IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HERMAN PRATHER — APPELLANT

VS. — NO. 2007-CP-1452

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

HERMAN PRATHER **APPELLANT**

vs. **CAUSE No. 2007-CP-1452-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 Tippah County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

STATEMENT OF FACTS

The prisoner entered a plea of guilty to the felony of sexual battery on 1 December 2005. In the course of the colloquy, the prisoner indicated that he was satisfied with the services of his attorney, that he understood the various rights explained to him by the trial court, that he was not suffering from some mental defect that might impair his ability to understand what he was doing, and that he had no questions regarding the plea colloquy. (R. Vol. 1, pp. 7; 10; 11; 12). However, after the Circuit Court accepted the plea, the prisoner did ask about the availability of mental health treatment while in prison. (R. Vol. 1, pg. 15).

On either 2 or 20 November 2006, the prisoner filed a motion in post - conviction relief,

in which he attempted to have his sentence set aside. (R. Vol. 1, pg. 27). The prisoner specifically limited his motion to the sentence imposed against him; he specifically admitted his guilt for sexual battery. (R. Vol. 1, pg. 31). As grounds for such relief, the prisoner alleged that the trial court failed to advise the prisoner that the "charge of sexual battery carried mandatory time"; that he was not informed of the minimum and maximum penalties imposable upon conviction of sexual battery; that counsel was ineffective for having failed to raise and insanity defense; and that the trial court should have required a mental competency examination of the prisoner. (R. Vol. 1, pp. 28 - 29).

Relief was denied on the prisoner's motion, without an evidentiary hearing, by order filed on 19 January 2007. (R. Vol. 1, pg. 61). The prisoner filed his notice of appeal on 14 August 2007. (R. Vol. 1, pg. 63).

STATEMENT OF ISSUES

1. IS THE INSTANT APPEAL PROPERLY BEFORE THIS HONORABLE COURT?

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

SUMMARY OF ARGUMENT

1. THAT THE INSTANT APPEAL IS NOT PROPERLY BEFORE THE COURT

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

ARGUMENT

1. THAT THE INSTANT APPEAL IS NOT PROPERLY BEFORE THE COURT

As we have stated above, the Circuit Court entered its order denying relief on the prisoner's motion on 19 January 2007. The prisoner did not file a notice of appeal until August of that year. The prisoner had thirty days from the entry of the order in which to file his notice of appeal. Rule 4, MRAP. Obviously, the prisoner missed this deadline. There is nothing to show that the prisoner sought and was granted an out - of - time appeal.

We are aware, of course, that this Court has said that, when an inmate has failed to file a notice of appeal in a timely fashion, it is somehow the State's duty to prove that the inmate did not give prison authorities the notice of appeal in a timely fashion. *Gaston v. State*, 817 So.2d 613 (Miss. Ct. App. 2002). Accordingly, we have contacted the institution in which the prisoner is confined and have been informed that the prisoner sent nothing to the Circuit Court of Tippah County or to this Court's clerk until 10 August 2007. We are awaiting a signed and notarized certificate by the custodian to this effect. Since we may not receive further extensions of time in which to file this brief, we will supplement this brief once we receive the certificate.

Because the prisoner failed to file his notice of appeal in a timely fashion, this Court is without jurisdiction to entertain the instant appeal. *Craft v. State*, 966 So.2d 856 (Miss. Ct. App. 2007).

2. 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 summarily dismiss a motion in post - conviction relief "[i]f 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). The circuit court's decision will not be disturbed here absent a finding that the decision was clearly erroneous. *Trice v. State*, No. 2007-KA-00041-COA (Miss. Ct. App., Decided 15 December 2007, Not Yet Officially Reported).

The prisoner may or may not be asserting that his attorney was ineffective for allegedly having failed to advise him "about the mandatory time statute." Or, on the other hand, it could be that he is asserting that the trial court failed to do this.

First of all, as to the ineffective assistance of counsel claim(s), the Court will find that it or they are supported only by the prisoner's affidavit. This is insufficient to state a claim of ineffective assistance of counsel in post - conviction relief. *Minchew v. State*, 967 So.2d 1244 (Miss. Ct. App. 2007). We also note that the prisoner, under oath, expressed satisfaction with his attorney.

Assuming the ineffective assistance of counsel claims were properly before the circuit court, there was no merit in them.

