

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MYRON POLLARD

APPELLANT

VS.

NO. 2008-CA-0678-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PREFACE

Myron Pollard, after pleading guilty, has filed a post-sentence motion to withdraw his plea.

After entering open and voluntary pleas of guilty to the possession of controlled substances, Pollard, following sentence imposition, sought to withdraw his pleas upon learning his application for participation in a drug court program had been rejected.

An adversarial hearing was conducted during which the circuit judge declined to entertain a proffer made by Pollard. Following arguments, both by the state as well as the defendant, the judge, for want of jurisdiction of the subject matter, dismissed Pollard's motion to withdraw guilty pleas and his demand for trial by jury.

Feeling aggrieved, Pollard appeals to this Court.

STATEMENT OF THE CASE

MYRON POLLARD appeals directly to this Court from an order entered on March 12, 2008, by the Circuit Court of Coahoma County, Albert B. Smith, III., Circuit Judge, presiding,

denying summarily Pollard's pleading styled "Motion to Set Aside Involuntary Guilty Plea and Subsequent Sentencing Judgment and Motion Demanding Trial." (C.P. at 22-28; appellee's exhibit A, attached)

This motion was filed post-plea and post-sentence as an independent action separate and apart from the statutory procedure provided by the Mississippi Uniform Post-Conviction Collateral Relief Act.

Judge Smith's two page order denying relief states, in part, that

" . . . the Court is of the opinion that it is without jurisdiction to hear the present motion. The term of court in which the Defendant entered his plea has expired, and the Court did not retain jurisdiction over this matter past sentencing. The only avenue available to the Defendant at this time is through the uniform post-conviction collateral relief act." (C.P. at 37-38; appellee's exhibit A, attached)

We agree.

STATEMENT OF FACTS

On July 13, 2007, following a plea-qualification hearing, Pollard entered open and voluntary guilty pleas in two separate cause numbers to four counts of possession of controlled substances, to include codeine, cocaine, and marijuana. (R. 1-12)

During the hearing defense counsel told the judge they would be "requesting Drug Court."
(R. 4) According to defense counsel

"[i]n both cause numbers, 2007-0042 and -43, Mr. Pollard wishes to withdraw his previously entered pleas of guilty to both indictments to both counts - - to all counts, and request that he be accepted into the Eleventh Circuit Drug Court." (R. 5)

After qualifying Pollard's guilty pleas and finding them to have been "freely, voluntarily, knowingly and understandingly given," the court elected to " . . . defer sentence pending a pre-sentence investigation report, the defendant having made application to Drug Court." (R. 12)

On August 20, 2007, a hearing was held at which time Judge Smith imposed, *inter alia*, two 15 year sentences to run concurrent, together with certain fines. (R. 13, 16,17)

All was well until Pollard learned his drug court application had been rejected by the drug court team. On September 6, 2007, Pollard filed a motion asking the court to set aside his allegedly involuntary pleas and demanding a trial by jury. (C.P. at 22-28) This was two (2) months following Pollard's pleas of guilty, two (2) weeks following sentence imposition, and after expiration of the term of court at which Pollard had entered his pleas.

The State contested the motion in an answer filed March 11th, 2008. (C.P. at 34-36)

A hearing was conducted on March 12, 2008, during which the State vigorously opposed the motion. Pollard twice rejected Judge Smith's invitation to treat Pollard's motion as one filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. (R. 17-18, 20)

In the end, Judge Smith denied Pollard's motion on the ground he had no jurisdiction to entertain the subject matter. (R. 19; C.P. at 37-38)

SUMMARY OF THE ARGUMENT

This Court can affirm the decision of the trial judge denying relief on the ground he did not have jurisdiction of the subject matter. Such would be without prejudice to Pollard to reform his motion and file it as a motion for post-conviction relief under the provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. §99-39-1 *et seq.* **Moody v. State**, 915 So.2d 1130 (¶4) (Ct.App.Miss. 2005), citing **Presley v. State**, 792 So.2d 950, 954 (¶18) (Miss. 2001), quoting **Harrigill v. State**, 403 So.2d 867, 868-69 (Miss. 1981).

Or this Court can treat Pollard's attempt to change his plea as a request for post-conviction relief and deny same with prejudice. **Barnes v. State**, 937 So.2d 1006 (Miss. 2006).

ARGUMENT

In an order signed by Circuit Judge Smith on October 13, 2006, and entered on October 16th, Judge Smith concluded he had no jurisdiction over this matter because “[t]he term of court in which the Defendant entered his plea has since expired, and the Court did not retain jurisdiction over this matter past sentencing.” (R. 33-38)

We respectfully submit that Pollard’s motion to withdraw was properly denied for this reason, if for no other. **Creel v. State**, 944 So.2d 891, 893-94 (Miss. 2006); **Denton v. Maples**, 394 So.2d 895, 898-99 (Miss. 1981).

