IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID WAYNE GADDY — APPELLANT

VS. — NO. 2008-CP-0343-COA

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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# BRIEF FOR THE APPELLEE

## STATEMENT OF THE CASE

On June 7, 2004 David Wayne Gaddy entered pleas of guilty to Unlawful Touching and Voyeurism in the Circuit Court of Harrison County, Second Judicial District.. He was subsequently sentenced to serve fifteen (15) years for the unlawful touching, and five (5) years for the Voyeurism conviction. The sentences were to be run consecutively for a total of twenty (20) years. On June 16, 2004, Gaddy filed a Motion to Reconsider Sentence which was granted, changing the sentences to run concurrently. On March 13, 2007, Gaddy filed a Motion for Post Conviction Relief that was denied. He appealed that denial to which the State now responds.

## STATEMENT OF FACTS

David Wayne Gaddy was convicted of voyeurism as well as touching for lustful purposes. On the voyeurism conviction, he was employed at the clothing store, Overstocked Fashions, when he was caught looking into the women's dressing room. T.190. On the conviction for touching for lustful purposes, Gaddy's eleven year old daughter accused him of touching her vagina. T.189. He denied none of these charges and plead guilty to both.

## SUMMARY OF THE ARGUMENT

The Court should affirm the decision of the Circuit Court and deny David Wayne Gaddy's Motion for Post Conviction Relief. Gaddy presents a number of errors, none of which have merit. All of the errors which Gaddy raises are unfounded, thus there is no cumulative error.

Additionally, a large number of Gaddy's claims arise from what he perceived as bias on the part of Judge Simpson as a result of the Judge having two daughters. This is not a valid ground for recusal. As a result, Gaddy has not proven his claims for recusal and ineffective assistance for failing to object to the non-recusal. Gaddy presents no evidence that would support a claim of ineffective assistance, nor does he demonstrate the need for a hearing on the matter.

Gaddy's guilty plea was supported by sufficient evidence and there was no error in accepting it. Taking the pleadings, record, indictment, and entirety of the record into consideration, there was easily enough evidence to support a plea. There is no evidence that the plea was involuntary as Gaddy stated in open court that he understood the charges and that he was guilty. Though, he claims to have mental problems that would invalidate his plea, he made no assertions nor did the Court determine he was unable to plea guilty.

Upon the valid guilty plea, the Judge's sentence was within the maximum

allowed by statute and was therefore proper.

## ISSUES PRESENTED

I. THERE WERE NO INDIVIDUAL ERRORS NOR CUMULATIVE ERROR TO DEPRIVE GADDY OF A FAIR AND IMPARTIAL HEARING

II. THERE IS NO ISSUE OF BIAS AS A RESULT OF THE JUDGE RULING AT THE APPELLANT'S PLEA HEARING AND ON HIS MOTION FOR POST-CONVICTION RELIEF

III. THE JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF

IV,V IT WAS PROPER FOR THE JUDGE TO ACCEPT APPELLANT'S GUILTY PLEA WITHOUT A PSYCHIATRIC EVALUATION

VI. THE IMPOSITION OF THE MAXIMUM SENTENCE WAS PROPER

VII. THERE IS A FACTUAL BASIS TO SUPPORT GADDY'S GUILTY PLEA

VIII. THE DEFENDANT'S GUILTY PLEA WAS SUFFICIENT EVIDENCE TO CONVICT HIM

IX. THE DEFENDANT'S GUILTY PLEA WAS VOLUNTARY

X. THE APPELLANT'S GUILTY PLEA WAIVED HIS RIGHT TO A TRIAL BY JURY

XI. GADDY IS NOT ENTITLED TO AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL

XII. GADDY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

XIII. THE JUDGE'S SENTENCE WAS PROPER

## ARGUMENT

The standard of review for a dismissal of a post-conviction motion is that the findings of the trial court must be clearly erogenous. However, questions of law will be reviewed de novo. *Shumpert v. State*, 983 So.2d 1074 (Miss. Ct. App. 2008).

### I. THERE WERE NO INDIVIDUAL ERRORS NOR CUMULATIVE ERROR TO DEPRIVE GADDY OF A FAIR AND IMPARTIAL HEARING

"The 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." *Harris v. State*, 970 So.2d 151, 157 (Miss.2007). However, this requires a finding of some error. Most of David Wayne Gaddy's assertion of error center around Judge Simpson's alleged bias and partiality. This, along with the other issues, should not be found to be in error. The State contends that there is no single reversible error, nor are there so many as to deprive Gaddy of a fair and impartial plea hearing.

