IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELISHA HARDING — APPELLANT

VS. — NO. 2008-CA-1216

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 ISSUES 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE TRIAL COURT DID NOT ERR IN ACCEPTING THE APPELLANT'S GUILTY PLEA AS THE TRIAL COURT DETERMINED, AFTER A THOROUGH EVALUATION OF THE APPELLANT, THAT THERE WAS A FACTUAL BASIS FOR THE PLEA AND THAT THE APPELLANT WAS ENTERING THE PLEA BECAUSE SHE BELIEVED IT WAS IN HER BEST INTEREST TO DO SO. 3

II. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL 6

III. THERE IS NO CUMULATIVE ERROR AS THERE WERE NO INDIVIDUAL ERRORS 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) 6

STATE CASES

Bush v. State, 922 So.2d 802, 805 (Miss. Ct. App. 2005) 4

Cole v. State, 918 So.2d 890, 893 (Miss. Ct. App. 2006) 5

Crowell v. State, 801 So.2d 747, 749 (Miss. Ct. App. 2000) 3

Kinney v. State, 737 So.2d 1038, 1041 (Miss. Ct. App. 1999) 7

McNickles v. State, 979 So.2d 693, 696 (Miss. Ct. App. 2007) 5

McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990) 6

Neal v. State, 525 So.2d 1279, 1281 (Miss. 1987) 6

Richardson v. State, 769 So.2d 230, 234 (Miss. Ct. App. 2000) 6

Thompson v. State, 990 So.2d 265, 270 (Miss. Ct. App. 2008) 7, 8

STATE STATUTES

Mississippi Code Annotated §99-19-81 1

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ERR IN ACCEPTING THE APPELLANT'S GUILTY PLEA AS THE TRIAL COURT DETERMINED, AFTER A THOROUGH EVALUATION OF THE APPELLANT, THAT THERE WAS A FACTUAL BASIS FOR THE PLEA AND THAT THE APPELLANT WAS ENTERING THE PLEA BECAUSE SHE BELIEVED IT WAS IN HER BEST INTEREST TO DO SO.

II. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

III. THERE IS NO CUMULATIVE ERROR AS THERE WERE NO INDIVIDUAL ERRORS.

STATEMENT OF THE FACTS

The Appellant, Melisha Harding, was indicted for burglary, grand larceny, and uttering a forgery. (Record p. 7 - 8). On November 7, 2008, Harding, subject to a plea agreement, entered an *Alford* plea to the charge of uttering a forgery as a habitual offender under Mississippi Code Annotated §99-19-81 with the two remaining charges being remanded. (See generally Transcript of Plea Hearing and Sentencing Hearing). After extensive examination, the trial court accepted the

plea. (Transcript p. 32). She was later sentenced as a habitual offender to ten years in the custody of the Mississippi Department of Corrections with six years suspended and four years to serve and with six years post release supervision, five of that reporting and one non-reporting. (Record p. 9 - 11).

On March 20, 2008, Harding filed a petition for post-conviction relief alleging that "the conviction was imposed in violation of the laws of Mississippi," "her plea was made involuntarily," and "her counsel was ineffective in his representation." (Record p. 5). She also filed a memorandum in support of her petition in which she argued that: 1) "the trial court should not have accepted your petitioner's *Alford* plea and, therefore, your petitioner entered her plea involuntarily;" 2) "the petitioner was denied her 6th Amendment right to the effective assistance of counsel within the meaning of *Strickland v. Washington* and corresponding portions of the Mississippi Constitution;" and 3) "the trial court commit[ted] reversible error based on the cumulative effect of the aforementioned errors." (Record p. 14 - 23). On May 9, 2008, the trial court ordered the State of Mississippi to respond to Harding's petition. (Record p. 29). The State filed a response on May 30, 2008. (Record p. 30 - 38). On June 13, 2008, the trial court entered an order denying Harding's petition. (Record p. 39 - 42).

SUMMARY OF THE ARGUMENT

The trial court did not err in accepting Harding's *Alford* plea as the record clearly establishes not only that Harding understood the implication of her *Alford* plea, but also that she believed it was in her best interest to plead guilty and it was her desire to do so. Furthermore, there is no Mississippi case law requiring that Harding state specifically on the record that she believed it was in her best interest to plead guilty. The case law only requires that Harding knowingly and intelligently conclude that its in her best interest to plead guilty.

