

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICHARD K. DICKERSON

APPELLANT

VS.

NO. 2008-CP-1149-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the denial of a *pro se* motion for post-conviction relief from the Circuit Court of Grenada County, Mississippi, Honorable Joseph H. Loper, presiding.

ISSUE

- I. WHETHER THE TRIAL COURT PROPERLY DENIED DICKERSON'S MOTION FOR POST CONVICTION RELIEF?

STATEMENT OF THE FACTS

On June 22, 2006, a Grenada County Grand Jury indicted Richard Kerry Dickerson as a habitual offender for Aggravated Assault and Armed Robbery. (CP 14). On August 16, 2006, the court declared a mistrial after the jury was unable to reach a verdict. (CP 15). On January 22, 2007, Dickerson pleaded guilty to Aggravated Assault and Armed Robbery, as a non-habitual. (CP 16-18). He received two concurrent sentences of nineteen years and three hundred and fifty days in the custody of the Mississippi Department of Corrections with nineteen years suspended and then post release supervision. As part of the plea agreement and on motion of the State, the habitual offender status was dismissed. (CP 19-21; Supp.T 12-15).

Less than a year after being released from incarceration, Dickerson violated the terms of his post release supervision. The trial court revoked his suspended sentence and ordered him to serve nineteen years.(CP 22-23).

Dickerson filed a pro se motion for post conviction relief alleging ineffective assistance of counsel. (CP 50-59). On June 22, 2008, Judge Loper found the motion without merit and summarily denied the relief without hearing. (CP 26-33, 34). Feeling aggrieved, Dickerson appealed. (CP 3-13).

SUMMARY OF THE ARGUMENT

The Grenada County Circuit Court's ruling denying Dickerson's motion for post-conviction relief should be affirmed. Dickerson's trial counsel was not deficient in his performance. Issues raised for the first time in Dickerson's Supplement Brief on Appeal were waived for failure to raise them with the trial court in his Motion for Post-Conviction Collateral Relief.

ARGUMENT

PROPOSITION I: THE TRIAL COURT PROPERLY DENIED DICKERSON'S MOTION FOR POST CONVICTION RELIEF.

An appellate court will not reverse the trial court's decision to dismiss a motion for post-conviction relief "absent a finding that the trial court's decision was clearly erroneous." *Williams v. State*, 872 So2d 711, 712 (Miss.Ct.App. 2004).

Dickerson begins by arguing that he received ineffective assistance from the attorney who represented him in circuit court. This is the same attorney who was able to get a hung jury at Dickerson's first trial and was able to convince the prosecutor to recommend that Dickerson receive 20 years, with only the 350 days to serve, instead of life without parole.

To prevail on an issue of ineffective assistance of counsel, Dickerson must demonstrate that his counsel's performance was deficient and the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a guilty plea, Dickerson must demonstrate that his counsel's performance fell below the range of competence demanded of attorney's in criminal cases and that but for the attorney's substandard performance, he would have insisted on going to trial. See *Alexander v. State*, 605 So.2d 1170, 1173 (Miss.1992). Dickerson wholly fails in his burden of proof.

In *Smith v. State*, 636 So.2d 1220 (Miss. 1994), the Mississippi Supreme Court held that when the transcript from court proceedings and the petition for post-conviction relief contradict one another, "the latter is practically rendered a "sham", thus allowing the summary dismissal of the petition to stand." In *Ford v. State*, 708 so.2d 73 (Miss.1998), the court held that a post conviction motion "cannot be supported when the record clearly belies every allegation Petitioner makes in his Post-Conviction Relief Motion." In *Grayer v. State*, 823 So.2d 592 (Miss.App.2002), it was held

that, “This lack of evidence would not be fatally prejudicial to his claim, but for the fact that the record of the guilty plea hearing in this case directly contradicts his claims.”

