IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CORNELIUS BADY — APPELLANT

VS. — NO. 2007-CP-1144

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-CP-1144**

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STATEMENT OF THE CASE

This is an appeal from the denial of Post - Conviction Collateral Relief Act of the Circuit Court of Lee County, Mississippi, in which the Appellant, Cornelius Bady, pled guilty and was sentenced for the felony crime of **RECEIVING STOLEN PROPERTY**.

STATEMENT OF FACTS

In Lee County, on July 26, 2005, the Appellant, Cornelius Bady (Bady), did wilfully, unlawfully, and feloniously knowingly receive, possess, retain, or dispose of one 32 inch Sharp television, of a value of $500.00 and more, good and lawful money of the United States, the property of Elaine Nelson. (R. E. 25).

SUMMARY OF THE ARGUMENT

I., IV., V., VI., and VII. are combined.

THE APPELLANT WAS AFFORDED DUE PROCESS OF LAW.

Uniform Circuit and County Court Rules 8.04 (A)(3) states that:

Before the trial court may accept a plea of guilty, the court must determine that the plea is

voluntary and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that a plea of guilty was voluntarily and intelligently made must appear in the records.

North Carolina v. Alford, 400 U.S. 25, 40 (U.S. N.C. 1970) holds:

"Ordinarily, judgment of conviction resting on plea of guilty is justified by defendant's admission that he committed crime charged against him and his consent that judgment be entered without trial of any kind. Guilty plea which represented voluntary and intelligent choice among alternatives available to defendant, especially where he was represented by competent counsel, was not compelled within meaning of Fifth Amendment merely because plea was entered to avoid possibility of death penalty. Standard of validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant."

II.

THE INDICTMENT WAS PROPER.

Reid v. State, 910 So.2d 615, 624 (Miss. App. 2005) holds that an indictment which is substantially in the language of the statute is sufficient; so long as from a fair reading of the indictment, taken as a whole, the nature and cause of the charge against the accused are clear, the indictment is legally sufficient. Fuqua v. State, 938 So.2d 277 (Miss. App. 2006) holds that for an indictment to be sufficient, it must contain the essential elements of the crime charged.

Kline v. State, 741 So.2d 944, 948 (Miss. App. 1999) held that the trial court did not have to follow recommendation, where the defendant was advised by trial court that it was authorized to impose any sentence within statutory limits.

III.

APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record. The standard of performance used is whether

counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. The record shows Appellant's counsel was well within the Garibaldi competency requirements.

THE ARGUMENT

PROPOSITIONS I., IV., V., VI., and VII. are combined.

THE APPELLANT WAS AFFORDED DUE PROCESS OF LAW.

In short, the record plainly belies Cornelius Bady's instant claim that his plea was anything but voluntarily and intelligently (knowingly) made.

Uniform Circuit and County Court Rules 8.04 (A)(3) states that:

> Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntary and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that a plea of guilty was voluntarily and intelligently made must appear in the records.

North Carolina v. Alford, 400 U.S. 25, 40 (U.S. N.C. 1970) holds:

> "Ordinarily, judgment of conviction resting on plea of guilty is justified by defendant's admission that he committed crime charged against him and his consent that judgment be entered without trial of any kind. Guilty plea which represented voluntary and intelligent choice among alternatives available to defendant, especially where he was represented by competent counsel, was not compelled within meaning of Fifth Amendment merely because plea was entered to avoid possibility of death penalty. Standard of validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant."

The State contends that Bady did not have to admit to this crime because this was an "Alford Plea." Every element of an "Alford Plea" has been met and is satisfied. Alford held that one does not have to say he is guilty to be and plead guilty.

Appellant intelligently, knowingly, and voluntarily Entered a Guilty Plea. (R. E. 44) and (

R. E. 38 - 55). Furthermore, the trial court asked Bady, "....was there anything about the procedure that he did not understand." (R. E. 44). In response, Bady stated, "No, Ma'am." (R. E. 44 and 56).

