IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GARY L. STALLWORTH — APPELLANT

VS. — NO. 2007-CP-1875

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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III. Stallworth was correctly indicted and sentenced as an habitual offender and this issue is without merit.

STATEMENT OF THE CASE

On or about April 24, 2002, Gary Lamont Stallworth came to the front door of the Holiday Inn Express at about two o'clock in the morning and asked to be buzzed in. Stallworth was clean cut, neatly dressed, and had towels in his hand. Ms. Roberts, the victim, thought Stallworth was a hotel guest let him in the door. (C.P. 31) Stallworth asked for extra face clothes. Ms. Roberts turned to get them from the cabinet. When she turned around, Stallworth was standing beside her wrapping something around his hand. Stallworth then hit Ms. Roberts and told her "Don't call anybody, don't say anything." Ms. Roberts testified that Stallworth hit her several times with his wrapped fist. He asked her for the keys and opened the drawer. (C.P. 32) Noting how little cash there was in the drawer, Stallworth said, "There ain't shit in here." Ms. Roberts told him, "It's a hotel. What do you expect. Stallworth proceeded to hit Ms. Roberts again. He then asked Ms. Roberts for her car keys, which she gave him, and he then left the building. Ms. Roberts was hospitalized for four days as a result of the beating. (C.P. 33)

Stallworth was indicted for robbery on or about May 27, 2003, as an habitual offender pursuant to Section 99-19-81, Miss. Code of 1972, as amended. (C.P. 15) The indictment states that Stallworth was previously convicted of Grand Larceny, a felony, and Burglary of a dwelling, a felony. On February 13, 2004, Stallworth pled guilty before Judge Kosta Vlahos and on March 16, 2004, was sentenced to fifteen years to be served day for day. The record currently before the Court does not indicate that there was any recommendation made by the District Attorney's Office at his plea or sentencing.

On March 17, 2004, Stallworth's counsel filed a Motion to Reconsider his sentence of 15

years to serve due to the assistance Stallworth gave the DA's office in two murder cases. The Motion was apparently never set for hearing.

On or about June 6, 2005, Stallworth filed his Extraordinary Motion for New Trial as to Sentence Only, alleging that he gave statements to law enforcement officers and sworn testimony regarding other crimes. He alleges that the State agreed to request, in exchange for Stallworth's testimony, the trial court grant his motion as to sentence only and that the court reduce his sentence of 15 years as a habitual offender so that he might be released as soon as possible.

On or about September 5, 2005, filed a Petition for Order to Show Cause or in the Alternative Petition for Writ of Habeas Corpus. (C.P. 69) Stallworth sought enforcement of an alleged plea agreement and reconsideration of his sentence.

On November 2, 2005, Stallworth filed his Petition for Writ of Mandamus with the Mississippi Supreme Court concerning the Motion to Reconsider. The Judge responded with by letter dated November 23, 2005. By Order dated March 1, 2006, the Mississippi Supreme Court grant the Petition for Mandamus concerning the Motion to Reconsider. On July 14, 2006, Judge Vlahos entered an order denying the Motion to Reconsider and entered his Answer to the Petition for Mandamus. In the criminal case, Stallworth then filed his *pro se* Notice of Appeal and Motion to Proceed in Forma Pauperis and entered his Answer to the Writ of Mandamus. On April 2, 2007, the Mississippi Supreme Court entered its Order denying Stallworth's Petition for Writ of Mandamus filed November 2, 2006 and denying his Petition for Writ of Mandamus filed January 16, 2007.

On September 25, 2007, Circuit Court Judge Lisa Dodson denied Stallworth's "Extraordinary Motion", stating, " . . . so that the record is clear, the Extraordinary Motion must

also be denied. If the Extraordinary Motion is considered as either seeking a new trial or seeking a reconsideration of sentence, it was untimely filed. If that motion is considered pursuant to the Post Conviction Collateral Relief Act, it is without merit."

Judge Dodson further denied Stallworth's Petition for Order to Show Cause, since his complaints are not proper habeas corpus matters, and the Petition was untimely pursuant to the Post Conviction Collateral Relief Act.

It is from Judge Dodson's Order of September 25, 2007 that Stallworth appeals.