Harding was not denied effective assistance of counsel. The record illustrates that her attorney explained an *Alford* plea and its implications to her and that she was pleased with his assistance. Further, and most importantly, Harding wholly failed to establish the second prong of the *Strickland* analysis as she did not specifically state what prejudice her attorney's alleged deficiency caused.

Lastly, as there were no individual errors, there can be no cumulative error. Thus, Harding's conviction and sentence should be affirmed.

ARGUMENT

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)).

I. THE TRIAL COURT DID NOT ERR IN ACCEPTING THE APPELLANT'S GUILTY PLEA AS THE TRIAL COURT DETERMINED, AFTER A THOROUGH EVALUATION OF THE APPELLANT, THAT THERE WAS A FACTUAL BASIS FOR THE PLEA AND THAT THE APPELLANT WAS ENTERING THE PLEA BECAUSE SHE BELIEVED IT WAS IN HER BEST INTEREST TO DO SO.

On appeal, Harding first raises the issue of "whether the trial court erred in denying the Appellant's Petition for Post-Conviction Relief, because Appellant never indicated that pleading guilty was in her best interest?" (Appellant's Brief p. 10). Harding entered what is commonly referred to as an *Alford* plea. "An *Alford* plea allows a defendant to avoid the risk of conviction at trial by pleading guilty without admitting to actual guilt of the crime charged." *In re Shelton,* 987 So.2d 938, 939 (Miss. 2008). This Court noted in *Bush v. State*, that the United State Supreme Court previously "found no constitutional error in accepting a guilty plea despite a protestation of innocence, when the defendant knowingly and intelligently concluded that his best interests required entry of a guilty plea and the trial judge made a determination on the record that there was strong

evidence of actual guilt." 922 So.2d 802, 805 (Miss. Ct. App. 2005) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

At her guilty plea hearing, there was more than adequate evidence not only that Harding understood the implication of her *Alford* plea, but also that she believed it was in her best interest to plead guilty and it was her desire to do so:

Q: By submitting this petition, you're asking to enter a plea of guilty to Count 3 of the amended indictment, that being uttering a forgery charge pursuant to Section 99-19-81 of the habitual offender statute: is that correct?
A: Yes, sir.
Q: Ms. Harding, it indicates this is an *Alford* plea of guilty. Do you understand what that means?
A: Yes, sir.
Q: Let me go over it with you to make sure that you do understand. Ms. Harding, an *Alford* plea is a plea in which it means you are pleading guilty but not admitting your guilt. Do you understand that?
A: Yes, sir.
Q: It is similar to what you might call a no contest plea. Do you understand that?
A: Yes, sir.
Q: But do you understand that whether we refer to it as an *Alford* plea or refer to it as a no contest plea, it is a guilty plea nonetheless? Do you understand that?
A: Yes, sir.
Q: Is that what you want to do?
A: Yes sir.

(Transcript p. 13 - 14).

Q: Do you understand that by pleading guilty pursuant to *North Carolina v. Alford*, you are asking me to accept everything the State says they can prove as true as being true?
A: Yes.
Q: Is that what you want to do?
A: Yes.

(Transcript p. 17 - 18).

Q: Ms. Harding, are you pleading guilty because pursuant to *North Carolina v. Alford,* you're asking me to accept what the State says they can prove as being true?

A: Yes.

(Transcript p. 29).

Q: Ms Harding, do you understand that your indictment in Count 3 alleges that you have committed the crime of uttering a forgery, all in violation of Mississippi law, all in DeSoto County, Mississippi, while a habitual offender under Mississippi Code Annotated, Section 99-19-81, that being your amended indictment I'm referring to? Do you understand that is what you charged with?
A: Yes, sir.
Q: Do you understand that by pleading guilty pursuant to *North Carolina v. Alford,* you are asking me to accept those facts as being true and accept those charges as being true? Do you understand that?
A: Yes, sir.
Q: Is that what you want to do?
A: Yes, sir.

(Transcript p. 31).

Q: Ms. Harding, I may not have asked you, but let me make sure that I have. Is it your decision and your decision alone to plead guilty?
A: Yes, sir.
Q: Are you asking me to accept that plea?
A: Yes, sir.

