

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**RONALD MARTIN BAILEY**

**APPELLANT**

**VS.**

**NO. 2008-CP-1607**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE ISSUES**

- I. The State's resubmission of charges against Bailey to a later grand jury did not constitute double jeopardy.
- II. Bailey waived the right to question the validity of the search warrant or any evidence against him when he pleaded guilty.
- III. By pleading guilty, Bailey waived his right to a speedy trial.
- IV. Bailey is not entitled to receive credit for time served on a different charge even though he was on a detainer for his Lowndes County charge.
- V. By pleading guilty, Bailey has waived his right to challenge the sufficiency of the informant's statement that was the basis for the search warrant.
- VI. Bailey is unable to show that his plea was in any way coerced and his sworn statements during the plea hearing contradict his contention that his plea was coerced.
- VII. Bailey fails to show, under either prong of *Strickland*, that he received ineffective assistance of counsel.

### STATEMENT OF THE CASE

On or about August 24, 2006, Ronald Martin Bailey filed his Petition to Enter a Guilty Plea to one count of Possession of Hydrocodone. The remaining three counts were retired to the file. (Tr. 9; C.P. 49) On August 24, 2006, a plea hearing was held. (Tr. 1) The prosecution recommended that Bailey be sentenced to serve a term of eight years in the Mississippi Department of Correction to be followed by five years post-release supervision, with a fine to be set by the court. (Tr. 7) On August 14, 2008, Bailey filed a Motion for Post Conviction Relief in the Circuit Court of Lowndes County, Mississippi. (C.P. 12) On or about September 5, 2008, the Lowndes County Circuit Court dismissed Bailey's Petition for Post Conviction Relief. On or about September 30, 2008, Bailey filed a Motion for Appeal with the Mississippi Supreme Court. (C.P. 77) The Mississippi Supreme Court granted Bailey's motion and the instant appeal ensued. (C.P. 78)

### SUMMARY OF THE ARGUMENT

The State's resubmission of charges against Bailey to a later grand jury did not constitute double jeopardy since double jeopardy does not attach until the jury is sworn. Bailey waived the right to question the validity of the search warrant or any evidence against him when he pleaded guilty. By pleading guilty, Bailey waived his right to a speedy trial. Bailey is not entitled to receive credit for time served on a different charge even though he was on a detainer for his Lowndes County charge. By pleading guilty, Bailey has waived his right to challenge the sufficiency of the informant's statement that was the basis for the search warrant. Bailey is unable to show that his plea was in any way coerced and his sworn statements during the plea hearing contradict his contention that his plea was coerced. Bailey fails to show, under either prong of *Strickland*, that he received ineffective assistance of counsel. Further, he offers no

affidavit of his own to support this contention. There is no evidence in the record that he received ineffective assistance of counsel. Further, his plea bargain was for significantly less than the maximum sentence for the crime to which he pled and the three remaining charges were retired to the file.

### **ARGUMENT**

#### **I. The State's resubmission of charges against Bailey to a later grand jury does not constitute double jeopardy.**

Bailey states that the Lowndes County Grand Jury had previously returned a No True Bill on his indictment in the same cause. According to Bailey, the indictment with a change in the date of the crime was resubmitted to the grand jury which then returned a true bill. Bailey argues that this is double jeopardy.

The basic law in Mississippi as to double jeopardy is as follows:

Double jeopardy protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *White v. State*, 702 So.2d 107, 109 (Miss.1997). "Where the two offenses for which the defendant is punished or tried cannot survive the same elements test, the double jeopardy bar applies.... The same elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *Id.* (quoting *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556, (1993)). Even though there may be a substantial overlap in the proof supporting the convictions of the different crimes, the Blockburger test is met where each offense requires proof of an element not necessary to the other. *Bannister v. State*, 731 So.2d 583, 586 ¶¶ 12 (Miss.1999). Double jeopardy does not protect a defendant against different prosecutions for different offenses. *Moore v. State*, 617 So.2d 272, 274-75 (Miss.1993).

*Greenwood v. State*, 744 So.2d 767, 770-71 (Miss.1999).

Jeopardy does not attach until the jury is sworn. No jury was ever sworn when Bailey's first indictment went before the grand jury. He was not acquitted, prosecuted for the same offense after conviction or punished multiple times for the same offense. This issue is without merit and the ruling of the trial court should be affirmed.

**II. Bailey waived the right to question the validity of the search warrant or any evidence against him when he pleaded guilty.**

"[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin." *Madden v. State*, 991 So.2d 1231, 1237 (Miss. App. Ct. 2008). Further, a guilty plea, waives any argument that the indictment was faulty. See *Miller v. State*, 834 So.2d 721, 723 (Miss. Ct. App. 2003). Bailey has waived any argument that the search warrant was invalid. This issue is without merit and the ruling of the trial court should be upheld.

**III. By pleading guilty, Bailey waived his right to a speedy trial.**

"[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin." *Madden v. State*, 991 So.2d 1231, 1237 (Miss. App. Ct. 2008).

Further, as the trial court noted in its order, the delay in the bringing Bailey before the Court was due in part to his being held in a correctional facility in a different state and having to be extradited and in part to various continuances contained because he kept changing counsel.

This issue is without merit and the ruling of the trial court should be affirmed.