### II. THERE IS NO ISSUE OF BIAS AS A RESULT OF THE JUDGE RULING AT THE APPELLANT'S PLEA HEARING AND ON HIS MOTION FOR POST-CONVICTION RELIEF

If a reasonable person knowing all of the circumstances surrounding the issue in question would doubt the judge's impartiality, then the judge must recuse himself.

However, there is a presumption that a judge is impartial and unbiased in every case before him. The appellant must prove beyond a reasonable doubt that the judge was prejudiced or partial against him. *Brooks v. State*, 953 So.2d 291, 297 (Miss. Ct. App.. 2007). Gaddy presents no evidence that the judge was biased in ruling on his guilty plea and on his motion for post-conviction relief.

The question here is the same as in Brooks. As in this case, in Brooks the judge ruled in both the defendant's plea hearing and in his post-conviction relief proceedings. In Brooks the court found that the judge presented a well reasoned opinion on the defendant's motion therefore there was no reason to doubt the judge's impartiality. The situation here is exactly the same, and there is no evidence presented by Gaddy that demonstrates any bias of the judge. Therefore Gaddy has clearly not proven beyond a reasonable doubt that the judge was prejudiced.

III. THE JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF

When a judge is not disqualified under the constitutional or statutory provisions, the decision is left up to each individual judge and is subject to review only in a case of manifest abuse of discretion. *Taylor v. State*, 789 So.2d 787, 797 (Miss.2001). Again, the appellant must prove beyond a reasonable doubt that the judge was not impartial.

In the case of *Green v. State*, 631 So.2d 167 Miss.1994), the trial judge stated

that he was "one of the few people in the South perhaps that advocates strict handgun control." Id at 177. The defendant in his post conviction relief motion asserted that the judge should have recused himself because of his "bias." The court disagreed finding that the statement, while a personal bias, was not a "personal bias or prejudice concerning a party" as contemplated by Canon 3 ©.

In the present case, the judge reaffirmed, not that he had a bias against all sex offenders, rather that his two daughters would not effect his decision. As in Green, this is not a "personal bias" as contemplated by the Canons. As a policy matter, surely the Judicial Canons don't require that all judges with children must recuse themselves from hearing sex offender cases. A judge has the discretion to decide the propriety of his sitting and that decision is subject to review only in a case of manifest abuse of discretion. *Steed v. State*, 752 So.2d 1056, 1061 (Miss. Ct. App.1999).

Additionally, Gaddy cites to *Brent v. State*, 929 So.2d 952 (Miss. Ct. App.. 2005) for the proposition that a judge cannot try his own case. In that case, the court found that the judge should have recused himself. However, the judge, in his capacity as a County Court judge, had issued the warrant that became a central focus of the trial before him as a Circuit Court judge. The two situations are not analogous. One presents a situation where a judge is essentially a prosecutor, and the other in which a judge must review a decision that is within his discretion.

## IV,V IT WAS PROPER FOR THE JUDGE TO ACCEPT APPELLANT'S GUILTY PLEA WITHOUT A PSYCHIATRIC EVALUATION

In the "Statement of the Issues" section of his brief, Gaddy raises two issues relating to his guilty plea and his alleged mental illness, but he has neglected to make any argument within the appeal. Regardless, Gaddy is not entitled to relief as a result of his alleged mental illness and its effect on his plea. A trial judge is required, before accepting a plea of guilty, to "determine that the accused is competent to understand the nature of the charge." URCCC 8.04(4)(a). The court has authority to order, upon its own motion, a psychiatric evaluation of the accused. *Miss.Code Ann.* § 99-13-11 (Rev.2000). "Even where the issue of competency to stand trial has not been raised by defense counsel, the trial judge has an ongoing responsibility to prevent the trial of an accused unable to assist in his own defense." *Howard v. State*, 701 So.2d 274, 280 (Miss.1997). The decision to order a mental examination is within the discretion of the trial judge; there is "no abuse of discretion in denying a mental evaluation where there has been no proof presented to the judge." *Dunn v. State*, 693 So.2d 1333, 1340-41 (Miss.1997).

In this case, the only evidence presented to the judge during the plea hearing was the statement of Gaddy that he was "seeing a psychiatrist." His attorney had searched for the doctor, but was unable to find the doctor or Gaddy's records. Additionally, the only mental illness that Gaddy claims to have relate to stress and

anxiety. It doesn't seem that any of the problems Gaddy alleges to have would so affect his ability to understand the charges against him. Without any evidence of mental illness, Gaddy was competent to enter a plea.

