IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONNIE MITCHENER — APPELLANT

VS. — NO. 2008-CA-1750

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

SUMMARY OF THE ARGUMENT 9

PROPOSITION:
NO BASIS EXISTS FOR DISTURBING THE
CIRCUIT COURT'S DENIAL OF RELIEF IN
THIS CASE 9

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 9

STATE CASES

Buck v. State, 838 So.2d 256, 260 (Miss. 2003) 9

Johns v. State, 926 So.2d 188, 194 (Miss. 2006) 13

Mitchener v. State, 964 So.2d 1188 (Miss. App. 2007) 1, 9, 14

Rankin v. State, 636 So.2d 652, 656 (Miss. 1994) 9

Reynolds v. State, 521 So.2d 914, 918 (Miss. 1988) 13

IN THE COURT OF APPEALS OF MISSISSIPPI

RONNIE MITCHENER **APPELLANT**

VERSUS **NO. 2008-CA-1750-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

In November 2004, Ronnie Mitchener pleaded guilty in the Circuit Court of Lowndes County to one count of kidnaping. The following March he was sentenced to 20 years in the custody of the Mississippi Department of Corrections. Thereafter, Mitchener filed in the circuit court a motion for post-conviction relief. The court dismissed the motion summarily, and Mitchener perfected an appeal. The Court of Appeals reversed the judgment of the circuit court and remanded the case for an evidentiary hearing on the issues of ineffective assistance of counsel and the voluntariness of the plea. All of the other issues raised were found to be without merit. *Mitchener v. State*, 964 So.2d 1188 (Miss. App.2007).

On November 13, 2007, the circuit court conducted the hearing on Mitchener's motion. Having made detailed findings of fact and conclusions of law, the court ultimately denied relief. (C.P.79-91) Aggrieved by the judgment rendered against him, Mitchener has perfected an appeal to this Court.

Substantive Facts

THE MOVANT'S CASE

Mr. Mitchener first called Elizabeth Stephens, who testified that in October 2004, the defendant telephoned her and asked her "to call Jackson Brown," his attorney. Ms. Stephens then set up a three-way call. When asked to recount the representations Mr. Brown had made to his client, Ms. Stephens testified as follows:

> They discussed the details of probation, that we could get you time served and probation... It was like a carrot dangling in front of him. It was as if the tone of everything had changed. We had heard that he's going to do time for a very long time ... And the all of a sudden everything turned around where it was, we can get you time served and we can get you probation and these are the conditions.
>
> (T.10-11)

When she was asked, "But was the statement that Mr. Brown made to Mr. Mitchener, was it an absolute or a guarantee that this is what's going to happen?" Ms. Stephens answered, "Yes."

On cross-examination, Ms. Stephens acknowledged that she did not listen to the entire conversation. She also testified that she was dating Mr. Mitchener at the time. (T.11-14)

Christine Mitchener, the movant's ex-wife, testified that in September 2004, she "asked Mr. Brown about Ronnie's case, where it was going, stating some concerns" she had "about Ronnie signing and open plea agreement." Mr. Brown assured her that her ex-husband "would get probation as a term of signing the plea agreement." When Mr. Brown told her that Mr. Mitchener "would have

to live with someone during the term of his probation," Mrs. Mitchener agreed to have him live with her. According to her, probation "was being discussed as a guaranteed fact." (T.17-19)

On cross-examination, Mrs. Mitchener admitted that Mr. Brown had never used the words "guarantee" or "absolute" or any form of those words when discussing the outcome of the plea. (T.20) She also acknowledged that she was present when Mitchener was sentenced. When he was not placed on probation, she did not confront Mr. Brown; nor did she write a letter to the court. (T.23)

Mr. Mitchener's cousin Betsy Chandler testified that after Mr. Mitchener was arrested, she spoke directly with Mr. Brown on several occasions. A day or two before the plea was entered, she asked Mr. Brown why her cousin had agreed to plead guilty when he faced a sentence of 20 or 30 years. Mr. Brown replied, "There is no way that is going to happen." He then assured her that Mr. Mitchener "would get probation." (T.25-27)

On cross-examination, Ms. Chandler acknowledged that Mr. Brown had also told her that Mitchener would be entering an open plea. (T.28)

