

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**RAYMOND BOWLING, SR.**

**APPELLANT**

**VS.**

**NO. 2008-CP-0135**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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## **STATEMENT OF THE ISSUES**

- I. Bowling's due process rights were not violated by the application of Mississippi Code § 47-7-3 requiring him to serve his sentence day for day and the trial court correctly denied Bowling's Petition for Post-Conviction Collateral Relief.
- II. The record reflects that Bowling's plea was voluntarily, knowingly and intelligently made and the Trial Court correctly denied his Petition for Post-Conviction Relief.
- III. Bowling's sentence is within the statutory limits of Mississippi Code Annotated § 97-5-23 and does not violate his due process rights or constitute cruel and unusual punishment.
- IV. Bowling's constitutional rights were not violated where the indictment did not cite to Mississippi Code § 47-7-3 which governs parole of prisoners.
- V. Bowling received effective assistance of counsel and cannot show a violation of either prong of *Strickland*.

## **SUMMARY OF THE CASE**

On or about August 2, 2005, Raymond Darrell Bowling, Sr. was indicted for fondling by the Grand Jury of Itawamba County. (C.P. 24) On January 26, 2006, Bowling withdrew his not guilty plea and entered a plea of guilty. The Trial Court accepted the plea and found that the plea was voluntarily and understandingly entered by Bowling. Bowling was sentenced to fifteen (15) years in the custody of the Mississippi Department of Corrections with eight (8) years of the sentence suspended and five (5) years of post-release supervision pursuant to Mississippi Code § 47-7-34. (C.P. 25-26)

On or about September 21, 2006, Bowling filed a Petition for Post-Conviction Collateral Relief and Motion to Vacate, Set Aside or Correct Sentence. (CP 55) On December 17, 2007 the State responded to Bowling's Petition. (CP 80) On January 3, 2008, the Trial Court entered an Order denying Bowling's Petition for Post-Conviction Collateral Relief. (C.P. 85) The instant

appeal ensued.

### **SUMMARY OF THE ARGUMENT**

Bowling's due process rights were not violated by the application of Mississippi Code § 47-7-3 requiring him to serve his sentence day for day and the trial court correctly denied Bowling's Petition for Post-Conviction Collateral Relief. The record reflects that Bowling's plea was voluntarily, knowingly and intelligently made and the Trial Court correctly denied his Petition for Post-Conviction Relief. Bowling was clearly informed of the maximum and minimum sentence and the recommendation of the prosecutor for a sentence of 7 years to be served day-for-day with five years post-release supervision and a \$1,000.00 fine. Bowling testified under oath that he understood the minimum and maximum sentences and that he understood and expected the prosecutor's recommendation. Bowling's sentence is within the statutory limits of Mississippi Code Annotated § 97-5-23 and does not violate his due process rights or constitute cruel and unusual punishment. Bowling's constitutional rights were not violated where the indictment did not cite to Mississippi Code § 47-7-3 which governs parole of prisoners. Bowling received effective assistance of counsel and cannot show a violation of either prong of *Strickland*. Any deficiency on the part of his counsel was cured by the trial court's thorough questioning of Bowling at the plea hearing regarding his sentence.

### **ARGUMENT**

**I. Bowling's due process rights were not violated by the application of Mississippi Code § 47-7-3 requiring him to serve his sentence day for day and the trial court correctly denied Bowling's Petition for Post-Conviction Collateral Relief.**

If a defendant is advised regarding the nature of the charge and the consequences of the

plea, it is considered “voluntary and intelligent.” *Alexander v. State*, 605 So.2d 1180, 1172 (Miss. 1992). Bowling alleges that his plea was involuntary due to his attorney’s alleged failure to inform him that he would be required to serve his time day for day pursuant to Mississippi Code § 47-7-3 which requires that any person who shall have been convicted of a sex crime shall not be released on parole except for a person under the age of nineteen (19) who has been convicted under Mississippi Code § 97-3-67.

At the plea hearing, the following colloquy took place:

The Court: Mr. Daniels, would you advise Mr. Bowling of the minimums and maximums that apply.

