

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COPY

ALLEN SMITH

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APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS.

NO. 2007-CP-1631

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court correctly dismissed Smith's Petition for Post Conviction Collateral Relief since Smith was unable to meet the proof requirements of either prong of *Strickland*.
- II. Smith's argument that guilty plea was not intelligent and voluntary is facially invalid, unsupported by any evidence or affidavits and the trial court correctly dismissed his Motion for Post Conviction Collateral Relief.

STATEMENT OF THE CASE

Smith pled guilty to a charge of murder in the Circuit Court of Yazoo County, Mississippi on August 3, 2004. He was sentenced to serve a term of life in the custody of the Mississippi Department of Corrections. On July 19, 2007, Smith filed his Motion for Post-Conviction Collateral Relief on the grounds that the trial court did not provide a transcript of his guilty plea and ineffective assistance of counsel. On September 7, 2007, the trial court held that Smith's request for records, as a matter of law, states no grounds for justifying a trial transcript or a copy of his records being prepared and given to him without cost. The trial court further held that Smith failed to satisfy either prong of the *Strickland* test. On September 18, 2007, Smith filed his Notice of Appeal from the trial court's dismissal.

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed Smith's Petition for Post Conviction Collateral Relief since Smith was unable to meet the proof requirements of either prong of *Strickland* and his claim that his guilty plea was not intelligent and voluntary was facially invalid. The *Strickland* test was not met for ineffective assistance of counsel. Smith did not support his claim of ineffective assistance of counsel with any affidavits other than his own. His bald allegations that his counsel did not sufficiently investigate his claim and gave him "ill advice" are not sufficient to sustain his claim. The motion, on its face, does not entitle him to any relief. Further, Smith offers no proof in the way of affidavits of witnesses which could testify that he did not knowingly, intelligently and voluntarily enter his plea of guilty. Because his Motion for Post-Conviction Collateral Relief was facially invalid, Smith was not entitled to have a copy of the transcript provided to him at no cost. Therefore, this Court should affirm the trial court's denial of Smith's Motion for Post-Conviction Relief.

ARGUMENT

A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150 (Miss.Ct.App. 2002). However, when reviewing issues of law, this Court's proper standard of review is de novo. *Brown v. State*, 731 So.2d 595, 598 (Miss.1999).

I. The trial court correctly dismissed Smith's Petition for Post Conviction Collateral Relief since Smith was unable to meet the proof requirements of either prong of *Strickland*.

The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in determining whether a claim of ineffective assistance of counsel should prevail. *Colenburg v. State*, 735 So.2d 1099, 1103 (Miss.Ct.App. 1999). The *Strickland* test requires a showing that counsel's performance was so deficient as to constitute prejudice to the defense. *Id.* The defendant has the burden of proof on both prongs of the *Strickland* test. *Id.* There is a strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. *Id.* The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. *Id.*

From the four corners of the record, the reviewing court must determine whether counsel's performance was both deficient and prejudicial. *Colenburg v. State*, 735 So.2d 1099, 1103 (Miss.Ct.App. 1999). A convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with as per *Strickland*. *Id.* First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second,

the defendant must show that counsel's errors deprived him of a fair trial with reliable results. *Id.*

Smith's bald allegations of ineffective assistance of counsel are insufficient to satisfy the two prongs of *Strickland*. Pursuant to Miss. Code Ann. § 99-39-11(2) (Supp. 1997), in order to withstand summary dismissal, an ineffective assistance of counsel claim must be alleged with specificity. *Ford v. State*, 708 So.2d 73 (Miss. 1998). Smith argues that his counsel did not adequately investigate his claim and did not she "gave him ill advice that caused him to plead guilty". He alleges that counsel told him that if he didn't plead guilty, he would face two life sentences or death. This is clearly strategic advice on the part of Smith's counsel and falls within the presumption of effective assistance of counsel.

Further, in cases involving post-conviction relief, "where a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). Smith did not name any potential witnesses that his counsel should have interviewed or provide an indication of what testimony they might have offered on his behalf. Smith's Motion for Post Conviction Collateral Relief was facially insufficient to state a claim for ineffective assistance of counsel. The trial court's dismissal of Smith's Motion for Post Conviction Collateral Relief should therefore be affirmed.

II. Smith is unable to show that his guilty plea was not intelligently and voluntarily made and the trial court correctly denied his facially insufficient Motion for Post Conviction Collateral Relief.

Smith alleges that his guilty plea was not intelligently and voluntarily made because he only spoke with his attorney once prior to his guilty plea and that his counsel did not properly investigate his case. Smith further alleges that he did not know that he could have received a lesser sentence and that had he known, he would not have pled guilty, but would have gone to

trial. Smith offers no proof for any of these allegations.

Smith's request for records stated no grounds for justifying a trial transcript or a copy of his records being provided to him at no cost. Smith failed to demonstrate a specific need for the documents and offered no good cause why he was in need of or entitled to the requested records. In *Fleming v. State*, 553 So.2d 505 (Miss. 1989), the Mississippi Supreme Court stated that "[a] prisoner who has filed a proper motion pursuant to this Act, and who motion has withstood summary dismissal under Miss. Code Ann. § 99-39-11(2) (1972, as amended) may be entitled to trial transcripts or other relevant documents under the discovery provisions of § 99-39-11(2). Smith's Motion for Post Conviction Collateral Relief was facially insufficient for the trial court to grant relief and therefore Smith was not entitled to the requested records. Smith did not attach the required affidavits to support a claim for ineffective assistance of counsel. *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995).

Smith alleges that his counsel did not file a Motion for Post Conviction Relief on his behalf. However, as the trial court noted in it's order, trial counsel is under no duty to file a Motion for Post Conviction Relief for a client who has pled guilty.

Smith offers no proof in the way of affidavits of witnesses which could testify that he did not knowingly, intelligently and voluntarily enter his plea of guilty. The *Strickland* test was not met for ineffective assistance of counsel. The motion, on its face, does not entitle the movant to any relief. Therefore, this Court should affirm the trial court's denial of Smith's motion for post-conviction relief.

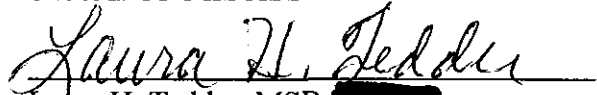

CONCLUSION

The Smith's assignments of error are without merit and the trial court's dismissal of his Motion for Post-Conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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Honorable James H. Powell, III
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This the 10th day of April, 2008.


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