IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN HENRY JOHNSON — APPELLANT

VS. — NO. 2008-CA-1359-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2008-CA-1359-COA**

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PROCEDURAL HISTORY:

On November 21, 2005, John Henry Johnson, "Johnson" with the benefit of guilty plea counsel pled guilty to three counts of statutory rape before the Circuit Court of Hinds County, the Honorable Tomie Green presiding. R. 1-16. Johnson was sentenced to serve three concurrent twenty five year sentences for his convictions. R. 15.

On February 7, 2007, Johnson with the benefit of appeal counsel filed a petition for post conviction relief. C.P. 26-83. The trial court denied relief. C.P. 84-85.

From that denial of relief, Johnson filed notice of appeal to the Mississippi Supreme Court. C.P. 86.

ISSUES ON APPEAL

I.

WAS JOHNSON'S GUILTY PLEAS VOLUNTARILY AND INTELLIGENTLY ENTERED?

II.

DID JOHNSON RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

III.

WAS SENTENCING IMPROPERLY CONDUCTED?

IV.

WAS THE POST CONVICTION MOTION PROPERLY DENIED?

STATEMENT OF THE FACTS

On October 15, 2004, Johnson was indicted for three counts of statutory rape of Ms. Stephanie Denham, his female step-child, who was twelve years old when the first two alleged rapes occurred, and between fourteen and sixteen when the last alleged rape occurred. Johnson, was an adult male over the age of seventeen at the time of the actions at issue. He was indicted by a Hinds County Grand jury for these sexual felonies. This was under the statutory rape statute, M. C. A. Sect. 97-3-65(1)(a)(b). C.P. 2.

On November 21, 2005, Johnson with the benefit of counsel filed a "Petition To Enter A Guilty Plea." C.P. 60-63. His counsel was Mr. Adam Powers with the Hinds County public defender's office. R. 1. In that sworn petition, Johnson admitted that he was entering an "open plea." C.P. 62. He stated he was pleading guilty to "three" counts of statutory rape. C.P. 61. He stated that he knew the maximum "life" sentences for statutory rape. C.P. 61. He also admitted that he was guilty of the alleged rapes, and that he knew the Constitutional rights he was waiving by pleading guilty. C.P. 62.

On November 21, 2005, Johnson was sworn in at his guilty plea hearing. R. 1-16. Johnson admitted that he had signed and submitted the petition, and was aware of its contents. He admitted that he was guilty of the three felonies. R. 8. Johnson admitted to having sexual relations with his step daughter. This was when she was twelve and fourteen. R. 62. As a result the female child gave birth to her own child. As a result of another rape, a second child by the step daughter was aborted. R. 8. Johnson admitted knowing that the trial court could sentence him to "a maximum of life" on each of the three charges. R. 9.

He admitted that he was entering "an open plea." C.P. 8. He admitted that no one had promised him anything or threatened him into pleading guilty. No one had promised him a more

lenient sentence. R. 9. Johnson also acknowledged knowing the Constitutional rights he was waiving by pleading guilty. R. 10-11; C.P. 61. His petition stated that he knew he was waiving his right to a trial with cross examination as well as right against self incrimination. C.P. 60-61.

After questioning Johnson and his guilty plea counsel about Johnson's understanding of the significance of the proceedings against him, the trial court accepted his guilty pleas as voluntarily and intelligently entered. C.P. 11-12.

There was no "contemporaneous objections" during sentencing to either the procedure used or the sentence imposed. R. 15. The trial court did not hear any testimony from witnesses at the sentencing hearing. Johnson was sentenced to serve "concurrent" twenty five year sentences for the three different counts of statutory rape. R. 15.

On February 7, 2007, Johnson filed for post conviction relief. C.P.26-83. Johnson claimed an involuntary plea, ineffective assistance of counsel, and an alleged improper sentencing procedure. While Johnson filed an accusatory affidavit against his counsel, there was no affidavit from guilty plea counsel.