Mr. Daniels: Yes, Your Honor. The minimum sentence is two years and \$1,000 fine. The maximum sentence is 15 years and a \$5,000 fine.

**Examination by the Court**

Q. Mr. Bowling, do you understand the minimum sentence and fine prescribed by state law?

A. Yes, ma’am.

The Court: Does the State have a recommendation in Mr. Bowling’s Case?

Mr. Daniels: Yes, Your Honor. The State recommends a sentence of 15 years, that eight of those years be suspended, leaving the defendant seven years to serve day for day. We request five years supervised probation or post-release supervision, rather, at the

conclusion of that seven-year sentence.

We ask for a \$1,000 fine and costs of court; that the defendant, of course, be required to register as a sex offender and be notified in writing at this hearing of those requirements.

**Examination by the Court**

Q. Mr. Bowling, do you understand the State's recommendation in your case?

A. Yes, Ma'am.

Q. Is that the recommendation that you had talked to Ms. Benson about that you understood was going to be made today?

A. Yes, Ma'am.

Q. Do you understand that this Court is not bound to accept that recommendation?

A. Yes, Ma'am.

(C.P. 32)

In the above colloquy, Bowling is clearly informed of the recommended sentence, including the requirement that seven (7) years will be served day to day. Bowling affirms that he understands the sentence, that this is what his attorney told him, and that it is what he was expecting. (C.P.32) In his brief, Bowling asserts that:

The Appellant would state that the Section § 47-7-3 in which the Court stated was in the accordance with the day for day sentence was not in his indictment and before sentencing was never brought up and is not to be found in his transcript, making his sentence illegal, involuntary [sic], not knowingly made due to the

fact that this Section § 47-7-3, was never stated or discussed at anytime before his plead [sic] was made or after it was excepted by the Court.

(Appellant's Brief, page 3)

Bowling argues that in a case where a defendant is not fairly appraised of it's consequences, a guilty plea can be challenged under the Due Process Clause. *Marby v. Johnson*, 467 U.S. 637, 49 L.Ed.2d 108, -- S.Ct. 2253 (1973). However, transcript of the plea hearing shows clearly that Bowling was appraised on the consequences of his guilty plea, a seven year sentence to serve, day for day, followed by five (5) years of post-release supervision and a fine of \$1,000. It is without consequence that the citation of the statute was not given in the hearing where Bowling was clearly advised of the effect of his guilty plea and affirmed that he understood and was expecting that very sentence. Where the record of the plea hearing belies the defendant's claims, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). Solemn declarations ins open court carry a strong presumption of verity. *Baker v. State*, 358 So.2d 401, 403 (Miss. 1978).

Further, in *Richardson v. State*, 769 So.2d 230 (Miss.Ct.App. 2000) the Mississippi Court of Appeals opined that Richardson's attorney could not be found deficient in not objecting to the indictment, since the indictment is not required to have the no parole provision of the sentence. An attorney cannot be expected to object to a valid indictment. Bowling's constitutional rights were not violated absence of a citation to Mississippi Code § 47-7-3 in the indictment.

This issue is without merit as Bowling was fully informed of the consequences of his plea and affirmed his understanding of those consequences under oath in open court. The Trial Court correctly denied Bowling's Petition for Post-Conviction Relief and the decision of the Trial



Court should be affirmed.

**II. The record reflects that Bowling's plea was voluntarily, knowingly and intelligently made and the Trial Court correctly denied his Petition for Post-Conviction Relief.**

Bowling argues that his guilty plea was not entered into voluntarily. A plea is considered "voluntary and intelligent" if the defendant is advised of the nature of the charge against him, the consequences of the plea, and the maximum and minimum penalties to which he may be sentenced. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992). Furthermore, declarations made under oath and in court during sentencing carry a strong presumption of verity. *Gable v. State*, 748 So.2d 703, 706 (Miss.1999). Bowling was advised of the minimum and maximum sentence for this felony conviction and pleaded guilty to a felony charge. He was advised of the recommendation of the State, which included the requirement that Bowling serve seven (7) years day for day. Bowling stated in open court that he knew the minimum and maximum sentence for the felony, that he understood the sentence that was being recommended and that it was what he expected. He further testified that he was guilty of the felony of fondling. The Trial Court correctly denied Bowling's Motion for Post-Conviction Relief. This issue is without merit.

