

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID SIDNEY NICHOLS

APPELLANT

FILED

VS.

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NO. 2007-CP-1001

**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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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
STATEMENT OF ISSUES	2
SUMMARY OF ARGUMENT	2
ARGUMENT	2
THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF	2
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

STATE CASES

<i>Brown v. State</i> , 963 So.2d 577 (Miss. Ct. App. 2007)	4
<i>Edwards v. State</i> , 796 So.2d 1040 (Miss. Ct. App. 2001)	4
<i>Epps v. State</i> , 926 So.2d 242 (Miss. Ct. App. 2005)	2
<i>Havard v. State</i> , 928 So.2d 771 (Miss. 2006)	3

STATE STATUTES

Miss. Code Ann. Section 97-3-19(2)(g) (Rev. 2006)	4
Miss. Code Ann. Section 99-39-11(2) (Rev. 2007)	2

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CAUSE No. 2007-CP-01001-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Tate County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner, along with his brother and another individual, was indicted in December of 2002 on two counts of capital murder, conspiracy to commit capital murder, and arson of a dwelling house. (R. Vol. 31 - 33).

On 14 April 2004, the prisoner filed his "Petition to Enter Plea of Guilty" in the Circuit Court, in which he indicated that he wished to enter a plea of guilty to the two counts of murder. (R. Vol. 1, pp. 34 - 40).

On that same day, the prisoner with counsel appeared before the Circuit Court of Tate County to enter his pleas. The usual colloquy was had, and at the conclusion of it the Circuit Court accepted the prisoner's pleas, convicted him of the two counts of murder, and sentenced

him to two concurrent terms of life imprisonment. (R. Vol. 1, pp. 45 - 62).

On 9 March 2007, the prisoner filed his motion in post - conviction relief. He sought to have his convictions and sentences set aside, alleging that the Circuit Court failed to establish a factual basis for his pleas and that his attorneys were ineffective in that they failed to object to count 1 of the indictment. It also appears that the prisoner alleged that the attorneys told the prisoner that he would be sentenced to death if he did not enter the pleas. (R. Vol. 1, pp. - 5 - 28).

The Circuit Court denied relief on the prisoner's motion, without an evidentiary hearing, on 31 May 2007. (R. Vol. 1, pp. 63 - 64).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where "... it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief." Miss. Code Ann. Section 99-39-11(2) (Rev. 2007). This Court will not disturb a Circuit Court's decision to deny relief absent a showing that the Circuit Court's decision was clearly erroneous. *Epps v. State*, 926 So.2d 242 (Miss. Ct. App. 2005).

The prisoner alleges here, as he did in the Circuit Court, that the Circuit Court failed to determine that there was a factual basis for his pleas of guilty. This is simply untrue. (R. Vol. 1, pp. 50 -51). The description of what the State would have proved had the prisoner elected trial certainly provided a sufficient factual basis for murder.

The prisoner then contends, as he did in the Circuit Court, that his attorneys were ineffective. This was so, says the prisoner, because “. . . the [plea] agreement entered into by the [prisoner] was a product of coercion by and through counsel with counsel’s sole intentions as being to withhold crucial information from [the prisoner] ‘that there was never any foundation to the capital murder charges against [the prisoner] and the state would not have been able to prove murder under the indictment returned by the grand jury’.” (Brief for the prisoner, at 6).

We have no idea what the prisoner means by this statement. It may mean that he thinks that he could not have been convicted of murder on an indictment that charged him with capital murder. If that is what the prisoner means, he is wrong. The Court has frequently described murder as being a lesser - included offense to capital murder. *E.g. Havard v. State*, 928 So.2d 771 (Miss. 2006). If he means that there was no evidence to support capital murder, as opposed to murder, the claim is pointless since he pleaded guilty to murder.

