IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE S. THOMAS — APPELLANT

VS. — NO. 2007-CP-2064-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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VS. **NO. 2007-CP-2064-COA**

STATE OF MISSISSIPPI **APPELLEE**

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PROCEDURAL HISTORY:

On October 2, 2007 , Willie S. Thomas, "Thomas" plead guilty to two counts of sale of cocaine before the Circuit Court of Oktibbeha County, the Honorable Lee J. Howard presiding. R. 1. Thomas was sentenced to serve two twenty year consecutive sentences in the custody of the Mississippi Department of Corrections. R. 10.

On October 15, 2007, Thomas pro se filed for post conviction relief with the trial court. R. 2-10. The trial court denied relief. C.P. 15. From that denial of relief, Thomas filed notice of appeal to the Supreme Court. C.P. 17.

ISSUES ON APPEAL

I.

WAS THOMAS' GUILTY PLEAS VOLUNTARILY AND INTELLIGENTLY ENTERED?

II.

DID THOMAS RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE FACTS

On January 6, 2006, Thomas was indicted for three counts of transfer of cocaine on or about August 16,18 and September 13, 2005 as an habitual offender by an Oktibbeha Grand jury. C.P. 32-33.

On August 2, 2007, Thomas with the assistance of his counsel, Ms. Stephanie Mallett, completed a "Petition To Enter a Guilty Plea." C.P. 35-37. In that Petition, Thomas acknowledged that he was pleading guilty freely and voluntarily to two counts of sale of cocaine. He acknowledged knowing the "30 year maximum sentence," and the no year minimum sentence for his convictions. He acknowledged that he understood the recommendation for two "consecutive" twenty year sentences, and the retiring of the third sale charge to the file. There was also a recommendation not to seek habitual offender status against Thomas. C.P. 10. Thomas acknowledged being satisfied with the advise and services provided by his guilty plea counsel, Ms. Mallette. C.P. 36. He admitted that he had sold cocaine to an undercover agent. C.P. 36.

On August 2, 2007, Thomas with the assistance of counsel, Ms. Mallette voluntarily and intelligently pled guilty to two sales of cocaine before the Circuit Court of Oktibbeha County, the Honorable Lee J. Howard presiding. R. 1-12.

Thomas stated that he was 27 years old at that time. He had completed nine years of education and could read and write. R. 5. He also had two prior felony convictions. R. 5-6.

The trial court informed Thomas of the constitutional rights he was waiving by pleading guilty, as well as the thirty year maximum sentence for sale of cocaine. R. 2-6. Thomas acknowledged that by pleading guilty he was waiving his right to a trial with cross examination and his right against self incrimination. R. 4-5. Thomas acknowledged understanding the two sale of cocaine charges, the maximum thirty year sentence for each conviction, and admitted there was a

factual basis for the plea, in that he had sold cocaine to undercover agents on those two occasions. R. 7. Thomas stated in his Petition that he was satisfied with the advise and counsel of Ms. Mallette, his guilty plea counsel. C.P. 36. Thomas stated that he had not been coerced or promised anything in exchange for his guilty pleas. C.P. 36. He also was present when the prosecution stated the recommendation for two twenty year "consecutive" sentences. R. 8.

Thomas testified under oath that he had not been coerced or promised anything in order to get him to enter his two pleas of guilty. R. 7. Thomas admitted that he had sold cocaine to undercover agent, Travene Ryan, on the two occasions for which he had been indicted.. R. 7.

After advising and questioning Thomas and his counsel, the trial court found that his guilty pleas were voluntarily, and intelligently entered. R. 8. Thomas was sentenced to serve two consecutive twenty year sentences. R. 10. The third sale charge was retired to the file, and the prosecution did not seek to prove Thomas's prior convictions for an enhanced habitual offender sentence. R. 10.

Thomas filed pro se for post conviction relief. C.P. 2-10. He claimed his pleas were not voluntarily and intelligently entered, and that he did not receive effective assistance of counsel. The trial court found no merit to these claims based upon the record, which included Thomas' Petition as well as his guilty plea hearing admissions. C.P. 15-16.

Thomas filed pro se notice of appeal. C.P. 17.

SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court correctly found that Thomas' pleas were voluntarily and intelligently entered. C.P. 15-16. Thomas acknowledged understanding the constitutional rights he was waiving by pleading guilty, the maximum thirty year sentence for a sale of cocaine conviction, and that he was guilty of having sold cocaine on two occasions to an undercover agent. C.P. 36; R. 7. Thomas admitted knowing the two twenty year "consecutive" sentences recommended by the state. C.P. 36; R. 8. He admitted that he had not been coerced or promised anything and that he was satisfied with the services provided by Ms. Mallette. C.P. 36; R. 7. He admitted he was guilty of selling cocaine twice to Travene Ryan. R. 7.

Therefore, the Appellee believes the record reflects that Thomas "understood the nature of the charges and the consequences of his plea."**Alexander v. State** , 605 So. 2d 1170, 1172 (Miss. 1992).

2. The record reflects that Thomas received effective assistance of counsel. R. 1-11. There was a lack of evidence of either deficient performance or of prejudice to Thomas' defense as a result of the actions or advise provided to him by Ms. Mallette. Thomas is benefitting from a much shorter sentence as a non-habitual offender as a result of Ms. Mallette's actions and advise. He also had an additional third charge for which he was indicted retired to the files. This could have been an additional thirty year sentence in addition to what he received. Advising an appellant of the maximum sentences for convictions is evidence of effective rather than ineffective assistance of counsel. **Rankins v. State** , 839 So.2d 581, *584 (Miss. App. 2003).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT THOMAS' PLEAS WERE VOLUNTARILY AND INTELLIGENTLY ENTERED.

In his pro se motion for post conviction relief, Thomas argued that he was coerced into pleading guilty by his guilty plea counsel, Ms. Mallette. Thomas believes that he was threatened with "50,60 or 120 years" unless he plead guilty. He opines that she lead him to believe that if he would plead guilty he would only receive a twenty year sentence. Motion, C.P. page 2-10; Appellant's brief page 1-6.

To the contrary, the Appellee would submit that the record from Thomas's guilty plea hearing and his "Petition To Enter A Guilty Plea" indicates that Thomas understood "the nature of the charges and the consequences of his plea."

The Order of the trial court denying post conviction relief, stated as follows:

> The Petitioner has filed a motion alleging ineffective assistance of counsel stating that he would not plead guilty if not for the premises and threats made by his appointed public defender. The Court finds these allegations to be without merit. The Petitioner signed and swore to, before a notary, a guilty plea petition that shows he knew his plea bargain agreement was two twenty year sentences to be served consecutively on two counts of his indictment, with a third count to be retired to the files. As to any threats made by Petitioner's counsel, they do not seem to be threats since they were true statements of fact. The petitioner could have received a hefty sentence if he did not agree to the state's plea bargain agreement since he could have received the maximum for three sales of cocaine and could have had his indictment amended to reflect his habitual offender status. C.P. 15.

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 the 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 sentenced.

The record indicates that Thomas testified under oath at his guilty plea hearing that he understood the Constitutional rights he was waiving by pleading guilty. R. 4-5. These rights included his right to a trial with cross examination, and a right against self incrimination. He admitted knowing the thirty year maximum sentence and the recommended two twenty year "consecutive" sentences for his two convictions. R. 6.

Ms. Dennis for the prosecution stated that the recommendation was for two consecutive twenty year sentences. R. 8. This was also what was clearly stated in Thomas's Petition To Enter a Guilty Plea. C.P. 36.

> Ms. Dennis:... **The State would recommend that this defendant be sentenced to serve a term of 20 years in the custody of the Mississippi Department of Corrections on count one to run consecutively with the sentence of 20 years in the custody of the Mississippi Department of Corrections on count two, and the state will make a motion to retire count three.** R. 8. (Emphasis by Appellee).

Thomas admitted to the trial court that he had sold cocaine to Travene Ryan on the two occasions for which he was indicted. C.P. 35-37; R. 1-11. And finally Thomas testified that he had not been "coerced" or "promised" anything in exchange for his guilty plea. R. 7.

