

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

WALTER CONLEE

APPELLANT

VS.

FILED

NO. 2008-CP-0724-COA

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. CONLEE WAS INDICTED BY A LEGALLY CONVENED GRAND JURY.
- II. CONLEE'S ERRONEOUS BELIEF THAT HE WAS ELIGIBLE FOR "EARNED TIME" DOES NOT RENDER THE PLEA INVOLUNTARILY GIVEN.
- III. CONLEE WAIVED HIS RIGHT TO CHALLENGE THE STATE'S EVIDENCE AGAINST HIM UPON THE ENTRY OF A VALID GUILTY PLEA.

STATEMENT OF THE FACTS

In 2002, Walter Conlee pled guilty to manslaughter and delivery of a controlled substance.¹ Conlee received a twenty year sentence on the manslaughter charge and a concurrent thirty year sentence on the controlled substance charge. Conlee subsequently filed a motion for Post-Conviction Relief, which was denied by the trial court after an evidentiary hearing.

¹The controlled substance conviction is the basis of Conlee's motion for post-conviction relief.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Conlee's motion for Post-Conviction Relief. Conlee first asserts that the Grand Jury that indicted him was illegally convened because the December term for the Court had ended when his indictment was signed by the Grand Jury foreman. However, Conlee's entry of a guilty plea officially waived his right to challenge this issue. Further, Conlee has made a simple error of confusing the impanelment of a grand jury and the terms of the grand jury with the regular terms of a trial court.

Next, Conlee contends that his guilty plea was not knowingly made because of a change in law from the time of indictment to the time of trial. He asserts error in not being notified by his attorney that he would not be given credit for time served prior to his actual sentencing. However, this argument can only be applied to sentencing and penal statutes, not to his earned time classification within the Mississippi Department of Corrections (MDOC) and subsequent calculation of time by the MDOC.

Finally, Conlee asks for relief on the grounds that Mississippi Code Annotated. § 41-29-139 is ambiguous, causing him to involuntarily enter a guilty plea. Conlee calls the statute ambiguous, but makes no argument to support such a contention. Instead, he merely challenges the State's evidence against him. However, this claim is procedurally barred upon the entry of a valid guilty plea.

Conlee's claims are either procedurally barred or without merit. As such, the trial court properly denied post-conviction relief.

ARGUMENT

I. THE DEFENDANT WAS INDICTED BY A LEGALLY CONVENED GRAND JURY.

Conlee's indictment was returned on December, 19, 2002 by a recalled July 2002 term Rankin County Grand Jury. Conlee argues that this was in error because the corresponding term of court for the Rankin County Circuit Court ended on December 17, 2002. Further, Conlee asserts that the indictment was voided by the alleged prolonged signature of the grand jury foreman on January 13, 2003.

The Mississippi Supreme Court has recognized that "a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial." **Anderson v. State**, 577 So.2d 390 (Miss. 1991); **Drennan v. State**, 695 So.2d 581 (Miss. 1997). However, there are two exceptions in which a voluntary guilty plea does not waive a defect: (1) if an indictment fails to charge a necessary element of the crime and (2) there is no subject matter jurisdiction. **Id.**

Conlee does not challenge the indictment's charge of the criminal offense, nor does he challenge subject matter jurisdiction. Therefore, his claim is procedurally barred because Conlee seeks to attack non-jurisdictional defects after the entry of a valid guilty plea. Procedural bar notwithstanding, Conlee's claim also lacks merit as he confuses grand jury terms with terms of court.

The Mississippi Code provides that,

Upon impanelment, a grand jury may be convened and reconvened in termtime and in vacation. It shall continue to serve from term to term until the next grand jury is impaneled, and it may return indictments to any term of court, notwithstanding that a term of court at which criminal business may be conducted shall intervene between the time the grand jury is impaneled and the indictment is returned.

Miss. Code. Ann. § 13-5-39. This statute clearly grants a grand jury complete authority to convene

and reconvene at any time until the next grand jury is impaneled, and to return indictments to any term of court. Additionally, the signature date is of no consequence since the grand jury “may return indictments to any term of court.” **Id.**

As the trial court correctly found in its Order Denying Post Conviction Relief, “the petitioner’s argument confuses the impanelment of a grand jury and the term(s) of the grand jury with the regular terms of the trial court; neither one has any connection with the other and therefore Petitioner’s Indictment was valid.” (C.P. 59).

Because Conlee complains of non-jurisdictional “defects” in the indictment, a claim which is also wholly without merit, his first assignment of error must fail.

