

COPY
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FILED

TRAVIS WICKER

AUG 20 2008

APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS.

NO. 2008-CP-1078

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUES ON APPEAL	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
PROPOSITION I	
THE RECORD REFLECTS THAT WICKER IS TIME BARRED BY ‘THE UPCCRA.	7
A. THERE WAS NO DOUBLE JEOPARDY VIOLATION.	9
B. THERE WAS EVIDENCE THAT WICKER WAS PROPERLY CHARGED WITH MURDER AND AGGRAVATED ASSAULT.	10
C. THERE WAS EVIDENCE OF EFFECTIVE ASSISTANCE OF COUNSEL.	11
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

STATE CASES

Ferguson v. State, 507 So. 2d 94, 97 (Miss. 1987)	12
Graves v State, 969 So 2d 845 2007)	9
Lindsay v. State, 720 So. 2d 182, 184 (Miss. 1998)	11
McCullen v State, 786 So. 2d 1069 (Miss. App. 2001)	10
Odom v. State, 483 So. 2d 343, 344 (Miss. 1986)	7

STATE STATUTES

Miss. Code Ann. Sect 99-39-5(2)(Supp. 1985	7
Miss. Code Ann. Sect. 99-39-1	7

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PROCEDURAL HISTORY:

On November 30, 1995, Travis Wicker, “Wicker” with the benefit of counsel, Mr. James A. Bobo and Mrs. Vicky Williams, pled guilty to murder and aggravated assault before the Circuit Court of Rankin County. C.P. 50-54; 57-59. Wicker was given a life sentence and a consecutive twenty year sentence in the custody of the Mississippi Department of Corrections. C.P. 34-35; 37-38; 98-99.

On July 26, 2007, Wicker filed a “Motion To Vacate His Convictions and Sentences” which was denied. C.P. 6-60; 80-84. From that denial of relief, he filed notice of appeal to this court. C.P. 101.

ISSUES ON APPEAL

I.

**WAS WICKER PROCEDURALLY BARRED
BY THE STATUTE OF LIMITATIONS OF 'THE UPCCRA'?**

II.A.

WAS WICKER SUBJECTED TO DOUBLE JEOPARDY?

II.B

**WAS WICKER PROPERLY CHARGED BY CRIMINAL
INFORMATION?**

II.C.

**DID WICKER RECEIVE EFFECTIVE ASSISTANCE OF
COUNSEL?**

STATEMENT OF FACTS

On March 21, 1995, Wicker was indicted for capital murder of Karen Bond, a child, in that he did kill and murder the child while engaged in the felony crime of felonious child abuse of a child.
C.P. 29.

The record reflects that Wicker and his guilty plea counsel acknowledged "Waiver of Indictment" and receipt and review of "a Criminal Information" for aggravated assault filed by the Rankin County District Attorney. C.P. 87. A copy of the indictment and "The Criminal Information" for aggravated assault of Karen Bond were included in the record. C.P. 29; 85.

On November 30, 1995, Wicker with the benefit of counsel, Mr. James A. Bobo and Mrs. Vicky Williams, pled guilty to murder and aggravated assault before the Circuit Court of Rankin County. C.P. 50-54; 57-59.

Wicker filed two separate "Petitions To Enter A Guilty Plea." C.P. 50-54; 57-59. In those petitions Wicker acknowledged knowing that he was pleading guilty to the lesser charges of simple murder and aggravated assault. C. P. 51; 57. He acknowledged knowing the life and twenty year maximum sentences for murder and aggravated assault respectively. He acknowledged that he was guilty of having murdered the child victim as well as having assaulted her with a shot gun which did not at that time result in her death. C.P. 51;57.

He acknowledged knowing that by pleading guilty he was waiving his right to a trial with right of cross examination and a right against self incrimination. He acknowledged that he had not been coerced or promised anything in exchange for his guilty plea. C.P.47; 52. He admitted that he was "satisfied with the advise and counsel they have given me." C.P. 47; 52. This was for the advise and counsel provided by his guilty plea counsel team, Mr. Bobo and Ms. Williams. C.50-54; 57-59.

After advising and questioning Wicker and his guilty plea counsel team, the trial court found that his guilty pleas were “freely, voluntarily and intelligently made” and that “there is a factual basis” for his two separate pleas. C.P. 35; 38.

The trial court , Judge John B. Toney, sentenced Wicker to a life sentence for murder and a twenty year consecutive sentence for aggravated assault. These judgments of conviction were filed on “November 30, 1995.” C.P. 34-35; 37-38; 98-99.

On July 26, 2007, Wicker filed a “Motion To Vacate Unconstitutional Conviction and Sentence.” C.P. 6-23. On April 11, 2008, the Rankin County district attorneys’ officer responded to that motion pointing out that Wicker was barred by the statute of limitations under M. C. A. §99-39-5 (2) (1972) of the Mississippi Uniform Post Conviction Collateral Relief act, “the UPCCRA.” The prosecution also believed that the record indicated a lack of merit to any of Wicker’s three claims for relief. C.P. 75.