The trial court denied relief, finding no merit to Johnson's unsupported claims for relief. C.P. 84-85.

From that denial of relief, Johnson filed notice of appeal to the Mississippi Supreme Court. C.P. 86.

SUMMARY OF THE ARGUMENT

1. The record reflects that Johnson's guilty plea was voluntarily and intelligently entered. R. 16; C.P. 60-63. **Wilson v. State**, 577 So. 2d 394, 396-97 (Miss. 1991). In his "Petition To Enter A Guilty Plea" Johnson acknowledged knowing the maximum "life" sentence he could received for statutory rape. C.P. 61. At his guilty plea hearing, he admitted that he was entering "an open plea," and that the trial court could sentence him to "a maximum of life." R. 8. This could be the sentence on each of his three convictions for statutory rape. R. 8-9. He acknowledged under oath knowing that he was waiving his constitutional rights by pleading guilty. R. 9-10.

In addition, Johnson had no affidavit from his guilty plea counsel who was accused of incompetence and deviousness. C.P. 26-83. While Johnson included an affidavit with his motion, it provided no basis for "any reliance upon a firm representation" that he would receive a lenient sentence. C.P. 82-83. **Hurst v. State**, 811 So.2d 414, 418 (¶15) (Miss. App. 2001).

While Johnson could have received more than one life sentence for raping his step daughter, he only received three concurrent twenty five year sentences. R. 15.

2. The record reflects that Johnson received effective assistance of counsel. Johnson stated under oath that he was "satisfied with his representation." R. 10. There is a lack of evidence that Johnson was mislead as to his sentence by his counsel. There is no affidavit from his guilty plea counsel, and Johnson's unsubstantiated accusations in his affidavit had no record support. C.P. 82-83. Johnson's statements under oath "contradict" his accusations. **Mills v. State** 986 So.2d 345, 350 (¶14) (Miss. App. 2008)

He acknowledged knowing he could receive up to a life sentence for raping his step daughter three different times. R. 8. Instead of serving three life sentences, he is only serving concurrent twenty five year sentences as a result of his guilty plea counsel's representation.

3. and 4. These sentencing issues were waived. They were waived for failure to object during sentencing. **Farmer v. State** 770 So.2d 953, 959 (¶20) (Miss. 2000).

In addition, sentencing, although brief, was properly conducted. R. 14-15. Sentencing hearing procedures are discretionary with the trial court. There is "no requirement" that witnesses be heard on a felon's behalf. **Caldwell v. State** 953 So. 2d 266, 270 (Miss. App. 2007).

Johnson did not receive life sentences for his statutory rape convictions but rather three "concurrent" twenty five year sentences. R. 15. He acknowledged knowing he was entering an "open plea," and that sentencing would be "totally up to the court." R. 9. The record reflects the court did not abuse its sentencing discretion. R. 1-16; C.P. 60-63.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT JOHNSON'S GUILTY PLEAS WERE VOLUNTARILY AND INTELLIGENTLY ENTERED.

Johnson argues that his guilty pleas were not voluntarily and intelligently entered. They were not properly entered because Johnson was allegedly misinformed as to his possible sentences by his guilty plea counsel. In addition, the trial court did not allegedly advise Johnson of the possible sentence he could receive prior to his actual sentencing. Appellant's brief page 1-4.

To the contrary, the record indicates otherwise. The record reflects that the trial court accepted Johnson's guilty pleas as voluntarily and intelligently entered. R. 11-12. This was after advising and questioning Johnson and his guilty plea counsel about his understanding of the charges and the consequences of his plea. R. 1-16.

The record also reflects that Johnson and his counsel filled out and filed a sworn "Petition To Enter a Guilty Plea." C.P. 60-64. Johnson admitted under oath that this petition was his and that "he had gone over this petition with (his) ...attorney." R. 5.

