

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE CHERRY, JR.

APPELLANT

VS.

NO. 2008-CP-1705-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE RECORD CONTAINS NO EVIDENCE OF DEFENSE COUNSEL’S ALLEGED CONSTITUTIONALLY DEFICIENT PERFORMANCE.	3
II. THE RECORD ESTABLISHES A FACTUAL BASIS FOR CHERRY’S GUILTY PLEA.	4
III. CHERRY’S PLEA WAS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY MADE.	5
IV. THE TRIAL COURT IS NOT REQUIRED TO ADVISE A PLEA PETITIONER OF HIS RIGHT TO APPEAL HIS SENTENCE.	6
V. CHERRY DID NOT RECEIVE AN EXCESSIVE SENTENCE.	6
VI. NO <i>BRADY</i> VIOLATION WAS COMMITTED BY THE STATE.	7
VII. THE TRIAL COURT DID NOT ERR IN DENYING CHERRY’S POST-CONVICTION REQUEST FOR DISCOVERY.	7
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

FEDERAL CASES

Brady v. Maryland, 373 U.S. 83 (1963)	7
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STATE CASES

Beamon v. State, 9 So. 3d 376, 380 (¶11) (Miss. 2009)	7
Brown v. State, 989 So.2d 882, 884 (Miss. Ct. App. 2007)	5
Coleman v. State, 979 So.2d 731, 733 (Miss. Ct. App. 2008)	6
Cook v. State, 990 So.2d 788, 792-93 (Miss. Ct. App. 2008)	6
Elliott v. State, 993 So.2d 397, 399-400 (Miss. Ct. App. 2008)	6
Fleming v. State, 553 So.2d 505, 506 (Miss.1989)	7
Hannah v. State, 943 So.2d 20, 24 (Miss. 2006)	3
Jefferson v. State, 855 So.2d 1012, 1014 (Miss. Ct. App. 2003)	4
King v. State, 503 So.2d 271, 275 (Miss. 1987)	3
Leavitt v. State, 982 So.2d 981, 984 (Miss. Ct. App. 2008)	3, 7
Lott v. State, 597 So.2d 627, 628 (Miss. 1992)	4
McNeal v. State, 951 So.2d 615 (Miss. Ct. App. 2007)	5
Swift v. State, 815 So.2d 1230, 1234 (Miss. Ct. App. 2001)	6
Thomas v. State, 936 So.2d 964, 967 (Miss. Ct. App. 2006)	4
Thornhill v. State, 919 So.2d 238, 241 (Miss. Ct. App. 2005)	6
Triplett v. State, 840 So.2d 727, 731 (Miss. Ct. App. 2002)	3
White v. State, 921 So.2d 402, 405 (Miss. Ct. App. 2006)	5

STATE STATUTES

Miss. Code Ann. 97-3-79	7
Miss. Code Ann. 97-3-79	7

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STATEMENT OF ISSUES

- I. THE RECORD CONTAINS NO EVIDENCE OF DEFENSE COUNSEL'S ALLEGED CONSTITUTIONALLY DEFICIENT PERFORMANCE.
- II. THE RECORD ESTABLISHES A FACTUAL BASIS FOR CHERRY'S GUILTY PLEA.
- III. CHERRY'S PLEA WAS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY MADE.
- IV. THE TRIAL COURT IS NOT REQUIRED TO ADVISE A PLEA PETITIONER OF HIS RIGHT TO APPEAL HIS SENTENCE.
- V. CHERRY DID NOT RECEIVE AN EXCESSIVE SENTENCE.
- VI. THE STATE COMMITTED NO *BRADY* VIOLATIONS.
- VII. THE TRIAL COURT DID NOT ERR IN DENYING CHERRY'S POST-CONVICTION REQUEST FOR DISCOVERY.

STATEMENT OF FACTS

On April 29, 2004, Willie Cherry, Jr. pleaded guilty to armed robbery. Although Cherry made an open plea, the trial court sentenced Cherry to eight years in accordance with the State's recommendation. T. 8-10. On May 7, 2007, Cherry filed a motion for post-conviction relief. C.P. 2-51. The motion was summarily denied by the trial court on March 20, 2008. C.P. 52-54.

SUMMARY OF ARGUMENT

Cherry has failed to show that trial counsel rendered deficient performance, and that absent defense counsel's alleged errors, Cherry would not have entered the guilty plea.

Cherry claims that there was no factual basis for the trial court's acceptance of his guilty plea. The record, however, shows otherwise. The State recited the facts it intended to prove if the case proceeded to trial. The facts announced by the State, if proven, constitute the crime of armed robbery.

Cherry's plea was voluntarily and intelligently given. The record shows that Cherry was the informed of the nature of the charges against him and the consequences of entering a guilty plea, as well as the minimum and maximum fines and sentences and the constitutional rights he would forfeit as a result of entering a guilty plea.

