

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROGER VONASPEN

APPELLANT

VS.

NO. 2008-KA-0710

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUE

- I. Von Aspen is unable to show that any deficiency of trial counsel resulted in prejudice to his defense since he was granted an out-of-time appeal and further cannot show that the result would have been any different had a motion for new trial been filed.

STATEMENT OF THE CASE

On or about July 19, 2004, Roger Wayne Von Aspen was indicted by a Grand Jury of the First Judicial District of Harrison County for aggravated assault of Philip M. Kitchen with a deadly weapon, a knife, cutting Kitchen with the knife.(C.P. 5) Von Aspen was tried on July 7th and 8th of 2005. (Tr. 1) At the close of the State's case, the trial court reserved the right Von Aspen to formally make his motion for directed verdict. That motion was later made on the record and the motion was denied by the trial court. (Tr. 201) At the close of all the evidence and the closing statements, the jury was instructed and returned a verdict of guilty for aggravated assault. (Tr. 236) A pen-pack from Louisiana reflected that Von Aspen was convicted of manslaughter in 1985 and sentenced to 15 years. The trial court sentenced Von Aspen to twenty years in the custody of the Mississippi Department of Corrections. (Tr. 243) The trial court's final judgement was entered July 8, 2005. (C.P. 56-57) On October 22, 2007, Von Aspen

petitioned the trial court for court appointed counsel and an out-of-time appeal. (C.P. 59-61) On May 21, 2008, the trial court granted Von Aspen's Motion for Appointment of Counsel and Petition for Out-of-Time Appeal. (Tr. 69) The instant appeal ensued.

SUMMARY OF THE ARGUMENT

Von Aspen is unable to show that any deficiency of trial counsel resulted in prejudice to his defense since he was granted an out of time appeal and further cannot show that the result would have been any different had a motion for new trial been filed. In the instant case, Von Aspen argues that his trial counsel was ineffective but does not argue at any point in his brief that these motions had any probability of success. As in *Holland v. State*, 656 So.2d 1192 (Miss.1995) and *Johnson v. State*, 876 So.2d 387 (Miss.Ct.App.2003) this failure is fatal to his claim.

ARGUMENT

I. Von Aspen is unable to show that any deficiency of trial counsel resulted in prejudice to his defense since he was granted an out of time appeal and further cannot show that the result would have been any different had a motion for new trial been filed.

Von Aspen argues that his trial counsel's failure to file a Motion for New Trial limited his constitutionally mandated right to appeal. However, in *Weaver v. State*, 996 So.2d 142 (Miss.Ct.App.2008), the Mississippi Court of Appeals opined that:

Weaver's final instance of the alleged ineffectiveness of his trial counsel was his trial counsel's failure to file a motion for a new trial or a judgment notwithstanding the verdict. We do note that Weaver's trial counsel did not file a timely notice of appeal, but Weaver was ultimately granted an out-of-time appeal. According to *Jackson v. State*, 423 So.2d 129, 131 (Miss.1982), where the grounds for an objection on appeal are included in the record, our

review on appeal is not necessarily barred for failure to raise the grounds in a motion for a new trial or a JNOV. Even if Weaver's trial counsel was deficient for failing to file post-trial motions, Weaver has not shown this Court how that deficiency resulted in prejudice to his defense since his issues on appeal were included in the record.

Weaver v. State, 996 So.2d 142 (Miss.Ct.App.2008).

The record in this case is devoid of any post-trial motions. However, in *Holland v. State*, 656 So.2d 1192 (Miss.1995), the supreme court dealt with ineffective assistance of counsel in a drug conviction. Holland's lawyer at trial failed to make any post-trial motions, move for a directed verdict, or even ask for a peremptory instruction. *Id.* at 1197. On appeal, the supreme court found that the lawyer's performance did amount to ineffective assistance of counsel. While the Holland court did not specify which, if any, of the three acts Holland's lawyer omitted was most serious, it did explain that the omissions “deprived the trial judge of the opportunity to review the evidence and reexamine possible errors at trial. Specifically, it prevented the trial judge from reconsidering whether the evidence was sufficient to support the charge....” *Id.* at 1197-98. This, coupled with the trial strategy of admitting guilt of possession, but arguing that the evidence was insufficient to prove intent to distribute, amounted to ineffective assistance of counsel. *Id.* at 98.

In *Johnson v. State*, 876 So.2d 387 (Miss.Ct.App.2003), Johnson's strategy was similar. At trial, it was admitted that he was an accessory after the fact. He did help hide the body and helped clean up the crime scene. However, it was argued, that Aaron, and not Johnson committed the murder. By failing to make a post-trial motion, the trial judge was not provided an opportunity to reconsider whether the evidence was sufficient to support the charge of murder. Therefore, Johnson's trial counsel's performance was deficient under the first prong of the

Strickland test.

Johnson, in his brief to the Court of Appeals, did not point to any facts in the record or make a persuasive argument that, had trial counsel made the appropriate post-trial motion, there was a substantial likelihood of a different outcome, i.e., that his motion would have been granted. The Court of Appeals noted that, as the appellant, Johnson had the burden of persuasion on this point and his failure to offer any basis for us to conclude that such post-trial motions had any probability of success must be seen as fatal to this claim.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides that the test to be applied is (1) whether counsel's overall performance was deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. The defendant has the burden of proving both prongs.

In the instant case, Von Aspen argues that his trial counsel was ineffective but does not argue at any point in his brief that these motions had any probability of success. Even if one assumes, *arguendo*, that failure to file post-trial motions is ineffective assistance of counsel, this failure is fatal to his claim. Von Aspen's assignment of error is without merit and the jury's verdict and the rulings of the trial court should be upheld.

CONCLUSION

Von Aspen's assignment of error is without merit and the jury's verdict and the rulings of the trial court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

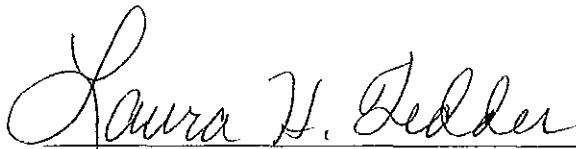
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi,
do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of
the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Jerry O. Terry
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421 Linda Drive
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This the 20th day of May, 2009.

A handwritten signature in black ink, reading "Laura H. Tedder", written over a horizontal line.

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