Johnson admitted under oath that was entering an "open plea." R. 8. Johnson admitted he had not been promised a "more lenient" sentence by anyone. He also admitted knowing that he was waiving his constitutional right to a trial with cross examination and a right to remain silent.

> Q. **Mr. Johnson, you understand by taking an open plea, that you are leaving sentencing totally up to the court, and that I can sentence up to the maximum of life on the charges of statutory rape?**
>
> A. **Yes, ma'am.**
>
> Q. **And understanding that, do you still wish to plead guilty?**
>
> A. **Yes, ma'am.**

Q. **Has anyone promised you anything of threatened you in order to get you to plead guilty?**

A. **No, ma'am.**

Q. **Has anyone told you that I'd be more lenient if you pled guilty?**

A. **No, ma'am.**

Q. **You understand that under our constitution there are certain rights that protect you as a defendant. And by pleading guilty, you give some of those–well, you give those rights up. You understand that?**

A. **Yes, ma'am.** R. 9-10. (Emphasis by appellee).

The record reflects that Johnson admitted in his Petition and under oath at his guilty plea hearing that he was, in deed, guilty of having raped his step daughter who was living in his house at the time on the three specified occasions. C.P. 62; R. 7-8.

After advising and questioning both Johnson and his counsel, the trial court found that his three pleas were voluntarily and intelligently entered.

> **Mr. Johnson, as a result of your answers to my questions, I am of the opinion that you're here of your own free will; that no one has promised you anything or threatened you to get you to plead guilty.** I am also of the opinion that you do have the education and the experience to understand these proceedings this morning; that you understand your constitutional rights and what it means to give those rights up and plead guilty. C.P. 11-12. (Emphasis by appellee).

Contrary to Johnson's argument on appeal, the record reflects that the trial court requested a pre sentence investigation report.

> Court: ...I have accepted the plea of the defendant and have ordered a pre sentence investigation. C.P. 14.

In Johnson's "Petition For Post Conviction Relief," he claimed that he had been mislead as to his sentence, and was shocked by his twenty five year concurrent sentences. C.P. 82-83.

The trial court found that, contrary to Johnson's unsupported statements in his affidavit, that

he was competently represented by counsel and that his guilty pleas were voluntarily and intelligently entered.

> **The court finds that defendant was competently represented by counsel, and did willfully, intelligently and voluntarily plead guilty to the charges of statutory rape, after being thoroughly advised by the court of his waiver of constitutional rights.**
> Defendant also advised the court that he was satisfied with the representation provided by counsel. The Court finds that there is no merit to defendant's claims alleged in his petition to set aside his plea, nor his motion for post conviction relief. Thus, the court is of the opinion that his motion should be denied. C.P. 84. (Emphasis by appellee).

In **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss. 1992), this Court found, in accord with **Boykin v. Alabama**, 395 U. S. 238, 242 (1969), that a defendant must be advised and understand "the nature of the charge against him and the consequences of the plea." This is necessary if the plea is to be accepted on the record as voluntarily and intelligently entered.

> A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. **Myers v. State**, 583 So. 2d 174, 177(Miss. 1991). A plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea. See **Wilson v. State**, 577 So. 2d 394, 396-97 (Miss. 1991). Specifically, the defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. **Boykin v. Alabama**, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Rule 3.03 of the Uniform Criminal Rules of Circuit Court Practice additionally requires, inter alia, that the trial judge "inquire and determine" that the accused understands the maximum and minimum penalties to which he may be sentenced.

The appellee would submit that there was sufficient record support from the guilty plea hearing and the Petition To Enter A Guilty Plea in support of the trial court's Order denying relief. There was sufficient evidence, as summarized above, for determining that Johnson understood the specific three statutory rape charges, and the sentencing range provided by statute for these felonies. R.. 1-16; C.P. 60- 63.

