IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOSEPH HENRY — APPELLANT

VS. — NO. 2007-CP-1435-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

FEDERAL RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOSEPH HENRY **APPELLANT**

VS. **NO. 2007-CP-1435-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY

On March 6, 2006, Joseph Henry, "Henry" pled guilty to sale of cocaine as an habitual offender before the Circuit Court of Harrison County, the Honorable Roger T. Clark presiding. R. 1. After advising and questioning Henry and his counsel, the trial court found that his guilty plea was voluntarily and intelligently entered. R. 12. Henry was sentenced to serve a recommended ten year sentence as an habitual offender without parole or probation in the custody of the Mississippi Department of Corrections.. R. 19.

On August 24, 2006, Henry filed for pro se post conviction relief with the trial court. C.P. 5-10. The trial court denied relief. C. P. 27-28; 29-30. Henry filed for reconsideration of the trial court's decision which was denied. C.P. 144-145. From that denial of relief, Henry filed notice of appeal to this court. C.P. 156-158.

ISSUES ON APPEAL

I.

WAS HENRY ENTITLED TO A REDUCED SENTENCE?

II.

DID HENRY RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

III.

WAS THERE ANY MERIT TO HENRY'S OTHER CLAIMS RAISED IN HIS APPELLANT'S BRIEF?

STATEMENT OF FACTS

Henry was indicted for transfer of controlled substance, cocaine, on August 30, 2002, as an habitual offender under M.C. A. § 99-19-81. C.P. 19-20. Henry had some four prior Hancock County felony convictions. They were for uttering forgery, grand larceny, and two burglaries of a dwelling. C.P. 19-20. With the assistance of Mr. Robert H. Koon, Henry completed and filed a "Petition to Enter Plea of Guilty." C.P. 21-24.

That Petition clearly indicated that Henry was pleading guilty to "transfer of a controlled substance" as an "habitual offender under M. C. A. § 99-19-81." C.P. 21-22. The four previous felony convictions in Hancock County were listed on the second page of that document. C.P. 22. Henry also stated the factual basis for the guilty plea. Henry admitted that he "did sell or transfer cocaine to undercover agent, Dianne Evans," on August 30, 2002. C.P. 22.

Henry acknowledged knowing the Constitutional rights he was waiving by pleading guilty. This included his right to a trial with cross examination and a right against self incrimination/ R. 5-6.

Henry stated "under oath" that he understood "the thirty year maximum sentence" for a transfer conviction, as well as "the ten year" recommendation offered by the District Attorney's Office. C.P. 22.

On March 6, 2006, the record reflects that Henry with benefit of counsel pled guilty to the transfer of controlled substance charge before the Circuit Court of Harrison County, the Honorable Roger T. Clark presiding. R. 1. Henry was represented by Mr. Robert H. Koon. R. 1.

Henry testified that he understood, as stated in his Petition, the thirty year maximum sentence for transfer and the ten year recommended sentence without possibility of reduction, probation or parole by the prosecution. R. 7; 17. Henry testified that he had not been coerced or promised anything in exchange for his plea. He admitted the factual basis for his plea. He sold cocaine to

Diane Evans on August 30, 2002. Henry stated that he was forty five years old and could read and write. R. 18.

After advising and questioning Henry and his counsel, Mr. Koon, about Henry's understanding of the transfer of cocaine charge, and the consequences of his plea, the trial court found that Henry's guilty plea was voluntarily and intelligently entered. R. 1-19. The trial court accepted the prosecution's recommendation and sentencing Henry to "ten years without parole or pardon." R. 19.

On August 24, 2006, Henry filed for pro se post conviction relief. Henry requested that his ten year sentence be reduced to five years. C.P. 7.

The trial court stated in its Order denying relief on Henry's pro se motion that he was sentenced as an habitual offender under M. C. A. § 99-19-81. C.P. 27-28. This statute requires a prisoner to be "sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation." The court found no authority under 99-19-81 for reducing Henry's sentence. C.P. 27-28.

On August 24, 2006, Henry also filed for a hearing on a pro se motion claiming ineffective assistance of counsel. C.P. 11-26. The trial court denied relief. C.P. 29-30. The Court found no support for Henry's claim that his guilty plea counsel failed to present evidence that "would have mitigated defendant's sentence." C.P. 29-30. In addition, in his petition, and at his guilty plea hearing, Henry stated that he "was satisfied with the advice and help he(his counsel) has given me." C.P. 22: R 4. .

