

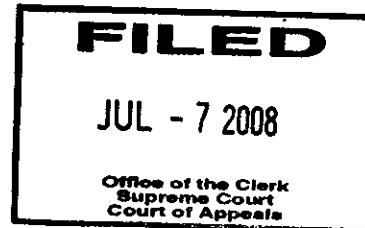
COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JESSIE MONTRELL OLIVER

APPELLANT

VS.



NO. 2007-CP-2071

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: DEIRDRE MCCRORY
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**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
PROPOSITION ONE: THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DISMISSING OLIVER'S CHALLENGE TO HIS SENTENCE	2
PROPOSITION TWO: THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DISMISSING OLIVER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL	5
PROPOSITION THREE: THE CIRCUIT COURT PROPERLY HELD THAT IT HAD NO OBLIGATION TO INFORM OLIVER OF HIS ABILITY TO APPEAL HIS SENTENCE	7
PROPOSITION FOUR: THE APPEAL RECORD INCLUDES A TRANSCRIPT OF THE PLEA HEARING	7
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Elliott v. State</i> , So.2d, 2008 WL 2098041 (Miss. App. 2006-CP-02157, decided May 20, 2008)	7
<i>Harmelin v. Michigan</i> , 501 U.S. 951 (1991)	4
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	3
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	5

STATE CASES

<i>Brooks v. State</i> , 573 So.2d 1350, 1354 (Miss.1990)	6
<i>Buckhalter v. State</i> , 912 So.2d 159, 162 (Miss. App. 2005)	6
<i>Erwin v. State</i> , 557 So.2d 799 (Miss.1990)	3
<i>Gable v. State</i> , 748 So.2d 703, 706 (Miss.1999)	6
<i>Garner v. State</i> , 864 So.2d 1005, 1009 (Miss. App. 2004)	3
<i>Kirksey v. State</i> , 728 So.2d 565, 567 (Miss.1999)	4
<i>Moody v. State</i> , 644 So.2d 451, 456 (Miss. 1994)	5
<i>Rice v. State</i> , 910 So.2d 1163, 1165 (Miss. App. 2005)	5
<i>Taylor v. State</i> , 766 So.2d 830, 832 (Miss. App. 2000)	4
<i>Vielee v. State</i> , 653 So.2d 920, 922 (Miss.1995)	6
<i>Wash v. State</i> , 807 So.2d 452, 458 (Miss. App. 2001)	3
<i>White v. State</i> , 919 SO2d 1029, 1035-36 (Miss. App. 2005)	3
<i>Willis v. State</i> , 911 So.2d 947, 951 (Miss. 2005)	3
<i>Womack v. State</i> , 827 So.2d 55 (Miss. App. 2002)	4
<i>Wright v. State</i> , 577 So.2d 387, 390 (Miss. 1991)	6

STATE STATUTES

Miss. Code Ann. § 97-3-79	4
Miss. Code Ann. § 99-39-11(2)	6

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JESSIE MONTRELL OLIVER

APPELLANT

VS.

NO. 2007-CP-2071

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In April 2006, a grand jury empaneled in the Circuit Court of Desoto County returned an indictment charging Jessie Montrell Oliver with one count of conspiracy to commit armed robbery (Count 1), three counts of armed robbery (Counts 2, 3 and 4), and one count of aggravated assault (Count 5). (C.P.43-45) On October 30, 2006, Oliver entered a plea of guilty to Counts 2, 3 and 4 and was sentenced to ten years' imprisonment on each conviction. (C.P.46-55) Counts 1 and 5 were remanded.

On September 26, 2007, Oliver filed in the Circuit Court a Motion for Post-Conviction Collateral Relief. (C.P.6) Having reviewed all of the pertinent pleadings and court files, the circuit court found that the motion was plainly without merit and dismissed it summarily. (C.P.56-60) Aggrieved by the judgment rendered against him, Oliver has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

The circuit court did not err in summarily dismissing Oliver's challenge to his sentence. **The court correctly concluded that the the rule prohibiting a sentence in excess of the defendant's life expectancy applies only to the armed robbery in the case *sub judice*, and not the aggregate sentence. Moreover, Oliver failed to make a threshold showing that his sentence was constitutionally disproportionate.**

Nor did the court err in summarily dismissing Oliver's challenge to the effectiveness of his counsel. This claim was belied by Oliver's testimony under oath in his petition to plead guilty and at the plea colloquy. It also was supported by no affidavit other than his own. Under these circumstances, no hearing was required.

Furthermore, the court correctly concluded that it had no obligation to advise Oliver that he had the right to appeal an allegedly illegal sentence imposed as the result of a guilty plea. No error has been shown in this determination.