Johnson acknowledged knowing the rights he was waiving by pleading guilty, and admitted that he had not been promised a more lenient sentence should he plead guilty. He knew sentencing would be left to the discretion of the trial court on an open plea. R. 8-9. He admitted that no one had lead him to believe he would receive a lenient sentence. R. 9. He admitted knowing the maximum life sentence for a conviction, and he knew, as stated in his Petition, that he was waiving his right to a trial by pleading guilty. R. 9-10. And he admitted that he was guilty of the three separate instances of statutory rape. R. 8.

The appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT JOHNSON WAS GIVEN EFFECTIVE ASSISTANCE OF COUNSEL.

Johnson believes that his guilty plea counsel was ineffective on his behalf. He believes that he was ineffective because he allegedly misinformed him as to the sentence he would receive upon pleading guilty. In addition, he did not either object or proffer anything on behalf of a lenient sentence for Johnson at his actual sentencing. Since Johnson had no other prior offenses, he believes this was harmful to the sentence which he actually received. Appellant's brief page 4-12.

To the contrary, the record reflects that in Johnson's "Petition To Enter A Guilty Plea" he acknowledged knowing the maximum "life" sentence he could receive for pleading guilty to statutory rape of his step daughter. C.P. 61. In addition, the record reflects he admitted knowing that he was entering "an open plea" with no recommendation from the prosecution. R. 8. He acknowledged knowing "the maximum of life" sentence that he could receive for each of his three felonies. R. 9.

Johnson admitted under oath that he was "satisfied" with the representation of his guilty plea counsel. R. 10.

The record also reflects that while Johnson filed an affidavit with his motion for post conviction relief, he had neither an affidavit from his guilty plea counsel nor a statement of "good cause why" he could not obtain it. See M. C. A. Sect. 99-39-9 (1) (e). In other words, he had no "affidavits of the witnesses who will testify" on his behalf should he be granted a hearing on his motion. C.P. 81-83.

In **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998), the Supreme Court stated that an ineffective assistance claim is deficient when supported only by a defendant's affidavit.

Q. **You're in court with your attorney, Mr. Powers. Are you satisfied with his representation?**

A. **Yes, ma'am.**

Q. Do you believe he's advised you of your constitutional rights and what it means to give those rights up and plead guilty?

A. Yes, ma'am.

Q. Do you believe he's advised you of your constitutional rights and what it means to give those rights up and plead guilty?

A. Yes, ma'am.

Q. And do you think you understood them, Mr. Johnson?

A. Yes, ma'am. R. 10-11. (Emphasis by appellee).

The record reflects that Johnson's statements under oath "contradict" his accusations on appeal. **Mills v. State** 986 So.2d 345, 350 (¶14) (Miss. App. 2008).

For Johnson to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington,** 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Johnson must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense.

The burden of proving both prongs rests with Johnson. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Johnson must show that there is "a reasonable probability" that but for the alleged errors of his guilty plea counsel, Mr. Powers, the sentences of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The appellee would submit that based upon the record we have cited, there is a lack of

evidence for holding that there was "a reasonable probability" that guilty plea counsel erred in advising, assisting, and representing Johnson prior to and at his guilty plea hearing.

Instead of receiving three life sentences, Johnson received "concurrent" twenty five year sentences.

In **Hurst v. State**, 811 So.2d 414, 418 (¶15) (Miss. App. 2001), the Court found that Hurst was not entitled to relief. While Hurst claimed he "expected" a lesser sentence, there was no record evidence of "any reliance upon a firm representation of a lesser sentence."

> ¶ 15. Though it could be argued that Hurst expected a lesser sentence because Walsh told him that the best he could expect was probation, precedent clearly distinguishes between the mere expectation of a lesser sentence and a reliance upon a firm representation of a lesser sentence. A mere expectation, though reasonable, is generally not sufficient to merit relief. **Myers v. State**, 583 So.2d 174, 177 (Miss.1991). Having reviewed the record, we find that the decision of the trial judge was not manifestly in error or contrary to the weight of the evidence, and we can therefore not reverse on the basis of this issue. **Foster**, 639 So.2d at 1281.

