IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM HENRY WHITE, JR. — APPELLANT

VS. — NO. 2008-CP-1885-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM HENRY WHITE, JR. **APPELLANT**

VS. **NO. 2008-CP-1885-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

William Henry White appeals from the summary denial of his " motion to Vacate Conviction and Sentence . . . *et cetera* " filed October 22, 2007, in the Circuit Court of Wilkinson County, Lillie Blackmon Sanders, Circuit Judge, presiding.

Regrettably, White's motion to vacate has not been made a part of the official record on appeal. Rather, a copy thereof has apparently been submitted with White's brief on the merits.

This will not do at all.

The Supreme Court can act " . . . only on the basis of the contents of the official record, as filed after approved by counsel for both parties. It may not act upon statements in briefs or arguments of counsel which are not reflected by the record." **Saucier v. State,** 328 So.2d 355, 357 (Miss. 1976).

STATEMENT OF FACTS

WILLIAM HENRY WHITE, at the time of his guilty plea to burglary on October 19, 2004,

was a thirty-six (36) year old African-American male and prior convicted felon. (R. 12-13) He completed ten (10) years of high school and had obtained a GED. He can both read and write. (R. 6)

Following a plea of guilty to dwelling house burglary entered on October 19, 2004, White, who was informed he could consult with his attorney at any time and that he understood the court had the discretion to sentence him to a maximum of 25 years (R. 4, 8-9), was sentenced to serve ten (10) years in the custody of the MDOC. (R. 11, 17; C.P. at 7)

During the taking of a subsequent plea on the same day by Judge Sanders, White, who had remained seated inside the courtroom, repeatedly failed to abide by Judge Sanders's admonitions to keep quiet during the remainder of the proceedings. (R. 20-23) After White's 4th or 5th verbal outburst, Judge Sanders, in the presence of White's lawyer, called White back to the bench and re-sentenced him to the maximum sentence of twenty-five (25) years. (R. 37)

On October 22, 2007, over three (3) years after his plea of guilty and 25 year sentence imposed on October 19, 2004, White filed a motion to vacate both his conviction and sentence. That motion is not a part of the clerk's papers or the guilty plea transcript but appears to have been included as an exhibit or attachment to White's brief.

On September 22, 2008, Judge Sanders, in a three (3) page order, summarily denied White's motion to vacate. (C.P. at 14-16; appellee's exhibit A, attached)

In his *pro se* appeal from summary denial of the motion to vacate conviction and sentence, White claims

(1) the trial judge abused her judicial discretion in re-sentencing White to 25 years after initially sentencing him to 10 years;

(2) the trial judge, in violation of Rule 8.04(A)(3) of the Uniform Rules of Circuit and

County Court Practice, erred in failing to grant White a hearing prior to re-sentencing him to 25 years, and

(3) White received the ineffective assistance of trial counsel because his lawyer stood mute when Judge Sanders chastised White and re-sentenced him to 25 years.

SUMMARY OF ARGUMENT

First, the appellate record is imperfect because White's motion to vacate conviction and sentence filed in the trial court has not been made a part of the appellate record but instead is submitted together with his brief on the merits. This state of affairs is fatal to White's complaint.

Second, White's three (3) appellate claims are made for the first time in White's appellate brief. Issues not presented to the trial judge in White's motion to vacate conviction and sentence are procedurally barred from consideration in the present appeal. **Foster v. State,** 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State,** 648 So.2d 73, 80 (Miss. 1994) ["Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal."]

Third, White's motion to vacate is time-barred because it was filed three (3) days too late. Miss.Code Ann. §99-39-5(2); **Odom v. State,** 483 So.2d 343, 344 (Miss. 1986).

Fourth, it was manifestly without merit as well.

ARGUMENT

AN IMPERFECT RECORD PRECLUDES APPELLATE REVIEW. WHITE IS ALSO PROCEDURALLY BARRED FROM RAISING HIS CLAIMS BECAUSE THESE CLAIMS WERE NEVER RAISED IN THE COURT BELOW. WHITE'S CLAIMS WERE ALSO TIME-BARRED AND MANIFESTLY WITHOUT MERIT AS WELL.

The issues raised by White in his three (3) page motion to vacate conviction and sentence are

an involuntary plea based upon the erroneous advice of counsel and ineffective trial counsel based upon that allegedly erroneous advice.

1. Involuntary Plea.

White claims he entered a guilty plea with the understanding he would receive an eight (8) year sentence. "My lawyer told me to lie to the judge and say no one had promised me any particular sentence when she knew I was only suppose to get 8 years."