Carolyn Bentley testified that as an employee of Mr. Mitchener's former accountant, she had placed several three-way calls for Mitchener before the plea was entered. According to her, "Mr. Brown just kept telling him, Ronnie, ... [y]ou don't want to go to trial. ... You're going to get probation and time served." (T.33-34)

Mr. Mitchener testified that he pleaded not guilty to this charge in August 2004. The following September, Mr. Brown visited him at the county jail and told him that he was going to ensure that he received "time served and probation." He repeated this assurance in October. Mr. Mitchener testified that based on this promise, he signed the petition to enter a plea of guilty. He

also testified that immediately before the plea colloquy, Mr. Brown advised him to answer "no" when the judge asked whether he had received any promises of leniency. (T.41-42)

On cross-examination, Mitchener acknowledged that before he entered his plea, he clearly understood that the judge would make the final decision as to sentence. (T.53-54)

THE RESPONDENT'S CASE

Larry Willis, an employee of Jackson Brown, testified that he was Mitchener's first cousin. After Mitchener was arrested, Mr. Brown attended a "family meeting" at which it was decided that Mr. Brown should be hired to represent Mitchener. Thereafter, Mr. Willis acted as the "go-between between Mr. Mitchener and Mr. Brown." Mr. Willis "would come over here and see him [Mr. Mitchener] in jail and bring papers back from the attorney and take papers back." During the course of these visits, Mr. Willis and Mr. Mitchener talked about the case, but, according to Mr. Willis, "I conveyed those messages [from Mr. Brown], but I did not answer any of his [Mr. Mitchener's] questions because I didn't know." As his trial date approached, Mr. Mitchener vacillated between demanding a trial and desiring to plead guilty. (T.100-04)

On October 29, 2004, Mr. Willis and Mr. Brown went to the jail to visit Mr. Mitchener, whose trial date was looming. To Mr. Willis's knowledge, no offer had been made to Mr. Mitchener; in other words, any plea would have been open. When he was asked, "[D]uring the course of time that you visited Mr. Mitchener when Jack Brown was there, did you ever at any point hear Mr. Brown guarantee Mr. Mitchener that he was going to receive probation?" Mr. Willis answered, "No." He went on to testify that he had never known Mr. Brown to make any promises to a criminal defendant with respect to an open plea. (T.104-06)

Mr. Willis was present when Mr. Brown reviewed the petition to plead guilty with Mr. Mitchener. He heard Mr. Brown tell his client that the plea would be open, i.e., that the judge could impose any sentence authorized by the controlling statute. (T.108-09)

Jackson Brown testified that he had been a practicing attorney since 1972, and that his practice had consisted of at least 50 percent criminal cases. In January 2004, "Mr. Mitchener was charged with a felony and his family employed" Mr. Brown to represent him. Initially, Mr. Brown investigated the case and arranged for his client to be examined by a psychologist. He then discussed with Mr. Mitchener the evidence against him and the ramifications of it, and any defenses that might have been available. Ultimately, Mr. Brown concluded, in his professional opinion, "I didn't like our odds of going before a jury." Thereafter, he and Mr. Mitchener had many conversations about Mr. Brown's concerns. (T.122-27)

Asked the describe how Mr. Mitchener finally decided to plead guilty, Mr. Brown testified, "Well, the facts the State would have proved at trial was very strong. And under the circumstances, rather than let a jury decide the issue, it was decided that we would have a better opportunity to attempt to convince the judge to give him less time than we would face with a jury." (T.130-31) With respect to Mr. Brown's advising the defendant of his options and the ramifications of his plea, the state conducted this colloquy:

> Q. And with respect to Mr. Mitchener's decision to plead guilty, did you explain to him the different options that he had prior to his decision, that is, to go to trial, plead open, all of that?
>
> A. Oh, yes. We did that obviously several times before the trial– excuse me, before the plea of guilty.
>
> Q. And, Mr. Brown, how would you– how did you go about explaining the different options with Mr. Mitchener that he had?

Well, he could either to go a jury trial and let the jury decide his guilty, either as he didn't do it or not guilty by reason of insanity, or he could waive a jury trial, have the judge determine his guilt, either that he didn't do it or not guilty by reason of insanity. Or he could plead guilty and put the sentencing up to the judge.