VI. THE IMPOSITION OF THE MAXIMUM SENTENCE WAS PROPER

Sentencing is generally within the sound discretion of the trial judge, and his decision will not be disturbed on appeal so long as the sentence is within the term provided by statute. *Davis v. State*, 724 So.2d 342, 344 (Miss.1998). Traditionally, this means that a trial judge's sentencing decision is not reviewable so long as the sentence was within the statutory limits. Gaddy does not argue that his sentence is not within the statutory period, rather he presents a long list of other similar convictions shorter sentences. Regardless of whether Gaddy thinks that his sentence was fair or not, there is no argument that it is within the statutory period. Thus, the fifteen year sentence should not be reviewable.

VII. THERE IS A FACTUAL BASIS TO SUPPORT GADDY'S GUILTY PLEA

Gaddy contends that there is no factual basis to support a guilty plea. The purpose of the factual basis rule is to "push the court to delve beyond the admission of guilt lying on the surface and determine for itself whether there is substantial evidence that the petitioner did in fact commit those crimes he is charged with and is not entering the plea for some other reason that the law finds objectionable."

*Gaskin v. State*, 618 So.2d 103, 106 (Miss.1993). However, it doesn't matter that the factual basis for the defendant's guilt does not provide every detail that may have been produced at a full trial. When specific, an indictment or information can be the only factual basis for a guilty plea. *Drake v. State*, 823 So.2d 593, 594 (Miss.Ct.App.2002). Even in case that Gaddy cites, *Parkman v. State*, 953 So.2d 315, 319 (Miss. Ct. App. 2007), when the court found that there wasn't a factual basis established at trial, the rule allowed for the court to look at the entirety of the record to find all elements of the crime.

In this case, the record, the indictment, and his admission all show that there is a factual basis for the guilty plea.

Gaddy also asserts that he is not guilty of the crime because the element of touching for "lustful purposes" was not proven. He cites to *Bradford v. State*, 736 So.2d 464 (Miss. Ct. App. 1999), which attempts to define when touching is for lustful purposes. However, not only has Gaddy admitted to all elements of the charge, but the outcome in Bradford is not helpful. In that case, the court ruled that in order to determine whether the touching was lustful, the context and situation had to be considered. When viewed in context, the defendant in Bradford was found to have been playfully pinching a child's buttocks and then acting like it was another child. It was essentially a non-sexual game. While the court doesn't say so, any

touching of a child's genitals should be found to be for lustful purposes regardless of the context.

VIII. THE DEFENDANT'S GUILTY PLEA WAS SUFFICIENT EVIDENCE TO CONVICT HIM

Again Gaddy presents an issue in his "Statement of the Issues" section and fails to discuss it within the body of the brief. However, it seems to be a repeat of the previous assertion of insufficient factual basis to support a guilty plea. Again, the Supreme Court has held that a defendant's admission alone may establish factual basis for the guilty plea so long as the trial court can say with confidence that the prosecution could prove the accused guilty. *Coleman v. State*, 979 So.2d 731, 734 (Miss. Ct. App. 2008). Here the record indicates that the State could have proven Gaddy guilty because of the indictment, the record, his statements at trial, and his guilty plea.

IX. THE DEFENDANT'S GUILTY PLEA WAS VOLUNTARY

A guilty plea is voluntary, intelligent, and knowing if the defendant has been advised of the nature of the charge against him and the consequences of a plea. The defendant must be aware that his plea waives a right to a jury trial, the right to confront witnesses, and the right against self incrimination. *Lockhart v. State*, 980 So.2d 336 (Miss. Ct. App.. 2008). Finally, under the Uniform Rules of Circuit and County Court Practice, the court must inquire and determine whether the accused

understands the maximum and minimum penalties provided by law. URCCCP 8.04(A)(4)(b). Gaddy stated under oath that his plea was knowing and voluntary. The reasons why he questions the voluntariness of his guilty plea are mostly issues that would have been presented as evidence at trial had he plead not guilty. Whether he was actually asleep and whether his daughter's issues caused her to lie are both evidence of innocence and are irrelevant following a guilty plea. The judge clearly read the charges and the consequences and Gaddy admitted to them in open court. There is no question of the voluntariness.

## X. THE APPELLANT'S GUILTY PLEA WAIVED HIS RIGHT TO A TRIAL BY JURY

In his appeal, Gaddy states that is wasn't fair for "the judge to deny Appellant an opportunity to present his case to a jury after considering the facts presented in the PCR Petition." At trial, Gaddy was clearly informed of the ramifications of his guilty plea and that it acted as a waiver of jury trial. This court has previously held that;

> Newly discovered evidence is relevant only in situations where a defendant went to trial and was convicted. If, following the trial, a defendant discovers relevant and material evidence which could not have reasonably been discovered prior to trial, the defendant may seek to have his conviction set aside based on the newly discovered evidence. When a defendant pleads guilty, he is admitting that he committed the offense. Therefore, by definition, a plea of guilty negates any notion that there is some undiscovered evidence which could prove his innocence.
>
> *Jones v. State*, 915 So.2d 511, 514(Miss.Ct.App.2005).