On July 27, 2007, Henry filed for reconsideration. C.P. 147-153. The trial court denied relief, finding that Henry filed for relief under a federal civil rule, FRCP Rule 60(b). The Court

found it similar to Rule 60(b) of the Mississippi Rules of Civil Procedure. Under that rule one has "not more than six months after the entry of judgment" to file for relief. Henry's motion was beyond that six month period for filing. C.P. 144-146.

From that denial of relief, Henry filed a pro se notice of appeal to the Mississippi Supreme Court. C.P. 156-158.

SUMMARY OF THE ARGUMENT

1. The record reflects that trial court corrected denied Henry's pro se Motion. C.P. 27-28. Henry was not entitled to any reduction in his sentence. C.P. 7. Henry was indicted for transfer of cocaine as an habitual offender under M. C. A. § 99-19-81. C.P. 19-20. He filed a Petition and pled guilty at a guilty plea hearing, acknowledging that he was "an habitual offender" with more than two prior separate felony convictions for which he served at least a year in prison. C.P. 21-24. Henry and his counsel were present when the prosecution stated for the record that he was pleading guilty as "an habitual offender." C.P. 22-23; R. 17..

The trial court sentenced Henry to the recommended ten years after finding his plea was voluntarily and intelligently entered.. R. 19; C.P. 25-26. Under M. C. A. §99-19-81 an enhanced sentence "shall not be reduced" nor is an appellant entitled to parole or probation.

The trial court has discretion to deny a motion without a hearing. **Meeks v. State**, 781 So.2d 109, 114 (¶ 14) (Miss. 2001). This is true where there is record evidence indicating that a movant's assertions are contradicted by his sworn statements at his guilty plea hearing. **White v. State**, 818 So. 2d 369, 371 (¶ 4) (Miss. Ct.App.2002).

2. The record reflects that Henry received effective assistance of counsel. There is lack of evidence in the record of either "deficient" performance or of "prejudice" to Henry as a result of any actions, or advise by his guilty plea counsel. Henry's complaint of prejudice by virtue of his counsel not offering mitigating evidence is wide of the mark. C.P. 14. The record reflects that Mr. Robert H. Koon negotiated a ten year reduced sentence for Henry. Henry is enjoying the benefit of that reduced sentence instead of the thirty year maximum for transfer of cocaine.

In his Petition, and at his guilty plea hearing, Henry stated that he "was satisfied with the advice and help he(his counsel) has given me." R. 4; C.P. 22. The record also indicates that Mr.

Koon stated for the record evidence favorable to Henry prior to his being sentenced, as well as requested credit for time served which was granted. R. 18.

3. The record reflects that issues were raised for the first time in Henry's appeal brief. These issues not raised with the trial court were waived. **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988)

ARGUMENT

PROPOSITION I.

THE RECORD REFLECTS THE TRIAL COURT CORRECTLY DENIED RELIEF.

In Henry's pro se motion for post-conviction relief, he requests that his ten years sentence for transfer of controlled substance, cocaine in violation of 41-29-139(a)(1) be reduced to five years. C.P. 7. In his pro se appeal brief, Henry argues that he was improperly found to be an habitual offender, improperly denied a hearing on his pro se motion, and improperly procedurally barred for filing more than six months after his sentence a motion for reconsideration. Appellant's brief page 1-34.

The record reflects that Henry was indicted for transfer of controlled substance, cocaine, on August 30, 2002, as an habitual offender under M.C. A. § 99-19-81. C.P. 19-20. Henry had some four prior Harrison County felony convictions for uttering forgery, grand larceny, and two burglaries of a dwelling. C.P. 19-20.

On March 6, 2006, the record reflects that Henry pled guilty to the transfer of controlled substance charge before the Circuit Court of Harrison County, the Honorable Roger T. Clark presiding. R. 1. Henry was represented by Mr Robert H. Koon. R. 1. With the assistance of Mr. Koon, a "Petition to Enter a Guilty Plea" had been completed. C.P. 21-24. That Petition clearly indicated that Henry was pleading guilty to transfer of a controlled substance as an "habitual offender under M. C. A. § 99-19-81." C.P. 21-22. The four previous felony convictions in Hancock County were listed on the second and third page of that document. C.P. 22.

That Petition also stated the factual basis for the guilty plea. Henry admitted that he transferred cocaine to undercover agent, Dianne Evans on August 30, 2002. C.P. 22.

The trial court stated in its Order denying relief on Henry's pro se motion for post-conviction relief that he was sentenced as an habitual offender under M. C. A. §99-19-81. C.P. 25. This requires a prisoner to be "sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation." C.P. 27.

