IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY W. BROWN — APPELLANT

VS. — NO. 2008-CP-0789

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SUMMARY OF THE CASE

On or about October 20, 2004, Larry W. Brown was indicted by the Marshall County Grand Jury for manufacture of a controlled substance, over one pound of marijuana, pursuant to Miss. Code Ann. § 41-29-130(a)(1) and possession of a controlled substance with intent to sell, transfer or distribute over one pound of marijuana, pursuant to Miss. Code Ann. § 41-29-139(a). On November 17, 2005, Brown entered a plea of guilty to both charges. On November 20, 2005, a forfeiture and sentencing hearing was held. Brown was sentenced to 15 years on each count, with five years of each count suspended and five years of post-release supervision. Brown filed his motion for post conviction collateral relief on November 9, 2007. The trial court denied the petition on or about March 25, 2008. The instant appeal ensued.

SUMMARY OF THE ARGUMENT

The indictment clearly charges Brown with possession with intent to sell and manufacture of marijuana, and Schedule I controlled substance, pursuant 41-29-139(a) and 41-29-139(a)(1). The incorrect citation of marijuana's position on the list of Schedule I controlled substances does not change the substance of the crime charged or affect the defense strategy, and is clearly a typographical or scrivener's error. Further, it is evident that the second count on the indictment,

incorrectly entitled Count I, is a second, separate account which is mislabeled due to a typographical error. The two counts are substantively distinct, listed under separate headings and the indictment is designated a multi-count indictment pursuant to Miss. Code Ann. § 99-7-2 (of 1972, as amended). This is clearly an error of form and not of substance. This issue is without merit and the decision of the trial court should be affirmed. Brown's Counsel's performance fell within the wide range of reasonable professional assistance, and, further, Brown suffered no prejudice from any of the errors he asserts were made by his trial counsel.

ARGUMENT

I. and II. The State's amendments of the indictment were not substantive and the trial court correctly allowed the amendments.

Count I of the indictment charged Brown with the manufacture of a controlled substance, to-wit, 2,092.7 grams of marijuana which is a Schedule I controlled substance. (C.P. 20-19) The indictment mistakenly cited Section 41-29-113(c)(12) of the Mississippi Code of 1972, Annotated, as amended, as the authority for marijuana's designation as a Schedule I controlled substance, the correct cite for which is 41-29-113(c)(14). However, throughout that section of the indictment, the substance is referred to as marijuana. Section 41-29-113(c)(12) of the Mississippi Code of 1972, Annotated, as amended is Ibogaine. Despite the fact that the subsection of the code cited refers to Ibogaine instead of marijuana, it is clear from the indictment that Brown is charged with the manufacture of more than one (1) kilogram of marijuana, a Schedule I controlled substance, the penalty for which is stated correctly in the indictment as imprisonment not exceeding thirty (30) years and by a fine of not less than One Thousand Dollars ($1,000.00). The elements of the crime charged and the penalty are contained

in Miss. Code Ann. 41-29-139(a)(1), which is correctly cited in the indictment.

Count II is listed as Count I, but it clearly follows Count I and is a separate charge. Further, the heading of the indictment specifies that it is a multi-count indictment pursuant to Miss. Code Ann. § 99-7-2 (as 1972, as amended) of the indictment charged Brown with the possession with intent to sell a Scheduled I controlled substance, to-wit, 1,183.9 grams of marijuana (more than one (1) kilogram). (C.P. 20-19) The indictment mistakenly cited Section 41-29-113(c)(12) of the Mississippi Code of 1972, Annotated, as amended, as the authority for marijuana's designation as a Schedule I controlled substance, the correct cite for which is 41-29-113(c)(14). However, throughout that section of the indictment, the substance is referred to as marijuana. Section 41-29-113(c)(12) of the Mississippi Code of 1972, Annotated, as amended is Ibogaine. Despite the fact that the subsection of the code cited refers to Ibogaine instead of marijuana, it is clear from the indictment that Brown is charged with the possession of more than a kilogram of marijuana, a Schedule I controlled substance, the penalty for which is stated correctly in the indictment as imprisonment not exceeding thirty (30) years and by a fine of not less than One Thousand Dollars ($1,000.00) and not exceeding One Million Dollars ($1,000,000.00) or both. The elements of the crime charged and the penalty are contained in Miss. Code Ann. 41-29-139(a), which is correctly cited in the indictment.

The general rule is that: "All indictments may be amended as to form but not as to the substance of the offense charged." Lee v. State, 944 So.2d 35,40 (Miss.2006). An amendment as to form is one where the defense under the original indictment is equally available after the amendment and the evidence which the defendant must use is the same in the pre- and post-indictment. *Griffin v. State*, 540 So.2d 17, 21 (Miss. 1989). If an offense is "fully and clearly

defined in the statute," an indictment which tracks the language of that criminal statute if sufficient to inform the accused of the charge against him. *Joshua v. State*, 445 So.2d 221, 223 (Miss. 1984). "[O]therwise, the indictment should charge the offense by the use of additional words that clearly set forth every element necessary to constitute the crime." *Id.* (Quoting, *Jackson v. State*, 420 So.2d 1045, 1046 (Miss. 1982)).

