

JAMES EARL SPENCER

APPELLANT

VS.

FILED

NO. 2007-CP-1667-COA

MAR 21 2008

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS.**NO. 2007-CP-1667-COA****STATE OF MISSISSIPPI****APPELLEE****BRIEF FOR THE APPELLEE****PROCEDURAL HISTORY:**

On May 17, 2004 , James Spencer, “Spencer” pled guilty to burglary as an habitual offender before the Circuit Court of Lowndes County, the Honorable Lee J. Howard presiding. Spencer was represented by Mr. Michael R. Farrow . C.P. 20-30. After advising and questioning Spencer and his counsel, Mr. Farrow, the trial court found that Spencer’s plea was voluntarily and intelligently entered. C.P. 28.

A hearing was held on Spencer’s attempt to withdraw his guilty plea prior to sentencing. R. 1-26. After the hearing, the trial court found that Spencer’s plea was voluntarily and intelligently entered, and that Spencer understood the nature of the charges and the consequences of his plea. Spencer did not meet his burden of proof for withdrawing his guilty plea. R. 1-26.

Prior to sentencing with notice to Spencer, and his counsel, Spencer’s indictment was amended to reflect his habitual offender status under M. C. A. § 99-9-81. C.P. 31-32.

After a sentencing hearing with testimony and presentation of documentary evidence of Spencer’s

parole or possibility of early release. C.P. 33.

On August 22, 2007, Spencer filed a hand written pro se Motion for Post Conviction relief. C.P. 49-72. Spencer claimed involuntary plea, and ineffective assistance of counsel(s). The trial court denied relief. C. P. 73-75. From that denial of relief, Spencer filed notice of appeal to the Supreme Court. C. P. 77.

RELIEF?

II.

**DID SPENCER RECEIVE EFFECTIVE ASSISTANCE OF
COUNSEL?**

house on or about July 3, 2003 by a Lowndes County Grand jury. C.P. 4-5.

On May 17, 2004, Spencer pled guilty to burglary before the Circuit Court of Lowndes County, the Honorable Lee J. Howard presiding. Spencer was represented by appointed counsel Mr. Michael R. Farrow .C.P. 20-30. With the assistance of Mr. Farrow, Spencer completed a sworn "Petition To Enter A Guilty Plea." C. P. 6-14.

In that Petition, Spencer acknowledged that he was pleading guilty to burglary as a "§ 99-19-81 habitual offender." R. 6. Spencer stated that he realized that he was waiving his Constitutional rights to a trial with cross examination of witnesses, and a right against self incrimination. C.P. 7-8; 22-23. Spencer stated he knew "the three year minimum" and "the twenty five year maximum" sentence he could receive for a conviction for burglary of a dwelling. R. 8. Spencer admitted that he was guilty of burglarizing Ms. Bigelow's house. C.P. 10; R. 10. He admitted that he "was satisfied with the advise and help " provided by his counsel, Mr. Farrow. C.P. 10.

Spencer was also present at his guilty plea hearing when his counsel stated that he was pleading guilty as an "habitual offender." C.P. 26. This was also acknowledged in his "Petition To Enter a Guilty Plea" in more than one place. C.P. 6-11. He admitted at his sentencing hearing that he had "four" prior felony convictions. R. 14.

After advising and questioning Spencer and his counsel, Mr. Farrow, at Spencer's guilty plea hearing, the trial court found that Spencer's plea was "freely, voluntarily, knowingly and intelligently entered. " C.P. 28. Prior to sentencing with notice to Spencer, Spencer's indictment was amended to reflect his habitual offender status under M. C. A. § 99-9-81. C.P. 31-32. The trial court found there was sufficient evidence for finding that Spencer qualified for enhanced

one year in incarceration. C.P. 16-18.

Prior to his sentencing, Spencer filed a pro se motion to withdraw his guilty plea. R. 5.

A hearing was held on Spencer's attempt to withdraw his guilty plea prior to sentencing. R. 1-26. Mr. Farrow requested permission to withdraw from representing Spencer which was granted. Mr. Spencer was represented at the withdrawal request hearing by Mr. Gary Goodwin. R. 1.

After hearing testimony from Spencer, and the prosecution, the trial court found that Spencer's plea had been voluntarily and intelligently entered. He found that Spencer understood "the nature of the charges and the consequences of his plea." The Court found Spencer had not met his burden of proof for establishing any valid reason for withdrawing his guilty plea. R. 1-26.

After a sentencing hearing with presentation of documentary evidence, the trial court found sufficient evidence for establishing that Spencer was a M. C. A. §99-19-81 habitual offender. R. 24. The record reflects that the prosecution's motions to amend the indictment to show Spencer qualified for enhanced punishment were filed on May 18, 2004 and June 9, 2004. C.P. 16-18. The Order approving the formal amendment was entered on August 17, 2004. C.P. 31-32. On August 17, 2004, Spencer was sentenced to serve a twenty five year sentence without parole or possibility of early release. C.P. 33.