On May 9, 2008, the trial court issued an Order denying relief, finding no merit to Wicker’s complaints. The trial court found that Wicker was barred by ‘the UPCCRA’ and that his claims for relief were also lacking in merit. C.P. 80-84. Those claims were based upon an alleged double jeopardy violation, due process violation for use of criminal information rather than indictment and alleged ineffective assistance of counsel.

From that denial of relief, Wicker filed notice of appeal to the Mississippi Supreme Court. C.P. 101.

SUMMARY OF ARGUMENT

1. The record clearly reflects that Wicker's motion was barred by M. C. A. § 99-39-5(2) of 'the UPCCRA.' Wicker's motion came more than "three years after entry of his judgments of convictions." C.P. 6-60. There was no claim and a lack of evidence in support of any claim as to any exception for avoiding the three year statute of limitation. Wicker is therefore barred by the statute of limitations.

2. In addition, the record reflects no evidence or grounds for relief on the merits. The record contains no affidavits relevant to Wicker's claims of unconstitutional convictions and sentences. C.P. 6-60.

A. There was no basis for a claim of double jeopardy where the elements of the aggravated assault charge are different from the elements for the murder felony. And this is true even if the two separately charged crimes occurred close in time to each other at the crime scene.

B. The criminal information was valid for putting Wicker on notice as to the two separate reduced charges, which he acknowledged understanding in his two separate "Petitions To Enter a Guilty Plea." These pleas were for the separate charge of murder and aggravated assault. C.P. 50-54; 57-59; 87.

The record reflects that Wicker filed a "Waiver of Indictment." In that waiver, he consented to have his case proceed without the need for a formal indictment. C. P. 87. He admitted "receipt" and review of "this bill of information" from the Rankin County District Attorney. C.P. 87. He admitted that he was guilty of the aggravated assault of Karen Bond. C.P. 57.

C. The record reflects no basis for any claim of ineffective assistance. Wicker acknowledged being "satisfied" with the services provided by his guilty plea counsel team." C.P. 52; 58. The record also reflects that as a result of their advise, counsel and dialogue with the prosecution, Wicker avoided a possible death penalty. C.P. 51.

Wicker also acknowledged a factual basis for his plea of guilty to murder, as well as for his plea of guilty to aggravated assault. C.P. 46; 51. Wicker also acknowledged that he had not been coerced or promised anything in exchange for his guilty plea. C.P. 47; 52.

There is a lack of evidence for finding that the result of Wicker's guilty plea would have been different based upon Wicker's unsubstantiated charges against his guilty plea hearing team.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT WICKER IS TIME BARRED BY 'THE UPCCRA.'

The record reflects that Wicker's entry of judgments of conviction for murder and aggravated assault was on "November 30, 1995." C.P. 34-35; 37-38; 98-99. Wicker filed his "Motion To Vacate For Alleged Unconstitutional Conviction and Sentence" on "July 25, 2007." C.P. 6-60. Therefore, under the provisions of "the UPCCRA" this motion was filed more than "three years after entry of his judgment of convictions." In fact, it came some ten years after these judgments were entered.

In addition, there was no claim of recently discovered evidence or of any relevant new intervening decision or case that would have adversely effected the outcome of his guilty plea hearing. C.P. 6-60.

In *Odom v. State*, 483 So. 2d 343, 344 (Miss. 1986), the court stated under the Uniform Post Conviction Collateral Relief Act, a petitioner/ prisoner only has three years to apply for relief. Unless, his case falls under the exceptions provided, which are for newly discovered evidence or for a relevant intervening decision, he is time barred.

We would also point out that in dismissing the petition, the trial judge erroneously applied the three year statute of limitations provided for under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss. Code Ann. Sect. 99-39-1 et seq (Supp 1985). This act applies prospectively from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three years from April 17, 1984, to file their petition for post conviction relief. Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss. Code Ann. Sect 99-39-5(2)(Supp. 1985), which states:

A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of

Mississippi or, in case no appeal is taken, within three years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three years after entry of the judgement of conviction. Excepted from this three year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise, excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

The appellee would submit that the record indicates that Wicker's motion, as correctly stated by the Office of the District Attorney and in the trial court's order denying relief was barred as untimely under the provisions of the Mississippi Uniform Post Conviction Collateral Relief Act.

PROPOSITION II A, B AND C.

A.

THERE WAS NO DOUBLE JEOPARDY VIOLATION.

The record reflects that Wicker acknowledged in his “Waiver of Arraignment” that he was waiving any requirement of formal indictment. He also acknowledged “receipt” of “the Criminal Information” filed by the Rankin County District Attorney. C.P. 87.

