

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT "BOBBY" DIDON

APPELLANT

VS.

NO. 2008-CA-0928

STATE OF MISSISSIPPI

APPELLEE

MOTION TO DISMISS APPEAL
OR IN THE ALTERNATIVE,
BRIEF FOR APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
DIDON IS PROCEDURALLY BARRED FROM RAISING HIS INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE ON APPEAL AS HE DID NOT PLACE A SUFFICIENT RECORD BEFORE THE COURT	4
PROCEDURAL BAR NOTWITHSTANDING, DIDON'S MOTION FOR POST CONVICTION RELIEF WAS PROPERLY DENIED	5
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	5
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STATE CASES

<i>Cole v. State</i> , 666 So.2d 767, 776 (Miss. 1995)	6
<i>Crowell v. State</i> , 801 So.2d 747, 749 (Miss. Ct. App. 2000)	5
<i>Evans v. State</i> , 846 So.2d 301, 303 (Miss. Ct. App. 2003)	4
<i>Genry v. State</i> , 735 So.2d 186, 200 - 201 (Miss. 1999)	5
<i>Lyons v. State</i> , 881 So.2d 373 (Miss. Ct. App. 2004)	3
<i>McQuarter v. State</i> , 574 So.2d 685, 687 (Miss.1990)	5
<i>Neal v. State</i> , 525 So.2d 1279, 1281 (Miss.1987)	5
<i>Richardson v. State</i> , 769 So.2d 230, 234 (Miss. Ct. App. 2000)	5
<i>Ross v. State</i> , 936 So.2d 983, 985 (Miss. Ct. App. 2006)	4
<i>Shorter v. State</i> , 946 So.2d 815, 820 (Miss. Ct. App. 2007)	5

STATE STATUTES

Mississippi Code Annotated Section 99-39-7	2,3
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STATEMENT OF THE FACTS

According to the Appellant, Bobby Didon's Motion for Post Conviction Relief, on December 16, 2003, he was indicted for "the crime of Touching, Handling, and Fondling of his nine-year old grand daughter pursuant to Section 97-5-23(2) of Mississippi Code of 1972, as amended." (Record p. 6). He was tried, convicted, and sentenced as a habitual offender to life without parole. (Record p. 7). Didon filed a Notice of Appeal with the Mississippi Supreme Court on April 13, 2006. *See* Clerk's Docket: *Bobby Didon v. State of Mississippi*, 2006-KA-00629SCT. The designation of record was received on April 27, 2006. *Id.* Didon then filed a Motion for Voluntary Dismissal of Appeal on August 24, 2006. *Id.* The case was dismissed on September 12, 2006 and a mandate was issued on October 3, 2006. *Id.*

Didon then filed a motion for post conviction relief with the Lawrence County Circuit Court on July 12, 2007. (Record p. 2 - 12). The Circuit Court ordered the State to respond to the motion on September 10, 2007. (Record p. 100). The State responded on October 22, 2007. (Record p. 102 - 107). On January 28, 2008, the Circuit Court ordered an evidentiary hearing which was later set for April 4, 2008. (Record p. 109 - 110 and 112). The hearing was held; however, there is no transcript of the hearing in the record and no transcript was designated by the Appellant. The Circuit Court denied Didon's motion for post conviction relief on May 5, 2008. (Record p. 114 - 116). Didon now appeals that decision.

SUMMARY OF THE ARGUMENT

This trial court lacked jurisdiction to hear Didon's motion for post conviction relief as the Appellant never sought leave to proceed with his motion for post conviction relief in the trial court. Thus, this appeal is not properly before this Court. However, if this Court overrules the State's motion to dismiss appeal, the State of Mississippi alternatively argues that Didon is procedurally barred from raising his issue on appeal as he failed to place a necessary part of the record before this Court. Thus, the Circuit Court's denial must stand.

ARGUMENT

A. MOTION TO DISMISS APPEAL

The State of Mississippi respectfully asserts that this appeal should be dismissed as the Appellant was not granted leave by the Mississippi Supreme Court to file the motion for post conviction relief which is the subject of this appeal. Mississippi Code Annotated §99-39-7 states as follows in this regard:

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed.

Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the justices of the supreme court of Mississippi, convened for said purpose . . . and an order granted allowing the filing of such motion in the trial court. . . .