SUMMARY OF THE ARGUMENT

Stallworth was indicted for robbery on or about May 27, 2003, as an habitual offender pursuant to Section 99-19-81, Miss. Code of 1972, as amended. (C.P. 15) The indictment states that Stallworth was previously convicted of Grand Larceny, a felony, and Burglary of a dwelling, a felony. Stallworth pled guilty to robbery and was sentenced within the statutory limits of the offense for which he pled guilty. There was not sentencing recommendation at the time of the plea. Stallworth is therefore not entitled a new trial as to his sentence.

Stallworth does not meet the requirement of proof for either prong of *Strickland* and therefore contention that he received ineffective assistance of counsel is without merit.

Stallworth was correctly indicted and sentenced as an habitual offender and this issue is without merit. The record is clear that the Trial Court made a specific and uncontradicted finding that Stallworth's record contained two previous felonies for which he received sentences of at least one year. Stallworth does not provide any affidavits or other evidence to support his claim that he was incorrectly sentenced as an habitual offender.

Finally Stallworth's Petition Extraordinary Motion was correctly dismissed by the trial court as untimely filed, if filed as a motion for new trial or motion for reconsideration for sentence or as being without merit pursuant to the Post Conviction Relief Act. It contains no supporting affidavits or other evidence to support its contentions and is not proper under that act.

ARGUMENT

I. Stallworth entered into an open plea agreement and was sentenced within the statutory limits of the offense for which he pled guilty and is therefore not entitled a new trial as to his sentence.

The standard of review for denial of a petition for post conviction collateral relief requires that when reviewing a lower court's decision, the appellate court must not disturb the trial court's factual findings unless they are found to be clearly erroneous. Where questions of law are raised, the standard of review is de novo. *Pace v. State*, 770 So.2d 1052 (Miss.Ct.App. 2000).

Stallworth was indicted for robbery on or about May 27, 2003, as an habitual offender pursuant to Section 99-19-81, Miss. Code of 1972, as amended. (C.P. 15) The indictment states that Stallworth was previously convicted of Grand Larceny, a felony, and Burglary of a dwelling, a felony.

At the sentencing hearing, the trial court admitted the pen-pack into evidence and determined that it established beyond a reasonable doubt that Stallworth was convicted of two previous felonies and sentenced to a year or more in each case, ruling that Stallworth was an habitual offender. The sentencing judge was aware of the Stallworth's cooperation with the prosecution in other case at the time of the sentencing. There was no plea recommendation made at the time of the plea.

Stallworth was sentenced to 15 years to be served day for day. Section 97-3-75 of the Mississippi Code Annotated of 1972, as amended, provides that "[e]very person convicted of robbery shall be punished by imprisonment in the penitentiary for a term of not more than fifteen years. Further, Section 99-19-81 provides taht "[e]very person convicted in this state of a felony

who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, **shall** be sentenced to the maximum term of imprisonments prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation." [Emphasis added.] Clearly, Stallworth was correctly sentenced according to the indictment for the maximum term for robbery with no reductions or suspensions or eligibility for parole or probation, as mandated by statute. This issue is without merit.

Further, Stallworth fails to support his allegations with the necessary proof. Section 99-39-9 of the Miss. Code Anno., as amended, requires that a motion for post collateral conviction relief must include a specific statement of the facts which are not in the prisoner's knowledge and that the motion shall state how or by whom the facts will be proven. The statute further requires affidavits by witnesses and copies of documents or records that will be offered must be attached to the motion. Stallworth offers no such affidavits, documents or records to prove his claim that an agreement existed. Further, he does not explain why his attorney for the sentencing has not provided such an affidavit that an agreement existed.

Where a petition does not contain affidavits which includes facts and state how or by whom these facts will be proven, said petition does not fully satisfy the requirements of Mississippi Code Annotated section 99-39-9 and is without merit. *Robertson v. State*, 669 So.2d 11, 12-13 (Miss. 1996).

Further, Stallworth's Petition filed September 25, 2007 was correctly treated as a Petition

for Post Conviction Collateral Relief and denied as time barred, since more than three years elapsed between the Stallworth's sentencing and the filing of his Petition.

II. Stallworth does not meet the requirement of proof for either prong of Strickland and therefore contention that he received ineffective assistance of counsel is without merit.