Finally, the record does contain a transcript of the plea colloquy. Oliver's final proposition plainly lacks merit.

PROPOSITION ONE:

THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DISMISSING OLIVER'S CHALLENGE TO HIS SENTENCE

Under his claims 1. and 2., Oliver contended that his sentence violated his right to due process because he was sentenced to a term of 40 years as a first offender absent a proportionality analysis, and that the sentence was excessive because it exceeded his life expectancy. In determining that these claims were facially devoid of merit, the circuit court made the following findings and conclusions:

The court sentenced Oliver to ten (10) years to serve in the Mississippi Department of Corrections ("MDOC") in Count 2, ten (10) years to serve in MDOC in Count 3 which was consecutive to Count 2, and ten (10) years to serve in MDOC in Count 4 followed by ten (10) years or post-release supervision ... with this sentence to run consecutive to Count 3 and Count 2. **In essence, Oliver got a thirty (30) year sentence to serve without parole.**

First of all, Oliver was not a first-time offender. According to his petition, Oliver had previous convictions of possession of stolen property and burglary of a vehicle. He received three ten year sentences to serve followed by ten years of post-release supervision. **In *Erwin v. State*, 557 So.2d 799 (Miss.1990), the Mississippi Supreme Court said that each sentence is to be imposed without respect to the other and that those sentences, when imposed consecutively, could exceed the defendant's actuarial life expectancy. The Court of Appeals in *Wash v. State*, 807 So.2d 452, 458 (Miss.App.2001), discussing this issue and the *Erwin* case said that the rule prohibiting a sentence beyond the defendant's life expectancy applies only to the armed robbery in the case *sub judice*, and not the aggregate sentence. As the Court of Appeals said in *Garner v. State*, 864 So.2d 1005, 1009 (Miss.App.2004), that his sentences are to run consecutively rather than concurrently is one of the many hazards of committing multiple crimes.**

(emphasis added) (C.P.56-57)

The court went on to observe that "when a sentence falls within a range permitted by statute then it will not be disturbed on appeal." (C.P. 57) *Willis v. State*, 911 So.2d 947, 951 (Miss.2005). In any case, Oliver had failed to make even a threshold showing of gross disproportionality in his sentences. Having cited *Solem v. Helm*, 463 U.S. 277 (1983), the court expressly found and concluded the following, in pertinent part:

All three factors must be presented by a defendant when determining the disproportionality of a sentence. Oliver has not really set forth any of the factors. The Mississippi Court of Appeals in *White v. State*, 919 SO2d 1029, 1035-36 (Midss.App.2005), said recently that the Supreme Court has

subsequently altered its interpretation of *Solem*. The Eighth Amendment does not contain a proportionality guarantee. [*Harmelin v. Michigan*, 501 U.S. 951 (1991)] Severe penalties are not, by themselves, violative of the Eighth Amendment. *Id.* at 994-95. Before [they] will make such comparisons, [the defendant] must meet the threshold requirement of showing the sentence imposed is grossly disproportionate to the crime charged ... Unless [the defendant] satisfies this preliminary requirement, he is not entitled to the extended *Solem* comparison analysis.

(C.P.57-58)

The court concluded its analysis of this issue with the following:

The crime of armed robbery carries a maximum imprisonment penalty of life in prison. Miss Code Ann. § 97-3-79. See also *Womack v. State*, 827 So.2d 55 (Miss.App.2002) where the Court of Appeals found that a thirty year sentence and a ten year consecutive sentence for armed robberies was not disproportionate to the crimes committed. Even so, the recommended sentence was negotiated between the defense attorney and the District Attorney.

(emphasis added) (C.P.56-58)

The state submits the circuit court's findings and conclusions are factually and legally correct. Thus, the ruling is not subject to reversal. *Taylor v. State*, 766 So.2d 830, 832 (Miss.App.2000), citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss.1999). No basis exists for disturbing the court's well-reasoned conclusion, supported by dispositive case law, that Oliver's challenge to his sentence plainly lacked merit.

PROPOSITION TWO:

THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DISMISSING OLIVER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

In his motion for post-conviction collateral relief, Oliver contended additionally that he was denied his right to effective assistance of counsel because his attorney) failed to raise an alleged speedy trial violation and failed to summon adequate witnesses and to conduct a proper and thorough investigation. (C.P.3-4) The circuit court dismissed this claim with the following findings and conclusions:

