IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALEX DURODE JOHNSON, III — APPELLANT

VS. — NO. 2007-CP-1649

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. JOHNSON WAS INFORMED OF HIS RIGHT TO AVOID SELF-INCRIMINATION AND KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED SAID RIGHT.

II. JOHNSON WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING JOHNSON TO PLEAD GUILTY TO THE LESSER-INCLUDED OFFENCE OF POSSESSION OF COCAINE.

IV. THE TRIAL JUDGE DID NOT ERR IN DENYING JOHNSON'S MOTION FOR POST-CONVICTION RELIEF AS JOHNSON'S PLEA WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

STATEMENT OF THE FACTS

Alex Durode Johnson, III was indicted for possession of cocaine with intent to sell, barter, transfer or deliver the same to another. (Record p. 55). On April 4, 2006, Johnson pled guilty to the lesser-included offense of possession of cocaine. (*See* generally p. 68 - 79). His counsel was present with him at the plea hearing during which Johnson stated that he understood his rights, his plea, and the rights he was waiving by entering a guilty plea. (*See* generally Record p. 68 - 79).

Johnson was sentenced to serve a term of twelve years, such time to be served as eight years in the custody of the Mississippi Department of Corrections, followed by four years Post-Release Supervision. (Record p. 81).

On August 4, 2007, Johnson filed a Motion for Post-Conviction Relief to Vacate Conviction and Sentence in which he claimed that "his guilty plea was not freely, voluntarily, and intelligently entered due to attorney advice" and that he "received ineffective assistance of counsel as the result, counsel did not provide adequate information prior to making his plea of guilty." (Record p. 14). He then filed a Notice of Amended Post-Conviction Claim in which he claimed that "the trial court committed reversible error when it allowed the State to convict petitioner of possession of cocaine a offense for which petitioner was never indicted." (Record p. 60). The trial court denied his motion by written Order explaining its reasons for denying Johnson's Motion in detail. (Record p. 81 - 83).

SUMMARY OF THE ARGUMENT

The trial judge properly denied Johnson's Motion for Post-Conviction Relief as Johnson's plea was knowingly, intelligently, and voluntarily made. Johnson was informed of his rights, including his right to avoid self-incrimination and was informed that a guilty plea waived those rights. Further, Johnson was not denied his right to effective assistance of counsel and the trial court properly allowed Johnson to plead guilty to the lesser-included offense of simple possession.

ARGUMENT

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)).

I. JOHNSON WAS INFORMED OF HIS RIGHT TO AVOID SELF-INCRIMINATION AND KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED SAID RIGHT.

Johnson first argues that "the trial court erred in failing to informer Johnson of his constitutional right to avoid self-incrimination." (Appellant's Brief p. 1). Johnson was, however, informed of his right to avoid self-incrimination. First, Johnson testified at his plea hearing that he and his attorney discussed his petition to plead guilty, that his attorney explained everything in the petition to him, and that he understood everything in the petition. (Record p. 70). Johnson's Petition to Plead Guilty, signed by Johnson, states in pertinent part as follows:

> By pleading guilty to the charge(s) against me, I give up the following rights guaranteed to me by the Constitution of the United States of America and by the Constitution of the State of Mississippi:
>
> * * *
>
> (f) the right to testify or not testify and thereby incriminate myself, at my sole option and, if I do not testify, the jury will be instructed that this should not be held against me;
>
> * * *
>
> I present this petition of my own free will and accord and have executed the same . . .

(Record p. 43 - 45). Further, at the plea hearing, the trial judge informed Johnson of his rights including the "right to testify or the right not to testify." (Record p. 71). The trial judge also informed him, "if you decide not to testify, then I would instruct the jury that they could draw no inference of guilt by the fact that you did not testify." (Record p. 71). Johnson indicated that he understood those rights and that he understood that he was waiving those rights by entering a guilty a plea. (Record p. 73). This Court has previously held that "[g]reat weight is given to statements made under oath and in open court during sentencing." *Ward v. State*, 879 So.2d 452, 455 (Miss. Ct. App. 2003) (quoting *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999)). *See also Hearvey v. State*, 887 So.2d 836, 840 (Miss. Ct. App. 2004) (holding that "where the defendant's claims are in

contradiction with the record, the trial judge may rely heavily on statements which were made under oath.") and *Pleas v. State*, 766 So.2d 41, 43 (Miss. Ct. App. 2000).