Appellant argues that his sentence of six years exceeds the statutory maximum. The total number of years of Post - Release Supervision plus the total number of years of incarceration must not be greater than the statutory maximum allowed for the charge. Miss. Code Ann. § 47-7-34. In this case, the sentence imposed is well within the aforementioned parameters.

In short, there is no record evidence that the Appellant could not or did not understand, or lacked knowledge of the legal proceedings in this case. The lower court questioned him extensively regarding his knowledge of both the crime charged and the consequences of pleading guilty to that crime.

This issue brought by the Appellant is therefore lacking in merit.

PROPOSITION II.

THE INDICTMENT WAS PROPER.

Reid v. State, 910 So.2d 615, 624 (Miss. App. 2005) holds that an indictment which is substantially in the language of the statute is sufficient; so long as from a fair reading of the indictment, taken as a whole, the nature and cause of the charge against the accused are clear, the indictment is legally sufficient. Fuqua v. State, 938 So.2d 277 (Miss. App. 2006) holds that for an indictment to be sufficient, it must contain the essential elements of the crime charged.

Kline v. State, 741 So.2d 944, 948 (Miss. App. 1999) held that the trial court did not have to follow recommendation, where the defendant was advised by trial court that it was authorized to impose any sentence within statutory limits.

Furthermore, by entering a plea of guilty, Appellant waived any argument as to alleged defects in the indictment. Von Brock v. State, 794 So.2d 279, 280 (Miss. 2001).

The indictment tracked the pertinent statute. The indictment was proper.

This issue brought by the Appellant is therefore lacking in merit.

PROPOSITION III.

APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record. The standard of performance used is whether counsel provided reasonably effective assistance, and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. The record shows Appellant's counsel was well within the Garibaldi competency requirements.

Furthermore, this Court is charged with a review of the totality of counsel's performance and the demonstration of resulting prejudice. Stringer v. State, 627 So.2d 326, 329 (Miss. 1993). Mere allegations are insufficient.

In Stevenson v. State, 798 So.2d 599, 602 (Miss. App. 2001), the Court's standard for the determination of ineffective assistance of counsel is as follows:

> The standard for determining whether or not a defendant was afforded effective assistance of counsel was set out in the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984). Before counsel can be determined to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by his counsel's mistakes... Under Strickland, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different. A reasonable probability is sufficient to undermine confidence in the outcome. Strickland. 446 U.S. at 684, 104 S. Ct. at 2068.

There is no indication in the record other than the allegations of the Appellant that

performance of the counsel fell below the standards as defined by Strickland. In fact the record supports the exact opposite.

On appeal this Court must confine itself to what actually appears in the record, and unless provided otherwise by the record, the trial court will be presumed correct. Shelton v. Kindred, 279 So.2d 642, 643 (Miss. 1973). Bady has not presented a claim procedurally alive "substantially showing denial of a state or federal right" and as is apparent from the face of the motion and from the prior proceedings, he was not entitled to any relief. Horton v. State, 584 So.2d 764, 767 (1991).

Clearly, judging on the totality of the performance of counsel there was no merit to the Appellant's claim that he was denied effective assistance of counsel. Counsel is required to be competent and not flawless.

The substantive principles of law relative to this issue are found in the familiar case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was not only deficient, but that said deficient performance prejudiced the defense. The State submits that it simply cannot be maintained from the record in this case that counsel's assistance was ineffective, and that ineffective assistance should have been apparent to the trial court, which would then have had the duty to declare a mistrial or to order a new trial *sua sponte*.

Moreover, Bady contends that he was denied effective assistance of counsel by way of counsel's failure to be abreast of the proceedings and applicable law; however, nothing in the record evinces this allegation.

This issue brought by Bady is therefore lacking in merit. Bady has failed to show deficiency in his attorney or as a result prejudice.

This issue brought by the Appellant is therefore lacking in merit.

CERTIFICATE OF SERVICE

I, Deshun T. Martin, 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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Circuit Court Judge
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Honorable John R. Young
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This the 21st day of Septmber,2007.

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