Q. Now, did you ever express an offer to Mr. Mitchener that the State made in regards to a plea offer?

A. I'm sorry?

Q. Did you ever convey a plea offer from the State to Mr. Mitchener?

A. There was no offer.

Q. Okay. Now, before Mr. Mitchener entered his guilty plea, did you have the opportunity to learn the wishes of the victim in this particular case?

A. I did.

Q. And what was those wishes, sir?

A. He wanted maximum time.

Q. And was that conveyed to Mr. Mitchener?

A. It was.

Q. And did he– was he aware of that before he ever actually came before the Court to enter his guilty plea?

A. He knew that Mr. Boterf wanted the maximum time. And we delayed sentencing with hopes that Mr. Boterf might cool off.

* * * * *

Q. Okay. Now, at any point, did you make any guarantees to Mr. Mitchener was far as what his sentence would be?

A. No, ma'am.

Q. Okay. Did you ever promise him that you would get

him time served and probation?

A. No, ma'am.

Q. Okay. What was your– after devising this strategy, that you would present at the hearing, what was your hope?

A. Well, the best he could have done was time serve [sic] and probation. That statute calls for 1 to 30 years if the jury doesn't give him life. He had already served about 14 months. He had already done the minimum that is allowed by the statute.

So the best he could hope for or we could hope for was time served and probation.

Q. And did you take steps toward trying to present the best case scenario for the Court?

A. I think we did.

Q. Now, going in and doing the guilty plea, was Mr. Mitchener aware that the ultimate decision was– would be the Judge's?

A. Oh, yes. He even knew that when he went to the State's Hospital at Whitfield. And the experts specifically asked him about that and he gave them the correct answers as knowing the jury could give him a life sentence.

The– and if they didn't agree, then the Judge would decide 1 to 30 years. ...

(emphasis added) (T.131-34)

Mr. Brown went on to testify that he reviewed the petition to plead guilty with his client; that Mitchener "understood" it and did not appear confused in any way; that he particularly understood the meaning of "open plea; and that he (Mr. Brown) fully explained each of the constitutional rights which would be waived by the plea. At no time did he advise Mr. Mitchener to give untruthful answers during the plea colloquy. (T.136-37) To the contrary, he advised Mr. Mitchener to "[t]ell the truth." (T.141)

Mr. Brown testified unequivocally, "I never stated that Mr. Mitchener would get time served

and probation." (T.142) Furthermore, after the court imposed sentence, none of Mr. Mitchener's family members questioned Mr. Brown about why Mr. Mitchener did not receive probation. While they were upset about the length of the sentence, they never indicated that they expected Mr. Mitchener to receive probation or that Mr. Brown had misled them about the outcome. When the prosecutor asked, "And at any point after Mr. Mitchener was sentenced, did he contact you to say you promised me I was getting probation and I got 20 years?" Mr. Brown answered, "No, ma'am." (T.145-46) Finally, the state conducted this colloquy:

> Q. And, Mr. Brown, based upon the length of time that you were involved in this and your review of all of the evidence as best you can, do you have an opinion as to what the outcome would have been had Mr. Mitchener gone to trial?
>
> A. I didn't like the odds and I recommended to him on my advice that he plead guilty and we put it before the Court.
>
> Q. Okay. And if the odds would have gone against Mr. Mitchener in that respect, the sentence, could it have exceeded what he got at the guilty plea?
>
> A. Absolutely.
>
> (T.147)

SUMMARY OF THE ARGUMENT

The trial court's ruling embodies findings of fact amply supported by the record. No basis exists for disturbing it on appeal.

