IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TIMOTHY DIGGS — APPELLANT

VS. — NO. 2008-CP-1546

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TIMOTHY WAYNE DIGGS **APPELLANT**

vs. **CAUSE No. 2009-CP-01546-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Lawrence County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner executed a waiver of indictment and consent to be proceeded against by information to the felony of armed robbery. The armed robbery was committed against a clerk of a store known as the Valley Quik Stop on 9 February 2005. (R. Vol. 2, pp. 21 - 22; Vol. 1, pg. 32). The prisoner executed a petition to enter a guilty plea, and on 21 April 2005 it was taken up by the Circuit Court. After the usual enquiries were made by the Circuit Court, his plea of guilty to the felony was accepted and he was duly convicted and sentenced, this by Order filed on 27 June 2005). (R. Vol. 1, pp. 33 - 35; Vol. 2).

In due course, the prisoner, on 9 May 2008, filed a motion in post - conviction relief, alleging that: (1) he had been sentenced to a mandatory sentence without having been indicted;

(2) that no firearm was introduced into evidence to show that an armed robbery had been committed; (3) that the Circuit Court failed to advise the prisoner of his right to appeal his sentence; (4) that his attorney told him that if he did not waive indictment and consent to being proceeded against by information that the attorney would see to it that he would be tried before a particular judge and be sentenced to a term of life imprisonment; (5) that the trial court failed to determine that a factual basis for the plea of guilty existed. The prisoner further alleged that he never went inside the store during the commission of the armed robbery. (R. Vol. 1, pp. 2 - 3).

The Circuit Court denied relief on this motion, without an evidentiary hearing, in a detailed order filed 27 August 2008. (R. Vol. 1, pp. 43 - 49). As night must follow day, so this appeal follows the Circuit Court's Order denying relief in post - conviction relief, by notice of appeal filed on 15 September 2008. (Vol. 1, pg. 56).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

This Court will not disturb a Circuit Court's denial of relief on a motion in post - conviction relief absent a finding that its decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148 (Miss. Ct. App. 2002). Questions of law, however, are reviewed *de novo*. *Pace v.*

State, 770 So.2d 1052 (Miss. Ct. App. 2000).

1. Was it required that the information exhibited against the prisoner inform him of the mandatory nature of a sentence imposed for the felony of armed robbery; was the information defective because it did not identify the statute number assigned to the felony of armed robbery?

The first argument tendered by the prisoner appears to be a claim that the information he consented to was defective because it mentioned nothing about the mandatory nature of a sentence to be served upon conviction of armed robbery, and because the information did not cite the statute number for armed robbery. (Brief for the prisoner, at pages 6 - 8).

These claims were waived by the prisoner's plea of guilty. A valid plea of guilty acts as a waiver as to all non-jurisdictional defects. *Swift v. State*, 3 So.3rd 1108 (Miss. Ct. App. 2008). Neither of these alleged defects are jurisdictional in nature.

Secondly, the prisoner presents no authority to demonstrate that an information must notice an accused about parole eligibility considerations with respect to any sentence that might be imposed upon conviction, and no authority to demonstrate that the lack of a statute number in an information invalidates the information. His argument is for that reason abandoned. *Wall v. State*, 883 So.2d 617 (Miss. Ct. App. 2004).

Even if these claims were not waived or abandoned, there is no merit in them. There is no requirement of which we are aware that an information must inform an accused that any sentence imposed upon conviction will or may be a mandatory sentence. As for the statute number, the lack of the statute number will not invalidate a charging document where it is clear that the accused was aware of what felony to which he was pleading. *Harris v. State*, 819 So.2d 1286 (Miss. Ct. App. 2002). In any event, as noted by the Circuit Court, the information did in fact identify the statute number. (R. Vol. 1, pg. 45). We further adopt the Circuit Court's findings and conclusion of law with respect to this issue. (R. Vol. 1, pp. 44 - 45).

To the extent that the prisoner means to say that he had been given incorrect advice concerning the mandatory nature of the sentence by his attorney, there is nothing to support this claim in the prisoner's motion save his own affidavit. (R. Vol. 1, pg. 21). This was insufficient to require an evidentiary hearing. *Bliss v. State*, 2 So.3rd 777 (Miss. Ct. App. 2009). Beyond this, the prisoner stated under oath that his attorney had explained the penalties attached to the charge against him, and stated that he was satisfied with his attorney's representation. (R. Vol. 2, pp. 22 - 23; 25; 27-29).

