IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CALVIN LEE ROBINSON — APPELLANT

VS. — NO. 2007-CP-1795-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On December 11, 2002, Calvin Lee Robinson, "Robinson" pled guilty to statutory rape of Ms. Tajuana Glass, a female child under the age of fourteen, before the Circuit Court of Leflore County, the Honorable Ashley Hines presiding. R. 2-6. After advising and questioning Robinson about his understanding of the nature of the charge and the consequences of his plea, the trial court found that his plea was voluntarily and intelligently entered. R. 2-6; C.P. 04. Robinson was given a thirty year with ten years suspended sentence. C.P. 45.

On June 13, 2003, Robinson filed a motion for leave to withdraw his guilty plea. R.7. Robinson was granted a hearing on his motion. R. 7-52. After hearing testimony from Robinson, the trial court denied relief. R. 52-53.

On July 24, 2004, Robinson filed a motion for post conviction relief, which was denied by the trial court. C.P. 4-7; 37.

On September 17, 2007, Robinson filed a motion for post conviction relief to vacate and set aside sentence. C.P. 8-40. On September 26, 2007, the trial court denied relief. The Court found

that Robinson's motion was barred as "a successive writ" under M. C.A. § 99-39-23 (6). C.P. 48-49.

From that denial of relief, Robinson filed notice of appeal to the Mississippi Supreme Court. C.P. 52.

ISSUES ON APPEAL

I.

WAS ROBINSON'S MOTION A SUCCESSIVE WRIT UNDER M.C.A. § 99-39-23(6)?

II.

WAS THERE ANY EXCEPTION TO THE SUCCESSIVE WRIT BAR?

III

WAS THERE ANY SUPPORT FOR ROBINSON'S CLAIMS FOR RELIEF? FOR ALTERING HIS MINIMUM SENTENCE?

STATEMENT OF THE FACTS

On June 27, 2002, Robinson, an adult male over the age of twenty one, was indicted for statutory rape of Ms. Tajuana Glass, a female child under the age of fourteen, to whom he was not married, on or about March 3, 2002. C.P. 42. This was under M. C. A. § 97-3-65(1)(b).

On December 11, 2002, Robinson pled guilty to statutory rape before the Circuit Court of Leflore County, the Honorable Ashley Hines presiding. Robinson was represented by Mr. Leland Jones. R. 2-6; C.P. 5.

After advising and questioning Robinson and his counsel about his understanding of "the nature of the charge and the consequences of his plea," the trial court found that his plea was "voluntarily and intelligently entered." R. 6; C.P. 4. Robinson was given a thirty years with ten years suspended sentence with five years of supervised probation in the custody of the Mississippi Department of Corrections. C.P. 44-45; 64.

On June 13, 2003, Robinson filed "a motion for leave to withdraw guilty plea." R. 7. Robinson was granted a hearing on his motion. R. 7-52. During the hearing when guilty plea counsel was present to testify in defense of Robinson's claim of ineffective assistance of counsel, Robinson and his counsel, Mr. Wall, decided to withdraw their complaint of ineffective assistance. R. 44-45. Robinson claimed to have decided to plead guilty not because of any dereliction of duty by his counsel but because of alleged duress.

After hearing testimony from Robinson, and his family, the trial court denied relief. R. 52-53.

On July 24, 2004, Robinson filed a motion for post conviction relief, which was denied by the trial court. C. P. 4-7. He complained of an involuntary plea, ineffective assistance and a cruel and unnecessarily long twenty year sentence for a man his age. C.P. 4-7.

On September 17, 2007, Robinson filed another motion for post conviction relief. C.P. 8-47.

This included another claim of ineffective assistance of counsel. C.P. 22-47. There was no affidavit from anyone except Robinson.

On September 26, 2007, the trial court denied relief, finding the Order issued on October 25, 2004 was "a final judgment." Therefore under M. C. A. § 99-39-23(6) Robinson's second motion was barred as "a successive writ." C.P. 48-49.

