

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FRANK AGUIRRE

APPELLANT

VS.

NO. 2008-CP-1856-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the denial of Frank Aguirre's *pro se* motion for post-conviction relief from the Circuit Court of Okitzebha County, Mississippi, Honorable Lee J. Howard, presiding.

ISSUE

**I. WHETHER THE TRIAL COURT PROPERLY DENIED
AGUIRRE'S MOTION FOR POST CONVICTION RELIEF?**

STATEMENT OF THE FACTS

On January 19, 2007, an Okitzebha County Grand Jury indicted Frank Aguirre for the attempted exploitation of a minor, in violation of M.C.A. § 97-5-33(6). (CP 63). On April 26, 2007, Aguirre pleaded guilty. (CP 66-67; T.3-8). On April 30, 2007, the trial court sentenced Aguirre to five years in the custody of the Mississippi Department of Corrections, post supervision and a \$50,000.00 fine. (CP 70-3; T.34).

On July 26, 2007, Aguirre filed a sworn, *pro se* motion for post-conviction relief asking for a modification or reduction of his sentence. (CP31-20). Acquirre alleged his guilty plea was based on his belief that he would receive a minimum time to serve because he was a first time offender. On August 1. 2007, the trial court found the allegations without merit and summarily dismissed the

motion without hearing. (CP 33). Aguirre did not appeal from that denial.

On August 14, 2007, Aguirre filed his second sworn, pro se motion for post conviction relief asking for clarification of his sentence so he would be treated like a first time, non-violent offender for the purposes of early release. (CP 1-3). On October 18, 2007, the trial court dismissed the motion without hearing. (CP 4). Aguirre did not appeal from that denial.

On October 18, 2007, Aguirre filed another pro se motion for post conviction relief and a motion for an evidentiary hearing. (CP 34-61). Aguirre filed the motions in his criminal case, being cause number 2007-0098 and not in the civil case, being cause number 2007-340 CV. As indicated in his certificate of service, Aguirre mailed the motion for post conviction relief to the clerk of the court, Angie McGinnis, and not to the trial judge or district attorney. (CP 41). He mailed the motion for an evidentiary hearing to the "Prosecutor of Okitzebha." (CP 61). There is no indication in the record that either motion was served on the district attorney or presented to the trial judge to consider.¹

On November 28, 2007, Aguirre filed another pro se motion for post conviction relief asking the court to reconsider his previous motion for post conviction relief and claiming the defense of entrapment and an excessive fine. (CP 6-12). On February 7, 2008, after reviewing the entire record, the trial judge found that Aguirre waived the defense of entrapment when he plead guilty and that it was within the trial court's discretion to impose such fines upon a defendant dismissed the petition without hearing. (CP 13). The trial court summarily dismissed the motion without hearing. Aguirre did not appeal.

¹ On October 23, 2007, upon discovering Acquirre had two post conviction relief files in addition to a criminal file, the trial court combined the post conviction civil files 2007-340 and 2007-304 into one file. (CP 5).

On February 18, 2008, Aguirre filed yet another sworn, pro se motion for post-conviction relief with the trial court claiming he had no intent to exploit a fourteen year girl, as required under the statute he was convicted, and asked for reconsideration of his sentence. (CP 14-15). On April 30, 2008, after review of the matter, the trial court summarily dismissed the motion for post conviction relief, finding the court no longer had jurisdiction to sentence the petitioner. (CP 16). Aguirre did not appeal.

On October 21, 2008, Aguirre filed another sworn, pro se motion for post conviction relief requesting the court to allow him to withdraw his guilty plea and to set the case for trial. (CP 17-21). Aguirre alleged his plea was not voluntarily and intelligently made; ineffective assistance of counsel; and excessive fine and punishment. On November 3, 2008, the trial court found the allegations of the motion without merit and summarily dismissed the motion. (CP 22-3). Aguirre appealed to this Court. The State responds to the appeal of denial of Aguirre's motion dated October 17, 2008 and filed October 21, 2008.

A review of the plea colloquy and the plea petition show the trial court thoroughly examined Aguirre during the plea proceedings to ascertain whether his plea of guilty was intelligently, knowingly, understandingly, freely and voluntarily given.

SUMMARY OF THE ARGUMENT

The order of the Okitzebha County Circuit Court denying Aguirre's motion for post-conviction relief should be affirmed. Aguirre's motion for post conviction relief was a successive writ and therefore procedurally barred. Aguirre's trial attorney provided adequate assistance of counsel. Aguirre's guilty plea was intelligently and voluntarily made. Aguirre waived any question of his innocence and the defense of entrapment when he entered his guilty plea.

ARGUMENT

PROPOSITION I: THE TRIAL COURT PROPERLY DENIED AGUIRRE'S MOTION FOR POST CONVICTION RELIEF.

An appellate court will not reverse the trial court's decision to dismiss a motion for post-conviction relief "absent a finding that the trial court's decision was clearly erroneous." *Williams v. State*, 872 So2d 711, 712 (Miss.Ct.App. 2004).

Whether Aguirre's motion is procedurally barred?

Aguirre's motion is procedurally barred as an impermissible successive attempt to obtain post-conviction relief. See *Gatlin v. State*, 932 So.2d 67 (Miss.Ct.App.2006); *Wildee v. State*, 930 So.2d 478 (Miss.Ct.App.2006). Pursuant to Mississippi Code Annotated section 99-39-23(6), the denial of a post-conviction relief motion is a final judgment and bars subsequent requests for post-conviction relief unless (1) there are issues with the defendant's supervening insanity prior to the execution of a death sentence, (2) there has been an intervening decision of the United States Supreme Court or of the Mississippi Supreme Court, which would require a different outcome or sentence, (3) there is newly discovered evidence, which was not previously discoverable, that would have been practically conclusive if it were available at trial, or (4) the defendant claims that his sentence has expired, or his probation, parole, or conditional release has been unlawfully revoked. Miss.Code Ann. § 99-39-23(6) (Supp.2006).

