IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENTRIAL BELK — APPELLANT

VS. — NO. 2008-CP-0300-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2008-CP-0300-COA**

STATE OF MISSISSIPPI **APPELLEE**

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PROCEDURAL HISTORY:

On July 11, 2006, Kentrial Belk, "Belk" pled guilty to sale of cocaine before the Circuit Court of Clay County, the Honorable Lee J. Howard presiding. C.P. 63. After advising and questioning Belk and his counsel, Mr. Thad Buck, the trial court found that his guilty plea was voluntarily and intelligently entered. C. P. 69-70. Belk was sentenced to serve a ten year sentence in the custody of the Mississippi Department of Corrections. C.P. 14.

On December 28, 2007, Belk filed for "Post Conviction Relief," complaining of an alleged defective indictment. C.P. 28-60. The trial court denied relief, finding no merit to any of Belk's various related claim. C.P. 71. Belk filed notice of appeal to the Mississippi Supreme Court. C.P. 72.

ISSUES ON APPEAL

I.
WAS BELK PROPERLY INDICTED?

II.
WAS THERE ANY MERIT TO BELK'S OTHER RELATED CLAIMS FOR RELIEF?

STATEMENT OF FACTS

On October 5, 2005 Belk was indicted for two sales of cocaine to Debra Cunningham on or about March 24, 2007 in Clay County by a Clay County Grand jury. C.P. 62. The phrase " to Debra Cunningham" was written between the lines of the otherwise typed indictment. C.P. 62.

On July 11, 2006, Belk pled guilty to sale of count 1 cocaine before the Circuit Court of Clay County, the Honorable Lee J. Howard presiding. C.P. 63.

Belk with the benefit of his guilty plea counsel, Mr. Thad Buck, had filled out and filed a "Petition To Enter A Guilty Plea." After being sworn in, Belk testified that his statements in that petition were true and correct. C.P. 64-65.

The trial court advised Belk of the thirty year maximum sentence for sale of cocaine. C.P.68. Belk admitted that he understood that he was giving up his constitutional rights by pleading guilty. This included his right to a trial with cross examination and a right against self incrimination. C.P. 65-66. He admitted that he had not been coerced or promised anything in exchange for his guilty plea. C.P. 69

Mr. Buck testified that he had advised Belk as stated in his petition to enter a guilty plea. Buck also testified that he had "explained to him the elements of crime to which he is pleading guilty." R. 69. Belk admitted that he was guilty of having sold cocaine "to an individual by the name of Debra Cunningham" on March 24, 2005 in Clay County. C.P. 69.

After advising and questioning Belk and his counsel, Mr. Thad Buck, the trial court found that his guilty plea was voluntarily and intelligently entered. C.P. 69-70.. Belk was sentenced to serve a ten year sentence in the custody of the Mississippi Department of Corrections. C.P. 29.

On December 28, 2007, Belk filed a "Motion For Post Conviction Collateral Relief", complaining of an alleged defective indictment. C.P. 28-60. The trial court denied relief, finding no

merit to Belk's claims for relief on any of his indictment related complaints. C.P. 71. Belk filed notice of appeal to the Mississippi Supreme Court. C.P. 72.

SUMMARY OF ARGUMENT

1. The record reflects that Belk waived all non-jurisdiction issues when he voluntarily and intelligently pled guilty to sale of cocaine. **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990). In addition, the record , which includes both the indictment against Belk, and the transcript of his guilty plea hearing, indicates that Belk was properly indicted by a Clay County Grand jury. C. P. 62. The appellee would submit that it indicated that Belk clearly knew what he was charged with, as well as the nature of the offense for which he was pleading guilty. He admitted under oath that he was guilty of selling cocaine to Debra Cunningham on March 24, 2005, as stated in the indictment. C.P. 69.

The indictment advised him that on March 24, 2005 he had allegedly sold cocaine in Clay County "to Ms. Debra Cunningham." C.P. 62. The fact that the name of the buyer was written in between the lines of the statement of the facts of the offense does not invalidate an otherwise valid indictment.

The trial court correctly denied relief stating that the phrase "to Debra Cunningham" was completed "prior" to the indictment being signed by the jury foreman. C.P. 71. There is a presumption that the indictment was proper, and that the trial court's ruling was correct. **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987).

There is no evidence in the record to the contrary. A ten year sentence within the range provided by M.C.A. § 41-29-139 statute for sale of cocaine can not be said to be an illegal sentence. C.P. 29. **Barnwell v. State**, 567 So. 2d 215, 221-222 (Miss. 1990).