**IV. Bailey is not entitled to receive credit for time served on a different charge even though he was on a detainer for his Lowndes County charge.**

The prosecution stated during the plea hearing that the recommendation was for Bailey's sentence was to run consecutively with the sentence he was serving in federal jurisdiction. The trial judge stated that he was uncertain of his authority to determine if the sentence would run concurrently or consecutively with the federal sentence. Both Bailey and his counsel stated that the prosecution's recommendation was what they expected.

In *Skinner v. State*, 790 So.2d 218 (Miss. Ct. App. 2001), the Mississippi Court of Appeals held that Skinner was not entitled to credit for time served on another charge in another county even though he was on detainer for charge on which he was being sentenced. Sentencing is generally within the sound discretion of the trial judge and the trial judge's decision will not be disturbed on appeal if the sentence is within the term provided by statute. *Davis v. State*, 724 So.2d 342 (Miss.1998). The practical effect of this general rule is that a trial judge's sentencing decision has traditionally been treated as unreviewable so long as the sentence was within the statutory limits. As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal. *Wallace v. State*, 607 So.2d 1184, 1188 (Miss.1992).

This issue is without merit and the ruling of the trial court should be upheld.

**V. Bailey is not entitled to challenge the sufficiency of the informant's statement to support the search warrant as he has pleaded guilty.**

"[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin." *Madden v. State*, 991 So.2d 1231, 1237 (Miss. App. Ct. 2008). This issue is without merit and the judgment of the trial court should be affirmed. In *Pevey v. State*, 914 So.2d 1287



(Miss. Ct. App. 2005), the Mississippi Court of Appeals opined:

Pevey first contends that the search and seizure violated the Fourth Amendment because the officers did not enter his home with a warrant. Pevey also argues that the situation did not create exigent circumstances to prevent the officers from obtaining a warrant. He further argues that the officers created any exigent circumstances that may have existed in order to circumvent the warrant requirement. However, the possibility does remain that exigent circumstances could exist to enter the home such as in *Moss v. State*, 411 So.2d 90 (Miss.1982) where the officer heard the code word to know that a drug sale was happening after announcing his presence and the officer had a justified belief that the drugs might be destroyed.

However, Pevey waived his challenge to this constitutional violation by pleading guilty. This case is similar to *Young v. State*, 859 So.2d 1025, 1028 (Miss. Ct. App. 2003) where the court found that the defendant waived his probable cause violation to searching his vehicle by pleading guilty. Here, Pevey waived his search and seizure claim by pleading guilty. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of his constitutional rights that occurred prior to the entry of the guilty plea." *Battaya v. State*, 861 So.2d 364, 366 (Miss. Ct. App. 2003) (citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235, (1973)).

Bailey has waived his right to object to the search and seizure by pleading guilty. This issue is without merit and the ruling of the trial court should be upheld.

**VI. Bailey's sworn statements during the plea hearing do not support his contention that his plea was coerced.**

Bailey asserts that prosecutors, police and detectives coerced his guilty plea. This issue is unsupported by the record and is without merit.

The following colloquy took place during the plea hearing:

Court: Mr. Bailey, did your lawyer, police officers [or] anyone else promise you

anything or threaten you to get you to sign the petition or plead guilty to this charge?

Bailey: No, I was --

Court: Other than a plea bargain agreement?

Bailey: Other than a plea bargain agreement, no sir.

Bailey offers nothing more than his bald allegation that he was “coerced and intimidated into pleading guilty by police, detectives and the district attorney prior to hearing on said guilty plea. Bailey references a petition signed by twenty people, however the petition appears to be a protest against jail conditions and does not reference Bailey’s plea agreement in any way. It should be noted that “[s]olemn declarations in open court [by a defendant] carry a strong presumption of verity.” *Baker v. State*, 358 So.2d 401 (Miss. 1978); See *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

## **VII. Bailey cannot show that he received ineffective assistance of counsel.**

To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with the defendant to prove both prongs. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). Under *Strickland*, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To overcome this presumption, “[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Bailey asserts that the three attorneys who represented him at different times in the course of the proceedings against him failed to insure that his constitutional rights were protected. Bailey makes these broad assertions, yet he does not provide any factual or evidentiary basis to support his claims. He also appears to complain about the plea bargain his final attorney negotiated, wherein three of the four counts against him were retired to the file and he was sentenced well below the statutory maximum.

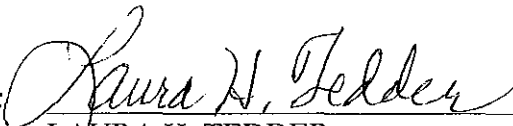

Bailey is unable to show any facts supporting his contention that his counsel's performance is deficient. Further, there is no reasonable probability that the outcome of the case would have been different. Further, "[w]here a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). See also *Brooks v. State*, 573 So.2d 1350 (Miss.1990). Accordingly, this issue is without merit and the ruling of the trial court should be upheld.

#### CONCLUSION

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

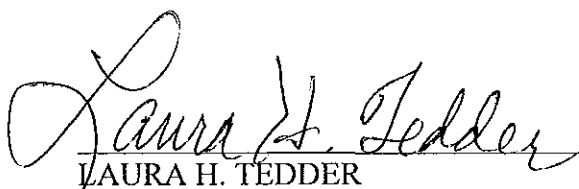
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 15th day of May, 2009.



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