2. Ineffective Assistance of Counsel.

"My attorney was in a hurry to resolve my case and lied to me by saying a plea deal had been reached [and] due to my lawyers faulty advice I received 17 years more than what I bargained for."

The relief sought by White in his motion to vacate is vacation of his guilty plea and a trial by jury.

The issues raised by White in his appellate brief, on the other hand, are identified as follows:

1. Re-sentencing.

"Whether the trial court abused its discretion by re-sentencing [White] after the first sentence had been imposed, in violation of . . . [the] . . . prohibition against double jeopardy."

2. Rule 8.04(A)(3) hearing prior to re-sentencing.

"Whether the trial court . . . erred when it failed to conduct a rule 8.04(A)(3) hearing before imposing a 25 year sentence."

3. Ineffective Assistance of Counsel.

"Whether [White] received effective counsel [during re-sentencing]."

White's post-conviction claims are devoid of merit for the following reasons.

First, the record is imperfect.

The official record is imperfect because it contains none of the following: the motion to

vacate conviction and sentence. How then is a reviewing court going to apply the clearly erroneous standard of review to the findings of fact made by Judge Sanders in her order of dismissal?

The imperfect record is inadequate to support and/or reinforce the defendant's post-conviction claims. It is, on the other hand, sufficient to justify, without the necessity of remand, affirmation of the denial of post-conviction relief.

"The burden is on the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999). "[T]o the appellant falls the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal." **Burney v. State,** 515 So.2d 1154, 1160 (Miss. 1987). *See also* **Truitt v. State,** 958 So.2d 299 (Ct.App.Miss. 2007); **Jones v. State,** 962 So.2d 571 (Ct.App.Miss. 2006),reh denied.

Assertions in White's appellate brief concerning his allegedly invalid conviction have not been fully developed in the official record. This Court cannot consider them here. **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999) ["This Court 'cannot decide an issue based on assertions in the briefs alone; rather, issues must be proven by the record."]; **Wortham v. State,** 219 So.2d 923, 926-27 (Miss. 1969) ["We will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs."] *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003) [Consideration of matters on appeal is limited strictly to matters contained in the trial record.]

In **Pulphus v. State,** 782 So.2d 1220 (Miss. 2001), this Court stated the following:

> There is no record of this guilty plea, and this defendant is not a co-defendant of Pulphus's. This court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record. *Robinson v. State,* 662 So.2d 1100, 1104 (Miss. 1995) (citing *Dillon v. State,* 641 So.2d 1223, 1225 (Miss. 1994)). Issues cannot be decided based on assertions from the briefs

> alone. The issues must be supported and proved by the record. *Robinson,* 662 So.2d at 1104 (citing *Ross v. State,* 603 So.2d 857, 861 (Miss. 1992)). In *Robinson* this Court stated, "we have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions." *Robinson,* 662 So.2d at 1104 (quoting *Mason v. State,* 440 So.2d 318, 319 (Miss.1983)).

See also **Gross v. State,** 948 So.2d 439 (Ct.App.Miss. 2006).

It is enough to say that White's brief fails to conform to the issues raised in his motion to vacate conviction and sentence which is not a part of the official record.

Second, White's appellate claims targeting, *inter alia,* his re-sentencing to 25 years after an initial sentence of 10 years, the failure to grant him a hearing at re-sentencing, and ineffective counsel asserted here for the first time on the grounds his lawyer stood mute at sentencing, were not distinctly raised and presented to the trial judge in White's "outside the record" motion to vacate conviction and sentence. Rather, these legal issues and grounds appear to be raised and discussed for the first time in White's appellate brief. (Brief of Appellant at 1-5)

White's motion to vacate did not contain a single argument that was the same as the arguments now advanced in the present appeal. These new arguments are procedurally barred because they were never raised and presented to the trial judge. **Bates v. State,** 914 So.2d 297, 299 (Ct.App.Miss. 2005) citing Miss.Code Ann §99-39-21 (1)(2) (Rev. 2000) ["Bates did not make this argument in his motions for post-conviction relief. Therefore, this issue is procedurally barred from further review."]

Issues and claims raised for the first time in White's *pro se* appellate brief cannot be considered for the first time on appeal. White is procedurally barred from raising them in the present context. **Foster v. State,** *supra,* 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State,** *supra,* 648 So.2d 73, 80 (Miss. 1994) ["Because Foster did not raise this issue in his petition for post-conviction

relief, its consideration is precluded on appeal."]; **Bell v. State,** No. 2007-CP-01857-COA (¶¶ 10, 11, 12, 13) decided February 3, 2009 [Not Yet Reported]; **Davis v. State,** *supra,* No. 2007-CP-00264-COA (¶4) decided June 17, 2008 [Not Yet Reported]; **Wallace v. State,** No.2007-CP-00766-COA (¶27) decided May 27, 2008 [Not Yet Reported].