From that denial of relief, Robinson filed notice of appeal to the Mississippi Supreme Court. C.P. 52.

SUMMARY OF ARGUMENT

1. The record reflects that the trial court correctly found that Robinson's motion for post conviction relief in this cause was his second motion for post conviction relief. C.P. 48-49. His first motion for post conviction relief was filed on July 13, 2003. R. 7. After a hearing, the trial court denied relief. R. 52-53.

Another motion was filed on "July 24, 2004." C.P. 4 ; 37. His current motion came on "September 17, 2007." C.P. 37.

The trial court found under M. C. A. § 99-39-23(6) that Robinson's motion in September, 2007 was therefore barred as "a successive writ." The denial of Robinson's motion in October 22, 2004 was "a final judgment." C.P. 48. There is a presumption that the trial court's ruling was correct. **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987).

2. There was no claim or evidence in support of any claim by Robinson indicating that he qualified for any of the exceptions provided for dismissal of an petitioner's motion as being "a final judgment." See M. C. A. § 99-39-23(6). **Towner v. State**, 837 So. 2d 221, 227 (Miss. App. 2003) provides no basis for an exception to the bar for a successive writ.

There was no claim of recently discovered evidence or any " relevant" intervening decision "that would be practically conclusive" that Robinson's plea or sentence would have been different as a result. C.P. 8-41.

3. The record reflects that in addition to Robinson's motion being barred as a successive writ, it is also lacking in merit. The record reflects that Robinson's guilty plea with counsel was properly accepted, after a hearing. R. 2-6. . It was accepted after the court questioned Robinson and his counsel about Robinson's comprehension of the nature of the charge and consequences of his plea. After this process, the trial court found that Robinson's plea was voluntarily and intelligently

entered. R. 6; C.P. 4; 48.

There is a lack of evidence of any ineffective assistance of counsel on the part of his guilty plea counsel, Mr. Leland Jones. There is a "strong presumption" that guilty plea counsel's advise, counsel and actions on behalf of a client, fall within the wide range of professional competence required of such counsel.

There is a presumption that his actions were strategic choices within the wide range of possible such choices on behalf of a defendant.

Jones was available to testify in his defense at the hearing on Robinson's motion to withdraw guilty plea, but Robinson did not chose to question him. R. 44-45.

The thirty with ten years suspended sentence is within the guidelines provided for one convicted of statutory rape under M. C. A. § 97-3-65(1) (c), which can range from life imprisonment to not less than twenty.

There is a lack of evidence for finding that Robinson was misinformed or mislead as to his sentence in the instant cause. **Smith v. State**, 636 So. 2d 1220, 1227 (Miss. 1994). There was no affidavit from Mr. Leland Jones who is being accused of having mislead Robinson as to his sentence.

The claim of having been mislead concerning a possible six or eight year sentence is not only contradicted by the statutory authority for sentences for statutory rape, but also by the trial court's order indicating that the record showed Robinson acknowledged under oath that he knew the trial court "was bound only by the statutory limits of the sentence. Do you understand that? Robinson answered, "Yes, sir." C.P. 5; R. 5. .

The record also reflects that the trial court lacked authority to alter or modify a sentence. The term of court in which Robinson was sentenced had expired when he filed his motion. **Presley v. State**, 792 So. 2d 950 (¶ 18) (Miss. 2001).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT ROBINSON'S MOTION WAS HIS SECOND MOTION FOR POST CONVICTION RELIEF AND BARRED AS A SUCCESSIVE WRIT.

In his "motion for post conviction relief to vacate and set aside sentence," Robinson complains of an involuntary plea, ineffective assistance of counsel, and an excessive sentence given his age at the time of conviction. Robinson also attempts to argue evidentiary issues related to substantiating the factual elements necessary to prove the charges against him at a trial by jury in the instant cause. Appellant's brief page 1-34 and motion page 8-41

The record reflects that the trial court found that this motion for post conviction relief filed by Robinson was his second motion in this cause. C.P. 48-49.