PROPOSITION:

NO BASIS EXISTS FOR DISTURBING THE CIRCUIT COURT'S DENIAL OF RELIEF IN THIS CASE

In *Mitchener*, 964 So.2d at 1194-95, the Court of Appeals remanded this case for an evidentiary hearing on the issue whether defense counsel's alleged misrepresentation of sentence constituted ineffective asssistance of counsel and thereby rendered Mitchener's plea involuntary. In its order denying relief, the circuit court aptly summarized the issue as follows:

> Simply put, Mitchener's argument in this case is that he is entitled to have his guilty plea set aside and his case set for trial because his first trial attorney lied to him.
>
> (C.P.83)

Immediately preceding this summary is a statement of the controlling law, set out below:

> The Standard for proving ineffective assistance of counsel is well settled and provides that before one may prevail on a claim of ineffective assistance of counsel he must show that he can satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, Mitchener must show that his trial court attorney's performance was deficient and that he was in fact prejudiced by that deficient performance. *Id.* When a convicted defendant challenges his guilty plea on ground of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. *Buck v. State*, 838 So.2d 256, 260 (Mis.2003). In cases such as this before this Court, Mitchener bears the burden of proving both prongs of the *Strickland* test and he is faced with the rebuttable presumption that his trial court's performance was within the wide range of reasonable professional assistance. *See Rankin v. State*, 636 So.2d 652, 656 (Miss.1994).
>
> (C.P.82-83)

Before issuing its ruling, the court painstakingly reviewed the evidence presented at the hearing, as well as facts brought out during the plea process. (C.P.83-91) With respect to the latter, the court made these findings:

> During the November 12, 2004 guilty plea conducted in open court, the Court elicited from Mitchener that he was 43 years old at the time of the plea and had completed some 2 ½ years of college and that he could read and write. The Court also asked Mitchener whether he had gone over the Petition to Enter a Guilty Plea with his attorney and whether he understood his righits as set for in the petition and whether he gave his attorney truthful answers about the petition as his attorney asked him questions while completing the petition. Mitchener indicated that he understood the petition and he in fact gave truthful answers to Brown as he explained and questioned him about the petition. Mitchener said he understood the sentence that he could receive ... Mitchener concurred with the State's recitation of the evidence against him but did indicate that he did not have the victim at gunpoint when he took the victim to his house. However, he did indicate that there were other times that he did hold the victim at gunpoint. **The Court believes that this exchange demonstrates that Mitchener was not afraid to address or correct the court or the State when a statement was made that he did not agree to.**
>
> When Mitchener was remanded to custody on November 12, 2004 after he had entered his plea, he did not ask this Court when he was going to be placed on probation. Moreover, when he was sentenced to prison on March 3, 2005, he did not ask this Court about his supposed guaranteed probation. **This Court had the luxury of observing Mitchener on November 12, 2004, March 3, 2005 and November 13, 2007 as he interacted with his attorneys during the course of the respective proceedings. Nothing that this Court observed from Mitchener would lead this Court to believe that Mitchener is the type of man to sit mute in the face of some sentence or statement that he did not believe in or agree to. ...** Also, Mitchener did not speak out at the March 3, 2005 sentencing when the Court Ordered that he be incarcerated for twenty years and ask why he was not being placed on probation like his attorney had promised him ...
>
> (emphasis added) (C.P.86-87)

The court went on to list detailed reasons, supported by the record, for its finding that the state's witnesses were more credible that those put on by the movant, and that, therefore, the movant had failed to sustain his burden of proof. First, the court considered the testimony of Betsy Chandler along with letters she had written to the court. In a letter dated November 16, 2004, Mrs. Chandler stated in part, "I strongly believe that prison will not benefit Ronnie" and that she prayed the court would make the right decision in this matter. The court concluded, "There is no indication in this letter that Mitchener was promised probation by Brown or anyone." The court went on to observe that Mrs. Chandler had failed to "produce any documentation to establish the time frame of her three-way call with Jack Brown and Ronnie Mitchener." Considered along with her letter, her testimony at the evidentiary hearing did not appear to be credible to the court. (T.88-89)

Regarding the testimony of Elizabeth Stephens, the court made these findings:

> The Court does not find Ms. Stephens' recollection of a phone call with Brown and Mitchener to be credible. Ms. Stephens did not produce any corroboration of said call, and her letter filed with this Court on March 3, 2005, does not indicate that Mitchener was promised probation or that she thought he was going to receive probation. The Court believes that if Ms. Stephens had been told that Mitchener was going to receive probation, she would certainly have sent another letter to this Court asking about the confusion or asking why Mitchener was not given the probation he was promised.
>
> (C.P.89)

The court analyzed Mrs. Mitchener's testimony as follows, in pertinent part:

