

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL W. PRUITT

APPELLANT

VS.

NO. 2008-CP-1716

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court correctly denied Pruitt's motion to vacate his conviction as Pruitt's plea was knowing, voluntary and intelligent.
- II. The trial court correctly denied Pruitt's motion to vacate his conviction as Pruitt received constitutionally effective assistance of counsel.

STATEMENT OF THE CASE

On or about August 14, 2006, Michael W. Pruitt was indicted for two counts of sexual battery, one count of touching a child for lustful purposes, one count of aggravated assault and one count of kidnapping. (C.P. 29) On March 19, 2007, Pruitt filed his Petition to Enter Plea of Guilty to one count of kidnapping, one count of aggravated assault and one count of sexual battery. (Motion to Supplement the Record, Exhibit A) Pruitt was sentenced to a term of life in prison in the custody of the Mississippi Department of Corrections for sexual battery, 30 years in prison for the crime of kidnapping and twenty years in prison for the crime of aggravated assault. The trial court ordered the sentences to run consecutively. (State's Motion to Supplement the Record, Attachment C, Sentencing Hearing, pages 44-45.)

On or about May 19, 2008, Pruitt filed a Motion for Post Conviction Collateral Relief in the Circuit Court of Marshall County, Mississippi. (C.P. 1-27) There were no affidavits attached to the motion. On September 15, 2008, Pruitt filed a Motion for Leave to File Amended Motion for Post Conviction Relief Under the Post Conviction Collateral Relief Act. (C.P. 139) There were no affidavits attached to this motion. The trial court denied both the Motion and the Amended Motion on September 22, 2008. (C.P. 146) Pruitt filed his Notice of Appeal on October 16, 2008. Pruitt further filed a Designation of the Record which identified the following parts of the record as being necessary to be included on appeal:

- (1) All Pre-trial motions;
- (2) Indictment;
- (3) Plea agreement;
- (4) Guilty Plea transcript;
- (5) Sentencing order and transcript;
- (6) All Post-conviction proceedings;
- (7) Copy of all docket entries;
- (8) And all other Clerk papers, Pleadings filed in this case.

(C.P. 152)

The record as it was received by the State did not include the Plea Agreement, Guilty Plea Transcript or the Sentencing Order and Transcript. The State, in a separate Motion to Supplement, filed simultaneously with its Brief, requests that the record be supplemented to include these items. Copies of the Plea Agreement, Guilty Plea Transcript and Sentencing Order and Transcript are attached to the accompanying Motion to Supplement. The State will forward certified copies requested from the Marshall Circuit County Clerk's Office as soon as they are received.

SUMMARY OF THE FACTS

The victim, a six year old female, was reported missing from her bedroom during the early morning hours of the 22nd day of July, 2006. The parents reported that the door was partially opened when they discovered that the victim was missing. The investigation developed Michael Pruitt as the likely suspect. Pruitt was the boyfriend of the victim's babysitter and continually accompanied his girlfriend while she baby sat the victim.

On approximately July 12, 2006, Niki Shaw, the victim's baby sitter, ended her relationship with Pruitt, which enraged him. Pruitt subsequently made threats against Shaw's new boyfriend. During the early morning hours on July 22, several witnesses saw Pruitt's truck in the Laws Hill area where the victim was from. With assistance from the U.S. Attorney's office and the FBI, the Sheriff's department obtained cell phone tower records which indicated that Pruitt was in the Laws Hill area.

Pruitt abducted the victim from her residence during the early morning hours. He rode around with her in his truck in an attempt to locate Shaw's new boyfriend. During the time he had the victim in his custody, he fondled her and attempted vaginal and anal penetration with the victim. The victim had vaginal and anal injury consistent with blunt force trauma. During that time Pruitt talked to several people on his cell phone. After Pruitt was alerted that police were looking for him, he took the victim to an abandoned house where he shot her one time in the head and left her. He left the scene and went to the home of a friend, Jason Reeves, where he left the weapon he used to shoot the victim and he asked Reeves to provide an alibi for him. Pruitt then left Reeves house and went to his grandmother's house where he took a shower and went back to bed until he was apprehended by the Marshall County Sheriff's Department.