In **White v. State**, 818 So.2d 369, 371(¶ 4) (Miss. Ct. App.2002), the court found that a movant's assertions may be disregarded by the trial court where contradicted by his sworn statements

at his guilty plea hearing..

> A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilt.

Consequently, the Appellee would submit that the record reflects that trial court correctly found no merit to Thomas' claims of having been coerced or frightened into pleading guilty. Rather, Thomas admitted knowing the maximum 30 year and the two consecutive twenty year sentences recommended for his two convictions, which the prosecution honored in the instant cause. This issue is therefore lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT THOMAS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Thomas complained to the trial court that he had been coerced or panicked into pleading guilty when his guilty plea counsel informed him of the "50, 60 or 120 years" sentences he could encounter should he be tried and found guilty of three sales of cocaine. In his pro se appeal brief he claims that his guilty plea counsel lead him to believe that he would serve only a twenty year sentence instead of the forty year sentence he is currently serving. Motion, page 3, Appellant brief page 3-6.

To the contrary, the record cited above indicates that the recommendation from the prosecution was for two consecutive twenty year sentences rather than any twenty year sentence. This is reflected in the Petition To Enter A Guilty Plea, as well as from the record from Thomas's guilty plea hearing. C.P. 36; R. 8. The record from the Petition and the guilty plea hearing indicated that as a result of Ms. Mallette's actions on Thomas behalf, the prosecution was recommending the retirement of a third sale of cocaine charge for which Thomas was indicted, as well as not pursuing habitual offender charges.R.8-9.

For Thomas to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Thomas must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Thomas. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Thomas must show that there is a reasonable probability that but for the alleged errors of his counsel, the

sentences of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington,**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his counsel, Ms. Mallette, the result of Thomas's guilty plea would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is "a reasonable probability" that Ms. Mallette erred in advising, and assisting Thomas in filing out a guilty plea petition and then plead guilty under oath before the *Circuit Court of Oktibbeha County.*

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Thomas bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6) (Miss. 1998); **Smith v State**, 490 So. 2d

860 (Miss. 1986). Thomas had provided no affidavits from anyone including himself in support of his allegations of ineffectiveness by his guilty plea counsel

In **Rankins v. State** , 839 So.2d 581, *584 (Miss. App. 2003), the Court stated

> ¶13... Advising a client of the possibility of receiving the maximum sentence if the case goes to trial is not a form of coercion. **Brasington v. State**, 760 So.2d 18, 26(¶ 38) (Miss. Ct. App.2000).
> ¶ 14. Furthermore, a review of the transcript from the sentencing hearing reveals that Rankins's plea was voluntarily and intelligently made. He responded that he understood the maximum and minimum sentencing and fining requirements associated with his crime. He also affirmed that his attorney had not pressured him into making the plea and that he entered his plea voluntarily.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either 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 Appellee would submit that there is a lack of evidence that Ms. Mallette's advise or services on behalf of Thomas were delinquent in any way. To the contrary, as a result of her services and negotiations with the prosecution, Thomas is benefitting from two twenty year sentences instead of three thirty year sentences which would total some ninety years. He also is

benefitting from a sentence which can be reduced since he was not convicted as an habitual offender. Thomas admitted that he had two prior convictions at his guilty plea hearing. R. 5-6.

Q. You have a prior conviction, felony sale of marijuana?

A. Yes, sir.

Q. You also have a prior conviction of receiving stolen property, a felony?

A. Yes, sir. R. 5-6.

The Appellee would submit that the record cited and reviewed indicates that Ms. Mallette was effective and efficient in her representation of Mr. Thomas. Contrary to Thomas' lament, the record indicates that he stated that he understood the two "consecutive" twenty year sentences recommended by the prosecution. C.P. 36; R. 8. To properly advise an appellant of the maximum sentences for his indicted felony offenses is an indication of proper professional services rather than the contrary. **Rankins v. State, supra.**

This issue is also lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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:

Honorable Lee J. Howard
Circuit Court Judge
Post Office Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, MS 39703

Willie S. Thomas, #T2983
SMCI
Area II- D-1-A-Zone, Bed #55
P. O. Box 1419
Leakesville, MS 39451-1419

This the 28th day of January, 2008.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680