In **Green v. State**, 631 So. 2d 167, 176 (Miss. 1994), the Supreme Court stated that sentencing was in the trial court's discretion. This is where the sentence is within the limits established by statute.

> So long as the sentence imposed is within the statutory limits, sentencing is generally a matter of trial court discretion. **Wallace v. State**, 607 So. 2d 1184, 1188 (Miss. 1992).

In **Johnson v. State** 511 So.2d 1360, *1367 (Miss.1987), the Court stated that the life sentence that Johnson received as a 99-19-81 habitual offender was that required by law for his conviction for rape.

> Miss. Code Ann. § 99-19-81 provides that a person convicted of a felony who has previously been convicted of two separate felonies arising out of separate incidents at different times and who shall have been sentenced to separate terms of one year or more, shall, for the principal offense, be sentenced to the maximum term of imprisonment prescribed therefor and that such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.
>
> The maximum term of imprisonment for the crime of rape for which Johnson was convicted is life imprisonment, and that, indeed, is the sentence imposed by the jury. Miss. Code Ann. § 97-3-65(2) (Supp.1985). The sentence imposed upon Johnson was, therefore, that required by law.

The Appellee would submit that the record reflects that Henry's sentence was within the discretion of the trial court. The trial court's sentence of ten years based upon the recommendation of the prosecution was well within the range provided by statute for transfer of cocaine. See M. C.

A. § 41-29-139(a)(1). R. 17-19. Since the record reflected that Henry was sentenced as "an habitual offender" under 99-19-81, the trial court correctly found that he lacked authority under that statute to alter or reduce his sentence.

In **Hebert v. State** 864 So.2d 1041, 1045 (Miss. App. 2004), the Court relied upon **Meeks v. State**, 781 So. 2d 109, 114(¶ 14) (Miss. 2001) in finding that granting a hearing is within the trial court's discretion. It need not be granted where assertions are contradicted by the record taken from a movant's guilty plea hearing.

> ¶ 11. It is noteworthy that Frank also alleges that he should have been afforded an evidentiary hearing before the circuit judge. A trial court has considerable discretion in determining whether to grant an evidentiary hearing. **Meeks v. State**, 781 So.2d 109, 114 (¶ 14) (Miss.2001). Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Jones v. State**, 795 So.2d 589, 590 (¶ 3) (Miss. Ct. App.2001). A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilt. **White v. State**, 818 So. 2d 369, 371 (¶ 4) (Miss. Ct. App.2002).

The record indicates that Henry stated in his Petition To Enter a Guilty Plea, as well as under oath at his guilty plea hearing that he understood the thirty year maximum sentence, as well as the ten year recommended sentence by the prosecution for his conviction for sale of cocaine. C.P. 22; R. 7;17. The record also reflects that Henry stated in his petition, and acknowledged by his silence at his guilty plea hearing that he was pleading guilty as an M. C. A. § 99-19-81 habitual offender. The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT HENRY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Henry also believes that he did not receive effective assistance of counsel. He complains that his counsel did not present "non-statutory mitigating evidence" for reduction of his sentence at his sentencing. C.P. 14. He also complains about Mr. Koon's being allowed to withdraw from representing him. However, he admits he was represented prior to and during his guilty plea motion hearing. Appellant's brief page 11-26.

To the contrary, the record reflects that Mr. Koon represented Henry prior to and during his guilty plea hearing. He assisted Henry in filling out his Petition To Enter a Guilty Plea. C.P. 21-24. There is a certification of counsel from Mr. Koon included in the record which was attached to Henry's sworn and signed Petition. C.. 24. The record also reflects that Koon assisted Henry by representing him at his guilty plea hearing. R. 1-19.

In his Petition, Henry admitted that he was "satisfied with the advice and help he(Mr. Koon) has given me..." R. 22.

At his guilty plea hearing, the trial court questioned not only Henry but also his counsel, Mr. Koon. Koon was questioned about Henry's understanding of his transfer of the cocaine charge. He was also questioned about Henry's understanding of the consequences of having his guilty plea accepted. This included Henry admitting under oath that he understood what was included in his Petition to enter a guilty plea. R. 3-4.

Henry also admitted under oath that he was satisfied with the services provided by his attorney.

> Court: **All right. Let me ask you if you are satisfied with the services of your attorney and the advice he's given you in your case, Mr. Henry?**

Henry: **Yes, sir.** R. 4. (Emphasis by Appellee).