I consent to and request that the case against me proceed on waiver of indictment and bill of information filed by the District Attorney. C.P. 87.

The criminal information was for “the aggravated assault of Karen Bound.” This was specifically for assaulting the child with the butt end of a shot gun which did not by means of that blow result in the death of the child victim. C.P. 32.

By acknowledging that he was guilty of assaulting the child victim with the shot gun wooden stock, he was also acknowledging that this assault with a deadly weapon did not at that time result in the death of the victim. C.P. 57.

In *Graves v State*, 969 So 2d 845 (¶14) (Miss. 2007), the Supreme Court found that the two separate crimes could be committed at the same time as long as elements of one crime were separate and apart from the elements necessary for establishing the facts of the other. Therefore charging Graves with shooting into a vehicle as well as with aggravated assault did not expose him to double jeopardy.

The Appellee would submit that the record reflects that this assault with a deadly weapon which resulted in injuries to the victim were separate from the other separate actions which actually resulted in the death of the child victim.

The Appellee would submit that this issue is also lacking in merit.

B.
**THERE WAS EVIDENCE THAT WICKER WAS
PROPERLY CHARGED WITH MURDER AND
AGGRAVATED ASSAULT.**

The record contains a sworn “Waiver of Indictment” which was signed by Wicker and his counsel, Ms. Vickie Williams, in the record of this cause. C.P. 87. It waived any requirement for a formal indictment for aggravated assault.

I consent to and request that the case against me proceed on waiver of indictment and bill of information filed by the District Attorney. C.P. 87.

It also contained acknowledgment by Wicker that he had received a copy of “The Criminal Information,” which is also contained in the record. C.P. 32; 87. That criminal information was for “the aggravated assault of Karen Bound.” This was specifically for assaulting the child with the butt end of a shot gun which did not by means of that blow result in the death of the child victim. C.P. 32.

In addition, in Wicker’s “Petition To Enter a Guilty Plea” to aggravated assault, he acknowledged knowing the aggravated assault charge was separate and apart from the murder charge for which he as also pleading guilty. C.P. 46. As stated, “I did knowingly or intentionally cause bodily injury to another , Karen Bond, with a deadly weapon by striking her in the head with a shotgun. However, the blow to the head did not cause the death of Karen Bond. This act occurred in Rankin County, Mississippi.” C.P. 46; 57.

In **McCullen v State**, 786 So. 2d 1069 (Miss. App. 2001), the Court of Appeals pointed out that a bill of information was the equivalent of an indictment.

Therefore, the Appellee would submit that this issue was not only barred by the statute of limitations, but is also lacking in merit.

C.
THERE WAS EVIDENCE OF EFFECTIVE
ASSISTANCE OF COUNSEL.

In his motion, Wicker also claimed that he received ineffective assistance of counsel from his guilty plea counsel team, Mr. Bobo and Ms. Williams. He alleges that they were ineffective because they allowed him to be plead guilty to a separate charge “that he knew nothing about.” C.P. 19. This was a charge that resulted in Wicker having an additional sentence added to the sentence he received for murder. C.P. 19.

The record reflects that Wicker acknowledged in his “Waiver of Indictment” that he was waiving any requirement for a formal indictment for aggravated assault. He consented to have his case proceed under “a Bill of Information filed by the District Attorney.” C.P. 87.

In addition, in his Petition he acknowledge knowing that he was charged with the separate crime of aggravated assault. This was more particularly explained as the aggravated assault of Karen Bond by hitting her in the head with the butt end of a shot gun which did not at that time result in her death. C.P. 46.

In his “Petitions To Enter a Guilty Plea,” Wicker acknowledged that was guilty of the aggravated assault with a rifle butt of the victim as well as the murder of the victim. C.P. 51; 57. This was acknowledged in two separate Petitions. C.P. 51;57.

In addition, Wicker acknowledged that he “was satisfied with the advice and counsel they have given me.” C.P. 47; 52. The record reflects that as a result of his guilty plea counsels efforts on his behalf, Wicker avoided a possible death penalty.

In **Lindsay v. State**, 720 So. 2d 182, 184 (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant’s affidavit. The record reflects no affidavits or any informal statement by Wicker of any proposed witness who could testify in support

of his claims for relief. C.P. 6-60.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052, the Court pointed out that where there was a lack of evidence that the alleged deficiencies of guilty plea counsel undermined confidence in the reliability of the proceedings, the claim would fail. There is no such evidence in the instant cause.

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.

Therefore, this issue was not only waived, it was also lacking in merit.

CONCLUSION

This Court should affirm the trial court's denial of relief on grounds of procedural bar as well as lacking in merit for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

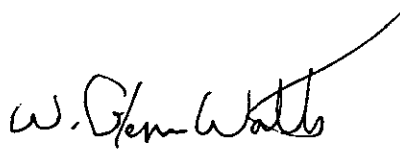
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 20th day of August, 2008.



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