Regarding the speedy trial allegations, with his entry of a guilty plea, Oliver waived speedy trial violations. See *Rice v. State*, 910 So.2d 1163, 1165 (Miss.App.2005). The crimes took place in June and July of 2005. Oliver was served with a copy of his indictment of April 20, 2006. Although there is no waiver of arraignment in the court file, a pretrial scheduling order indicating that Oliver had waived arraignment was filed on April 20, 2006 setting Oliver for trial on June 26, 2006. There were two orders to continue with the Defendant's counsel's approval. Eventually there was an order moving the last trial date up until November 13, 2006. Also, there is no indication when Oliver was first arrested. The time from the time he was served with the indictment and his plea was just over six months. All of the continuances were agreed to by his attorney. Therefore, there was no speedy trial violation. **Regarding the allegations that the attorney failed to properly prepare, Oliver stated under oath that he was satisfied with his attorney and that he was not coerced into entering his pleas. Oliver provides no affidavits.** ... Oliver has failed to demonstrate that his counsel's performance was deficient much less that any deficient performance prejudiced his defense. Oliver has not proved ineffective assistance of counsel based on the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984) [parallel citations omitted]; and *Moody v. State*, 644 So.2d 451, 456 (Miss. 1994).

A thorough review of the court files, including the transcripts of the plea and sentencing hearings, reveals that it is undeniably clear that Oliver's sworn statements contained in Oliver's PCR motion are "overwhelmingly belied by

unimpeachable documentary evidence in the record”, causing this Court to therefore conclude that Oliver’s sworn statements are a “sham” and that no evidentiary hearing is required. See *Wright v. State*, 577 So.2d 387, 390 (Miss.1991). The Court, having reviewed the pleadings and both of the court files, finds that Oliver’s allegations in his motion do not entitle him to any relief, his petition is motion merit and should be dismissed pursuant to MISS.CODE ANN. § 99-39-11(2), without benefit of a hearing.

(emphasis added) (C.P.58-59)

In his Petition to Enter Plea of Guilty, Oliver swore in pertinent part, “I believe that my lawyer is competent and has done all that anyone could do to counsel and assist me, and I am fully satisfied with the advice and help he has given me.” (C.P.77) During the plea hearing, Oliver swore that he was satisfied with the services rendered by his lawyer; that his lawyer had been available to him; and that he had no complaint whatsoever about the quality of his representation. (T.21-22)

Thus, Oliver’s challenge to the effectiveness of his counsel is belied by unimpeachable documentary evidence. The complaint is also unsupported by affidavit. Under these circumstances, the court properly concluded that no hearing was required on this claim. *Buckhalter v. State*, 912 So.2d 159, 162 (Miss.App.2005); *Gable v. State*, 748 So.2d 703, 706 (Miss.1999). *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995), citing *Brooks v. State*, 573 So.2d 1350, 1354 (Miss.1990).

PROPOSITION THREE:

**THE CIRCUIT COURT PROPERLY HELD THAT IT HAD NO
OBLIGATION TO INFORM OLIVER OF HIS ABILITY
TO APPEAL HIS SENTENCE**

Oliver argued additionally that court violated his right to due process by failing to advise him of the right to appeal the sentence(s) resulting from his guilty plea. The circuit court found in its order that it had no such duty: "[T]he Court is under no obligation to explain to a defendant that if his sentence is illegal, he has the right to appeal it." (C.P.59) This conclusion is correct. *Elliott v. State*, ____ So.2d ____, 2008 WL 2098041 (Miss.App.2006-CP-02157, decided May 20, 2008). No error has been shown in the court's summary dismissal of this claim for relief.

PROPOSITION FOUR:

**THE APPEAL RECORD INCLUDES A TRANSCRIPT
OF THE PLEA HEARING**

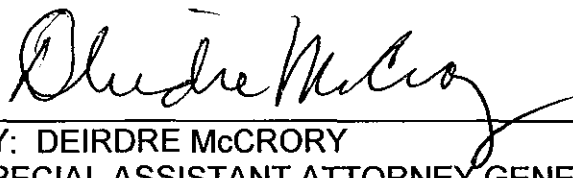
Oliver finally contends the circuit court "erred in failing to allow the record to contain transcript of guilty plea colloquy in court proceedings ..." (Brief for Appellant 4) The short and dispositive answer to this proposition is that the record does contain a transcript of the plea colloquy. (T.2-28) This proposition plainly lacks merit.

CONCLUSION

The state respectfully submits the circuit court properly denied Oliver's motion for post-conviction collateral relief. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

A handwritten signature in black ink, appearing to read "Deirdre McCrory", is written over a horizontal line.

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 Robert P. Chamberlin
Circuit Court Judge
P. O. Box 280
Hernando, MS 38632

Honorable John W. Champion
District Attorney
365 Loshier Street, Suite 210
Hernando, MS 38632

Jessie Montrell Oliver, #R9549
Mississippi State Penitentiary
Unit 29-A
Parchman, Mississippi 38738

This the 7th day of July, 2008.



DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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