> She likewise submitted a sworn affidavit in Mitchener's post-conviction file. ... She indicated in her affidavit that Mitchener had trouble contacting Brown, and it fell to her to exchange information between Brown and Mitchener. This statement is certainly impeached by the phone records and visitation records that show Brown and his employee, Willis, not only visited Mitchener in jail; Brown also took a large number of collect calls from Mitchener while he was in jail. Mrs. Mitchener did not provide any phone record corroboration of her three-way calls with Brown and Mitchener. This

> Court did not credit Mrs. Mitchener's testimony regarding an alleged three-way call between Mitchener and Brown to be accurate.
>
> (C.P.89-90)

Considering the testimony of Carolyn Bentley, the court likewise observed that "Mrs. Bentley's office did not submit any documents to corroborate or demonstrate when the alleged three-way call between Brown and Mitchener occurred." Moreover, "There was no indication at the November 13, 2007 hearing that Bentley knew Brown or for that matter that she was familiar with his voice so that she could say with certainly that she knew that Mitchener was in fact talking to Brown." (C.P.90)

Proceeding to analyze the evidence presented by the respondent, the court found the following:

> The Court has reviewed Jack Brown's testimony and the documentary evidence before it in Mitchener's criminal file. The Court is satisfied that in explaining the potential outcomes available to Mitchener, Brown would have told him that he could get anything from time served to probation to prison and a fine. Additionally, this Court told Mitchener that he could receive up to thirty years in prison and be fined $10,000. This Court credits Mr. Brown's denial that he promised Mitchener probation and that Adam Boterf would not be called to testify at his sentencing hearing. The Court also notes that certainly Mitchener would have questioned the necessity of a sentencing hearing after his November 12, 2004 plea if he had already been promised probation. Likewise, Mrs. Chandler with her considerable experience with the MDCO surely would have raised concerns about the need for a sentencing hearing when probation had been allegedly promised. This Court notes that Mr. Brown has been a lawyer in this State for many years and is in good standing. This Court also notes that Mr. Brown will gladly try a case if need be. Mr. Brown does not have the reputation of allegedly lying to or misleading his criminal defendants into pleading guilty. In fact, this is the first such allegation against Mr. Brown that this Court is personally aware of.
>
> (C.P.90-91)

The court thus concluded "that Mr. Brown did not engage in Constitutionally ineffective assistance of counsel" and ordered the motion to be denied. (C.P.91) Attempting to overturn this ruling, the appellant faces a heavy burden, summarized below:

> On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard. *Reynolds v. State*, 521 So.2d 914, 918 (Miss.1988). A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. [citations omitted] "This Court must examine the entire record and accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact." [citations omitted] And, finally, the trial judge, sitting in a bench trial as the trier of fact, has sole authority for determining credibility of the witnesses. Mullins v. Ratcliff, 515 So.2d at 1189.
>
> *Johns v. State*, 926 So.2d 188, 194 (Miss.2006).

The state submits the appellant cannot shoulder this burden in light of the record presented here. Not only was the court's ruling not "clearly erroneous," but it is overwhelmingly supported by the record. As shown by the excerpts from the court's order set out above, the court performed a thorough analysis of the testimony of the witnesses, whose credibility was for the court alone to determine. The issue had devolved into a relatively simple one: whether the plea had been induced by the erroneous advice of counsel that Mr. Mitchener would receive time served and probation. The court found that it was not, i.e., that Mr. Brown had not misrepresented the sentence, and athe court's findings and conclusions comport with the record. No basis exists for disturbing the court's judgment at this juncture.

The appellant goes on to challenge Mr. Brown's failure to assure that a transcript was made of aggravating and mitigating testimony at the sentencing hearing. This argument was addressed and

rejected in *Mitchener*, 964 So.2d at 1195. It is therefore without merit and is *res judicata* at this point.

For these reasons, the state submits the judgment entered below should be affirmed.

CONCLUSION

The state respectfully submits the arguments presented by the appellant are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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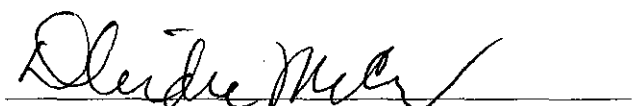
This the 5th day of May, 2009.



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