

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

**JERMAINE MCKINNEY**

**APPELLANT**

**VS.**

**FILED**

**APR 23 2008**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**NO. 2007-CP-1377**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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

**JERMAINE McKINNEY**

**APPELLANT**

**vs.**

**CAUSE No. 2007-CP-01377-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 Clay County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

**STATEMENT OF FACTS**

In a multi - count indictment, the prisoner was charged with burglary, burglary of a dwelling, aggravated assault, and attempted burglary of a dwelling. ( R. Vol. 1, pp. 35 - 36). The prisoner subsequently entered a plea of guilty to attempted burglary of a dwelling. The plea was accepted and the prisoner was then convicted and sentenced to a term of eight years imprisonment with five years post - release supervision. ( R. Vol. 1, pp. 37 - 40).

After getting settled in with the Department of Corrections, the prisoner then filed a motion in post - conviction relief. In that motion, he claimed that his attorney was ineffective

because the attorney failed to challenge an allegedly defective indictment, that the sentence imposed denied him due process and equal protection of the law, and that his plea was involuntary because the Circuit Court allegedly failed to advise him that he had the right to appeal his sentence. ( R. Vol. 1, pp. 6 - 7). He then went on a rambling complaint about various things, including a claim that the victim of his felony lied, his attorney conspired with the prosecutor to get him to plead guilty and other such things. ( R. Vol. 1, pp. 19 - 25).

The Circuit Court denied relief on the prisoner's motion, without an evidentiary hearing, setting out its reasons for doing so. ( R. Vol. 1, pp. 45 - 46).

#### **STATEMENT OF ISSUES**

**1. 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 where "it plainly appears from the face of the motion any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief." Miss. Code Ann. Section 99-39-11(2) (Rev. 2007). This Court will not disturb the decision by the Circuit Court to dismiss such a motion absent a finding that the Circuit Court clearly erred in its decision. *Trice v. State*, No. 2007-KA-00041-COA (Miss. Ct. App., Decided 15 December 2007, Not Yet Officially Reported) The Circuit

Court committed no error in denying relief on the prisoner's motion.

In his first claim, the prisoner says that his attorney was ineffective for having failed to object to the indictment. It is said that the indictment failed to allege the jurisdiction in which the prisoner committed the felonies alleged in it. This is simply untrue: jurisdiction is clearly alleged in the upper left hand part of the indictment; the particular counts of the indictment refer to that allegation of jurisdiction. ( R. Vol. 1, pg. 35).

The prisoner then says that counsel "mentally coerc[ed]" him into pleading guilty, knowing that the indictment was "illegal." It was "illegal," according to the prisoner, because the prisoner was allegedly indicted in counts one and two on false information.

The prisoner was not convicted on counts one and two of the indictment. He was convicted on count three, which alleged attempted burglary of a dwelling. ( R. Vol. 1, pg. 37). Consequently, counts one and two are of no significance. There is, in any event, not the first suggestion in this record, other than one arising from the prisoner's fevered imagination, supported only by his verification, that counts one and two were returned on the basis of "false information." And certainly there is nothing, again other than the prisoner's own verification, that the defense counsel used counts one and two to coerce the prisoner into pleading guilty. This Court has consistently held that a Circuit Court commits no error in denying relief on a claim of ineffective assistance of counsel where the claim is supported only by the prisoner's affidavit. *E.g. Ray v. State*, 976 So.2d 398 (Miss. Ct. App. 2008).

The prisoner then says that he was not aware of Count 3 of the indictment. There is nothing to support this most unlikely claim, other than the prisoner's verification.

The prisoner then says that the Circuit Court erred in imposing a period of five years on post -release supervision in addition to an eight - year term of imprisonment. The complaint

appears to be that, in the event the prisoner serves the entire eight - year term, the court would not be in a position to require him to serve additional time in the event that the prisoner will be unable to satisfactorily complete the period of post - release supervision.

The Circuit Court sentenced the prisoner to a term of eight years imprisonment. It does not appear that the court suspended any part of that term. The court then imposed a period of five years post - release supervision. ( R. Vol. 1, pp. 37 - 40).

Under Miss. Code Ann. Section 47-7-34(1) (Rev. 2004), a circuit court may impose a period of post - release supervision, if it has imposed a term of incarceration. The only limitation on the court's power in this regard is that the number of years of incarceration and the number of years of post - release supervision may not exceed the maximum period of incarceration authorized to be imposed. However, the maximum amount of time that the Department of Corrections may supervise an offender is five years. Miss. Code Ann. Section 47-7-34(3). In the case at bar, the sentence of eight years and five - year period of post - release supervision did not exceed the maximum imposable period of incarceration for a conviction of attempted burglary of a dwelling. Miss. Code Ann. Section 97-17-23; 97-1-7 ( Rev. 2006).