II. CONLEE’S ERRONEOUS BELIEF THAT HE WAS ELIGIBLE FOR “EARNED TIME” DOES NOT RENDER THE PLEA INVOLUNTARILY GIVEN.

Guilty pleas are knowingly, voluntarily, and intelligently made when the defendant knows the elements of the charge against him, the effect of the plea, and the possible sentence. **Cross v. State**, 964 So.2d 535, 539 (¶17) (Miss. Ct. App. 2007). The petitioner has the burden to prove that his plea was involuntarily made. **Id.** The petitioner is also charged with providing a record to support his claim. **Roberts v. State**, 761 So.2d 934, 935 (¶3) (Miss. Ct. App. 2000) (citing **Mason v. State**, 440 So.2d 318, 319 (Miss. 1983); **Williams v. State**, 522 So.2d 201, 209 (Miss. 1988)). Conlee has failed to meet his burden in establishing that his plea was made involuntarily. He has also failed to provide a transcript of plea hearing, or any other documentation to support of his claim.

Conlee’s claim regarding ineligibility for earned time credit with MDOC is an administrative matter to be addressed with that entity. However, he asserts an *ex post facto* argument that fails because such arguments only apply to sentencing and penal statutes, not his earned time classification and subsequent calculation of time by MDOC. **McLamb v. State**, 974 So.2d 935 (Miss. App. 2008); **Ross v. Epps**, 922 So.2d 847 (Miss. App. 2006); **Smith v. State**, 465 So.2d 999 (Miss. 1985)).

Conlee does not allege that counsel gave erroneous advice or any advice whatsoever regarding eligibility for earned time. Rather, he simply states that he was unaware that he was ineligible, and had he known, he would not have pled guilt to Count II. “Being unaware is not synonymous with ill or erroneous advice. A defendant does not possess a constitutional right to full parole information at or before his guilty plea. A trial judge is not required to inform a defendant of the defendant's ineligibility for parole.” **Stewart v. State**, 845 So.2d 744, 747 (¶11) (Miss. Ct.

App. 2003) (citing **Ware**, 379 So.2d at 907).

While ineffective assistance of counsel is not an issue Conlee specifically raises in the case at bar, he alludes to such a claim in his appellate brief. Conlee claims that had he been informed of the statutory mandatory service of the sentence, he would not have pled guilty. (Appellant's. Brief at 5). This is the only allusion to ineffective assistance by his attorney and wholly insufficient to prove an ineffective assistance claim. The Mississippi Supreme Court has held that, "where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Coleman v. State**, 772 So.2d 1101, 1102-03 (¶7) (Miss.App. 2000) (citing **Vielee v. State**, 653 So.2d 920, 922 (Miss. 1995)). Since Conlee provided no supporting evidence, any perceived ineffective assistance claim must fail.

As previously stated, "a valid guilty plea admits all elements of a criminal charge and waives all non-jurisdictional defects contained in the indictment." **Ford v. State**, 911 So.2d 1007 (Miss.App. 2005). Conlee entered a valid guilty plea and has failed to show that it was involuntarily given. He is therefore entitled to no relief.

III. CONLEE WAIVED HIS RIGHT TO CHALLENGE THE STATE'S EVIDENCE AGAINST HIM UPON THE ENTRY OF A VALID GUILTY PLEA.

Conlee was indicted on the delivery of a controlled substance in violation of Mississippi Code Section 41-29-139. (C.P. 29). He claims that this statute was ambiguous and his inability to interpret it was the cause of his erroneous guilty plea. Conlee does not attempt to elucidate any ambiguity of this statute. Instead, his argument pertains to what drug he actually transferred. Conlee asserts that he did not transfer hydrocodone as his indictment stated, but that he transferred Lortab.²

²Although not part of the record, the State would point out that Lortab is simply a brand name of the generic drug hydrocodone.

As such, Conlee attacks the State's evidence against him. However, the entry of a valid guilty plea waives the defendant's right to challenge the sufficiency of the State's evidence against him. **Thornhill v. State**, 919 So.2d 238, 241 (¶13) (Miss. Ct. App. 2005) ((citing **Swift v. State**, 815 So.2d 1230, 1234 (¶13) (Miss. Ct. App. 2001))).

Conlee also alludes to there having been no factual basis for his guilty plea. This claim is procedurally barred because it was not addressed in his petition for post conviction relief filed in trial court. **Connell v. State**, 691 So.2d 1004, 1007 (Miss. 1997)). Any such claim would also be procedurally barred because, as stated, he failed to include the plea transcript to support this claim. Accordingly, Conlee's third and final assignment of error also fails.

CONCLUSION

As supported by the foregoing facts and authority, Walter Conlee's claims for relief are procedurally barred and without merit. Accordingly, 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 29th day of July, 2008.



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