If Gaddy now wants a trial then he must show that his plea was involuntary and request to have it withdrawn. In order to withdraw a plea of guilty, the defendant must prove by a preponderance of the evidence that his plea was made involuntarily. *Law v. State*, 822 So.2d 1006, 1009 (Miss. Ct. App. 2002) citing *Leatherwood v. State*, 539 So.2d 1378, 1381 (Miss.1989). This Court will only reverse the findings of a trial judge sitting without a jury concerning a guilty plea's intelligent and voluntary manner when the findings are clearly erroneous. Id citing *House v. State*, 754 So.2d 1147, 1152 (Miss.1999).

## XI. GADDY IS NOT ENTITLED TO AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL

To show prejudice, Gaddy must prove that he would never have pled guilty but for the deficient advice of counsel. *Readus v. State*, 837 So.2d 209, 214 (Miss.Ct. App. 2003). Gaddy has failed to meet this burden and presents no evidence that merits a hearing on ineffective assistance of counsel. The deficiencies and errors that Gaddy finds in his counsel's performance do not have any bearing on his guilty plea.

The case that Gaddy cites to does not correlate to this case. In *Readus* the defendant was entitled to an evidentiary hearing because he had been misinformed of the consequences of his guilty plea. Gaddy claims that he accepted a twelve year sentence in a plea deal with the prosecutor, but makes no claim that he was misinformed by his own counsel. He was also notified by the court prior to his plea

that he could receive the maximum sentence of fifteen years regardless of what the prosecutor recommended. Other than that, none of Gaddy's claims relate to ineffective assistance of counsel.

XII. GADDY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

The standard for ineffective assistance of counsel was laid out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance, it must be shown that (1) counsel's performance was deficient, and (2) the deficient performance caused prejudice to the defense. *Walker v. State*, 703 So.2d 266, 268 (Miss. 1997). Whether there was a deficient performance or actual prejudice is judged by looking at the totality of the circumstances, but there is a strong presumption counsel's performance fell within the wide range of reasonable professional assistance. *Hiter v. State*, 660 So.2d 961, 965 (Miss.1995). The burden is on the Defendant to prove ineffective assistance of counsel. *McKenzie v. State*, 856 So.2d 344 (Miss. Ct. App. 2003).

Gaddy asserts that as a result of his counsel's failure to object to the judge's recusal he was prejudiced and received an unfair sentence. Therefore, he brings this ineffective assistance of counsel claim. However, Gaddy makes no showing that he was actually prejudiced by counsel's failure. Not only has he failed to show that his counsel had any reason to object to the judge as a result of bias, but his sentence was

within the recommendations of statute. There is no evidence that he received a longer punishment than he would have received under a different judge. Since Gaddy was not prejudiced in any way by counsel's failure he has failed to prove ineffective assistance of counsel under the Strickland test.

XIII. THE JUDGE'S SENTENCE WAS PROPER

Though only presented in his "Issues" section, Gaddy claims that it was unfair for the Judge to find him a danger to the community without any history or evidence of danger. Again, sentencing is within the trial court's discretion and not subject to appellate review if the sentence is within statutory limits. *Tate v. State*, 912 So.2d 919, 933 (Miss. 2005). Whatever the judge's reasoning, the sentence was within the guidelines and is not subject to appellate review.

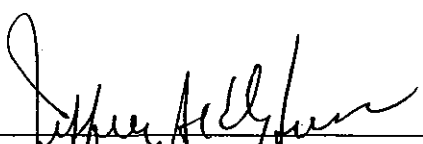
## CONCLUSION

The State would ask this reviewing Court to affirm the judgment of the Circuit Court in denying all of defendant's post-conviction claims. Defendant has presented no evidence that would entitle him to relief on any of the above assertions of error. Judge Simpson's impartiality was not an issue, no evidence is presented of ineffective counsel, the sentence was proper within the guidelines, and there was sufficient factual basis and admission of defendant to find the plea was knowingly and voluntarily entered. The rest of Gaddy's claims rely on facts and evidence that *could* have been presented at trial, but when he pled guilty he waived his right to that day in court.

Accordingly, the State would ask this Court to affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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## CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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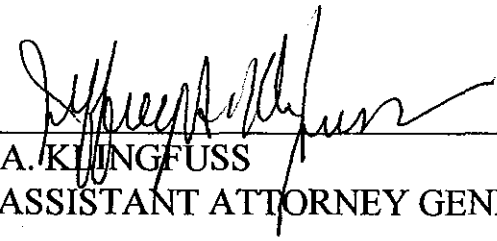
This the 14th day of November, 2008.



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