There is nothing in Section 47-7-34 that requires a sentencing court to suspend a sentence in whole or in part as a condition for imposing post - release supervision. The only requirement is that the to-serve sentence and period of post - release supervision not exceed the statutory maximum. Here it did not. Now, it may be that in many if not most instances the sentencing court will suspend some part of the sentence imposed. But that this is commonly done does not mean that it must be done. The statute does not require it. Here, the practical effect of the Circuit Court's sentence is that, in the event that the prisoner is released by the Department of Corrections before serving the whole of the eight - year sentence, the Circuit Court will be

limited to imposing that portion that the prisoner did not serve in the event that it should revoke the prisoner's post - release supervision.

In any event, the issue is not ripe for decision at this time. The prisoner is in custody, has not been released, and as far anyone can divine, he may never be subjected to revocation. The issue presented by the prisoner is not presently ripe for review in view of the fact that he is not now subject to revocation. The prisoner may challenge the propriety of the imposition of the term of post - release supervision if and when the State attempts to revoke it. *Cf. Conley v. State*, 790 So.2d 733, 806 (Miss. 2001).

The prisoner then complains that the trial court did not inform him, during the plea colloquy, that he had the right to appeal his sentence.

The Circuit Court informed the prisoner that “. . . under the laws of the State of Mississippi he would have no right to appeal to the Supreme Court after the plea of guilty.” ( R. Vol. 1, pg. 38). The court said nothing about any potential appeal as to the sentence imposed. The Circuit Court's explanation that there would be no right to appeal the guilty plea was correct. *Gladney v. State*, 963 So.2d 1217, 1222 (Miss. Ct. App. 2007). The information given to the prisoner by the Circuit Court was substantively the same as that given by the court in *Epps v. State*, 926 So.2d 242 (Miss. Ct. App. 2005). The advice to a person who is entering a guilty plea that a guilty plea waives the right to appeal in the event of a conviction after a trial is correct advice, and is no ground to set aside a conviction and sentence arising from a guilty plea.

Even assuming for argument that the Circuit Court was required to advise the prisoner that he could appeal the sentence imposed, there would be no prejudice to this prisoner. The sentence was well within statutory limits, and there is nothing to suggest that the prisoner had any good ground to complain of it. Thus, assuming for argument that the court erred, any such

error would surely be harmless error.

In the last claim, the prisoner alleges that the Circuit Court erred in refusing to grant an evidentiary hearing on his motion. Once again, he bandies about his allegations that witnesses lied, his attorney was involved in some sort of a conspiracy, and that a transcript of the plea colloquy was not included in the record on appeal.

There was nothing at all in the prisoner's motion in post - conviction relief, beyond his own say - so, to even suggest that one or more witnesses lied or that his attorney conspired against him. As we have said above, there was no obligation to grant an evidentiary hearing in view of the fact that there were no affidavits other than the prisoner's.

As for a transcript of the plea colloquy, the prisoner might have moved to supplement the record to have this included. He did not, and that was his choice. It was his burden to provide a record to support his claims. *Smith v. State*, 572 So.2d 847 (Miss. 1990). In any event, the record present here is, as the prisoner admits, sufficient upon which to address his claims.

The prisoner appears to claim that the Circuit Court was obliged by law to examine the transcript. For all this Court and we know, the Circuit Court did just that. But, in any event, there is no authority of which we are aware that requires such. The prisoner cites none. This claim is to be ignored since it is not supported by authority.



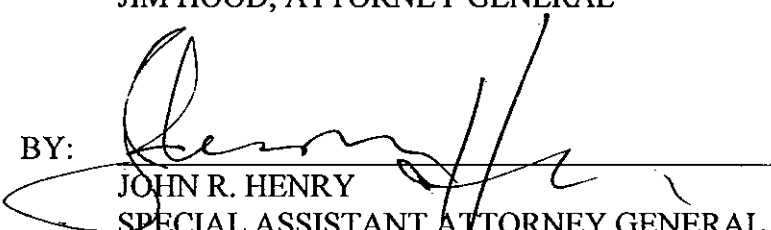
## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

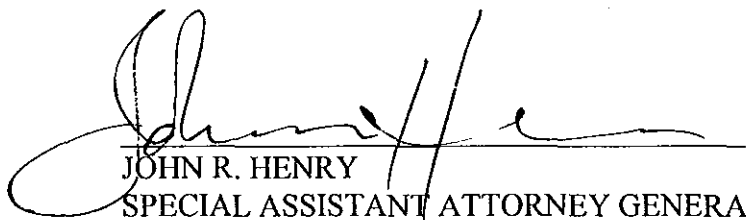
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 23rd day of April, 2008.

  
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