In **Berdin v. State,** *supra,* 648 So.2d 73, 80 (Miss. 1994), we find the following language controlling the posture of White's complaint:

> Both Berdin and the State raised issues under assignment number II that are procedurally barred. Berdin never raised this issue at the hearing as error for post-conviction relief. **It is assigned as error for the first time in her brief.** An assignment of error may not be raised for the first time on appeal. *Collins v. State,* 594 So.2d 29, 35 (Miss. 1992). Therefore, this issue is not properly before the court. [emphasis ours]

The same is true here. *See also* **Cross v. State,** 964 So.2d 535, 538 (Ct.App.Miss. 2007) [Issue of depression as a factor for involuntary guilty plea "procedurally barred" because presented for the first time on appeal]; **Sanchez v. State,** 913 So.2d 1024, 1028, n.1 (Ct.App.Miss. 2005), citing **Glover v. Jackson State University,** 755 So.2d 395, 398, n. 1 (Miss. 2000); **Foster v. State,** *supra,* 716 So.2d 538, 540 (Miss. 1998) citing **Berdin v. State,** *supra.* [Because voluntariness of guilty plea was not raised in petition for post-conviction relief, " . . . its consideration is precluded on appeal."]

White's claims of double jeopardy in re-sentencing, failure to conduct a hearing prior to re-sentencing and ineffective counsel on the ground counsel stood mute during re-sentencing do not appear as grounds for relief in White's motion to vacate; rather, they have been raised for the first time in his brief on appeal. Accordingly, the trial judge had no opportunity to rule on these claims articulated by White and presented here for the first time.

This is fatal to White's post-conviction complaint.

It is enough to say the present appeal is an attempt by White to present a second motion to vacate conviction and sentence rather than an appeal of the first.

Third, the circuit judge did not err in denying post-conviction relief because White's claims targeting his conviction via guilty plea and the sentence imposed in its wake were time barred. White missed the window of opportunity prescribed by statute by three (3) days. Miss.Code Ann. §99-39-5(2); **Odom v. State,** *supra*, 483 So.2d 343, 344 (Miss. 1986).

Fourth, White's claims were manifestly without merit as well. Miss. Code Ann. §99-39-11; **Garlotte v. State,** 530 So.2d 693 (Miss. 1988).

The trial judge correctly denied White's claims targeting an involuntary plea based upon counsel's allegedly erroneous advice, lies, and deception because these claims were clearly contradicted by the record. Specifically, claims that counsel lied and deceived were materially and totally contradicted by the record. (C.P. at 5-10; R. 4-13, 27-29) *See* **Richardson v. State,** 769 So.2d 230 (Ct.App.Miss. 2000) citing **Roland v. State,** 666 So.2d 747, 751 (Miss. 1995).

Moreover, an 8.04 (A)(3) hearing does not apply to the sentence subsequently imposed but to the guilty plea which had already been voluntarily entered by White. White was informed from the get-go he could consult with his lawyer at any time. We quote:

> Q. [BY THE COURT:] Your attorney, Ms. Ferrington, is standing with you, and you may consult with her at any time about any question that I ask you. Do you understand that?
>
> A. Yes, ma'am. (R. 4)

In short, White has failed to establish by a preponderance of the evidence he was entitled to any relief resulting from his conviction via an allegedly involuntary plea or from improper re-

sentencing.

It is elementary "[t]he burden is upon [Mr. White] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State,** 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge was neither clearly erroneous nor manifestly wrong in finding that William Henry White has failed to do so here.

CONCLUSION

White's appellate record is imperfect and precludes review of White's claims.

White's claims are also procedurally barred because they were never presented to the circuit judge.

White's arguments were time barred and manifestly without merit as well.

Finally, the findings of fact made by Judge Sanders were not clearly erroneous.

Miss.Code Ann. § 99-39-11 reads, in its pertinent parts, as follows:

> * * * * * *
>
> (2) *If it plainly appears* from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, *the judge may make an order* for its dismissal and *cause the prisoner to be notified.*
>
> * * * * * *

Apparently, it did, she did, and he was. **Garlotte v. State,** *supra*, 530 So.2d 693 (Miss. 1988)["This case presents an excellent example of the appropriate use of the summary disposition provision of §99-39-11(2)]; **Falconer v. State,** 832 So.2d 622 (Ct.App.Miss. 2002) ["(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without merit."].