2. In Belk's Motion he made other related claims. C.P. 28-60. The record reflects that Belk was given effective assistance of counsel by Mr. Thad Buck.. As a result of Buck's efforts on Belk's behalf, Belk is serving a ten year rather than two thirty year sentence without enhanced sentencing.

Belk admitted to having a prior possession of cocaine conviction. C.P. 29; 67-68. This qualified him for an additional enhanced drug related sentence.

In addition, there were no affidavits filed by any witnesses in support of Belk's charges against his guilty plea counsel, Mr. Buck. C.P. 28-60. Belk's statements under oath at his guilty plea hearing are sufficient for showing that he is not entitled to relief either as to any defective indictment or to any ineffective assistance of counsel. C.P. 63-70.

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND THE RECORD REFLECTS THAT BELK WAS PROPERLY INDICTED.

Belk believes that the trial court erred when he found his plea voluntarily and intelligently entered. He erred because Belk believes that his indictment for sale of cocaine was improper. It was improper because he thinks the name "Debra Cunningham" was added "after" the original indictment had been issued. Belk believes the name of the buyer was an essential element of the sale of cocaine charge against him. Therefore, he believes his indictment and his guilty plea was defective. Appellant's brief unnumbered, and Motion, page 28-60.

The record indicates that the trial court after advising and questioning Belk and his counsel, Mr. Thad Buck, about his understanding of the sale of cocaine charge and the possible consequences of his guilty plea, found that his plea was voluntarily and intelligently entered. C. P. 69-70. The record indicates that at the guilty plea hearing Belk was twenty eight years old, and had an eleventh grade education. R. 67.

In **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990), the Court stated that a guilty plea admits "all elements of a guilty charge" and operates as a waiver of all non-jurisdictional defects contained in an indictment.

> Brooks, in the wake of his guilty pleas, assails allegedly defective indictments. A valid guilty plea, however, admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.

In addition to being waived, the record reflects that the trial court found no merit to Belk's post conviction claim of a defective indictment. C.P. 71. He found that the name of the buyer was added to the indictment "prior" to the indictment being signed by the grand jury foreman. C.P. 71.

In addition, even without the name of the cocaine buyer added the indictment would have still been sufficient under Rule 7.06 of the Uniform Circuit and County Court Rules. Under Rule 7.06 of the Uniform Circuit and County Court Rules, an indictment does not have to include the name of a buyer. It only has to place a defendant on notice as to the approximate time and the place where the offense was allegedly committed.

The trial court's Order denying relief stated as follows:

> The petitioner has filed a motion alleging that his indictment was faulty because the name of the person to whom he sold the controlled substance was added to the indictment after the indictment was originally printed. **The Court finds that this issue is without merit since the addition o f the name of the buyer to the indictment happened before the indictment was signed by the grand jury foreman. Further the indictment would have been equally valid without the name of the buyer since the indictment was only required to contain the date, on or about, the date of the offense was alleged to have been committed.** C.P. 71. (Emphasis by Appellee).

Finally, the record from the guilty plea hearing clearly indicates that Belk stated under oath that he understood the Constitutional rights he was waiving by pleading guilty. Mr. Buck his guilty plea counsel stated that he had gone over the elements of the sale charge with him, and that he believed Belk understood them. C.P. 64. Belk admitted knowing the thirty year maximum sentence for sale of cocaine. C.P. 68. Belk also stated that he was guilty of having sold cocaine to Debra Cunningham on March 24, 2005. C.P. 69.

Consequently, it would appear to the Appellee that Belk had no basis for claiming any surprise in knowing that Cunningham was the buyer on March 24, 2005 when he sold her cocaine. The name of the buyer on the date of the sale as stated in the indictment was not an element of the crime that was added to the indictment without the benefit of grand jury action, as repeatedly claimed by Belk in his motions, and his appellant's brief. URCCC, rule 7.09.

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is "a

presumption" that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, 'There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court.' **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

The Appellee would submit that this issue was not only waived, the record from the guilty plea hearing indicates that it was also lacking in merit.

PROPOSITION II

THERE WAS NO MERIT TO BELK'S OTHER CLAIMS.

In Belk's appellant brief and in his motion, he also alleged other errors such as ineffective assistance of counsel, illegal sentence, and the failure of the trial court to grant him a hearing on his motion about his alleged defective indictment. Appellant's brief unnumbered, and Motion, page 28-60 .

