IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GARY LEWIS — APPELLANT

VS. — NO. 2008-CP-1752-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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GARY LEWIS **APPELLANT**

VS. **NO. 2008-CP-1752-COA**

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PROCEDURAL HISTORY:

On January 6, 2004, Gary Lewis, "Lewis" plead guilty to three counts of conspiracy to sale cocaine before the Circuit Court of Pike county, the Honorable Keith Starrett presiding. R. 1- 13. His guilty pleas were accepted as voluntarily and intelligently entered. R. 6. Lewis was given twenty year concurrent sentences in the custody of the Mississippi Department of Corrections. R. 11.

On January 17, 2008, Lewis filed a pro se "motion for post conviction relief." C.P. 14-44. The trial court denied relief. C.P. 50-52. From that denial of relief, Lewis filed notice of appeal. C.P. 68.

ISSUES ON APPEAL

I.

WERE THERE GROUNDS FOR RECUSAL FOR THE TRIAL COURT?

II.

DID LEWIS RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

III.

WERE LEWIS' PLEAS VOLUNTARILY AND INTELLIGENTLY ENTERED?

STATEMENT OF THE FACTS

In May 2003, Lewis was indicted, with other defendants , for three sales and three conspiracies to sell cocaine to a confidential informant on or about February 27, 2002, and May 17, 2002 by a Pike County Grand jury. C.P. 2, 6 and 10. The three separate Pike County cause numbers were 03-182-KB, 03-185-KB, 03-190-KB. C.P. 2-10.

On January 6, 2004 , Lewis pled guilty to three counts of conspiracy to sale cocaine before the Circuit Court of Pike county, the Honorable Keith Starrett presiding. R. 1- 13. Lewis was represented by Mr. Nelson Estess. R. 1. Lewis with the benefit of counsel had previously executed a "Petition To Enter A Guilty Plea."

The record reflects no request for recusal and no objection to the trial court presiding over the guilty plea hearing. R. 1-13.

The trial court advised Lewis as well as questioned him about his understanding of the charges, and the possible consequences of his guilty pleas. R. 1-13. The trial court advised Lewis of his right to a trial with cross examination, his right against self incrimination, as well as his right to a direct appeal should there be a conviction before a jury. R. 1-4. The trial court advised Lewis of the twenty year maximum sentence for a conviction for conspiracy to sell cocaine. Lewis indicated under oath that he understood the rights he was waiving, as well as the maximum sentences for his convictions.

The Court also questioned Lewis as to the factual basis of the pleas. Lewis stated he believed the prosecution could prove him guilty beyond a reasonable doubt. R.5. He also stated that he was "satisfied" with the services provided by his guilty plea counsel. R. 4.

Lewis stated that he had not been promised anything or coerced. R. 5.

After advising and questioning Lewis and his counsel, the trial court found that his guilty

pleas were voluntarily and intelligently entered. R. 6.

Lewis was given three "concurrent" twenty year sentences in the custody of the Mississippi Department of Corrections. Three other sale of cocaine charges were dropped as part of the plea agreement negotiated on Lewis' behalf by his guilty plea counsel. R. 11.

On January 17, 2008, Lewis filed a pro se "motion for post conviction relief." C.P. 14-44. Lewis claimed the trial judge should have recused himself from hearing his case. His also argued that his counsel was ineffective for not objecting to the trial judge's presiding over his guilty plea hearing.

After reviewing the motion, and the record, the trial court denied relief. C.P. 50-52. From that denial of relief, Lewis filed notice of appeal. C.P. 68.

SUMMARY OF THE ARGUMENT

1. The record reflects that Judge Starrett properly presided over Lewis' guilty plea hearing. R. 1-13. Judge Starrett was the senior judge in the district. The original judge assigned the case recused itself in favor of Starrett. C.P. 50-52.

The record reflects no request for recusal, and no objection of record on the basis of any prior knowledge about the pending charges. R. 1-13.

Lewis's pro se "motion for post conviction" relief provided no basis for any recusal. C.P. 14-44. There were no affidavits or proposed witnesses in support of any of his claims for relief. There was no claim and no support for any claim of any degree of prior knowledge about any of the charges against Lewis by the trial judge.