The indictment clearly charges Brown with possession with intent to sell and manufacture of marijuana, and Schedule I controlled substance, pursuant 41-29-139(a). The incorrect citation of marijuana's position on the list of Schedule I controlled substances does not change the substance of the crime charged or affect the defense strategy, and is clearly a typographical or scrivener's error. Further, it is evident that the second count on the indictment, incorrectly entitled Count I, is a second, separate account which is mislabeled due to a typographical error. The two counts are substantively distinct, listed under separate headings and the indictment is designated a multi-count indictment pursuant to Miss. Code Ann. § 99-7-2 (of 1972, as amended). This is clearly an error of form and not of substance. This issue is without merit and the decision of the trial court should be affirmed.

III. Brown's Counsel's performance fell within the wide range of reasonable professional assistance, and, further, Brown suffered no prejudice from any of the errors he asserts were made by his trial counsel.

The standard of review for a claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Ross v. State*, 954 So.2d 968, 1003-04 (Miss.2007), the Mississippi Court of Appeals opined:

> The touchstone for testing a claim of ineffectiveness of counsel

> must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Irby v. State*, 893 So.2d 1042, 1049 (Miss.2004) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

The standard of review for a claim of ineffective assistance involves a two-pronged inquiry: the defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. *Id.* To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. *Davis v. State*, 897 So.2d 960, 967 (Miss.2004) (citing *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The question is whether counsel's assistance was reasonable considering all the circumstances. *Id.* at 967 (citing *Strickland*, 466 U.S. at 688). Courts will not find ineffective assistance where a defendant's underlying claim is without merit. *Id.* Similarly, multiple defaults that do not independently constitute error will not be aggregated to find reversible error. *Walker v. State*, 863 So.2d 1, 22 (Miss.2003). Appellate review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Howard v. State*, 853 So.2d 781, 796 (Miss.2003) (citing *Hiter v. State*, 660 So.2d 961, 965 (Miss.1995)).

Brown alleges that but for the errors of his counsel, he would not have entered into a guilty plea. He asserts that he lied to the court because of the misrepresentation of his attorneys.

He alleges that his attorney told him that the court would give him a sentence of (60) years if he did not plead guilty. He alleges that prior to the his guilty plea on August 18, 2005, he had been offered a sentence of (3) years, but at that time he told his attorney that he wished to go to trial. Brown alleges that his attorney advised him that he was a good candidate for probation and that having no prior record, he would get probation. Brown alleges that his attorney told him that "he could get him off on the ground that the indictment was defective. Brown alleges that he was out on bond for one year before his attorney filed a motion to quash the indictment. Brown alleges that his attorney advised him to plead guilty to the amended indictment. Brown alleges that the advice his attorney gave him resulted in a more severe sentence.

Brown testified under oath at his guilty plea hearing that he was satisfied with the work his lawyer had done for him. (Tr. 16) He testified that his lawyer reviewed his Guilty Plea Petition with him. The trial court clearly informed him of his rights. (Tr. 16) He was clearly informed of the maximum and minimum penalties for the charges against him. (Tr. 20) He admitted at the guilty plea hearing that he was growing marijuana plants that the he had some packaged up in his house. (Tr. 20) The trial court correctly found that Brown's plea was freely and voluntarily offered after he had been advised by competent counsel. (Tr. 21) A sentencing and forfeiture hearing was held on August 19, 2005. (Tr. 22) The trial court declined to impose the maximum penalty of 30 years on each count because of Brown's age and his service to the country in Vietnam. (Tr. 79). The trial count sentenced Brown to 15 years in the custody of the MDOC on each count, with the sentences to run concurrently. The court suspended five years on each count and ordered post-release supervision for a period of five years. (Tr. 79)

Brown supports his claim of ineffective assistance of counsel only by the bare allegations

contained in his motion. He submitted no affidavits to support his motion other than the Verification of Prisoner. (C.P. 14) A prisoner's ineffective assistance of counsel claim is without merit when the only proof offered of the claim is the prisoner's own affidavit. *Buckhalter v. State*, 912 So.2d 159, 162 (Miss.Ct.App.2005) (citing *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995)). Moreover, Brown signed a plea agreement, and, in his plea colloquy, Brown was asked by the trial judge if he was satisfied with the help and advice that he had received from his counsel. He answered in the affirmative. Brown's ineffective assistance of counsel argument is rebutted by a lack of evidence, as well as his own statements. Thus, this issue is without merit and the ruling of the trial court should be affirmed.

CONCLUSION

Brown's assignments of error are without merit and the ruling of the trial court should be upheld.

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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This the 18th day of December, 2008.

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