To the extent that the prisoner means to complain that the Circuit Court did not advise him with respect to parole eligibility matters, the court was under no obligation to do so. *Smith v. State*, 919 So.2d 989, 993 (Miss. Ct. App. 2005).

2. Advice concerning appeal of sentence

The second complaint raised here by the prisoner is that he was not advised by the Circuit Court that he could appeal the sentence imposed in consequence of his guilty plea. (Brief for the prisoner, at 8 - 10). We note, preliminarily, that the prisoner has not indicated what ground or grounds exist to support such an appeal, other than a vague claim that some fundamental right might be involved.

Nonetheless, it is clear that the Circuit Court was under no obligation to advise the prisoner of this said-to-be right to appeal. *Coleman v. State*, 979 So.2d 732 (Miss. Ct. App. 2008).

3. Voluntariness of plea

The prisoner appears to complain that the Circuit Court failed to ensure that there was a factual basis for his plea of guilty. (Brief for the prisoner at 10 - 11).

In the course of the plea colloquy, the court asked the prisoner whether he wished to have

the charge against him read to him, to which the prisoner replied in the negative. The court then informed the prisoner that the charge was armed robbery, and asked him for his plea, to which the prisoner replied "guilty". The court then asked the prisoner if he was pleading guilty because he was guilty, and whether the allegations of the information were true and correct. The prisoner replied affirmatively. (R. Vol. 2, pg. 49). Prior to these questions and answers, the prisoner stated that he had read his petition to enter a guilty plea and the charge contained in the information and understood what he had read. (R. Vol. 2, pg. 17). He also indicated that his attorney had gone over the petition and the charge with him and explained them to him. (R. Vol. 2, pp. 20 - 21).

The information alleged that the prisoner had, on 9 February 2005, in Lawrence County, committed an armed robbery of Valley Quik Stop by putting a clerk in fear of immediate injury by the exhibition of a hand gun. (R. Vol. 1, pg 32).[1] The facts alleged in the information certainly alleged a violation of Miss. Code Ann. Section 97-3-79 (Rev. 2006).

According to the prisoner's sworn responses to the court's questions, he clearly was aware of the allegations made against him in the information. He further stated that those allegations were true and correct and that he was pleading guilty because he was guilty. The allegations of the information were sufficiently specific to establish a factual basis for the plea. *Cf. Coleman v. State*, 979 So.2d 731 (Miss. Ct. App. 2008). An indictment or information may be the sole source of the basis for the plea, if reasonably specific. *Madden v. State*, 991 So.2d

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[1] The executed information has not been made a part of the record. What is part of the record is apparently an unexecuted copy of the information that the prisoner attached as an exhibit to his motion in post - conviction relief. Here, though, the prisoner admits that he did execute a waiver of indictment and consent, (Brief for the prisoner, at 5), and no issue is made here concerning whether he did in fact waive indictment and consent to being proceeded against by information.

1231 (Miss. Ct. App. 2008).

4. Ineffective assistance of counsel

Several instances of alleged ineffective assistance of counsel are raised by the prisoner. However, his motion in post - conviction relief contained no affidavits other than his own. As we have stated above, for this reason the Circuit Court committed no error in refusing to grant an evidentiary hearing. *Bliss, supra.* This is especially so here in view of the fact that the prisoner alleges that the attorney coerced him into pleading guilty by appealing to the prisoner's family. There are no affidavits from anyone except the prisoner.

As for the claim that the attorney coerced the prisoner into pleading guilty (Brief for the prisoner, at 11), this claim is rebutted by what the prisoner told the Circuit Court, under oath, during the plea colloquy. The prisoner specifically denied having been coerced by anyone. Moreover, he expressed satisfaction with this attorney's representation. (R. Vol. 2, pp. 27 - 28; 39 - 41). Where a prisoner later contradicts his statements made under oath during a plea colloquy, a Circuit Court may rely upon the statements made during the plea colloquy. *Templeton v. State*, 725 So.2d 764, 767 (Miss. 1998).

The prisoner then claims that the attorney did not know the law concerning armed robbery and accessory after the fact of armed robbery. (Brief for the prisoner, at 13). There is nothing whatsoever in the record to support this bald accusation. Nor is there any support for the claim that the prisoner was not informed "regarding the full scope of the sentence". On the other hand, it is clear that the prisoner acknowledged that he had been informed of the minimum and maximum sentences imposable for his felony. (R. Vol. 2, pp. 22 - 23). Nor is there the slightest suggestion in the record or elsewhere that the prisoner's attorney did not investigate the case and interview witnesses. The prisoner does nothing more than to make these allegations; he does not

point to a single thing to give flesh to them. (Brief for the prisoner, at 23). There are no affidavits from these supposed witnesses.

