

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

LESLIE J. CORTEZ

APPELLANT

VS.

FILED

NO. 2008-CP-0581-COA

JUL 08 2008

STATE OF MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS**

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CORTEZ'S JURY INSTRUCTION ISSUE IS PROCEDURALLY BARRED AS IT WAS CAPABLE OF DETERMINATION ON DIRECT APPEAL.	4
II. CORTEZ'S CLAIM THAT THE TRIAL COURT IMPROPERLY COMMENTED UPON THE EVIDENCE IS LIKEWISE PROCEDURALLY BARRED AS IT WAS CAPABLE OF DETERMINATION ON DIRECT APPEAL	4
III. CORTEZ DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.....	5
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

STATE CASES

Gray v. State, 887 So.2d 158, 171 (Miss. 2004) 4

Lindsay v. State, 720 So.2d 182, 184 (Miss.1998) 5

Mickell v. State, 735 So.2d 1031 (Miss.1999) 4

Williams v. State, 856 So.2d 571 (Miss. Ct. App. 2003) 5

STATE STATUTES

Miss. Code Ann. 99-39-21(1) 4

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STATEMENT OF ISSUES

- I. CORTEZ'S JURY INSTRUCTION ISSUE IS PROCEDURALLY BARRED AS IT WAS CAPABLE OF DETERMINATION ON DIRECT APPEAL.
- II. CORTEZ'S CLAIM THAT THE TRIAL COURT IMPROPERLY COMMENTED UPON THE EVIDENCE IS LIKEWISE PROCEDURALLY BARRED AS IT WAS CAPABLE OF DETERMINATION ON DIRECT APPEAL.
- III. CORTEZ DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF FACTS

On July 16, 2002, Leslie Cortez was tried and convicted by a Rankin County Circuit Court jury of burglary of a dwelling. C.P. 61. He was sentenced as a habitual offender to twenty-five years in the custody of MDOC. C.P. 62. This honorable Court subsequently affirmed Cortez's conviction and sentence. C.P. 83-87. Cortez moved the lower court for post-conviction relief. After reviewing Cortez's motion for post-conviction relief, as well as the trial transcript and entire criminal file, the trial court summarily dismissed the petition finding that no relief was warranted. C.P. 130.

SUMMARY OF ARGUMENT

Cortez's first two claims regarding jury instructions and an alleged improper comment on the evidence are procedurally barred as they were capable of determination on direct appeal. Cortez's ineffective assistance claim is supported only by his own bare allegation that defense counsel sat at the prosecutor's table. Even if true, such conduct is not deficient performance which could have prejudiced the defendant's case.

ARGUMENT

I. CORTEZ'S JURY INSTRUCTION ISSUE IS PROCEDURALLY BARRED AS IT WAS CAPABLE OF DETERMINATION ON DIRECT APPEAL.

Claims which are capable of determination on direct appeal are procedurally barred from consideration in a motion for post-conviction relief. Miss. Code Ann. 99-39-21(1). Jury instruction issues are properly resolved on direct appeal and therefore barred from consideration when raised for the first time on a motion for post-conviction relief. *Gray v. State*, 887 So.2d 158, 171 (¶33) (Miss. 2004). Not only is Cortez's first claim procedurally barred, but also it is wholly without merit. He claims that the trial court erred in refusing his trespass instruction when he was in fact granted an instruction on trespass. C.P. 37. Accordingly, Cortez's first claim necessarily fails.

II. CORTEZ'S CLAIM THAT THE TRIAL COURT IMPROPERLY COMMENTED UPON THE EVIDENCE IS LIKEWISE PROCEDURALLY BARRED AS IT WAS CAPABLE OF DETERMINATION ON DIRECT APPEAL.

Cortez's second assignment of error also involves an issue which should have been raised on direct appeal. Since it was not, he is procedurally barred from raising the issue for the first time in a motion for post-conviction relief. Miss. Code Ann. 99-39-21(1). Even if the issue was procedurally alive, it lacks merit. Cortez claims that the trial court improperly commented on the evidence when it allegedly answered a jury note in which the jury inquired whether a certain exhibit was composed of one or two photographs. The trial court allegedly answered, after being advised by the prosecutor and defense counsel, that the exhibit was composed of only one photograph.

In *Mickell v. State*, 735 So.2d 1031 (Miss.1999), the trial court committed reversible error by impermissibly commenting on the evidence in answering a jury note. The jury's note asked whether Mickell could be convicted of armed robbery if the gun was never found. *Id.* at 1033 (¶5). The trial court wrote "yes" on the return note. *Id.* Because whether or not Mickell had a gun was

a central issue in the case, the supreme court found that the trial court impermissibly commented upon the evidence. *Id.* at (¶10). However, in *Williams v. State*, 856 So.2d 571 (Miss. Ct. App. 2003), the trial court's decision to answer a jury note did not amount to an impermissible comment on the evidence. In *Williams*, the jury sent two notes asking which exhibits corresponded with each count. *Id.* at 576 (¶¶14-15). The court answered the notes and this Court stated the following. "In the present case, the notes sent by the jury did not require the judge to comment on the evidence, but merely required clarification on the 'housekeeping' type issue of which evidence went with which count, not like in *Mickell* where the judge's answer acted to seal the jury's verdict." *Id.* at 577 (¶17).

In the case *sub judice*, the trial judge simply clarified that an exhibit was composed of two photographs, not a single photograph. As in *Williams* this was simply a "housekeeping type issue," not a comment which impermissibly singled out a particular piece of evidence to "seal the jury's verdict." Accordingly, Cortez's second assignment of error must fail.

III. CORTEZ DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Cortez claims that trial counsel's performance was constitutionally deficient because defense counsel allegedly sat at the prosecutor's table. "[W]here a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." *Lindsay v. State*, 720 So.2d 182, 184(¶ 6) (Miss.1998). Cortez offers nothing more than a bare assertion that defense counsel sat at the prosecutor's table. In accordance with *Lindsay*, his ineffective assistance claim must fail. Even had Cortez offered record support for his allegation, such an action could not be considered deficient performance that would prejudice the defendant's case.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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 July, 2008.



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