Cherry claims that the trial court committed error in failing to advise him of his right to appeal his sentence after entering a plea. This Court has repeatedly stated that the trial court is not required to inform a defendant of such.

Cherry received only an eight year sentence for armed robbery which carries a maximum sentence of life imprisonment. Such a sentence is far from excessive, and may even be characterized as lenient.

The record does not support Cherry's claim that the State committed a *Brady* violation.

The trial court did not abuse its discretion in denying Cherry's request for post-conviction discovery. His petition did not withstand summary dismissal, and he has not shown good cause for the discovery sought was relevant to any issue raised in his petition.

ARGUMENT

I. THE RECORD CONTAINS NO EVIDENCE OF DEFENSE COUNSEL'S ALLEGED CONSTITUTIONALLY DEFICIENT PERFORMANCE.

Cherry's ineffective assistance of counsel claim consists of allegations that defense counsel failed to investigate his case and failed to file a motion to suppress.

A defendant who enters a guilty plea and later alleges ineffective assistance of counsel must demonstrate that defense counsel's performance was deficient and that but for the alleged deficient performance, the defendant would not have entered a guilty plea. *Hannah v. State*, 943 So.2d 20, 24(¶7) (Miss. 2006). To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. *Leavitt v. State*, 982 So.2d 981, 984 (¶9) (Miss. Ct. App. 2008).

A post-conviction relief petitioner claiming ineffective assistance of counsel based on an alleged failure to investigate must state with particularity what the investigation would have revealed and how it would have altered the outcome. *Triplett v. State*, 840 So.2d 727, 731(¶ 11) (Miss. Ct. App. 2002). "[I]n order to establish that failure to investigate a line of defense constituted ineffective assistance, a petitioner must show that knowledge of the uninvestigated evidence would have caused counsel to vary his course." *King v. State*, 503 So.2d 271, 275 (Miss. 1987). Cherry apparently claims that further investigation would have revealed that a BB gun was used in the armed robbery, rather than a pistol which was alleged in the indictment. First, there is nothing in the record that would support Cherry's claim. Second, this Court has found that evidence was legally sufficient to

support a conviction for armed robbery where a pellet gun was the weapon of choice used during the commission of an armed robbery. *Thomas v. State*, 936 So.2d 964, 967 (Miss. Ct. App. 2006). Accordingly, Cherry has failed to assert any specifics that would have altered the outcome of his case, and his ineffective assistance claim on this point must fail.

Cherry also claims that trial counsel was constitutionally deficient in failing to file a motion to suppress. However, a defendant who enters a plea of guilty waives all evidentiary issues. *Jefferson v. State*, 855 So.2d 1012, 1014 (¶11) (Miss. Ct. App. 2003). Furthermore, Cherry fails to state a basis for a motion to suppress, much less assert facts that could establish that there was any merit to a motion to suppress.

Cherry has not proven deficient performance on the part of defense counsel. Without such a showing, Cherry cannot show that he was prejudiced. Accordingly, his claim of ineffective assistance of counsel necessarily fails.

II. THE RECORD ESTABLISHES A FACTUAL BASIS FOR CHERRY'S GUILTY PLEA.

Cherry claims that no factual basis existed for the trial court's acceptance of his guilty plea. A trial court must ensure that a factual basis exists before the court may accept a guilty plea. URCCC 8.04(A)(3). Reviewing courts must ensure that the record contains facts which are "sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." *Lott v. State*, 597 So.2d 627, 628 (Miss. 1992) (quoting *United States v. Oberski*, 734 F.2d 1030, 1031 (5th Cir. 1984)).

At the plea hearing, the State recited the facts it intended to prove if Cherry elected to proceed to trial.

In Cause No. 2004-005, Willie Cherry, Jr., on or about August the 11th, 2003, individually or while aiding and abetting or acting in concert with Henry Jennings

and/or another did unlawfully, willfully and feloniously with the intent to steal take approximately \$50.00 of United States' currency which was the property of Joseph Chandler and/or approximately \$1,961.40 in United States' currency which was the property of McDonalds from the person or presence of and against the will of Joseph Chandler or Ricardo Hollingsworth by putting either of them in fear of immediate injury to their person by the exhibition of a pistol.

T. 7. When asked if he committed the offense described by the prosecutor, Cherry answered in the affirmative. T. 8. A factual basis for a guilty plea exists where the State recites facts which constitute the crime charge. *Brown v. State*, 989 So.2d 882, 884 (¶9) (Miss. Ct. App. 2007) (citing *Corley v. State*, 585 So.2d 765, 767 (Miss. 1991)). The State's recitation of facts, if proven, constitutes armed robbery. Accordingly, Cherry's claim that no factual basis was established for the acceptance of his guilty plea is without merit.