The record reflects that the Henry knew that he was pleading guilty as an habitual offender.

Court:...All right, state, what do you have to say to Mr. Henry?

Smith: Your Honor, the state would recommend ten years to serve without the hope of parole.

Court: **He is a habitual offender?**

Smith: **Yes, your Honor.** R. 17. (Emphasis by Appellee)

Finally, Mr. Koon also pointed out that Henry had a letter of recommendation from a prison chaplain, and that he had completed a Bible correspondence course while incarcerated. He also requested that Henry be given credit for the nine months that he had already served in prison. R. 18.

For Henry to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Henry must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Henry. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Henry must show that there is a reasonable probability that but for the errors of his counsel, the sentence of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington,**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of Mr. Koon, his counsel, the result of Henry's guilty plea and sentence would have been different. This is to be determined from "the totality of the circumstances" involved in his

case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is "a reasonable probability" that Mr. Koon erred in assisting Henry in filing out a guilty plea petition and entering a guilty plea based in part upon a negotiated reduced ten year sentence.

> As stated in **Strickland**: and quoted in **Mohr v. State**, 584 So. 2d 426, 430 (Miss. 1991): Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Henry bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v. State**, 490 So. 2d 860 (Miss. 1986). There were no affidavits filed in support of any of Henry's allegations of inadequate services rendered on his behalf by his guilty plea counsel.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of

> prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

The Appellee would submit that the record summarized and cited above indicates that Mr. Robert Koon effectively represented Henry in the instant cause. As a result of Mr. Koon's efforts, Mr. Henry is serving a ten year rather than a thirty year sentence. The fact that Mr Henry's ten year sentence is without benefit of any reduction is the result of the statutory requirements of M. C. A. § 99-19-81, and not the result of any lack of effort of Mr. Koon's behalf in attempting to assist Henry before the Circuit Court of Harrison County. The record reflects that Mr. Koon did present evidence favorable to Henry prior to sentencing, including requesting credit for time served. R. 18. This issue is also lacking in merit.

PROPOSITION III

THERE WAS NO MERIT TO HENRY'S OTHER *CLAIMS NO RAISED WITH THE TRIAL* COURT.

In Henry's pro se appellant's brief, he mentions various issues not raised in his motion with the trial court. These include assertions about alleged denials of his Constitutional right to a legal sentence, to a hearing on his various motions for relief, to a right to a proper indictment and proper proof of his habitual offender status. Appellant's brief page 1-34.

To the contrary, to the best of Appellee's knowledge, these other issues were not raised with the trial court in Henry's pro se motions. C.P. 5-18; 33-72. Therefore, they can not be raised for the first time on appeal.

In **Gardner v. State**, 531 So. 2d 808-809(Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

> The issue regarding the constitutionality vel non of Sect. 97-1-1, M.C.A. (1972), was not raised in Gardner's motion for post conviction relief and may not be raise now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983)

As stated under the statement of the facts, Henry was indicted for transfer of cocaine to undercover agent, Diane Evans . C.P. 19-20. He acknowledged knowing the charge against him both in his Petition To Enter a Guilty Plea, and in his testimony at his guilty plea. He acknowledged knowing the 30 year maximum sentence as well as the ten year recommended sentence. C.P. 22; R. 7. He admitted there was a factual basis for his plea. R. 9.. He admitted that he had not been coerced or promised anything in exchange for his guilty plea. R. 6. He admitted knowing the Constitutional rights he was waiving by pleading guilty. R. 5-6.

His Petition, and his silence when the prosecution stated at his guilty plea hearing that he was

pleading guilty as "an habitual offender" was sufficient for establishing that he knew he was pleading guilty as a 99-19-81 habitual offender. C.P. 21.

Therefore, the Appellee would submit, as stated under proposition I and II, there were no errors or flaws involved Henry's indictment, voluntary plea, and his ten year sentence as recommended by the prosecution. The record reflects that Henry was not denied any of his constitutional rights during his guilty plea hearing, his sentencing, or in the trial court's orders denying relief on his various post trial motions.

The Appellee would submit that the record reflects that issues not raised with the trial court in Henry's motion for post conviction relief were waived. They can not be raised for the first time on appeal. These issues are also lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

Honorable Roger T. Clark
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39501

Honorable Cono Caranna
District Attorney
Post Office Drawer 1180
Gulfport, MS 39502

Joseph Henry, #07912
KNRCF
300 Industrial Park Rd.
DeKalb, MS 39328

This the 29th day of January, 2008.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680