On July 13, 2003, after a hearing before the Circuit Court, the trial court denied Robinson's "motion to withdraw his guilty plea." C.P. 4; R. 7- 53.

The record reflects that Mr. Leland Jones was Robinson's guilty plea counsel. R. 1-6. After questioning both Robinson, and his counsel, the trial court found that Robinson's guilty plea to the statutory rape of Ms. Twanna Glass was "knowingly, willingly, and voluntarily entered into." R. 6.

Mr Johnnie Walls represented Robinson at a hearing on his "motion for leave to withdraw his guilty plea." R. 7. That motion included alleged ineffective assistance of counsel on the part of Mr. Leland Jones. The record reflects that when Mr Jones was available before the Circuit Court at that hearing, Robinson and his counsel decided to withdraw their allegations of ineffective assistance of counsel. R. 43-45.

Walls: **We'd like to amend our motion to the extent that if it gives the impression**

that we're claiming that Mr. Jones was ineffective. ...It has nothing to do with the attorney's job or his effectiveness or his professionalism. It has something to do with what's in his mind, my client's mind.

Childs: **Well, is the state understanding that there are no ineffective assistance of counsel claims being attached to this motion to withdraw the defendant's guilty plea?**

Walls: **No.**

Childs: And if that's the case, then there's no need for us to call Mr. Jones to defend himself against any ineffectiveness of assistance of counsel. R. 44-45. (Emphasis by appellee).

On July 24, 2004, Robinson filed "a motion for post conviction relief," which was denied by the trial court. C.P. 4-7. Robinson complained of an involuntary plea, ineffective assistance and a cruel and unnecessarily long twenty year sentence for a man his age. C.P. 4-7.

On September 17, 2007, Robinson filed another motion for post conviction relief. C.P. 8-41. On September 26, 2007, the trial court denied relief finding the Order issued on October 25, 2004 was "a final judgment." Therefore under M C A § 99-39-23(6) Robinson's second motion was barred as "a successive writ." C.P. 48-49.

As stated in the trial court's Order denying relief on Robinson's motion:

On July 24, 2004, Mr. Robinson filed a motion for post conviction relief. On October 22, 2004, this Court denied Mr. Robinson's motion. On September 24, 2007, Mr. Robinson filed the present motion for post conviction relief to vacate and set aside sentence.
Pursuant to M. C. A. § 99-39-23(6) any order dismissing the prisoner's motion or otherwise denying relief under the post conviction relief act is a final judgement and shall be conclusive until reversed and shall be a bar to a second or successive motion under the act. According to M. C. A. § 99-39-23(6), there are several exceptions to this rule:...

Having reviewed Mr. Robinson's motion, the motion appears to be a second or successive motion under the post conviction relief act, fails to meet one of the listed exceptions, and should be barred pursuant to M. C. A. § 99-39-23(6). C.P. 48-49. (Emphasis by appellee).

The record reflects that the current motion for post conviction relief to vacate and set aside sentence was filed with the circuit court of Leflore County on September 17, 2007. C.P. 41. The trial court's Order denying relief on this motion was entered on September 26, 2007. C.P. 49.

In that Order, the trial court pointed out that this motion to vacate and set aside sentence was a second motion. An original motion for post conviction relief was filed in July, 2004. It was denied in October 2004. C.P. 48-49.

The trial court' Order did not included Robinson's initial "motion to withdraw his guilty plea." R. 7-53. As shown with cites to the record from that hearing, this was a hearing on a motion to withdraw which came six months after Robinson's guilty plea had been accepted. R. 1-6. This would appear to the appellee to be the first of Robinson's motions for post conviction relief. This plus the other two mentioned in the trial court's order would indicate to the appellee that this appeal is from the denial of Robinson's third motion for post conviction relief.

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is a presumption that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, "There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

The appellee would submit that the trial court's denial of relief should be affirmed. There was more than sufficient credible record evidence for concluding that Robinson's motion was barred as a second or third " successive writ." See M C A § 99-39-23(6).

This issue is lacking in merit.