Pruitt was polygraphed by the FBI and interviewed by Sheriff Kenny Dickerson. He disclosed what had happened and agreed to take law enforcement officials to where the victim was. Pruitt led the sheriff and other investigators to the scene and found the victim alive. Pruitt made other admissions to the sheriff, his aunt Sharon Campbell, his sister and inmates at the Lafayette County Detention Center concerning his involvement in the kidnapping, sexual assault and aggravated assault of the victim including that he may have taken pictures of the victim with

a cellular telephone.

(State's Motion to Supplement the Record, Attachment B, Guilty Plea Hearing, pages 9-11.)

SUMMARY OF THE ARGUMENT

The trial court correctly denied Pruitt's motion to vacate his conviction as Pruitt's plea was knowing, voluntary and intelligent. Pruitt's testimony at the Plea Hearing and in the Plea Petition carry a strong presumption of verity and Pruitt does not present any factual evidence to overcome that presumption. The trial court correctly denied Pruitt's motion to vacate his conviction as Pruitt received constitutionally effective assistance of counsel. The record of the Plea Hearing reflects that Pruitt received constitutionally effective assistance of counsel. He cannot show any harm from the alleged failure of his attorney to inform him of disciplinary action taken in the State of Tennessee. Pruitt's Petition for Post-Conviction Collateral Relief filed in the trial court was not supported by affidavit. Further he did not include a separate statement of specific facts within his personal knowledge and sworn to by him and did not include a specific statement of facts not within his specific knowledge stating how or by whom the facts would be proven along with affidavits of the witness who will testified as required by § 99-39-9 of the Mississippi Code Annotated of 1972, as amended. The trial judge's denial of Pruitt's Motion for Post Conviction Collateral Relief should be affirmed.

ARGUMENT

I. The trial court correctly denied Pruitt's motion to vacate his conviction as Pruitt's plea was knowing, voluntary and intelligent.

"On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard." Johns v. State, 926 So.2d 188, 194(¶ 29) (Miss.2006) (citing *Reynolds v. State*, 521 So.2d 914, 918 (Miss.1988)). "A finding of fact is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." Id. (citations omitted).

Pruitt argues that his plea was not knowing, voluntary or intelligently entered because he was taking an anti-depressant at the time of the plea hearing. He alleges further that his plea was coerced by his court appointed attorney. Pruitt alleges that when he signed the Plea Petition that he was not advised of the charges and that the agreement did not state the charges.

The record clear shows that Pruitt's plea was knowing, voluntary and intelligent. The Petition to Enter Plea of Guilty signed by Michael Pruitt and filed on March 19, 2007, states,

"I plead guilty to the charges of

1. Kidnapping Count 5
2. Aggravated Assault Count 4
3. Sexual Battery Count 1

set forth in the indictment of this cause. Counts 2 and 3 are retired to the files.

(Exhibit A to Motion to Supplement Record)

A guilty plea is voluntary and intelligent only if the defendant has been advised "concerning the nature of the charge against him and the consequences of the plea." Alexander v.

State, 605 So.2d 1170, 1172 (Miss.1992) (citing *Wilson v. State*, 577 So.2d 394, 396-97 (Miss.1991)). More specifically, the defendant must be informed that by pleading guilty he waives the following: (1) the right to a jury trial, (2) the right to confront adverse witnesses, and (3) the right to protection against self-incrimination. *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). Pursuant to Rule 8.04(A)(4)(b) of the Uniform Rules of Circuit and County Court, the trial court must also “inquire and determine ... [t]hat the accused understands ... the maximum and minimum penalties provided by law.”