(Transcript p. 32). This Court has recognized "that there is a strong presumption of validity when a statement is given while under oath." *Cole v. State,* 918 So.2d 890, 893 (Miss. Ct. App. 2006) (citing *King v. State*, 679 So.2d 208, 211 (Miss.1996)). Nonetheless, Harding argues that her plea was not valid as she "never acknowledged that the plea was in her best interest." (Appellant's Brief p. 11). However, as noted by the trial judge in his order denying post-conviction relief, "the court does not have to require the defendant to state that he knows that the plea is in his best interest but that the defendant knowingly and intelligently concludes it is in their best interest" and that it "found no cases that say this must be stated verbally on the record with the use of 'magic words.'" (Record p. 41). Thus, the record clearly indicates that Harding believed it was in her best interest to plead guilty to the charge. *See McNickles v. State,* 979 So.2d 693, 696 (Miss. Ct. App. 2007) and *Cole,*

918 So.2d at 892-93. As such, Harding's first issue is without merit.

II. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Harding also argues on appeal that his she was denied effective assistance of counsel. (Appellant's Brief p. 14). 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*). In this regard, Harding argues that "there is no record that at anytime [her counsel] informed [her] that she was required to conclude or acknowledge that pleading guilty was in her best interest." (Appellant's Brief p. 15). However, the record indicates otherwise:

> Q: . . . Have you had an opportunity to thoroughly discuss your case, including any potential defenses with your lawyer?
> A: Yes.

(Transcript p. 5).

> Q: Have you read this petition?
> A: Yes, sir.
> Q: Have you gone over this petition with [your attorney], had him explain it to you and answer any questions you might have?
> A: Yes, sir.
> Q: Is everything in the petition true and correct?
> A: Yes, sir.
> Q: Are you telling me that you have read the petition and you understand the petition?
> A: Yes, sir.

(Transcript p. 12 - 13).

Q: . . . are you each satisfied with the services rendered to you by your lawyers?
A: Yes.
Q: Have they been available to you?
A: Yes.
Q: Any complaints at all about their representation?
A: No.

(Transcript p. 29 - 30). From the above cited testimony as well as the testimony cited with regard to Issue 1 above, it is clear that Harding understood her *Alford* plea and that her attorney satisfactorily explained the plea as well as its implications to her. Thus, the first prong of *Strickland* has not been satisfied.

With regard to the second prong of the *Strickland* analysis, Harding simply argues that her counsel "made critical errors that seriously prejudiced the outcome of the plea hearing." (Appellant's Brief p. 15). It is well-established law that a defendant must, in order to establish a prima facie case of ineffective assistance of counsel, allege "with specificity and detail matters to show both that his counsel's performance was deficient, but also that the deficient performance prejudiced him." *Kinney v. State,* 737 So.2d 1038, 1041 (Miss. Ct. App. 1999) (citing *Cole v. State*, 666 So.2d 767, 777 (Miss.1995)) (*emphasis added*). Harding wholly failed to establish the second prong of the *Strickland* analysis. As such, Harding's second issue is without merit.

III. THERE IS NO CUMULATIVE ERROR AS THERE WERE NO INDIVIDUAL ERRORS.

Lastly, Harding argues that "the cumulative effect of these individual errors deprived her of her fundamental rights." (Appellant's Brief p. 16). This Court recently held that "[t]he cumulative error doctrine stems from the doctrine of harmless error which holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." *Thompson v. State,* 990 So.2d 265, 270 (Miss. Ct. App. 2008)(quoting *Harris v. State*, 970 So.2d 151, 157

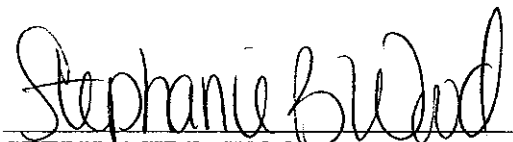
(Miss. 2007)). However, as the *Thompson* Court held, "reversal based upon cumulative error requires a finding or findings of error" and because the Court found "no error regarding [the defendant's] conviction, harmless or otherwise, this issue is without merit." *Id.* Thus, in Harding's case, as there were no errors, harmless or otherwise, there is no cumulative error.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the trial court's denial of the Appellant's motion for post-conviction relief as the trial court correctly determined that the Appellant's guilty plea was properly accepted and that the Appellant was not denied effective assistance of counsel.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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 **BRIEF FOR THE APPELLEE** to the following:

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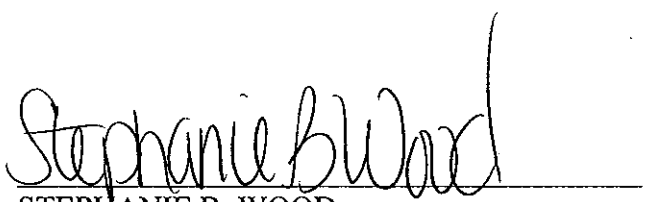
This the 20th day of January, 2009.



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