While Johnson contends in his Brief that he was not aware of his right to avoid self-incrimination, his testimony at the plea hearing reflects otherwise. Accordingly, this issue is without merit.

II. JOHNSON WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Johnson also argues that his trial lawyer was "ineffective for the following reasons: 1. failed to inform the petitioner of the elements of the crime and possible defenses, 2. failure to conduct and investigation and interview, 3. failure to pursue an adequate investigation of the case and evidence, 4. failure to challenge the improper admission of evidence to support a conviction and evidence of prior bad acts, 5. failure to conduct an investigation into the police files and discovery of the evidence that State held, 6. failure to bring the intimidation complaint to the court attention." (Appellant's Brief p. 1 - 2). The standard of review for such claims is as follows:

> Claims of ineffective assistance of counsel are judged by the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-part test set out in *Strickland* is whether counsel's performance was deficient and, if so, whether the deficiency prejudiced the defendant to the point that "our confidence in the correctness of the outcome is undermined." *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987). This standard is also applicable to a guilty plea. *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). A strong but rebuttable presumption exists that "counsel's conduct falls within a broad range of reasonable professional assistance." *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). To overcome this presumption, the defendant must show that "but for" the deficiency a different result would have occurred. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Richardson v. State, 769 So.2d 230, 234 (Miss. Ct. App. 2000).

Johnson first asserts that his counsel did not inform him of the elements of the crime; however, he testified at his plea hearing that he understood the charges against him, admitted to

doing the crime, and indicated that he was satisfied with the assistance of his counsel:

Q: And have you and your lawyer talked about the facts of this case?
A: Yes, sir.
Q: Has he explained to you and do you fully understand the nature of the charges against you?
A: Yes, sir.
Q: And you have discussed the way that you would defend yourself in the trial?
A: Yes, sir.
Q: And are you satisfied with the assistance given to you by Mr. Kelly?
A: Yes, sir.
Q: And after you and Mr. Kelly have discussed the case, is it your own decision to enter the plea of guilty?
A: Yes, sir.

(Record p. 74). Additionally, Johnson testified that he accepted the State's statement of the facts surrounding the charge and pled guilty to those facts. (Record p. 76). As noted above, great weight is given to statements made under oath and in open court.

Johnson also asserts that his counsel did not conduct a thorough investigation of the facts surrounding his charge. Specifically, Johnson claims that his counsel did not interview five witnesses. (Appellant's Brief p. 13). "For failure to investigate to arise to the level of ineffective assistance of counsel, the defendant must state with particularity what the investigation would have revealed and how it would have altered the outcome." *Middlebrook v. State*, 964 So.2d 638, 640 (Miss. Ct. App. 2007) (citing *Triplett v. State*, 840 So.2d 727, 731 (Miss. Ct. App. 2002)). First, there is nothing in the record to indicate whether Johnson's counsel did or did not interview these witnesses. Second, even if his counsel did not interview the listed witnesses, the affidavits of these witnesses, which are attached to Johnson's Motion, do not evidence that their testimony would, in any way, prove that Johnson did not commit the crime charged. Therefore, Johnson cannot show any resulting prejudice.

Johnson also complains that his counsel did not call DeAndre Gaston as a witness.