The record and case law cited under proposition I indicates that defects in the indictment were waived when Belk plead guilty. **Brooks, supra**. In addition, he admitted that he was familiar with the elements of the sale charge and that he was in fact guilty of having sold cocaine to Debra Cunningham on March 24, 2005 in Clay County. C.P. 69.

As a result of Mr. Buck's efforts on his behalf, Belk is serving a single ten rather than two thirty year sentences. C.P. 29; 68. In addition, the record reflects that although Belk admitted to having a prior possession of cocaine charge, he was not charged with or given enhanced sentencing. C.P. 67-68.

The record indicates that there were no affidavits filed by any witnesses in support of Belk's claims against his guilty plea counsel or the trial court. There was therefore no claim to have facts or witnesses available in support of his claims. C.P. 28-60. See M.C. A. § 99-39-9(1)(e).

In **Swington v. State** 742 So.2d 1106, *1117 (Miss.1999), the Supreme Court pointed out that there is a presumption that guilty plea counsel's decisions and actions are strategic in nature not negligent.

> ¶42. Once again, there is a presumption that counsel's decisions are strategic in nature, rather than negligent. See **Handley v. State**, 574 So.2d 671, 684 (Miss.1990); **Leatherwood v. State**, 473 So.2d 964, 968-69 (Miss.1985).

In **Lindsay v. State**, 720 So. 2d 182, 184 (Miss. 1998), the Supreme Court stated that where

a petitioner has "only his own affidavit" against his counsel, his ineffective assistance claim will fail.

> The only affidavits in the record that suggest appellant's counsel was deficient are those filed by Lindsay. This is not enough to prove ineffective assistance. In a case involving Post Conviction Relief, this court has held "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit. **Vielee v. State**, 653 So. 2d 920. 922 (Miss 1995). Se also **Brooks v. State**, 573 So. 2d 1350 (Miss 1990)...

For Belk 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). Belk 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 Belk . **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Belk must show that there is a reasonable probability that but for the alleged errors of his counsel, his guilty plea and/or sentence 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 second prong of the **Strickland v. Washington**,, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his counsel, Mr. Buck, the result of Belk's guilty plea would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Mr. Thad Buck erred in advising, and assisting Belk in filing out a guilty plea petition and pleading guilty under oath before the Circuit Court of Clay County. The record from that guilty plea hearing indicates that Belk has failed to met his burden of proof.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052. The Court held "a deficient performance", should it be established with record evidence, would have to be grave enough to "undermine confidence" in the fairness and reliability of the entire guilty plea proceeding.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

In **Gable v. State**, 748 So. 2d 703, 706 (Miss. 1999) the court in affirming the trial court's dismissal of Gable's contentions without a hearing quoted **Mowdy v. State**, 638 So. 2d 738, 743 (Miss 1994):

> Great weight is given to statements made under oath and in open court during sentencing. **Young** , 731 So. 2d 738, 743 (Miss. 1994). The transcript of Gable's guilty plea hearing belies his current contentions. Furthermore, Gable produced no affidavits other than his own contradicting his earlier sworn statements. Because the only support offered by Gable is his own affidavit which is contradicted by unimpeachable documents in the record, we conclude that an evidentiary hearing was not required. Accordingly, we affirm the trial court's judgment denying Gable post conviction relief.

The Appellee would submit that the record indicates that Belk waived any complaints about his indictment when he voluntarily and intelligently pled guilty. The guilty plea transcript contained in the record, clearly indicates that Belk stated under oath that he understood the basis for the indictment, the elements of the sale of cocaine charge, and the nature of the crime, as stated in the indictment, to which he was voluntarily and intelligently pleading guilty. C.P. 63-70.

In addition, the record from his guilty plea hearing indicates that his other claims for relief are lacking in merit. There was a lack of evidence of any deficient performance on the part of Mr. Thad Buck, and a lack of evidence that any of his actions or inactions undermined confidence in the reliability and fairness of Belk's guilty plea hearing. A ten year sentence within the thirty year range

provided by the sale of cocaine statute can not be said to be an illegal sentence. **Barnwell v. State**, 567 So. 2d 215, 221-222 (Miss. 1990).

The Appellee would submit that, based upon the record cited, these other related issues are also not meritorious. C.P. 63-70.

CONCLUSION

The trial court's Order denying relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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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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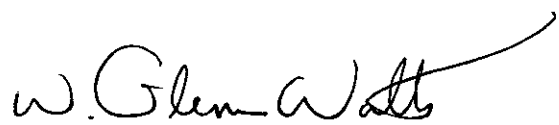
This the 8th day of September, 2008.



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