**III. Bowling's sentence is within the statutory limits of Mississippi Code Annotated § 97-5-23 and does not violate his due process rights or constitute cruel and unusual punishment.**

Bowling argues that he has suffered violations of Constitutional Amendments Fourteen, Five and Eight as his sentence is illegal as a matter of law. He alleges that this is a due process violation and cruel and unusual punishment. Bowling was sentenced pursuant to § 97-5-23 for the crime of fondling of a child under the age of sixteen (16), which provides a sentence of not less than two (2) years and not more than fifteen (15) years. Bowling was informed of the

statutory minimum and maximum in open court and he affirmed that he understood them.

Mississippi Code § 47-7-3 addresses the conditions for eligibility of parole of all prisoners and specifically states that “any person who shall have been convicted of a sex crime shall not be released on parole except for a person under the age of nineteen (19) who has been convicted under 97-3-67.” Bowling was also informed during the plea hearing that his sentence of seven (7) years would be served day for day. He affirmed under oath that he understood the recommended sentence.

The Mississippi Supreme Court has held that if a sentence is “grossly disproportionate” to the crime committed, it is “subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment.” *Tate v. State*, 912 So.2d 919, (Miss.2005) (citation omitted). Generally, if a sentence does not exceed the maximum term allowed by statute, we will not disturb it upon appeal. *Stromas v. State*, 618 So.2d 116, 122 (Miss.1993). Bowling’s sentence of seven (7) years to serve is clearly less than the maximum of fifteen (15) allowed by statute.

The Mississippi Supreme Court has previously address the constitutionality of Mississippi Code § 47-7-3(1)(d), which provides that “[n]o person shall be eligible for parole who shall . . . be convicted of robbery or attempted robbery through the display of a firearm until he shall have served (10) years if sentenced to a term or terms of more than ten years. . . .” In *Logan v. State*, 661 So.2d 1137 (Miss. 1995), the appellant argued that the statute violated the Eight Amendment because no other crime of violence imposes a minimum ten (10) year requirement. In *Reed v. State*, 506 So.2d 277 (Miss. 1987), the Supreme Court held that a life sentence imposed for armed robbery was not so disproportionate as to constitute cruel and

unusual punishment. The Court in *Logan v. State*, reasoned that if life was not disproportionate, then twenty-three years was not disproportional under *Reed*, then logically, ten years cannot be considered disproportionate so as to constitute cruel and unusual punishment. Seven years without parole is not disproportional for the crime of fondling a child. This issue is without merit and the Trial Court correctly denied Bowling's Petition for Post-Conviction Relief.

**IV. Bowling's constitutional rights were not violated where the indictment did not cite to Mississippi Code § 47-7-3 which governs parole of prisoners.**

Bowling argues that he was not "indicted under" § 47-7-3 which addresses conditions for eligibility of parole. However, as argued above, Bowling was advised of the maximum and minimum sentences and informed of the recommendation of the prosecution which was seven (7) years to serve day for day, with five years post-release supervision and a \$1,000 fine. Bowling affirmed at the plea hearing that he understood the maximum and minimum and that the prosecutor's recommendation was the sentence he was expecting. Further, in *Richardson v. State*, 769 So.2d 230 (Miss.Ct.App. 2000) the Mississippi Court of Appeals opined that Richardson's attorney could not be found deficient in not objecting to the indictment, since the indictment is not required to have the no parole provision of the sentence. An attorney cannot be expected to object to a valid indictment. Bowling's constitutional rights were not violated absence of a citation to Mississippi Code § 47-7-3 in the indictment.