On August 22, 2007, Spencer filed a hand written pro se motion for post conviction relief. C.P. 49-72. Spencer claimed involuntary plea, improper habitual offender sentencing, and ineffective assistance of counsel. The trial court denied relief. C. P. 73-75. From that denial of relief, Spencer filed notice of appeal to the Supreme Court. C. P. 77.

Motion For Post Conviction relief should be denied without a hearing. C.P. 73-75.

Spencer's claims for relief were contradicted by his answers under oath at his guilty plea hearing, as well as by his sworn statements corroborated by his guilty plea counsel included in his "Petition To Enter A Guilty Plea." C.P. 6-17; 19-29. **Wright v. State**, 577 So. 2d 387, 390 (Miss. 1991).

These documents reflect that Spencer understood the nature of the burglary charge. He understood the twenty five year maximum sentence for a M. C. A. § 99-19-81 habitual offender. He admitted that he had not been coerced or promised anything in exchange for his guilty plea and that he was guilty of burglarizing Ms. Bigelow's dwelling. C.P. 27. He acknowledged knowing he was waiving his right to a trial with cross examination and a right against self incrimination. C.P. 6-17; 19-29.

In his petition, Spencer acknowledged knowing that he was being charged as a M.C. A. § 99-19-81 habitual offender, was "satisfied with the advise and help he(Mr. Farrow) has given me." C.P. 10. He also acknowledged that as a result of a plea agreement with the prosecution, an additional robbery charge was to be dismissed. C.P. 8; 28-29.

2. The record reflects that Spencer received effective assistance of counsel. Both Mr. Farrow and Mr. Goodwin represented Spencer professionally, given the charges against him and evidence and his own admission of numerous prior convictions. Spencer acknowledged the evidence which the prosecution had against him on the burglary charge. C.P. 27-28. He stated in his sworn Petition, "I committed the offense." C.P. 10.

There is no evidence of any erroneous or misleading advise provided to Spencer that could be considered an improper inducement to plead guilty. Spencer indicated that he was "satisfied"

counsel, Mr. Farrow. R. 25.

In addition, there were no affidavits included with Spencer's petition with the trial court. Nor was there any statement of "good cause" for why they could not be obtained. See M. C. A. § 99-39-9(1)(e).

**THE RECORD REFLECTS A VOLUNTARY PLEA AND A
VALID AMENDMENT OF SPENCER'S INDICTMENT TO
REFLECT HIS HABITUAL OFFENDER STATUS.**

In Spencer's motion for post conviction relief, he claimed that his plea was involuntarily entered, that he was not properly advised, given a proper hearing or shown to have been an habitual offender . Motion page 50-51.

To the contrary, the record indicates that the trial court correctly found, based upon the record, that Spencer's Motion For Post Conviction relief should be denied without a hearing. C.P. 73-75. The record from Spencer's guilty plea hearing indicated that both he and his counsel, Mr. Farrow, had submitted a sworn "Petition To Enter A Guilty Plea." C.P. 6-11. They were also questioned by the trial court as to Spencer's understanding of the nature of the burglary charge and the consequences of his plea as an habitual offender. C.P. 20-29.

In **Alexander v. State** , 605 So. 2d 1170, 1172 (Miss. 1992), this Court found, in accord with **Boykin v Alabama**, 395 U. S. 238, 242 (1969), that a defendant must be advised and understand "the nature of the charge against him and the consequences of his plea." This is necessary if the plea is to be accepted on the record as voluntarily and intelligently entered.

A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. **Myers v. State**, 583 So. 2d 174, 177 (Miss. 1991). A plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea.. See **Wilson v. State**, 577 So. 2d 394, 396-97 (Miss. 1991). Specifically, the defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. **Boykin v. Alabama**, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Rule 3.03 of the Uniform Criminal Rules of Circuit Court Practice additionally requires, inter alia, that the trial judge "inquire and determine" that the accused understands the maximum and minimum penalties to which he may be

Plea,” as well as his answers to the trial court’s questions at his guilty plea hearing, he admitted that he understood he was waiving crucial constitutional rights. He specifically stated that he understood that he was waiving his right to a trial by a jury of his peers with a right of cross examination as well as a right against self incrimination. C.P. 7-8; 22. Spencer was thirty one years old with a tenth grade education when he pled guilty. C.P. 23.

Spencer stated that he understood the burglary charge and that he was guilty of committing the offense. C.P. 27-28. He understood the twenty five maximum sentence for a conviction for burglary as an habitual offender could result in only one sentence, twenty five years without parole.. C.P. 26.

Court: You understand that on a plea of guilty to this charge as an habitual offender, the only sentence I can sentence you to then would be the maximum sentence?

Spencer: Yes, sir.

Court: That’s twenty five years and a fine of \$10,000.

Spencer: Yes, sir.

Court: The only sentence I can do. Do you understand that?

Spencer: Yes, sir. C.P. 27. (Emphasis by Appellee).

