of counsel at his guilty plea and sentencing. Claims of ineffective assistance of counsel are governed by the two-part test set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So.2d 468, 476-77 (Miss.1984). In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate that his or her counsel's performance was deficient, and that, but for the deficiency, the outcome of the case would have been different. *Donnelly v. State*, 841 So.2d 207, 211(Miss.Ct.App.2003) (citing *Strickland*, 466 U.S. at 687). Specifically, when challenging a guilty plea based on ineffective assistance of counsel, a convicted defendant "must show unprofessional errors of substantial gravity." *Reynolds v. State*, 521 So.2d 914, 918 (Miss.1988). In addition, the defendant "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.” *Id.*

Cooper supports this claim only by his own affidavit. However, a prisoner's ineffective assistance of counsel claim is without merit when the only proof offered of the claim is the prisoner's own affidavit. *Buckhalter v. State*, 912 So.2d 159, 162 (Miss.Ct.App.2005) (citing *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995)). Moreover, Cooper signed a plea agreement, which stated in pertinent part, that he was satisfied with the services of his counsel. (C.P. 199) In his plea colloquy, Cooper was asked by the trial judge if he was satisfied with the help and advice that he had received from his counsel. He answered in the affirmative. Cooper offers no evidence that his counsel was deficient in any way aside from the bare allegations of his petition.

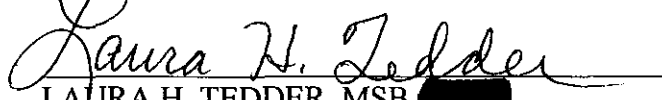

Cooper argues that his counsel's deficient performance caused him to be convicted and sentenced for capitol murder and armed robbery in violation of the double jeopardy clause. However, Cooper pled guilty to simple murder rather than capitol murder. Armed robbery is not an underlying felony for simple murder. Therefore, there is no double jeopardy violation. Further, Cooper's counsel was certainly employing strategy on behalf of his client in obtaining this plea bargain, since Cooper stood to be sentenced to death if he were tried for capitol murder as indicted.

CONCLUSION

Cooper's Petition for Postconviction Relief is barred by the three year statute of limitations and is also barred as a successive writ. Further, the issues presented in Cooper's petition are without substantive merit. Therefore, the judgment of the trial court overruling Cooper's Petition for Postconviction Relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

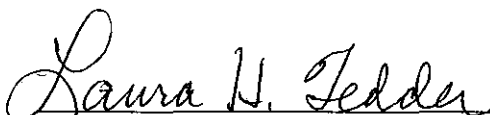
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 4th day of November, 2008.



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