2. The record reflects that Lewis received effective assistance of counsel. The record provides no basis for objecting to the jurisdiction or impartiality of the trial court. The record reflects that Lewis acknowledged knowing that he was waiving his right to appeal by pleading guilty. R. 4.

In addition, Lewis is serving concurrent twenty year sentences for three separate felonies rather than consecutive sentences which could have resulted in a sixty year sentence. Lewis stated under oath that he was "satisfied" with the services provided by his guilty plea counsel. R. 4.

The appellee would submit that the record does not provide any basis for finding either "deficient" performance or "prejudice" to Lewis as a result of his guilty plea counsel's advice and counsel. R. 1-13.

3. The trial court found that the record was sufficient for determining that Lewis' pleas were voluntarily and intelligently entered. C.P. 50-51. Lewis acknowledged knowing the rights he was waiving by pleading guilty, which included his right to a direct appeal after a conviction. R. 1-4. He acknowledged knowing the twenty year maximum sentences. He knew the prosecution had agreed

to run his sentences concurrently and to drop three other felony sale charges. He admitted a factual basis for the guilty pleas when he admitted that he believed the prosecution could prove him guilty beyond a reasonable doubt. R. 5. He admitted that he had not been promised anything or coerced into pleading guilty. R. 5.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS NO GROUNDS FOR RECUSAL.

In Lewis' pro se "motion for post conviction relief," he complained that the trial court, the Honorable Keith Starrett, should have recusal himself from presiding over his guilty plea hearing. He argued that he should have done so, because Judge Mike Smith, who originally was assigned these cases , recused himself. In addition, Lewis claimed that Judge Starrett had allegedly recused himself from another unidentified case prior to hearing his pleas in the instant cause. Motion page 14-46.

To the contrary, the record contains no request for recusal or an objection on any specific relevant grounds for recusal in the instant causes. R. 1-13 and C.P. 1-79.

Therefore, the appellee would submit that this issue was waived for failure to object or to request recusal in a timely manner.

In **Wilcher v. State** 863 So.2d 776, 794 (Miss. 2003), the Supreme Court found that a claim for recusal can be waived where it was not timely presented to the trial court.

> ¶ 21. Wilcher's attempts to show that Judge Gordon was biased are not convincing, but his argument that Judge Gordon should have recused himself may have merit. However, the evidence surrounding Wilcher's recusal claim was capable of being discovered and raised at both the trial level and on direct appeal. Therefore, the issue is barred. Miss. Code Ann. § 99-39-21(1) & (2).

In addition to being waived, the record indicates that this claim is also lacking in merit. Lewis' motion and the record assembled in this cause does not provide any basis for any recusal of the trial court in the instant cause.

As stated by the Pike County trial court, Judge Michael M. Taylor, in denying relief:

Lewis's right to counsel arguments are rooted in his belief that Judge Starrett was not

> qualified to take the plea. Lewis correctly notes that Judge Mike Smith was originally assigned to the case. Judge Smith recused himself from the case and Judge Starrett, then the Senior Judge in the circuit court district, accepted the case.
> Lewis cites section 9-1-105 M. C. A. in support of this argument, The code section deals not with recusal but with disability or absence. There was a qualified, duly elected judge in the district to hear the case.
>
> Still on the recusal issue, Lewis contends that "Judge Starrett and Judge Smith were judges in the same circuit court district and close acquaintances and friends."Apparently Lewis believes that the recusal of any judge disqualifies the others. Again, assuming the truthfulness of Lewis' assertions, he is not entitled to any relief. There is nothing in the record to indicate that Judge Starrett acted inappropriately in accepting this plea. C.P. 50.

In re Conservatorship of Bardwell , 849 So.2d 1240, 1247 (Miss. 2003), the Supreme Court found no grounds for recusal. The court found a lack of grounds for recusal where the claim was that a judge might have heard something about a case. This was not sufficient for any claim of "sufficient involvement."