The prisoner here asserts that he was not told that he could have been sentenced to life imprisonment for the felony of armed robbery, had a jury so decreed. This claim is rebutted by his statement in the plea colloquy that he had been informed of the minimum and maximum sentences imposable. Beyond this, though, since the prisoner was not sentenced to life imprisonment, we think he had nothing to complain of. He suffered no prejudice.

We also adopt the Circuit Court's reasoning concerning these claims as set out in its Order denying relief on the prisoner's motion.

5. The prisoner's claim that he never entered the store while a cohort robbed it

The prisoner asserts that he told the Circuit Court during the sentencing hearing that he never entered the store in the course of the robbery. He claims, apparently, that he denied his guilt. On the other hand, it could be that the prisoner is under the misapprehension that he could not have been guilty of armed robbery if he never entered the store with a gun, with the purpose of robbing it. *McGuiston v. State*, 791 So.2d 315 (Miss. Ct. App. 2001). The prisoner then goes on to tell a tale of woe about his alleged inability to make the transcript of the record of the sentencing hearing a part of the record before this Court. (Brief for the prisoner, at 24 - 29).

A transcription of the record of the sentencing hearing was made, and the Clerk of the Circuit Court has sent it to this Honorable Court's clerk. In the prisoner's sentencing hearing, the prisoner admitted that he had previously entered a guilty plea to the felony of armed robbery. When allowed allocution, the prisoner apologized for his actions and for having been with the wrong person at the wrong time. He further said that he had never been in trouble previously and that "it" was just something that came upon him.

The Circuit Court made reference to a letter, and indicated that it was taking the letter into consideration. It then stated that its main consideration, with respect to sentencing, was who went into the store with a gun. The prisoner replied that he had not gone into the store with a gun, that he never left his car. The court acknowledged that that was what the prisoner's lawyer had maintained. The prisoner allowed that he would sit for a polygraph examination on the point that he had never entered the store. The prisoner denied having entered the store with a gun, notwithstanding the apparent fact that the store owner would have testified that the prisoner was the one who entered the store with the gun. There were three persons involved in the armed robbery.

Although the Circuit Court had apparently arrived at a decision as to sentence, it did not impose sentence at that time. Instead, the Circuit Court deferred sentencing pending further investigation. It is clear that the court's intention was to mete out a stiffer sentence to the one who entered the store with the gun. (Supp. Vol. 1, pp. 1 - 5). What the court's investigation revealed cannot be determined on this record. All that can be known is that the prisoner was sentenced to a term of thirty years imprisonment, with ten to be served and twenty years on post - conviction release with a five - year period of supervision, fine and assessments. (R. Vol. 1, pp. 33 - 35).

We do not think that the comments made by the prisoner at the aborted sentencing hearing can be reasonably seen as an attempt to withdraw the previously entered plea of guilty or a claim of actual innocence. The colloquy was entirely about whether the prisoner actually went into the store with a gun in order to rob it, not whether the prisoner was not involved in the armed robbery as an aider and abettor of armed robbery. The prisoner admitted that he had been involved in the robbery: he told the court that he had never been in trouble before and that his

involved was something that came upon him. The prisoner here admits that he was involved in the robbery, although he attempts to say (without explanation) that he was a "simple accessory after the fact of armed robbery." (Brief for the prisoner, at 12). The prisoner at no time claimed that he was not guilty of the felony charged against him. He never attempted to withdraw his plea. He admitted his guilt in the plea colloquy, under oath.

Taking the prisoner's words in the light most favorable to the prisoner, the prisoner simply denied having himself taken the gun into the store. He clearly indicated, however, that he aided and abetted the person who carried the gun into the store and robbed it, or perhaps that he was an accessory before the fact of the commission of the felony. This, if true, though, would avail the prisoner nothing. An aider and abettor of a felony or an accessory before the fact of the commission of a felony is indictable and triable as a principal. Miss. Code Ann. Section 97-1-3 (Rev. 2006); *Pleasant v. State*, 701 So.2d 799 (Miss. 1997). As such, he is as guilty as the person who actually entered the store with the gun, and subject to the same penalties for it. *McGuiston, supra.*

CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief without an evidentiary hearing should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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