But even if it was not, we are not aware of any viable authority for direct appeal of a denial of a motion to withdraw a guilty plea.

“Convictions as a result of a guilty plea are statutorily prohibited from being directly appealed to an appellate court.” **Gladney v. State**, 963 So.2d 1217, 1222 (¶14) (Ct.App.Miss. 2007). If this is true, it stands to reason there can be no direct appeal from a motion to withdraw a guilty plea.

“The Mississippi Uniform Post-Conviction Collateral Relief Act provides the exclusive and uniform procedure for the collateral review of convictions and sentences in the state.” **Bailey v. State**, 953 So.2d 1132, 1133 (¶4) (Ct.App.Miss. 2007) citing **Judge v. State**, 933 So.2d 1012, 1013 (¶4) (Ct.App.Miss. 2006).

“The proper method of seeking relief [on convictions as a result of a guilty plea] is through the Mississippi Uniform Post-Conviction Collateral Relief Act.” **Gladney v. State**, *supra*, 963 So.2d 1217, 1222 (¶14) (Ct.App.Miss. 2007).

During the hearing conducted on March 12, 2008, counsel for Pollard twice declined Judge Smith’s invitation to treat Pollard’s motion to withdraw as “a post-conviction” filed under the

Mississippi Uniform Post-Conviction Collateral Relief Act. (R. 18-19)

The State's position on this matter is found in the following colloquy:

MR. BLECK: Judge, if she's going to not proceed under post-conviction relief, I don't think we do anything. I think the question is whether we have jurisdiction exclusively. I think we don't have jurisdiction. And at that point, you know, the only way she can appeal this, the only valid way to appeal this is via-post-conviction relief even to the Supreme Court because he pled guilty. So you can't do an out of time appeal. You can't do an appeal period other than post-conviction relief, of which one of the exact grounds for it is you claim your plea was involuntary. It's one of the enumerated statutory reasons. It's the only place in the statutes you've got the right to plead guilty and then have an appeal to the Supreme Court. I think we're wasting our time if we do it any other way.

THE COURT: I think he's correct, Counsel. (R. 18-19)

We agree.

In the recent decision styled **Krickbaum v. State**, No. 2007-CP-01421-COA (¶3. and ¶4.)

[Not Yet Reported], we find the following language that we believe is applicable to the present appeal:

It is important to note that Krickbaum solely moved for a copy of her transcript and her circuit court records. Krickbaum did not file a petition for post-conviction collateral relief. Now, she appeals the circuit court's decision to deny her motion for a copy of her transcript and records. However, Krickbaum "does not have a constitutional or common law right to appeal to this Court: instead, [her] ability to appeal is based entirely on statute." *Shanks v. State*, 906 So.2d 760, 761 (¶3) (Miss.Ct.App.2004) (citing *Fleming v. State*, 553 So.2d 505, 506 (Miss. 1989)).

"There are two primary ways a criminal defendant may challenge a trial court proceeding: a direct appeal from conviction under Miss.Code Ann. §99-35-101 (Rev. 2002) or a proceeding under the Post-Conviction Collateral Relief Act, Miss.Code Ann. §§99-39-1 to 29 (Rev.2000 & Supp. 2004)." *Id.* Because Krickbaum pled guilty to armed robbery, she forfeited her right to a direct appeal of her conviction. Miss.Code Ann. §99-35-101 (Rev. 2007). Therefore, Krickbaum's only available

alternative to challenge her conviction is by way of the Mississippi Post-Conviction Collateral Relief Act. Krickbaum's request for a free copy of her transcript and circuit court record did not accompany a petition for post-conviction collateral relief.

Although the trial court action appealed from in **Krickbaum** was a denial of a motion for production of records as opposed to a motion to withdraw a guilty plea, the facts are analogous and the law the same.

We are compelled to agree with Judge Smith he had no jurisdiction to hear this matter. There was no motion pending at the end of the term in which sentencing was imposed; rather, Pollard's motion to withdraw pleas was filed on September 6, 2007, *after* both Pollard's sentencing on August 20 as well as the expiration of the term on August 17, 2007. (C.P. at 34) *See also* Miss.Code Ann. §11-1-16.

