

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**TOMMY HAMBERLIN**

**APPELLANT**

**FILED**

**FEB 26 2008**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**VS.**

**NO. 2007-CP-1307**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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## **TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>STATEMENT OF THE CASE .....</b>	<b>1</b>
<b>STATEMENT OF FACTS .....</b>	<b>1</b>
<b>STATEMENT OF ISSUES .....</b>	<b>3</b>
<b>SUMMARY OF ARGUMENT .....</b>	<b>3</b>
<b>ARGUMENT .....</b>	<b>3</b>
<b>    THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF     ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF     WITHOUT AN EVIDENTIARY HEARING .....</b>	<b>3</b>
<b>CONCLUSION .....</b>	<b>5</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>6</b>

**TABLE OF AUTHORITIES**

**STATE STATUTES**

**Miss. Code Ann. Section 99-39-11(2) (Rev. 2007) ..... 3, 4**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TOMMY HAMBERLIN**

**APPELLANT**

**vs.**

**CAUSE No. 2007-CP-01307-COA**

**THE STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI**

**STATEMENT OF THE CASE**

This is an appeal against an Order of the Circuit Court of Warren County, Mississippi in which relief was denied on the prisoner's motion in post -conviction relief.

**STATEMENT OF FACTS**

The prisoner, on 26 February 2001, entered a guilty plea to possession of more than two grams but less than ten grams of cocaine. His plea was accepted by the Circuit Court. The court imposed a term of six years imprisonment with all but 180 days of that term suspended. The court ordered that the suspended portion be suspended on post - release supervision. The prisoner was further ordered to pay a two thousand dollar fine, and to pay certain costs. ( R. Vol. 1, pp. 30 - 49).

In the July, 2006 term of the Warren County Circuit Court, the grand jury indicted the

prisoner for sales of cocaine that occurred on 24 and 25 October 2005. ( R. Vol. 1, pp. 12 - 19).

On 7 February 2007, the prisoner filed his signed and sworn petitions to enter guilty pleas to two counts of possession of cocaine. In this petition, the prisoner stated that it was his understanding that the State would recommend as a sentence to the court that he be sentenced to eight years as an habitual offender on one of the convictions, seven years as a non - habitual on the other, and five years in consequence of the revocation of the prisoner's post - release supervision, all for a total of twenty years imprisonment. ( R. Vol. 1, pp. 9 - 20). An agreed order of revocation was also entered. ( R. Vol. 1, pp. 32 - 33).

The prisoner's petitions were taken up by the Circuit Court on the day the petitions were filed. At the conclusion of the hearing, the court accepted the prisoner's pleas of guilty and further accepted the State's recommendations with respect to the sentence to be imposed, credit being given for the 180 days the prisoner had served on the 2001 conviction. ( R. Vol. 1, pp. 63 - 78).

On 10 May 2007, the prisoner filed a "Motion for Sentencing Reconsiderations Reduction and/or Correction (*sic*).” In this motion, he sought to have the sentences imposed in the February, 2007 hearing vacated, and he sought to have the agreed order revoking post - release supervision vacated. As grounds in support of such relief, the prisoner alleged that his attorney had lied to him. He also asserted that his belief was that the eight-year sentence imposed would “eat up” the seven and five year sentences imposed. ( Vol. 1, pp. 4 - 11). We assume that the Appellant, by putting it this way, intended to allege that the sentences were to be served concurrently, rather than consecutively.

The Circuit Court denied relief on the prisoner's motion, without an evidentiary hearing, by Order filed 11 July 2007. ( R. Vol. 1, pg. 80)

## **STATEMENT OF ISSUES**

**DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?**

## **SUMMARY OF ARGUMENT**

**THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

## **ARGUMENT**

**THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where it plainly appears from the face of the motion, annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Rev. 2007). A trial court's decision in this regard will not be disturbed here absent a determination that it was clearly erroneous. *Trice v. State*, No. 2007-KA-00041-COA (Miss. Ct. App., Decided 15 December 2007, Not Yet Officially Reported). Here, the prisoner was clearly not entitled to relief.

The prisoner claims that he was lied to by his attorney concerning the amount of time he would be sentenced to, told to lie to the Circuit Court during the plea colloquy, and generally taken advantage of by his attorney. Other than the prisoner's allegations in his post - conviction relief filing, there is nothing in the record to substantiate those claims. Other than the prisoner's allegations, there are no affidavits in support of his claims.

On the other hand, the prisoner did state at the plea colloquy, under oath, that he understood and agreed with the sentencing recommendation made by the State. ( R. Vol. Pp. 69 -

70). He further stated that no one, including his attorney, had threatened him or promised him something for his plea. ( R. Vol. 1, pg. 72). He further stated that he was satisfied with the services of his attorney, and denied having been threatened or promised something by the attorney for the plea. He thought that the attorney had given him proper advice. ( R. Vol. 1, pp. 75 - 76).

The court then gave the prisoner the opportunity to say anything he wished before convicting and sentencing the prisoner. The prisoner did not avail himself of this opportunity, did not tell the court he had allegedly been lied to and misled by the attorney. Nor did he tell the court that the sentences recommended by the State were not what he had been led to expect. ( R. Vol. 1, pg. 76). There is not the first indication in the transcript of the plea colloquy that the prisoner was suffering from an infirmity that would have prevented him from understanding what was being done and what he was doing. The only physical problems the prisoner mentioned were diabetes and heart problems. ( R. Vol. 1, pg. 65). He did not indicate that he had some problem with his eyesight.

As we have said, the prisoner attached no affidavits of proposed witnesses to his motion in post - conviction relief. As against his claims in post - conviction relief, the Circuit Court had before it the prisoner's sworn statements in the plea colloquy. A Circuit Court does not err in dismissing a motion in post - conviction relief without an evidentiary hearing under such a circumstance. *Trice v. State, supra; Davis v. State*, No. 2007-CP-00544-COA (Miss. Ct. App, Decided 29 January 2008, Not Yet Officially Reported).

There appears to be some claim by the prisoner to the effect that the sentences imposed were to be served concurrently. However, the record does not bear this out. The prosecutor clearly stated the State's recommendation, and he mentioned nothing about the sentences being

served concurrently. The prisoner, when asked by the Circuit Court whether the prosecutor's recommendation was in accord with his understanding of what the State would recommend, indicated that the recommendation was what he expected. ( R. Vol. 1, pp. 68 - 70). The Circuit Court ordered them to be served consecutively. ( R. Vol. 1, pg. 78). There was no objection to this by the prisoner at that time. There is simply nothing beyond the prisoner's say - so to demonstrate that the sentences were to be served concurrently.

The prisoner also appears to suggest that he would have retained another attorney had he known he might have done so. There is nothing to support this claim; in any event, the claim is insignificant in view of the fact that the prisoner pronounced himself well satisfied with the attorney who did represent him.


#### **CONCLUSION**

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL**

BY:



JOHN R. HENRY  
SPECIAL ASSISTANT ATTORNEY GENERAL



## **CERTIFICATE OF SERVICE**

I, John R. Henry, 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 26th day of February, 2008.



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