The appellee would submit that while Johnson may have wanted or expected a lenient sentence, no one provided him with grounds for such an expectation. In addition, given the gravity of his offenses, he received a sentence closer to the minimum than the maximum. Instead of life he received concurrent twenty five year sentences.

This issue is also lacking in merit.

PROPOSITION III AND IV

THIS ISSUE WAS WAIVED. AND SENTENCING WAS PROPERLY CONDUCTED.

Although not separately briefed, Johnson argues that he was not given a proper sentencing hearing. He assumes in his argument that he was entitled to present witnesses on his behalf prior to his being sentenced by the trial court. He also states that he believes the trial court did not have the benefit of a pre-sentence investigative report prior to sentencing. Appellant's brief page 6-7.

The record reflects that no contemporaneous objection was made during sentencing by Johnson or his counsel. R. 1-15.

In **Farmer v. State** 770 So.2d 953, 959 (¶20) (Miss. 2000), the Supreme Court that failure "to make a contemporaneous objection" during sentencing waived the issue on appeal.

> Farmer further notes that the State made similar hearsay statements regarding Siklas's fear of Farmer. No objection to these statements appears in the record. Failure to make a contemporaneous objection to statements offered during sentencing waives the issue for appeal purposes. **Gatlin v. State**, 724 So. 2d 359 (¶ 50) (Miss.1998).

In addition, there are no affidavits or witnesses in support of Johnson's claims for relief other than his own unsubstantiated affidavit. There is no statement of "good cause why" they could not be obtained. C.P. 80-83. M. C. A. Sect. 99-39-9(1)(e).

The record indicates that the trial court ordered a pre-sentence investigation report.

> Court: ...I have accepted the plea of the defendant and have ordered a pre sentence investigation. C.P. 14.

In the trial court's Order denying relief, it stated that a pretrial investigation was "considered" in sentencing Johnson to his twenty five year sentences for statutory rape.

> The court order(ed) sic. a pretrial investigation, considered the same and thereafter sentenced defendant to an appropriate term of 25 years on each count of statutory rape (to run concurrent) in the custody of the M. D. O. C. C.P. 84.

In **Roderick v. State** , 837 So. 2d 240, 243 (Miss. App. 2003), the Court pointed out that it reviewed a trial court's denial of relief based upon "an abuse of discretion" standard. It would affirm the trial court's decision unless it was "clearly erroneous or an abuse of discretion."

> ¶ 11. When reviewing a trial court's denial of a motion for post-conviction relief, we will reverse only where the trial court's decision was clearly erroneous or an abuse of discretion. **Kirksey v. State**, 728 So.2d 565, 567(¶ 8) (Miss.1999).

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

In **Caldwell v. State** 953 So. 2d 266, 270 (Miss. App. 2007), the Court of Appeals found a lack of ineffective assistance and no violation of Caldwell's due process rights when witnesses were not heard on his behalf at his sentencing. The Court relied upon the U. S. Supreme Court in **Wiggins v. Smith, infra**, stating that there is "no requirement" that witnesses be heard on behalf of a defendant at his sentencing.

> ¶ 13. Several of Caldwell's family members presented affidavits in which they claimed that had they been allowed to testify, they would have expressed to the judge, among other things, some of Caldwell's good character traits. In **Wiggins v. Smith**, 539 U. S. 510, 533, 123 S. Ct. 2527, 156 L. Ed.2d 471 (2003), the United States Supreme Court stated: [i]n finding that [Wiggins' counsels'] investigation did not meet **Strickland**'s performance standards, we emphasize that **Strickland** does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does **Strickland** require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart Strickland.

The record reflects that Johnson was not given a maximum sentence. R. 15. He was given

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 10th day of September, 2009.

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