Stallworth claims that his counsel was ineffective for failing to enforce a plea agreement with the District Attorney guaranteeing a recommendation of 3-5 years in exchange for Stallworth's cooperation in regard to two murder investigations. (Appellant's Brief, P. 9) In order for Stallworth to prevail in his claim of ineffective assistance of counsel he must first show that his "counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Second, he must show that the "deficient performance prejudiced the defense." *Id.* This requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In regards to this second prong, Coleman must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; see *Leatherwood v. State*, 473 So.2d 964, 968 (Miss.1985); *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984). Stallworth must prove both of these elements in order to succeed on his claim. *Id.* Each case is decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990); *Stringer*, 454 So.2d at 476. The standard of performance used is whether counsel provided "reasonably effective assistance." *Leatherwood*, 473 So.2d at 968. "There is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct." Id. at 969.

The court, in *Jefferson v. State*, 556 So.2d 1016, 1019 (Miss.1989), stated that the law is

well settled that when properly entered and accepted, "a guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial and the right that the prosecution prove each element of the offense beyond a reasonable doubt." *Gunter v. State*, 841 So.2d 195 (Miss. Ct. App. 2003).

However, since he presents no proof other than his own statement. Stallworth cannot make a valid claim for ineffective assistance of counsel if the only proof he has concerning deficient performance is his own statement. *Vielee v. State*, 653 So.2d 920, 922 (Miss. 1995). Stallworth has not done so and has thus failed to overcome the presumption that his counsel was effective and further failed to demonstrate with particularity how his defense was prejudiced due to ineffective assistance of counsel. Therefore, this allegation is without merit.

III. Stallworth was correctly indicted and sentenced as an habitual offender and this issue is without merit.

Stallworth was indicted for robbery on or about May 27, 2003, as an habitual offender pursuant to Section 99-19-81, Miss. Code of 1972, as amended. (C.P. 15) The indictment states that Stallworth was previously convicted of Grand Larceny, a felony, and Burglary of a dwelling, a felony.

Sections 97-17-41 and 97-17-42, Miss. Code of 1972, as amended, provide that the felony of Grand Larceny is punishable by imprisonment in the penitentiary for not a term not exceeding ten years.

Section 97-17-23, Miss. Code of 1972, as amended, provides that "[e]very person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the

time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five (25) years."

At the sentencing hearing, the trial court admitted the pen-pack into evidence without objection from any party and determined that it established beyond a reasonable doubt that Stallworth was convicted of two previous felonies and sentenced to a year or more in each case. The Court ruled that Stallworth was an habitual offender. There was no objection at the time of this ruling. There is no indication in the record, and no proof offered by Stallworth that he was not correctly indicted and sentenced as an habitual offender. This issue is without merit.

Finally, to the extent that Stallworth seeks habeas corpus relief, such relief is not available in this case. Section 11-42-1 of the Mississippi Code of 1972 Annotated, as amended, provides that [t]he writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty. Further, Section 11-43-3 states that "[t]his chapter shall not apply to any collateral relief sought by any person following his conviction of a crime. Such relief shall be governed by the procedures prescribed in the Mississippi Uniform Post-Conviction Relief Act. Because Stallworth does not allege any illegal confinement, but merely seeks to have his sentence reduced, his complaints are not proper habeas corpus matters. Therefore, the trial court correctly treated Stallworth's pleadings in the lower court as petitions pursuant to the Post Conviction Collateral Relief Act.

Pursuant to the provisions of the Post Conviction Collateral Relief Act, Stallworth's Petition is untimely filed. Section 99-39-5 of the Mississippi Code Annotated of provides:

> (2) A motion for relief under this article shall be made . . . in the case of a guilty plea, within three (3) years after the entry of the

> judgment of conviction. Excepted from this three-year statute of limitation are those cases in which the prisoner can demonstrate that there has been an intervening decision of the Supreme Court of either 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 discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence.

Further, Stallworth's Petition is time barred, since the was filed on September 5, 2007, more than three years after the entry of the judgment of conviction (sentence) of which he complains (March 16, 2004). He does not submit any intervening decision on any issue. Further, there was no evidence submitted to the trial court which was not reasonably discoverable at the time of his plea or sentencing hearing.

All issues and assignments of error submitted by Stallworth are without merit and should be dismissed.

CONCLUSION

The issues raised in the instant appeal from the trial court's denial of post conviction relief are without merit and the trial court's ruling 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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This the 14th day of May, 2008.

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