This Court has previously held that:

The burden of proving that a guilty plea was not made voluntarily is on the defendant. If this burden is not met, the defendant's plea must be upheld as one that was made voluntarily, knowingly and intelligently. It should be noted that “solemn declarations in open court [by a defendant] carry a strong presumption of verity.” Further, the record must reflect that the trial court thoroughly discussed with the defendant all of the consequences of a guilty plea, including the waiver of rights, satisfaction with one's attorney and advisement on the maximum and minimum penalties one can acquire for the crime committed. *Barnes v. State*, 803 So.2d 1271, 1274 (Miss.Ct.App.2002) (internal citations omitted) (emphasis added).

The record in this case reflects that Pruitt, on numerous occasions was questioned about the voluntariness of his plea. In his sworn Plea Petition, Pruitt stated, that he was mentally competent to make the petition and that he was not under the influence of drugs or alcohol nor suffering from any mental disease. (State's Motion to Supplement the Record, Attachment A, Petition to Enter Plea of Guilty.) He further stated that he had not been beaten, threatened, physically or mentally forced, intimidated or coerced in any manner to plead guilty to the crime charged against him. Pruitt stated that he offered his plea of guilty freely and voluntary and of

his own accord and with full understanding of all the matters set forth in the indictment.

Further, under questioning by the trial judge during the sentencing hearing, Pruitt testified that he was not under the influence of alcohol, drugs or any other substances that might impair or affect his ability to understand the proceedings. He testified that he did not suffer from any type of disability, physical, mental or otherwise that might impair or affect his ability to understand the proceedings. Pruitt testified that no one had promised him anything or threatened, intimidated, coerced or forced him to plead guilty. (State's Motion to Supplement the Record, Attachment B, Guilty Plea Hearing, pages 8-9.)

The prosecutor read the proof into the record Pruitt agreed that the proffer was substantially true and correct. Further, Pruitt was voir dired by his own attorney at the sentencing hearing. He testified that his plea was voluntary was not made because someone told him to plead guilty. He testified that he had talked with his family members about his plea. Pruitt testified that it was only his decision to enter his plea of guilty.

Pruitt had ample opportunity to inform the court that he was on medication and chose not to do so. The documents that Pruitt has attached to his Motion for Post-Conviction Relief, prescriptions for clonazepam and citalopram are dated July 20, 2006. (C.P. 30,31) Pruitt's plea hearing was held on March 19, 2007 and the prescriptions do not establish that Pruitt was on any medication at the time of the hearing. Further, Pruitt does not include an affidavit of any physician stating that he was on medication at the time of the hearing or that such medication would cause him to be impaired to the extent that he could not make a knowing, voluntary and intelligent plea. The affidavits Pruitt now offers as attachments to his Brief before this court are not proper and should be stricken as they are not a part of the trial court's record. Further, none

of the affiants are qualified to offer an opinion as to whether any drugs Pruitt might have taken at the time of his hearing would have impaired his ability to enter a knowing, voluntary and intelligent plea. The affidavits do not state specific facts constituting coercion or an involuntary plea.

Pruitt has failed to establish that his plea was involuntarily or unintelligently made. Pruitt's solemn declarations in open court carry great weight. Pruitt alleges that his plea was coerced by threats against family members, however he offers no specific facts to support this allegation. The affidavits he now presents are not a part of the record and should be stricken. Pruitt did not include a separate statement of specific facts within his personal knowledge and sworn to by him and did not include a specific statement of facts not within his specific knowledge stating how or by whom the facts would be proven along with affidavits of the witnesses who will testify as required by § 99-39-9 of the Mississippi Code Annotated of 1972, as amended. The trial judge's denial of Pruitt's Motion for Post Conviction Collateral Relief should be affirmed.

II. The trial court correctly denied Pruitt's motion to vacate his conviction as Pruitt received constitutionally effective 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 demonstrate both prongs. McQuarter v. State, 574 So.2d 685, 687 (Miss.1990).