> ¶ 23. If we were to declare today on the facts of this case that the chancellor had "sufficient involvement" which warranted recusal, we would be establishing a standard whereby all chancellors would have to recuse themselves from all matters tried in their courts wherein they had previously heard anything involving the case. To carry this scenario out further, if "substantial involvement" in a case (or a party) were legitimate grounds for recusal, a circuit judge or county judge with five indictments on the same defendant would have to get four other judges involved in presiding over the remaining cases because of "substantial involvement" with the criminal defendant in the first case. Obviously, this is but one example of numerous absurdities which would result from such a declaration

The record reflects that this issue was waived. There was no request for recusal or objection. There were no grounds for recusal provided on appeal. In addition, even if there had been a motion for recusal, there was no evidence in support of the motion. There was, and still is, no evidence of any prior involvement or knowledge about any of the charges against Lewis. This was when he pled guilty voluntarily and intelligently to the charges against him. Motion, page 14-44.

The appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS LEWIS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Lewis argues he was denied effective assistance of counsel. He thinks his counsel should have objected to or requested that the trial judge recuse itself from presiding over his case in the instant cause. He also should have objected to Lewis not being informed of his right to appeal. Motion, page 18.

To the contrary, as shown under proposition I, there was no basis for recusal stated in Lewis's motion or in any of the documents which constitute the record of this cause. See motion.

The trial court denied relief on this claim also, finding no basis in the record for guilty plea counsel to have requested recusal, after the fact.

> Finally, Lewis alleges that he pointed out all of these recusal issues to his attorney who refused to act on the issues. This inaction, Lewis contends, deprived him of his right to effective assistance of counsel. In support of this Lewis provides many pages of argument on **Strickland v. Washington**, and other important "right to counsel" cases. Like Lewis's other argument, this is without merit. Lewis's attorney was under no duty to advance unsupported and erroneous legal theories-even if Mr. Lewis wanted those theories advanced. C.P. 51.

The **Strickland** standard for ineffective assistance of counsel, 466 U. S. at 687, 104 S. Ct. 2052, 80 L Ed 2d 674 (1984) which requires both a showing of "deficient" performance and "prejudicial" impact is also applicable to the entry of a guilty plea. **Roland v. State**, 666 So. 2d 747, 750 (Miss 1995); **Bailey v. State**, 760 So. 2d 781, 783 (Miss. App. 2000).

> This is an exacting standard and therefore demands a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. Unless a defendant can offer evidence supporting both prongs of analysis, it cannot be said that the outcome resulted from a breakdown in the adversary process that renders the result unreliable. **Stringer v. State**, 454 So. 2d 468, 477 (Miss 1987)(citing **Strickland**, 466 U S at 687, 104 S Ct 2052). The burden of proof in the **Strickland** test rests with the defendant who faces a rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. **Walker v State**, 703 So.

2d 266, 268 (Miss. 1997).

During the guilty plea hearing, Lewis stated that he was "satisfied with his attorney's representation." R. 4. He also stated that no one had "promised" him a lenient sentence. He also admitted that he was believed , based upon the discovery, that the prosecution could "prove him guilty beyond a reasonable doubt." R. 5. He was pleading guilty because he was guilty of these three conspiracy charges.

Court: Have you been satisfied with your attorney's representation?

Defendant: Yes, sir. R. 4.

...

Court: Has anyone threatened, abused or promised you anything to cause you to want to plead guilty?

Defendant: No, sir.

Court: Are you pleading guilty because you are guilty of these offenses and for no other reason?

Defendant: Yes, sir.

Q. Have your reviewed the state's discovery material with your attorney?

A. Yes, sir.

Q. Are you satisfied the state can prove beyond a reasonable doubt that you're guilty of the offenses charged?

A. Yes, sir. R.. 5.

The record does not indicate any misinformation or faulty advice provided by Lewis' guilty plea counsel. Nor is there any evidence that counsel's actions or inactions prejudiced Lewis' defense to the charges. Instead of serving more than sixty years for his three convictions, Lewis is enjoying the twenty year concurrent sentences negotiated on his behalf by his guilty plea counsel.

The appellee would submit that this issue is also lacking in merit.