**V. Bowling received effective assistance of counsel and cannot show a violation of either prong of *Strickland*.**

Claims for ineffective assistance of counsel are reviewed under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984), and adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So.2d 468, 476 (Miss.1984). *Stevenson v. State*, 798 So.2d 599, 601-02 (Miss.Ct.App.2001). The “test is applied with deference to counsel's performance, considering the totality of the circumstances .” *Id.* at 602. In order to prevail, petitioner must prove that: (1) counsel's performance was deficient, and (2) that deficiency caused prejudice to the petitioner. *Booker v. State*, 954 So.2d 448, 450 (Miss.Ct.App.2006). The term “prejudice” is defined as meaning “that the proceedings would have resulted in a different outcome but for the deficiency of counsel.” *Booker v. State*, 954 So.2d 448, 450-51 (Miss.Ct.App.2006).

Bowling alleges that his attorney did not attorney did not inform him of the day for day sentence and that there was a conflict of interest due to his attorney’s prior representation of Bowling’s wife. Bowling asserted in his original Petition that his attorney had a conflict of interest in his case, having represented Bowling’s ex-wife in their divorce proceedings. The victim in Bowling’s fondling case is the daughter of Bowling’s ex-wife. (C.P. 37) The trial court requested a response to Bowling’s Petition from the prosecution. The trial court held that there was not actual conflict of interest demonstrated by Bowling, merely the bare bones allegation that his Counsel had previously represented his ex-wife in an irreconcilable differences divorce from him. In *Lawrence v. State*, the Court of Appeals held that the Petitioner must show that his attorney was face with an actual conflict of interest adversely affecting his attorney’s performance. In *Lawrence*, as in the present case, there was no actual conflict of interest that adversely affected his attorney’s performance.

It is well settled that “there is a strong but rebuttable presumption that an attorney's performance falls within a wide range of reasonable professional assistance and that the decisions

made by trial counsel are strategic.” Stevenson, 798 So.2d at 602. The defendant may overcome this presumption if he is able to demonstrate “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”

*Plummer v. State*, 966 So.2d 186, 190 (Miss.Ct.App.2007) (quoting *Strickland*, 466 U.S. at 694).

However, “[w]ith respect to the overall performance of the attorney, counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim.” *Jackson v. State*, 815 So.2d 1196, 1200 (Miss.2002) (internal quotation omitted).

Bowling argues that his attorney was ineffective in failing to challenge the indictment since it did not cite to Mississippi Code § 47-7-3 which governs eligibility for parole. However, as noted earlier, the Mississippi Court of Appeals has held that there is no requirement that an indictment include the parole provision of the sentence and an attorney cannot be expected to object to a valid indictment. *Richardson* at 234-5.

The record does not reflect any deficient representation by Bowling's attorney. Further, even if Bowling's attorney had improperly advised him as to the day-for-day aspect of his sentence, there was no prejudice to Bowling. “Where erroneous legal advice on sentencing has been given to a defendant by his counsel and/or a defendant relied on assertions or predictions made by his counsel, no error attaches if the record affirmatively shows the defendant was correctly advised of his peril by the sentencing court. *Roland v. State*, 666 So.2d 747, 749-50 (Miss. 1995). The Trial Judge thoroughly questioned Bowling as to his understanding of the minimum and maximum sentences and the recommendation of the prosecutor. Bowling affirmed that he understood and was expecting the sentence he received. Further, Bowling testified under

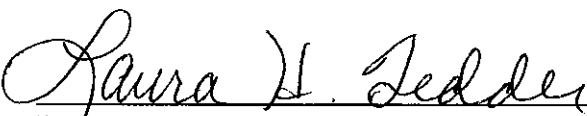
oath that he was satisfied with the representation of his attorney. Where the record of the plea hearing belies the defendant's claims, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). Solemn declarations ins open court carry a strong presumption of verity. *Baker v. State*, 358 So.2d 401, 403 (Miss. 1978).

**CONCLUSION**

Bowling's assignments of error are without merit and the Trial Court's denial of Bowling's Petition for Post-Conviction Collateral Relief should be affirmed.

**Respectfully Submitted,**

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## CERTIFICATE OF SERVICE

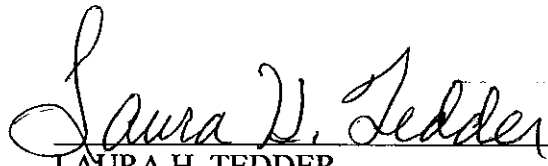
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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