Dickerson’s ineffective assistance of counsel claim is contradicted by the record. Dickerson claimed in his motion for post-conviction relief that: (1) trial counsel failed to advise him of the elements of the crimes that he was charged with committing; (2) counsel failed to advise him of the maximum and minimum sentences available for the crimes he was charged with committing; (3) counsel failed to advise him of the nature and consequences of a plea of guilty; (4) counsel failed to obtain his medical records before his first trial and inform the court and the prosecution of his “mental status at the time on making a decision in short notice.” Dickerson claims that he would not have pled guilty had his trial attorney properly informed him of the above matters and informed the trial court of his mental status.

A review of Dickerson’s Petition to Enter Plea of Guilty and the colloquy between Judge Loper and Dickerson show that Dickerson stated under oath that he discussed the elements of the crimes for which he was charged with his attorney (Supp.T 8); Dickerson knew the minimum and maximum sentences for both crimes (Supp. T 7, 8); he fully understood the nature and consequences of pleading guilty (Supp.T 5,6); and he understood all of his constitutional rights and further understood that he would be waiving or giving up those rights by pleading guilty (Supp. T 6). (CP 16-18). Additionally Dickerson advised the court during the plea that he was not suffering from any disability of mind. (Supp T 5) and that he was satisfied with the with the advice and assistance provided by his lawyer (Supp.T. 9). (CP 16-18).

Dickerson’s statement in his Motion for Post-Conviction Collateral Relief totally contradict his testimony under oath when he entered his guilty plea and signed the sworn petition. These contradictions show Dickerson’s present claim to be a sham.

The Mississippi Supreme Court “has implicitly recognized in the post-conviction relief context that where a party offers only his affidavit, his ineffective assistance of counsel claim is without merit.” *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995) (citing *Brooks*, 573 So.2d at 1354). Not only did Dickerson not provide affidavits from witnesses, he failed to provide an affidavit to his own motion for relief. Dickerson filed an affidavit, however it was with his Supplement Brief on Appeal.

“It is elementary that a party seeking reversal of the judgment of a trial court must present this Court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved.” *Hansen v. State*, 592 So.2d 114, 127 (Miss.1991). An order denying post-conviction relief is presumed correct. *Nelson v. State*, 919 So.2d 124, 126(¶ 6) (Miss.Ct.App.2005) (citing *Branch v. State*, 347 So.2d 957 (Miss.1977)). Mississippi Code Annotated section 99-39-9 (Rev.2005) states, in pertinent part, that:

- (1) A motion under this chapter shall name the state of Mississippi as respondent and shall contain all of the following:...
- (d) A separate statement of the specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner.
- (e) Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion....

Dickerson failed to provide this Court with affidavits of those who would testify to the assertions he made in his brief on appeal. This court held in *Barnes v. State*, 937 So.2d 1006 (Miss.Ct.App. 2006)(citing *Colenburg v. State*, 735 So.2d 1009 (Miss.Ct.App.1999) that it can only consider those facts that are found in the record, and cannot rely on allegations contained within a petitioner’s brief. *Henderson v. State*, 783 So.2d 769(¶ 4) (Miss.Ct.App.2001).

Dickerson claimed for the first time on appeal that he was not competent to enter a plea and therefore his guilty plea was involuntary; and that his attorney failed to obtain a competency hearing

pursuant to U.C.C.R. 9.06. (Appellant's Supplemental Brief 3,5,6,10,13). Additionally, Dickerson claimed for the first time on appeal that his sentence was illegal.(Appellant's Supplement Brief 8).

It is well settled that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court. *Gardner v. State*, 531 So.2d 808 (Miss.1988). "Questions will not be decided on appeal which were not presented to the trial court and that court given an opportunity to rule on them. In other words, the trial court cannot be put in error, unless it has had an opportunity of committing error." *Stringer v. State*, 279 So.2d 156, 158 (Miss.1973); *Jones v. State*, 915 So.2d 511, 513 (¶ 7) (Miss.Ct.App.2005).

Appellee would submit that the trial court correctly found Dickerson's motion for post conviction relief without merit. There is no indication in the record that the trial court's decision was clearly erroneous.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the order of the Circuit Court of Grenada County denying Richard Kerry Dickerson's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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 11th day of March, 2009.



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