PROPOSITION III

THE RECORD INDICATES LEWIS' PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.

In his motion, Lewis also indicates that his plea was not voluntarily and intelligently entered. He claimed that his "due process of law" was violated when he was allegedly not informed of his right to appeal. This was in addition to his complaint about his counsel not requesting recusal of the trial court. He also claimed no basis for his plea since he had not "knowingly sold such drugs while knowing such actions to be illegal." Motion, page 4-44.

To the contrary, the appellee would submit the record does not indicate any due process violations.

As stated by the trial court in denying relief:

> The court has examined the pleadings and attachments together with the court file. Mr. Lewis pled guilty in front of former Circuit Judge Keith Starrett. Lewis executed a "Know Your Rights Before Pleading Guilty" form that included language advising Lewis of that he was forfeiting his right to appeal and other important rights. Lewis acknowledged, under oath his guilt and admitted a factual basis for the plea. (Even now Lewis alleges only that he did not know that selling drugs was illegal at the time of the plea.) **The record does not support Lewis' contention that he did not understand the consequences of his plea. It was not necessary to procure from Mr. Lewis a statement that Lewis subjectively understood, at the time of the offense, that his conduct was illegal. There is no merit in Lewis' argument with the plea dialogue or process.** C.P. 50. (Emphasis by appellee).

In **Alexander v. State** , 605 So. 2d 1170, 1172 (Miss. 1992), this Court found, in accord with **Boykin v Alabama**, 395 U. S. 238, 242 (1969), that a defendant must be advised and understand "the nature of the charge against him and the consequences of the plea." This is necessary if the plea is to be accepted on the record as voluntarily and intelligently entered.

> A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. **Myers v. State**, 583 So. 2d 174, 177(Miss. 1991). A plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea. See

Wilson v. State, 577 So. 2d 394, 396-97 (Miss. 1991). Specifically, the defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. **Boykin v. Alabama**, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Rule 3.03 of the Uniform Criminal Rules of Circuit Court Practice additionally requires, inter alia, that the trial judge "inquire and determine" that the accused understands the maximum and minimum penalties to which he may be sentenced.

The record from the guilty plea hearing indicates that Lewis stated under oath that he understood he was waiving his right to a trial with cross examination of witnesses, along with his right to a direct appeal.

> Court: You have a right to require a unanimous verdict of twelve jurors before you can be convicted and even if your are convicted, you have the right to appeal. Do you understand these rights?
>
> Defendant: Yes sir. R. 4.

The record indicates that Lewis also stated that he understood the maximum twenty year sentence which for three convictions could total some sixty years. R. 4. He also understood that the prosecution had agreed as part of the plea negotiation to drop three additional felony charges for sale of cocaine. R. 7.

> Court: Has anyone threatened, abused or promised you anything to cause you to want to plead guilty?
>
> Defendant: No, sir.
>
> Court: **Are you pleading guilty because you are guilty of these offenses and for no other reason?**
>
> Defendant: **Yes, sir.**
>
> Court: Have you reviewed the state's discovery material with your attorney?
>
> Defendant: Yes, sir.
>
> Court: **Are you satisfied the state can prove beyond a reasonable doubt that you're guilty of the offenses charged?**

Defendant: **Yes, sir.** R. 5. (Emphasis by appellee).

The appellee would submit that the record cited above indicates that Lewis understood the rights he was waiving by pleading guilty. They included his right to a direct appeal, along with his right to a trial. R. 3-5. He stated he understood the twenty year maximum sentences for his convictions, as well as the recommendation by the prosecution to drop three other felony charges. He admitted that he had not been promised anything or coerced into pleading guilty. R. 5.

The record also reflects a factual basis for the plea. Lewis admitted that he was guilty of the conspiracy offenses as charged in the indictment. R. 5. It is not necessary that Lewis understand at the time of his actions that he was committing a felony. This would be when he was agreeing with and acting in concert with others for their illicit purposes. He was acting with them so as to create the conditions under which they could sell cocaine. C.P. 50-52.

This issue is also lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 1st day of December, 2009.

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