In the context of a guilty plea, "[t]he defendant claiming ineffective assistance of counsel

most favorable to the Petitioner, the Court is of the opinion that the Petitioner is not entitled to the requested relief. Accordingly, the relief requested in hereby denied.

Pruitt filed his Notice of Appeal from the trial court's ruling on October 16, 2008. (C.P. 147) His brief in this cause was filed June 10, 2009. Attached to Pruitt's brief are three affidavits by Sharon Campbell, Opal Stegall and Jo Ann Taylor. These affidavits are dated February 9th and 12th of 2009, well after the trial court's ruling on Pruitt's motions. Further, these affidavits were never made a part of the record in this case. These affidavits should be stricken from the Appellant's brief.

In Boyd v. State, 797 So.2d 356 (Miss.Ct.App. 2001), the Mississippi Court of Appeals granted the State's Motion to Strike Boyd's belated, self-serving affidavits, holding:

[T]his affidavit and its assertions were never seen or heard of by the lower court and therefore, it cannot be found in the record of this case. Because the rule is well settled by now, Boyd and his current counsel must be aware that this Court may only review and rely on evidence that is provided in the record. [citations omitted] "It is a well stated principle that issues not presented at trial cannot be raised on appeal." [citations omitted] As well, the rules of appellate procedure dictated that claims must be decided upon the facts in the record rather than upon assertions in the parties briefs." [citations omitted]

Boyd at 364.

The *Boyd* court continued, noting, "[w]e cannot entertain Boyd's affidavit as it clearly was not presented to the lower court as evidence." *Id.* Therefore, the affidavits attached to Pruitt's brief in this matter are not properly before this court and should be stricken.

The record before the trial court clearly shows that Pruitt received adequate representation in his plea hearing. Pruitt's attorney went so far as to voir dire his client on the record. Pruitt

testified that he was satisfied with his attorney's representation in the Plea Petition and in the Plea Hearing under the questioning of the judge and his own attorney.

Pruitt now claims that his attorney was the suspended from the practice of law in Tennessee at the time of the Plea Hearing. Pruitt states that Dolan was required to inform his clients of the judgement against him and that Pruitt was not informed of the action against Dolan. However, Pruitt did not present any affidavits to the trial court substantiating this claim. Further, Pruitt cannot show that he was in any way damaged by Dolan's alleged failure to inform him of the disciplinary action taken in Tennessee.

The Supreme Court has stated that, in cases involving post-conviction relief, "where 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). As noted earlier, the affidavits attached to Pruitt's brief should be stricken as they are not a part of the record in this case.

This issue is without merit. The record of the Plea Hearing reflects that Pruitt received constitutionally effective assistance of counsel. He cannot show any harm from the alleged failure of his attorney to inform him of disciplinary action taken in the State of Tennessee. Pruitt's Petition for Post-Conviction Collateral Relief filed in the trial court was not supported by affidavit. Further he did not include a separate statement of specific facts within his personal knowledge and sworn to by him and did not include a specific statement of facts not within his specific knowledge stating how or by whom the facts would be proven along with affidavits of the witnesses who will testify as required by § 99-39-9 of the Mississippi Code Annotated of 1972, as amended. The trial judge's denial of Pruitt's Motion for Post Conviction Collateral Relief should be affirmed.

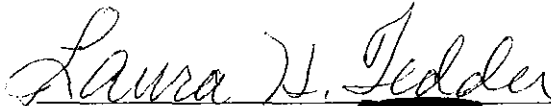
CONCLUSION

The assignments of error presented by Pruitt are without merit and the trial judge's denial of his Motion for Post Conviction Relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

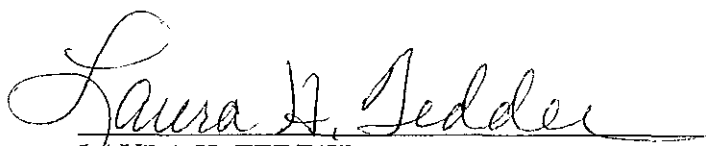
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 11th day of September, 2009.


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