The prisoner then makes some kind of claim to the effect that his attorneys were ineffective because they did not advise him of the fact that he had been indicted for conspiracy to commit capital murder. This count of the indictment was remanded to the files, no doubt as part of the plea agreement between the State and the defense. (R. Vol. 1, pg. 80). That being so, we fail to see how any failure to advise the prisoner concerning it could be prejudicial. As for the claim that the prisoner was told he would get the death penalty if he did not enter his guilty pleas, there is absolutely nothing to support this claim beyond the prisoner’s own affidavit. On the

other hand, the prisoner, under oath, testified in the plea colloquy that he had not been coerced into making his pleas by anyone. He further pronounced himself satisfied with his attorneys' representation. (R. Vol. 1, pp. 57 - 58). The Circuit Court committed no error in disregarding the prisoner's complaint under these circumstances. *Brown v. State*, 963 So.2d 577 (Miss. Ct. App. 2007).

The prisoner then rambles on about something to do with a murder on educational property, citing Miss. Code Ann. Section 97-3-19(2)(g) (Rev. 2006). We have no idea what the prisoner is trying to get at with this "argument." He was indicted under Miss. Code Ann. Section 97-19-3(2)(e) (Rev. 2006). (R. Vol. 1, pp. 31 - 32). The facts stated by the prosecutor indicated that the prisoner committed murder whilst in the course of committing burglary, as alleged in the indictment. There is no indication that the death penalty was simply unavailable under the indictment as drawn.

The prisoner then presents a litany of other supposed instances of ineffective assistance of counsel.¹ These, too, find no support save through the prisoner's affidavit. Where an ineffective assistance of counsel claim is supported only by a prisoner's own affidavit, a Circuit Court is not required to conduct an evidentiary hearing. The court may dismiss the motion under such a circumstance. *Edwards v. State*, 796 So.2d 1040 (Miss. Ct. App. 2001).

Continuing on with his tiresome complaining, the prisoner then says that the Circuit Court did not enquire of the prisoner whether he committed the murders. The Circuit Court was not required to do so; it was sufficient to simply establish a factual basis for the pleas. That,

¹ Amusingly, one of these items is a claim that the attorneys failed to interview witnesses. Even though the prisoner states that he does not know who those witnesses might have been, he thinks his attorneys were ineffective for having failed to interview them. Or maybe the claim is really a complaint that the attorneys did not invent witnesses.

taken with the fact that the prisoner wanted his guilty pleas accepted, surely indicated on his part an admission of guilt. Beyond that, in the petition to enter guilty plea, the prisoner specifically stated, under oath, that he pled guilty to murder, counts one and two. (R. Vol. 1, pg. 81). There was no requirement on the part of the trial court to gather more detail about the murders. All that was necessary was to establish a factual basis for the plea.

The prisoner then says that the Circuit Court failed to actually find him guilty. The Circuit Court did find the prisoner guilty of the murders. It accepted the prisoner's pleas. (R. Vol. 1, pp. 58 - 59). This acted so as to convict the prisoner. Moreover, the court signed and filed a sentencing order, on the day of the plea colloquy, in which it found the prisoner guilty of the murders. (R. Vol. 1, pp. 87 - 90).

None of the various claims advanced by the prisoner in the Circuit Court had any merit. Since the prisoner's motion had no affidavits beyond his own, the Circuit Court for that reason alone acted properly in dismissing the motion. This Court should affirm the Circuit Court's action in dismissing the prisoner's motion in post - conviction relief.

CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

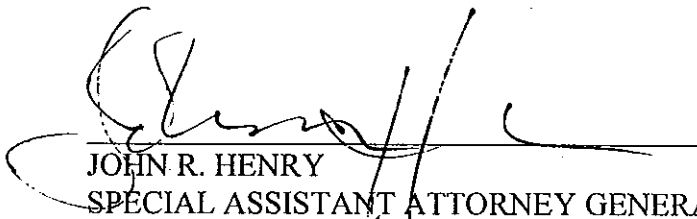
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 7th day of November, 2007.


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