PROPOSITION II

THERE WAS NO EVIDENCE OF ANY EXCEPTION TO THE BAR. THIS INCLUDED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

As stated by the trial court in denying relief to Robinson's second motion for post conviction relief, Robinson failed to qualify for any of the various exceptions for the bar to a second writ.

> Having reviewed Mr. Robinson's motion, the motion appears to be a second or successive motion under the post conviction relief act, fails to meet one of the listed exceptions, and should be barred pursuant to M. C. A. § 99-39-23(6). C.P. 48-49.

M C A § 99-39-23(6):

> Likewise, excepting from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discovered at the time of trial, which...would be practically conclusive that ..it would have caused a different result in the conviction or sentence.

The record reflects that in Robinson's appeal brief he thinks that **Towner v. State**, 837 So. 2d 221 (Miss. 2003) was an applicable intervening decision that would have caused a different result to his conviction or sentence. To the contrary, the record that Robinson rejected a plea offer made by the prosecution prior to pleading guilty. R. 24-26. Robinson's plea was "an open plea" with no recommendation from the state. He admitted knowing the twenty year minimum and life maximum sentence. R. 4. Robinson also admitted under oath that he understood the sentence he would receive would be left up to the trial court. R.5.

Towner, supra, is distinguishable from the facts of this case. First, Towner was found guilty after a trial and given a maximum sentence as a first time drug offender. Second, in **Towner**, the trial court admitted that his maximum sentence may have been excessive, and the prosecution was not opposed to any future sentencing.

And crucial for this appeal from Robinson's successive motion for post conviction relief,

Towner's sentencing issue was raised in his direct appeal. Whereas, Robinson acknowledged under oath at his guilty plea hearing that he understood their was no right of appeal from a guilty plea. R. 3.

Nor does **Towner, supra**, provide any basis for an exception to the bar for any successive writs under "the UPCCRA."

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance where a defendant was time barred from filing for relief under "the UPCCRA" was not enough to constitute an exception to the statute of limitations. As stated:

> Bevel raises a claim of ineffective assistance of counsel. It is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant, that the defendant's fundamental constitutional rights were violated. However, this Court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court's failure to advise a defendant of maximum and minimum sentences does not implicate a "fundamental constitutional right" sufficient to except a case from the procedural bar of Sect 99-39-5.

The appellee would submit that there is no reason to believe that Robinson has met the requirements for any exception to the bar for filing a successive writ. M. C.A. § 99-39-23(6). C.P. 4-41.

This issue is lacking in merit.

PROPOSITION III

THERE WAS NO SUPPORT FOR ROBINSON'S MOTION. OR FOR ANY CHANGE IN HIS MINIMUM SENTENCE.

In addition, to being barred as a successive writ, the record reflects that there was no merit to Robinson's claims for relief.

In the trial court's first order denying relief on Robinson's motion for post conviction relief, the court properly found, given the record of this cause, that there was a lack of merit for his claims of involuntary plea, ineffective assistance and an excessively long sentence for someone of Robinson's age. C.P. 4-7.

As to evidentiary issues raised by Robinson concerning alleged defects in establishing elements of the charge, these issues were waived when Robinson pled guilty before the circuit court of Leflore county. The prosecution pointed out that it was prepared to present expert witness testimony of DNA evidence from Reliagene Laboratories in support of his conviction for statutory rape of Ms. Tawanna Glass. R. 48-50.

However, Robinson with the benefit of counsel decided to plead guilty rather than face a jury. He acknowledged knowing that by pleading guilty the prosecution was not required to present factual proof beyond a reasonable doubt that he had in fact raped the victim. R. 2-6.

In **Brooks v. State,** 573 So. 2d 1350, 1352 (Miss. 1990), the Court stated that a guilty plea admits "all elements of a guilty charge" and operates as waives of all non-jurisdictional defects contained in an indictment.