The circuit court dismissed Aguirre's previous claims for post-conviction relief on August 1, 2007, October 18, 2007, February 7, 2008, and April 30, 2008, finding that the claims were without merit. The motion *sub judice* was filed October 21, 2008. Aguirre carried the burden of proving that he satisfied at least one of the exceptions to Section 99-39-23(6) in order to survive the procedural bar. See *Black v. State*, 963 So.2d 47 (Miss.App., 2007). Aguirre also had to prove that,

even if he satisfied an exception, the trial court had not previously decided on the merits of those claims. *Stone v. State*, 872 So.2d 87, 89(¶ 13) (Miss.Ct.App.2004). However, Aguirre does not satisfy any of the exceptions to the successive writ bar and therefore his motion is procedurally barred as a successive writ.

In the event this Court does not find Aguirre's motion barred as a successive writ, the State will address the issues in Appellant's brief. The Circuit Court issued findings and an order, and the State adopts it herein as part of our argument. (CP 22-3).

It is well settled that issues not raised below may not be raised on appeal. "Questions will not be decided on appeal which were not presented to the trial court and that court given an opportunity to rule on them. In other words, the trial court cannot be put in error, unless it has had an opportunity of committing error." *Stringer v. State*, 279 So.2d 156, 158 (Miss.1973); *Jones v. State*, 915 So.2d 511, 513 (¶ 7) (Miss.Ct.App.2005).

Aguirre argues for the first time on appeal that the indictment was defective and that his plea agreement does not conform to the rules of the federal courts. The State would submit the Federal Court Rules are not applicable in state court proceedings. The State would also submit Aguirre failed to raise these arguments in his October 17, 2008, motion for post conviction relief and is therefore barred for raising them the first time on appeal.

Whether Aguirre's attorney provided effective assistance of counsel.

Aguirre argues that he received ineffective assistance from his trial attorney because his attorney failed to object at his sentencing hearing to his cross examination by the State; failed to investigate; and failed to object to the allegations of the indictment. Aguirre's ineffective assistance of counsel claim is contradicted by the record.

To prevail on an issue of ineffective assistance of counsel, Aguirre must demonstrate that

his counsel's performance was deficient and the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a guilty plea, Aguirre must demonstrate that his counsel's performance fell below the range of competence demanded of attorney's in criminal cases and that but for the attorney's substandard performance, he would have insisted on going to trial. See *Alexander v. State*, 605 So.2d 1170, 1173 (Miss.1992). Aguirre wholly fails in his burden of proof.

Aguirre fails to support these allegations and uses this issue to reassert his innocence on this particular charge. Furthermore, in the plea petition, Aguirre states he is satisfied with the advice and help of his attorney. (CP 66-8). In *Smith v. State*, 636 So.2d 1220 (Miss. 1994), the Mississippi Supreme Court held that when the transcript from court proceedings and the petition for post-conviction relief contradict one another, "the latter is practically rendered a "sham", thus allowing the summary dismissal of the petition to stand."

The Mississippi Supreme Court "has implicitly recognized in the post-conviction relief context that where a party offers only his affidavit, his ineffective assistance of counsel claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). This issue is without merit.

Whether Aguirre knowingly and voluntarily entered his guilty plea?

A plea is considered "voluntary and intelligent" if the defendant knows the elements of the charge against him, understands the charge's relation to him, what effect the plea will have, and what sentence the plea may bring. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992). Furthermore, solemn declarations in court carry a strong presumption of verity. *Gable v. State*, 748 So.2d 703, 706(11) (Miss.1999).

A review of Aguirre's Petition to Enter Plea of Guilty and the colloquy between Judge Howard and Aguirre show that Aguirre stated under oath that he discussed the elements of the

crimes for which he was charged with his attorney; Aguirre knew the minimum and maximum sentences for both crimes; he fully understood the nature and consequences of pleading guilty; and he understood all of his constitutional rights and further understood that he would be waiving or giving up those rights by pleading guilty. Additionally Aguirre advised the court during the plea colloquy that his attorney filled out the guilty plea petition and that he understood everything in his petition to plead guilty. (T 3-8; CP 16-18).

Aguirre's statements in his Motion for Post Conviction Collateral Relief totally contradict his testimony under oath when he entered his guilty plea and signed the sworn petition. These contradictions show Aguirre's present claim to be a sham. To survive summary dismissal, a collateral attack on a facially correct plea must include supporting affidavits of other persons. *Baker v. State*, 358 So.2d 401, 403 (Miss.1978). Aguirre has not done so; this issue is without merit.

Whether Aguirre was entrapped?

Aguirre argues that he was entrapped by a law enforcement officer posing as a fourteen year old girl. Aguirre's plea was voluntarily entered. Therefore, Aguirre waived any defense he might have had to the charge, including the defense of entrapment. See *Taylor v. State*, 766 So.2d 830, 835 (¶ 24) (Miss.Ct.App.2000), *Campbell v. State*, 878 So.2d 227 (Miss.App.,2004).

Appellee would submit that the trial court correctly found Aguirre's motion for post conviction relief without merit. There is no indication in the record that the trial court's decision was clearly erroneous.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the order of the Circuit Court of Okitzebha County denying Frank Aguirre's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Lisa L. Blount, 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 22nd day of April, 2009.



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