Lyons v. State, 881 So.2d 373 (Miss. Ct. App. 2004) is directly on point. The Appellant in *Lyons* also filed a notice of appeal with the Mississippi Supreme Court after his conviction. *Id.* He later filed a motion to withdraw his appeal and a mandate dismissing the appeal was issued by the Court. *Id.* Lyons subsequently filed a motion for post-conviction relief in the Circuit Court of Lincoln County. *Id.* After the Circuit Court dismissed the motion, he appealed. *Id.* This Court held that his motion for post conviction relief was procedurally barred, further holding as follows:

The dismissal of his direct appeal from the supreme court was a final judgment. Once there has been a final judgment upon direct appeal, Mississippi Code Annotated Section 99-39-7 requires that the petitioner present any subsequent motion to a quorum of justices of the supreme court for permission to file in the trial court. Miss.Code Ann. § 99-39-7 (Supp.2003). . . . Since the dismissal of Lyons's appeal was a final judgment, Mississippi Code Annotated Section 99-39-7 required that he file his motion for post-conviction relief in the supreme court, seeking permission to file in the trial court. Since Lyons did not follow proper court procedure, the trial court properly denied his relief, and we affirm this denial.

Id. at 376.

Thus, in accordance with the holding in *Lyons* and with Mississippi Code Annotated §99-39-7, the Court's dismissal of Didon's appeal was a final judgment; and therefore, he was required to seek permission to file his motion for post conviction relief in the trial court prior to filing said motion. As such, the State of Mississippi requests that this Honorable Court dismiss Appellant's appeal.

B. BRIEF ON THE MERITS

Without waiving or compromising the State's foregoing contention that the trial court did not have proper jurisdiction to hear Appellant's motion for post conviction relief and therefore that

this appeal should be dismissed, the State of Mississippi also submits the following arguments on the merits of Didon's appeal.

DIDON IS PROCEDURALLY BARRED FROM RAISING HIS INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE ON APPEAL AS HE DID NOT PLACE A SUFFICIENT RECORD BEFORE THE COURT.

This Court has made it clear that “[a]s with any appeal, it is solely the appellant's duty to ensure that the record is sufficiently populated to support the error claimed.” *Ross v. State*, 936 So.2d 983, 985 (Miss. Ct. App. 2006). Moreover, “[i]f the record is found lacking in this regard, the lower court's order must stand.” *Id.* (*emphasis added*). See also *Evans v. State*, 846 So.2d 301, 303 (Miss. Ct. App. 2003) (holding that the Appellant “bears the responsibility of placing before this Court a record sufficient to establish his claim”). In the case at hand, Didon failed to make the transcript of the evidentiary hearing and any exhibits therefrom a part of the record. The trial judge indicated in his Order denying Didon's motion for post conviction relief that he relied on “the Petitioners' motion, together with all files, records, transcripts, and correspondence relating to the judgement under attack and conducted oral arguments” in rendering its decision. (Record p. 114). As such, the Court is unable to ascertain what testimony, if any, was given at the evidentiary hearing and what exhibits, if any, were entered into evidence as the hearing. Therefore, the Court does not have before it all the information that the trial court had before it in determining the merits of Didon's motion. The Court simply has Didon's motion for post conviction relief, the State's response, and the judge's order. The events that occurred at the evidentiary hearing could have been the deciding factor for the trial court in determining that Didon was not denied effective assistance of counsel and this Court does not have anything whatsoever to assist it in determining what those events were. As “this Court ‘cannot decide an issue based on assertions in the briefs alone; rather, issues must be proven by the record,’” this Court must hold that “the matter is not properly before

this Court.” *Genry v. State*, 735 So.2d 186, 200 - 201 (Miss. 1999).

PROCEDURAL BAR NOTWITHSTANDING, DIDON’S MOTION FOR POST CONVICTION RELIEF WAS PROPERLY DENIED.

The trial court’s denial of a motion for post-conviction relief should not be reversed “absent a finding that the trial court’s decision was clearly erroneous.” *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)). Didon argues that he “was denied effective representation as guaranteed by the Federal and State Constitutions.” (Appellant’s Brief p. iii). He specifically argues that his counsel failed to properly investigate the case. (Appellant’s Brief p. 5). The standard of review for such claims is as follows:

Claims of ineffective assistance of counsel are judged by the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-part test set out in *Strickland* is whether counsel's performance was deficient and, if so, whether the deficiency prejudiced the defendant to the point that "our confidence in the correctness of the outcome is undermined." *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987). . . . A strong but rebuttable presumption exists that "counsel's conduct falls within a broad range of reasonable professional assistance." *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). To overcome this presumption, the defendant must show that "but for" the deficiency a different result would have occurred. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Richardson v. State, 769 So.2d 230, 234 (Miss. Ct. App. 2000) (*emphasis added*). Further, with regard to claims of failure to investigate, this Court has held that “[w]hile counsel has a duty to make reasonable investigations, they do not, by any means, have to be completely exhaustive.” *Shorter v. State*, 946 So.2d 815, 820 (Miss. Ct. App. 2007) (citing *Wiley v. State*, 517 So.2d 1373, 1379 (Miss. 1987)) (*emphasis added*). “Counsel’s decisions in this area along with trial strategy are given a large measure of deference.” *Id.* Furthermore, the Mississippi Supreme Court has held that “a defendant who alleges that trial counsel’s failure to investigate constituted ineffectiveness must also state with particularity what the investigations would have revealed and specify how it would have altered the outcome of trial or how such additional investigations would have significantly aided his

cause at trial.” *Cole v. State*, 666 So.2d 767, 776 (Miss. 1995) (*citations omitted*) (*emphasis added*).

As set forth above, the only information in the record is Didon’s motion for post conviction relief, the State’s response filed by Assistant District Attorney Lauren Barnes Harless, and the trial judge’s order denying the motion. While Didon does provide transcripts from several depositions regarding testimony that “could have” been presented at trial, as ADA Harless pointed out, Didon did not produce any evidence which had it been produced at trial would have changed the outcome of the case. (Record p. 107). She further noted that “what Nora Didon now says she wished she had testified to (that she could see the bedroom the whole time the victim was there) is contrary to her trial testimony” which according to ADA Harless was that “the victim and the defendant were in the bedroom together, that she was cooking in the kitchen most of the time while the victim was there, and that the victim visited her home on numerous occasions and she could not remember each visit.” (Record p. 105 and 107). The trial judge agreed with these arguments, holding in his Order that while defense counsel “might have been deficient in his performance, it did not rise to a level that caused prejudice to Didon’s case” and that “presentation of these statements of Deer would likely not have changed the jury’s decision.” (Record p. 115 - 116).

Without the benefit of the trial transcript and, most importantly, the transcript of the evidentiary hearing, one can only speculate. However, from the record as it stands, it appears that not one of the statements presented by Didon established his innocence or even a slight reasonable doubt of his guilt. The most intriguing statement was given by his wife who stated as follows:

Well, from where I sit in the living room, you can see in the bedroom. Anytime I got up off the sofa or the chair, wherever I could walk, I could see into the bedroom. And I’m up and down all the time. Even if I went to the kitchen, I was only there a minute, I would come back in and you could see into the bedroom. Which, the bedroom was there, you could see right into it every time you went anywhere just about in the house.

(Record p. 57 - 58). However, as noted by ADA Harless, that statement directly contradicts her trial testimony that “the victim and the defendant were in the bedroom together, that she was cooking in the kitchen most of the time while the victim was there, and that the victim visited her home on numerous occasions and she could not remember each visit.” (Record p. 105). Furthermore, Ms. Didon’s testimony that she left Didon for a year after the allegations also brings up several other questions regarding exactly what she saw and knew about the day in question.

As such, the record does not provide sufficient evidence to show that but for defense counsel’s deficiencies, the outcome would have been different. Moreover, the record certainly does not show that the trial judge’s findings were clearly erroneous. Thus, procedural bars notwithstanding, Didon’s motion for post conviction relief was properly denied.

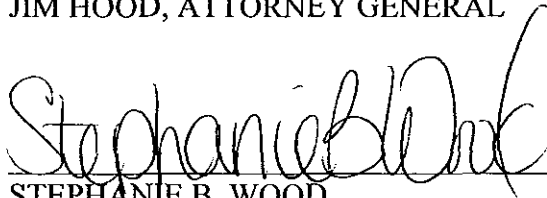
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court dismiss the Appellant's appeal as he did not properly request leave to file his motion for post-conviction relief in the trial court, the denial of which is the basis for this appeal. However, if this Court sees fit not to dismiss the appeal, the State of Mississippi respectfully requests that this Court affirm the trial court's denial of post conviction relief as the Appellant failed to place a necessary record before this Court, thereby requiring that the Circuit Court's denial must stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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 **MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE, BRIEF FOR APPELLEE** to the following:

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