> Brooks, in the wake of his guilty pleas, assails allegedly defective indictments. A valid guilty plea, however, admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is a

presumption that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, "There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

There is a lack of evidence of any ineffective assistance of counsel on the part of his guilty plea counsel, Mr. Leland Jones. There is a "strong presumption" that guilty plea counsel's advise, counsel and actions on behalf of Robinson fell within the wide range of professional competence required of such counsel. There is a presumption that his actions were "strategic choices" within the wide range of possible such choices on behalf of a defendant. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 693-95 (1984).

The thirty with ten years suspended sentence is within the guidelines provided for one convicted of statutory rape under M. C. A. § 97-3-65(1)(c), which can range from life imprisonment to "not less than twenty." In effect, contrary to Robinson's repeated complaints about his harsh sentence, he received "the minimum sentence" for one convicted of statutory rape.

There is a lack of evidence for finding that Robinson was misinformed or mislead as to his sentence in the instant cause. There were no affidavit from Mr. Jones who is being accused of having mislead Robinson as to his sentence.

At the hearing on his motion with Mr. Leland Jones prepared to testify in defense of Robinson's allegations, Robinson and his counsel, Mr. Walls, decided to withdraw their complaint of ineffective counsel. R. 44-48. There was no affidavit from Jones included with his motion to vacate and set aside sentence. C.P. 8-40.

In **Maston v. State** , 750 So. 2d 1234,1236 (Miss. 1999), the trial court denied Maston's Motion for post conviction relief both for failure to file any supporting affidavits as well as for filing a successive writ. As stated:

> This Court has upheld the denial of successive applications where the petitioner has failed to demonstrate the existence of exception set forth in 99-39-27(9). See **Sneed v. State** , 722 So. 2d 1255 (Miss. 1998)

The claim of an assurance of a possible six to eight year sentence is not only contradicted by the statutory authority for sentences for statutory rape, but also by the trial court's order indicating that the record showed Robinson acknowledged under oath that he knew the trial court "was bound only by the statutory limits of the sentence. C.P.1- 5. See M. C. A. §97-3-65 (1)(b) and (c).

In **Smith v. State**, 636 So. 2d 1220, 1227 (Miss. 1994), this Court relied upon **Myers v. State**, 583 So. 2d 174, 177 (Miss. 1991) (quoting from **Sanders v. State**, 440 So. 2d 278 at 287)(Miss. 1983)in its decision. In **Myers**, the "mere expectation" of a lesser sentence is contrasted with a "reliance" upon a "firm representation" provided for receiving a lesser sentence.

The Supreme Court found that Smith's plea was valid even though he had not been informed of the minimum sentence he could receive. In that case Smith was pleading guilty based upon a plea agreement with the state and knew what the recommended sentence for armed robbery would be.

In **Gable v. State**, 748 So. 2d 703, 706 (Miss. 1999) the court in affirming the trial court's dismissal of Gable's contentions without a hearing quoted **Mowdy v. State**, 638 So. 2d 738, 743 (Miss 1994):

> Great weight is given to statements made under oath and in open court during sentencing. **Young** , 731 So. 2d 738, 743 (Miss. 1994). The transcript of Gable's guilty plea hearing belies his current contentions. Furthermore, Gable produced no affidavits other than his own contradicting his earlier sworn statements. Because the only support offered by Gable is his own affidavit which is contradicted by unimpeachable documents in the record, we conclude that an evidentiary hearing was

not required. Accordingly, we affirm the trial court's judgment denying Gable post conviction relief.

The record also reflects that the trial court lacked authority to alter or modify a sentence. The term of court in which Robinson was sentenced had expired. **Presley v. State**, 792 So. 2d 950 (¶ 18) (Miss. 2001).

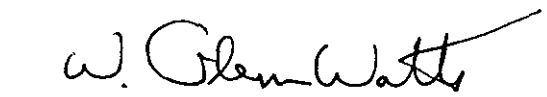
Therefore, the appellee would submit that not only was Robinson's motion barred as a successive writ, and for failure to provide supporting affidavits, it was also lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief. Robinson's motion for post conviction relief was not only barred as a successive writ, the record reflects that it was also lacking in merit.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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:

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