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary

hearing or vacation of the conviction or sentence imposed following White's voluntary plea of guilty. Accordingly, the judgment entered in the lower court summarily denying William Henry White's motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF WILKINSON COUNTY, MISSISSIPPI

WILLIAM HENRY WHITE PETITIONER

FILED

SEP 22 2008

J. LYNN DELANEY, CIRCUIT CLERK

BY

VS. CAUSE NO. 08-01-39 2008 - 0139

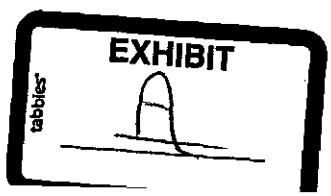
STATE OF MISSISSIPPI RESPONDENT

ORDER DENYING POST-CONVICTION RELIEF

AND NOW, this 22 day of September 2008, upon consideration of the Motion for Post-Conviction Collateral Relief pursuant to Mississippi Code Annotated section 99-39-1 et. Seq., filed on behalf of Petitioner, William Henry White, the Circuit Court of Wilkinson County's ruling on Petitioner's claim that his acceptance of a guilty plea was in violation of UCCCR 8.04 and ineffective assistance of counsel.

I. Voluntariness of Guilty Plea

Constitutional considerations of due process under the Fourteenth Amendment to the United States Constitution and under Mississippi law require that all guilty pleas to be knowing, intelligent, and voluntary. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Alexander v. State*, 226 So.2d 905 (Miss. 1969). To ensure that a criminal defendant understands that by entering a guilty plea he waives certain rights, the law requires the trial court to explain in detail each of the rights waived and the possible consequences of entering a guilty plea



Boykin, 395 U.S. at 243-44. Uniform Circuit and County Court Rule 8.04 sets forth the specific topics that the trial court must address when advising a defendant of the consequences of a guilty plea UCCCR Rule 8.04.

In this case, the trial court did address each of the topics described in Rule 8.04 during the reading of the plea. The trial court advised White of the minimum and maximum sentences for each of the charges to which he was pleading guilty. White answered all of the trial judge's questions affirmatively. Finally, White testified regarding his competency and the voluntariness of his plea. This Court finds that it complied with the requirements of Uniform Circuit and County Court Rule 8.04 in accepting White's guilty plea.

II. Ineffective Assistance of Counsel

White also complains of his lawyer's conduct, namely, the alleged misrepresentation by his counsel. In a post-conviction relief case, where the petitioner's pleadings are in direct conflict with the evidence in the transcript of the plea hearing, the motion fails to meet the statutory burden of proof required to establish a prima facie showing. *Ford v. State*, 708 So. 2d 73, 76 (Miss. 1998). There was no proof other than White's own statement that his counsel misled him, and the allegation is belied by the record itself in which the court explained that his plea of guilty would not afford him the right to contest any evidence withheld that would have been allowed in a jury trial. With his signature, White recognizes the agreement between him, his defense counsel, and the district attorney's office. When the accused's sworn

statements at a plea hearing are inconsistent with an affidavit that he files in support of post-conviction petition, a summary dismissal of the petition is justified. *Taylor v. State*, 682 So.2d 359, 364 (Miss.1996). We find Petitioner's order for post-conviction relief DENIED.

IT IS, THEREFORE, ORDERED that defendant's Petition for Relief from Judgment be and is hereby DENIED. A copy of this Order shall be sent to defendant by certified mail.

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Lillie Blackmon Sanders
LILLIE BLACKMON SANDERS
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I, Billy Gore, 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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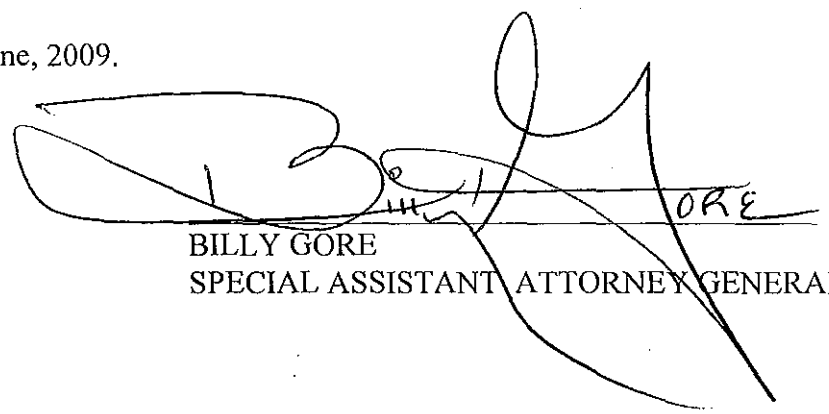
This the 10th day of June, 2009.



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