(Appellant's Brief p. 13 - 16). Johnson claimed at the plea hearing and in his Motion that the testimony of DeAndre Gaston would allow him to be "a free man." However, his counsel indicated at the plea hearing that he did interview Mr. Gaston and that his testimony could help Johnson's case but would not make him "a free man." (Record p. 72 - 73). Johnson argues that his counsel informed him that "Gaston's statement, 'light as to hold no merit.'" (Appellant's Brief p. 15). As noted in *Middlebrook v. State*, "[c]ounsel has 'a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case.'" 964 So.2d 638, 640 (Miss. Ct. App. 2007) (quoting *Daughtery v. State*, 847 So.2d 284, 287 (Miss. Ct. App.2003)). Johnson's counsel merely fulfilled this duty by informing his client of the value of Mr. Gaston's statement to his defense. Johnson further alleges that he was thereby "forced to plead guilty." (Appellant's Brief p. 16). However, as this Court held in *Richardson v. State,* " when the trial court questions the defendant and explains his rights and the effects and consequences of the plea on the record, the plea is rendered voluntary despite advice given to the defendant by his attorney." 769 So.2d 230, 234 (Miss. Ct. App. 2000) (citing *Roland v. State*, 666 So.2d 747, 750 (Miss.1995)). Johnson's rights were explained to him by the judge and he had every opportunity to voice any concerns he had about the plea or about his counsel's assistance and/or change his mind about the plea, but chose not to do so.

Johnson also claims that his counsel failed to adequately investigate the police files and thereby did not notice that the statements of the two officers involved are different. (Appellant's Brief. 18). Again, however, there is no indication in the record that his counsel did not investigate the police files and again Johnson failed to show how this prejudiced him. The statement of Deputy Vernon Jackson and Sgt. Donham did not differ as to the key elements of the crime. The only alleged discrepancies are regarding where the brown bag containing the cocaine fell after Johnson

threw it in the kitchen and whether there was anyone else in the room when he threw the bag. Both statements are clear that Johnson had possession of a brown bag with cocaine in it and that he threw the bag down in the kitchen. (Record p. 34 - 35). Thus, Johnson is unable to show prejudice.

Additionally, Johnson contends that his counsel knew that the State threatened DeAndre Gaston to keep him from testifying in Johnson's case and "was aware that Appellant was being coerced into making the plea." (Appellant's Brief p. 19 - 20). The following exchange took place at the plea hearing after Johnson brought the matter to the attention of the court:

A: My key witness that could free me, they threatened him, you know.
Q: Threatened him? What do you mean?
* * *
Q: Threatened. Threatened him with what?
A: They going to take him - - pull one his charges up and threatened him. They steady calling him to the jailhouse right now. As we speak now, the sheriff and them steady talking to him.
You know, this ain't right. The man that could free me, they threatened him.
* * *
Q: I don't think that violates any law or rule of court that I am aware of to prosecute somebody who has committed a crime, a different crime. I don't think that has anything to do with this.
A: Well, he's not going to testify.
Q: Well, he could exercise his Fifth Amendment rights, but if he's under subpoena, he has to testify, subject to his Fifth Amendment rights, of course.
MR. KELLY: I've told my client that.
A: I understand but he not going to tell the truth because - - I'm sorry, Your Honor. . . .
* * *
A: But he ain't going to testify 'cause they done called him and threatened him if he testify, he's going to get ten years. . . .
MR. KELLY: I think it might be good for me to put something on the record about this, now, at this point. He's talking about DeAndre Gaston.
* * *
MR. KELLY: DeAndre Gaston is a relative of the sheriff. I think a cousin or nephew. At any rate, I've interviewed DeAndre Gaston before this day, about a week ago, in my office, and he gave me a statement. I wrote down what he said. Now, what he said at that time was not something that would free my client, as he said. That's - - he was going to say that he saw my

> client throw a bag with a beer bottle in the trash can, which would help him, but wouldn't free him. Now, as I understand it today, he has told my client and my client has told me that DeAndre Gaston has told him that he was willing to testify today that it was somebody else's dope. Now, whether he's been called over to the sheriff's office and talked to - - he said he had, but I don't know that. I'm not sure. But I just want to point out to the Court, and my client knows this to be true because he was there also, when this guy gave me a statement originally, it wasn't anything that would free my client. It would have assisted him but not free him.

(Record p. 71 - 73). Immediately, thereafter, Johnson told the court that he understood his rights, he understood that he was waiving them, understood the charges against him and possible defenses, and was satisfied with his counsel. (Record p. 74). Again, Johnson did not utilize his opportunity to change his mind about the plea or to inform the trial judge that he was unhappy with his counsel.