The record reflects that the circuit court asked the prisoner, during the plea colloquy, whether he was aware of the maximum and minimum punishments for his felony. The prisoner indicated that he was aware of them and that he had no questions. The court also informed the prisoner that it was not bound by any recommendation as to sentence. (R. Vol. 1, pg. 12). While the petition to enter a plea of guilty does not itself appear in the record, it is clear that there was

one. (R. Vol. 1, pg. 5). As this Court is well aware, these petitions include advice as to the maximum and minimum punishments that may be imposed.

The Court has held that where an accused has been informed of the maximum and minimum imposable sentences, and further informed by the circuit court that it is not bound by a sentencing recommendation, the failure by the circuit court and the defense attorney to inform the accused of the "mandatory time statute" does not invalidate the plea. *Hadley v. State*, 821 So.2d 915 (Miss. Ct. App. 2002). The prisoner stated, under oath, that he was aware of the range of punishments that could be imposed. This was sufficient.

The prisoner then says that his attorney told him that "he would be sentenced under the 85% law" (Brief for the prisoner at 5). There is nothing to substantiate this claim. Nor is there anything to substantiate the claim that the prisoner would only serve a short time before he "parole out." *Alexander v. State*, 605 So.2d 1170 (Miss. 1990) is of no assistance to the prisoner. In that decision there was enough support in that appellant's pleading to permit an evidentiary hearing. Here, there is nothing in support of the prisoner's claims beyond the prisoner's own say-so.

The prisoner then says that counsel was ineffective for having failed to assert an insanity defense. Now this is a peculiar claim, in view of the fact that the prisoner is not challenging his conviction for sexual battery, only the sentence imposed. One would think that he would have challenged his conviction and sentence, if the prisoner thought and insanity defense was available.

There is nothing shown to so much as suggest that insanity was available as a defense. It is true that the prisoner claims that he has some kind of psychological disorder, but the Court is left to surmise what it might be, if he indeed has one. The prisoner has not troubled himself to

tell the Court what his malady is.

If, on the other hand, the prisoner means to suggest that he was incompetent to enter a plea, this claim is wholly undercut by his sworn statement at the plea colloquy to the effect that he was not suffering from a mental disability that might impair or affect his ability to understand what he was doing. (R. Vol. 1, pg. 11). While it is true that the prisoner did ask the circuit court, after the acceptance of the plea, whether would receive mental health treatment (R. Vol. 1, pg. 15), there was no claim made that whatever mysterious mental malady that the prisoner allegedly suffered from in any way affected his competence.

The prisoner wholly failed to make a showing in his pleadings that there was evidence to support an insanity defense – that he was unable to know right from wrong at the time he committed the sexual battery on account of some defect of reason or disease of mind. *Stevens v. State*, 806 So.2d 1031 (Miss. 2001). There is simply nothing alleged in the pleadings to suggest insanity – the prisoner does not even tell the Court what his alleged problem is.

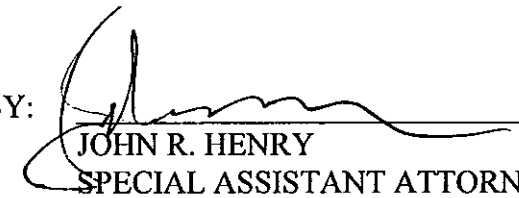
The prisoner says that the circuit court was required to stop the plea colloquy and order a competency hearing. However, there is nothing in the plea colloquy to show that there was a reasonable ground to believe that the prisoner was incompetent. Rule 9.06 UCCCP. He told the court that he was competent. A review of his answers to the questions put to him by the circuit court does not suggest incompetency. His answers were clear and congruent. There was nothing to suggest incompetence, thus no competency hearing was required. *Smith v. State*, 831 So.2d 590 (Miss. Ct. App. 2002). The fact that a person seeks mental health treatment does not, on that fact alone, require a competency hearing. Counsel was not ineffective for having failed to request such a hearing.

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: 

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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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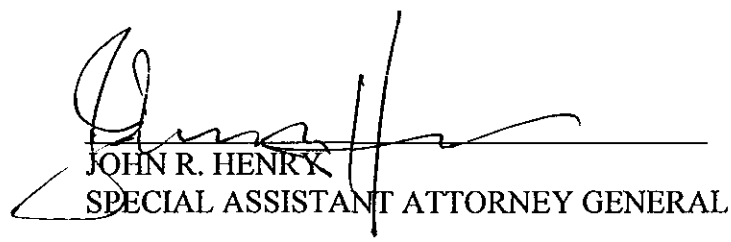
This the 21st day of April, 2008.



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