III. CHERRY'S PLEA WAS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY MADE.

Cherry claims that his plea was involuntary. Specifically, Cherry claims that no one explained to him what constitutes a deadly weapon. Cherry alleges under this issue, as he does throughout the brief, that a BB gun was used in the armed robbery. Cherry mistakenly believes that an armed robbery cannot be committed with a BB gun.

A guilty plea is valid only if it is entered into "voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." *McNeal v. State*, 951 So.2d 615 (¶6) (Miss. Ct. App. 2007). A plea is voluntary when the defendant has been informed of the nature of the charges against him and the consequences of entering a guilty plea. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992)). The trial court must inform the defendant of the minimum and maximum prescribed penalties and the constitutional rights forfeited by entering a guilty plea. *Id.* An examination of the plea colloquy shows that Cherry was informed of the nature of the charges against

him and the consequences of entering a guilty plea, as well as the minimum and maximum sentence and the constitutional rights he would forfeit as a result of entering a guilty plea. As such, his plea was voluntarily and intelligently given.

Cherry also argues throughout his brief that the evidence was legally insufficient to support a conviction for armed robbery. However, one who enters a guilty plea waives the right to challenge the sufficiency of the State's evidence. *Thornhill v. State*, 919 So.2d 238, 241 (¶13) (Miss. Ct. App. 2005) ((citing *Swift v. State*, 815 So.2d 1230, 1234 (¶13) (Miss. Ct. App. 2001))).

For the foregoing reasons, the appellant's third assignment of error must fail.

IV. THE TRIAL COURT IS NOT REQUIRED TO ADVISE A PLEA PETITIONER OF HIS RIGHT TO APPEAL HIS SENTENCE.

Cherry claims that the trial court committed reversible error in failing to advise him of his right to appeal his sentence by way of direct appeal. This Court has repeatedly held that the trial court is not required to inform the defendant of his right to appeal his sentence after entry of a guilty plea. *Cook v. State*, 990 So.2d 788, 792-93 (¶11) (Miss. Ct. App. 2008); *Elliott v. State*, 993 So.2d 397, 399-400 (¶10) (Miss. Ct. App. 2008); *Coleman v. State*, 979 So.2d 731, 733 (¶6) (Miss. Ct. App. 2008). Therefore, Cherry's claim is without merit.

V. CHERRY DID NOT RECEIVE AN EXCESSIVE SENTENCE.

Cherry's argument that he received an excessive sentence is based on the claim that he was guilty only of accessory after the fact, which carries a maximum penalty of five years incarceration. The entirety of Cherry's argument once again attacks the legal sufficiency of the State's evidence. As previously stated, Cherry waived the right to attack the sufficiency of the State's evidence of armed robbery upon the entry of a valid guilty plea.

Cherry swore in open court that he was guilty of armed robbery which carries a maximum

sentence of life imprisonment. Miss. Code Ann. 97-3-79. In light of the trial court's power to sentence a defendant who pleads guilty to armed robbery to life minus one day, there can be no serious argument that an eight year sentence for armed robbery is excessive. Because Cherry has failed to show that an eight year sentence for armed robbery leads to an inference of gross disproportionality, this Court need not engage in *Solem v. Helm*¹ analysis. *Beamon v. State*, 9 So. 3d 376, 380 (¶11) (Miss. 2009).

VI. NO *BRADY* VIOLATION WAS COMMITTED BY THE STATE.

Citing *Brady v. Maryland*, 373 U.S. 83 (1963), Cherry claims that the State failed to provide in discovery the pistol used in the armed robbery, which Cherry claims was actually a BB gun. Cherry fails to present any proof of his allegations. Even if his allegation were true, he fails to show how the alleged omission would have affected his decision to plead guilty. See *Leavitt v. State*, 982 So.2d 981, 990 (¶36) (Miss. Ct. App. 2008).

VII. THE TRIAL COURT DID NOT ERR IN DENYING CHERRY'S POST-CONVICTION REQUEST FOR DISCOVERY.

A post-conviction relief petitioner may be entitled to post-conviction discovery for good cause shown only if his motion withstands summary dismissal. *Lawrence v. State*, 970 So. 2d 1291, 1295 (¶9) (citing *Fleming v. State*, 553 So.2d 505, 506 (Miss.1989)). Cherry's motion did not withstand summary dismissal and he has failed to show good cause that the discovery he sought was relevant to the issues raised in his petition. Accordingly, the trial court did not err in denying Cherry's request for post-conviction discovery.

¹463 U.S. 277 (1983) (overruled by *Harmelin v. Michigan*, 501 U.S. 957, 965-66 (1991)).


CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

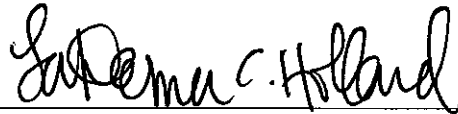
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 10th day of July, 2009.



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