In this posture, the case of **Barnes v. State**, *supra*, 937 So.2d 1006, 1008 (Ct.App.Miss. 2006), is quite relevant and relied upon here. Barnes, like Pollard, pled guilty and later filed a post-sentence motion for change of his plea. In treating Barnes's attempt to change his plea as a request for post-conviction relief, the court of appeals stated the following:

As stated, *supra*, Barnes filed a motion for change of plea, but this Court will treat his attempt to change his plea as a request for post-conviction collateral relief. Absent a statute to the contrary, a circuit court has no power to alter or vacate its judgment once the term in which the case was terminated has ended. *Moody v. State*, 915 So.2d 1130 (¶4) (Miss.Ct.App. 2005) (citing *Presley v. State*, 792 So.2d 950 (¶18) (Miss. 2001). Barnes[s] plea hearing was held June 2, 2005, and his sentencing hearing was held June 17, 2005. The term of the Circuit Court of Pike County, relevant to Barnes's motion, was the first Monday in June 2005, which turned out to be June 6, for a term of two weeks, or through June 17. Barnes filed his motion for change of plea on July 18, 2005, well past the term of court in which he pled guilty or was sentenced. Therefore, the trial court had no authority to grant Barnes's motion, and said motion must [be] reviewed in accordance with Mississippi Code Annotated §99-39-1, *et seq.*, (Rev. 2000). Additionally, as evidence of Barnes's intent that

said motion be viewed as a request for post-conviction collateral relief, in his motion for change of plea he stated, “The petitioner is without competent [sic] legal representation but seeks post conviction relief”

Cf. Peacock v. State, 970 So.2d 197, 199 (Ct.App.Miss. 2007) [Trial Court’s acceptance of guilty plea had not become a final judgment, as the court had not sentenced Peacock and was still in the same term when it set aside the guilty plea.]

Pollard, unlike Barnes, expressly declined Judge Smith’s invitation to treat his motion as a motion for post-conviction relief thus negating the intent found in **Barnes**. Nevertheless, we invite this Court to treat Pollard’s motion as a motion for post-conviction relief and, ala **Barnes**, deny same on this basis.

The record reflects that Pollard’s pleas were open pleas not based upon any recommendation, promise, or inducement - improper or otherwise - made by the prosecution, including Pollard’s participation in the drug court program which, at best, was a mere hope or expectation by Pollard as opposed to a firm representation by the State.

Pollard’s reliance upon Rule 10.05 of the Uniform Circuit and County Court Rules is misplaced. Rule 10.05 governs the procedure for the filing of a motion for a “new” trial based upon any of the grounds identified in 1. through 6.

Pollard, however, never had an “old” trial; rather, he elected to enter a plea of guilty. A guilty plea is not a trial, and a motion to withdraw a guilty plea is not the equivalent of a motion for a new trial. Pollard asserts “[t]his is not an appeal on the merits of the motion [to withdraw guilty plea *et cetera*] but only on whether or not the motion was timely filed.” (Appellant’s Brief at 3) This question, as well as the two questions presented in appellant’s brief at page 15, need not be decided because Rule 10.05 is simply not implicated in this case.

In the case of **Presley v. State**, *supra*, 792 So.2d 950, 953 (Miss. 2001), cited and relied upon by Pollard, there is language to the effect that “[u]nder the federal rule, a motion for withdrawal of a plea may be made at any time *before* sentencing and, on a sufficient showing, even after sentencing.” [emphasis ours] The latter alternative applies only to correct a manifest injustice. We certainly do not have this here. *See United States v. Brewster*, 137 F.3rd 853 (5th Cir. 1998), reh denied, cert denied [A defendant has no absolute right to withdraw a guilty plea.]

In addition to suggesting his pleas were induced by some sort of expectation he would be selected for participation in the drug court program, Pollard also claimed as a ground for a favorable ruling on his motion to withdraw “. . . there was no underlying factual basis to support the plea(s).” (C.P. at 25)

We reiterate.

“The proper method of seeking relief [on convictions as a result of a guilty plea] is through the Mississippi Uniform Post-Conviction Collateral Relief Act.” **Gladney v. State**, *supra*, 963 So.2d 1217, 1222 (Ct.App.Miss. 2007).

Miss.Code Ann. §99-39-5 (1) (f) of the Mississippi Uniform Post-Conviction Collateral Relief Act reads as follows:

(1) Any prisoner in custody under sentence of a court of record of the state of Mississippi who claims:

* * * * *

(f) That his plea was involuntary;

* * * * *

(i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may file a motion to vacate, set aside or correct the judgment or sentence, or for an

out-of-time appeal.

Pollard's remedy, if any, is to file in the trial court in complete compliance with the requirements of §99-39-1 *et. seq.* a motion for post-conviction relief assailing the integrity of his guilty pleas.

Finally, Pollard complains about the trial judge's decision to decline to entertain his proffer. Counsel does not, however, specifically identify in her appellate brief what evidence Pollard's proffer would have brought to light. She only states that Pollard's guilty plea rested in a significant degree upon a promise or agreement as the inducement. No abuse of judicial discretion has been demonstrated here. **Massengill v. State**, 755 So.2d 492 (Ct.App.Miss. 1999), reh denied [The decision to allow withdrawal of a guilty plea is a matter left to the sound discretion of the trial court.]