Furthermore, Johnson's Petition to Plead Guilty, signed by Johnson, states as follows: "I am satisfied with the services of my attorney, and believe my attorney has acted in my best interest in my case." (Record p. 44). The Petition also contains a certification of Johnson's attorney indicating that he "read and fully explained to the defendant the allegations contained in the indictment or information in the case" and that "the plea of guilty offered by the defendant accords with [his] understanding of the facts related to me by the defendant and is consistent with [his] advice to the defendant, is voluntarily and understandingly made." (Record p. 47). Moreover, Johnson failed to show how his attorney's alleged deficient performance prejudiced his case, Thus, Johnson's second issue is without merit.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING JOHNSON TO PLEAD GUILTY TO THE LESSER-INCLUDED OFFENCE OF POSSESSION OF COCAINE.

Johnson argues that "the court erred in failing to find that it committed reversible error when it allowed the State to convict the appellant of possession of cocaine, an offense for which the appellant was never indicted." (Appellant's Brief p. 2). A defendant may be convicted of an "'inferior offense . . . necessarily included within the more serious offense' charged in the indictment." *Booze V. State,* 964 So.2d 1218, 1222 (Miss. Ct. App. 2007) (quoting *Odom v. State*, 767 So.2d 242 (Miss. Ct. App. 2000)). Possession of a controlled substance is a lesser-included-offense of possession of a controlled substance with the intent to distribute. *Torrey v. State,* 816 So.2d 452, 454 (Miss. Ct. App. 2002) (citing *Hicks v. State*, 580 So.2d 1302, 1306 (Miss.1991)). Thus, the trial judge properly allowed Johnson to plead guilty to simple possession. Accordingly, Johnson's third issue is without merit.

IV. THE TRIAL JUDGE DID NOT ERR IN DENYING JOHNSON'S MOTION FOR POST-CONVICTION RELIEF AS JOHNSON'S PLEA WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

A defendant may collaterally attack the validity of a guilty plea with a motion for post-conviction relief. *Garner v. State*, 944 So.2d 934, 942 (Miss. Ct. App. 2006) (citing Miss. Code Ann. §99-39-5(1)(f) (Supp. 2006)). The petitioner has the burden of proof by a preponderance of the evidence that the plea was not knowingly and voluntarily made. *Id.* (citing Miss. Code Ann. §99-39-23(7) (Supp. 2006)). In order for a guilty plea to be deemed voluntary, the defendant must be advised of the nature of the charges against him and understand the consequences of entering a guilty plea, including the minimum and maximum penalties he faces. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992); URCCC 8.04(A)(4)(b)). As set forth in detail above, Johnson indicated both at his plea hearing and

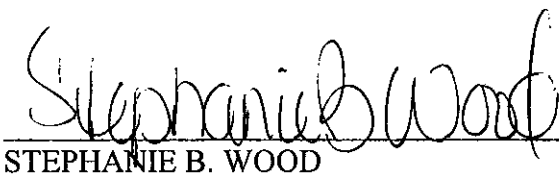
in his Petition to Plead Guilty that he understood his rights, understood the charges against him, and understood the consequences of pleading guilty. Further, his counsel also indicated in the Petition to Plead Guilty that Johnson's plea was voluntarily and understandably made. Thus, the trial court did not err in finding that Johnson's "guilty plea was knowingly, willingly, and voluntarily entered into," that Johnson "failed to prove that he received ineffective assistance of counsel," and that Johnson "is not entitled to relief." (Record p. 81 - 83).

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief as Johnson's guilty plea was knowingly, intelligently, and voluntarily made.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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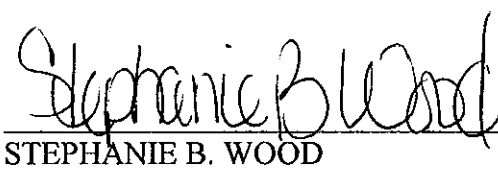
This the 28th day of January, 2008.



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