Spencer admitted that he had not been coerced or promised anything in exchange for his guilty plea. C.P. 27 Spencer also admitted both in his petition and before the trial court that he understood that he was pleading guilty as “an habitual offender.” C.P. 8-10; 26.

Farrow: Your Honor, this will be habitual offender.

He also acknowledged knowing that an additional pending burglary charge was being returned to the prosecutor's files. C.P. 28-29

After hearing from Spencer as well as the prosecution, the trial court found that Spencer had not met his burden of proof for showing that his guilty plea should be withdrawn. R. 19. The trial court found, based upon the record summarized above, that Spencer's guilty plea had been voluntarily and intelligently entered. There was sufficient evidence for determining that Spencer understood "the nature of the charges and the consequences of his guilty plea to burglary."

As stated by the trial court:

The Court feels that the defendant has not met his burden, and the Court does hereby deny his motion to withdraw his plea of guilty. I am now ready to begin the sentencing phase of the defendant's case. State, there is a motion to amend the indictment in the court file.

Faver: Yes, Your Honor. R. 19.

The record also reflects that at a separate sentencing hearing, after hearing testimony and reviewing documentation from the Department of Corrections, the trial court found there was sufficient evidence for concluding that Spencer had more than two prior felony offenses for which he had serve at least a year's sentence. R. 1-24. Therefore, it could be determined that Spencer was a M. C. A. §99-19-81 habitual offender for sentencing purposes, as he had previously acknowledged knowing.

Court: The Court has now signed the order allowing the amendment of the indictment and based on the proof presented and the evidence does hereby find that the defendant is an habitual 99-19-81 of the Mississippi Code of 1972 as amended. Therefore, as this court told the defendant when he entered his plea of guilty, there is only one sentence available. R. 24. (Emphasis by Appellee).

inadequate evidence that he was an habitual offender were contradicted by the record from Spencer's guilty plea and the sworn statements of Spencer and his counsel included in his "Petition To Enter A Guilty Plea." C.P. 6-13. Spencer stated at section number 3 of his Petition, . **" I wish to plead guilty to the charge of (99-19-81) burglary of dwelling (habitual offender)."** C.P. 6. (Emphasis by Appellee).

As stated by the trial court in denying post conviction relief:

The petitioner filed a motion alleging his guilty plea was made involuntarily because he pled guilty not realizing that he would be sentenced as an habitual offender. A review of the Petitioner's file show this claim to be false. The petitioner's sworn and notarized guilty plea petition entered on May 17, 2004 shows that the petitioner was pleading guilty as an habitual offender and would be sentenced as an habitual offender. The State's first Motion to Amend Indictment was filed on May 18, 2004 and their second Amended Motion To Amend Indictment was filed on June 9, 2004, both pursuant to Rule 7.09 of the Uniform Rules of Circuit and County Court Practice which states in part "indictments may also be amended to charge the defendant as an habitual offender." The order amending the indictment was filed August 17, 2004 and the Petitioner was sentenced the same day.

Therefore, pursuant to the Mississippi Supreme Court's ruling in **Wright v. State** (Miss. 1991), 577 So. 2d 387 which states in part: "where an affidavit is overwhelmingly belied by unimpeachable documentary evidence in the record, such as, for example, a transcript or written statements of the affiant to the contrary to the extent that the court can conclude that the affidavit is a sham no hearing is required.," the court finds the Petitioner's claims have no merit, and thereby the Petitioner's motion is accordingly dismissed. C.P. 74-75. (Emphasis by Appellee)

The Appellee would submit that the record summarized and cited above indicates that the trial court correctly found from documents summarized in the instant cause that Spencer "understood the nature of the charge and the consequences of his guilty plea" as a § 99-19-81 habitual offender. This issue is lacking in merit.

Johnston has failed on the second 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 record reflects that as a result of Mr. Farrow’s services Spencer avoided prosecution on an additional felony charge for robbery. C.P. 28-29; R. 25. That charge could have greatly increased the period of incarceration Spencer would be required to serve before being released from prison.

In addition, the record reflects that Spencer indicated in his Petition that he was “satisfied with” the services and help provided by Mr. Farrow. C.P. 10. And finally, Spencer stated in his Petition and through his counsel at his guilty plea hearing that he was pleading guilty as “an habitual offender” with “four” prior felony convictions and a pending charge which he acknowledged to the trial court. C.P. 26; 26. Through the efforts of his counsel, this additional charge was retired to the prosecutor’s files. R. 25.

Court: **You’re sure you’ve only got three felony convictions?**

Spencer: **It’s four.**

Court: **Four?**

Spencer: **Yes, sir.** C.P. 25. (Emphasis by Appellee).

The record reflects that Spencer received effective assistance of counsel given the nature of the evidence against him. This would include not only Spencer’s admission of having

Respectfully submitted,

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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 Lee J. Howard
Circuit Court Judge
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Honorable Forrest Allgood
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This the 21st day of March, 2008.



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