For these reasons the ruling issued by Judge Smith should be affirmed either with prejudice or without prejudice to Pollard to file in the court below a motion for post-conviction relief.

CONCLUSION

Pollard's direct appeal is without merit on the merits because the only method of assailing an allegedly involuntary guilty plea is the procedure found in the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. §99-39-1 *et. seq.*

Accordingly, the trial judge did not have jurisdiction to hear this matter. There was certainly no abuse of judicial discretion in denying Pollard's motion to withdraw his pleas of guilty.

Relief should either be denied with prejudice or Pollard's appeal dismissed without prejudice to Pollard to file a motion for post-conviction relief in the trial court.

Respectfully submitted,

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v.

CAUSE NO. 2007-0042

MYRON POLLARD

DEFENDANT

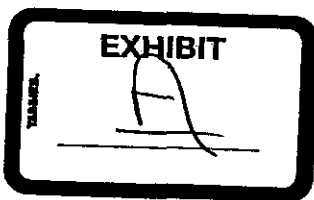
ORDER DENYING DEFENDANT'S MOTION
TO SET ASIDE GUILTY PLEA

This matter comes before this Court pursuant to the Defendant's Motion to Set Aside Guilty Plea. After carefully considering said motion along with the State's response thereto and conducting a hearing on the matter, the Court finds as follows:

The Defendant entered a plea of guilty before this Court on July 13, 2007 in the above referenced cause number and a companion case, Coahoma County cause number 2007-0043. The plea entered by the Defendant was open and was not based upon any recommendation made by the District Attorney's Office. The Defendant's attorney indicated that the Defendant would be making application to the 11th Circuit Drug Court Program. The Court, after thorough questioning, accepted the Defendant's plea and found that the Defendant was entering his plea knowingly, freely, voluntarily and understandably. After evaluating the Defendant, the Drug Court Team declined to recommend the Defendant for admission into the program. The Defendant was later sentenced in this matter on August 24, 2007.

The Defendant has now filed the present motion seeking to have this Court set aside his plea of guilty and reset this matter on the trial docket because he alleges he entered his plea involuntarily.

This Court is of the opinion that it is without jurisdiction to hear the present motion. The term of court in which the Defendant entered his plea has since expired, and the Court did not

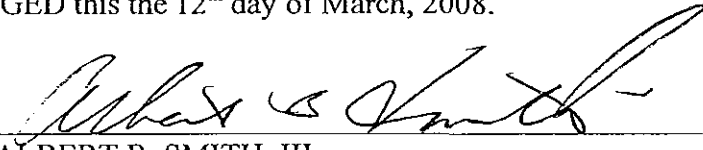


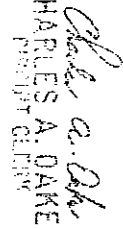
retain jurisdiction over this matter past sentencing. The only avenue available to the Defendant at this time is through the uniform post-conviction collateral relief act.

Since the Court finds that it does not have jurisdiction over this matter, it will not address the merits of the motion and finds no grounds to allow the Defendant to proffer evidence to this Court to support his claim at this time.

For the foregoing reasons, the Defendant's Motion to Set Aside Guilty Plea is hereby DENIED.

SO ORDERED AND ADJUDGED this the 12th day of March, 2008.


ALBERT B. SMITH, III.
CIRCUIT COURT JUDGE

2008 MAR 14 PM 1:33

CHARLES A. DAKES
PROBATE CLERK

CLERK'S OFFICE

CERTIFICATE OF SERVICE

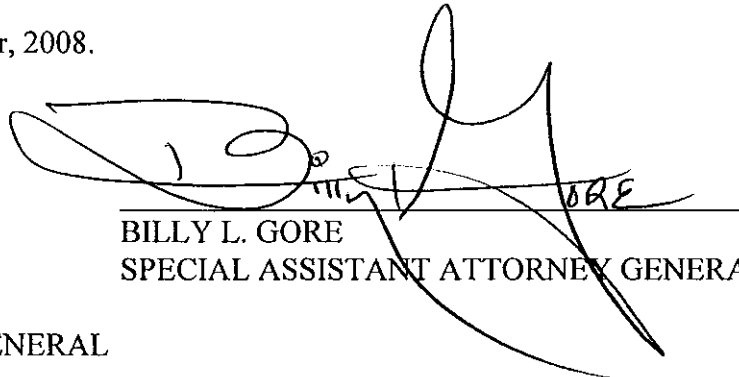
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of October, 2008.



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