

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT JOINER, JR.

APPELLANT

VS.

NO. 2009-CA-0222

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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NO. 2009-CA-0222

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the denial of Albert Joiner, Jr.'s Petition for Post-Conviction Relief and Amendment to Petition for Post-Conviction Collateral Relief from the Circuit Court of Lafayette County, Mississippi, Honorable Andrew K. Howorth presiding.

STATEMENT OF THE FACTS

On September 24, 2007, the Grand Jury of Lafayette County indicted Albert Joiner, Jr., on one count of felony flight and one count of felon in possession of a deadly weapon, in Circuit Court Cause Number LK07-399. On October 23, 2007, the grand jury indicted Joiner, in Circuit Court Cause Number LK07-133, for armed robbery as a habitual offender under Miss. Code Ann. § 97-19-83, which subjected him to life without parole.

On October 18, 2007, pursuant to a plea agreement, Joiner entered a guilty plea to felony

flight, as a lesser habitual, in Cause Number LK07-399, and to strong armed robbery, as a lesser habitual, in Cause Number LK07-133. In exchange for the guilty plea the state agreed to dismiss the felon in possession of a deadly weapon, reduce the armed robbery to strong armed robbery and reduced the lifetime habitual status under Mississippi Code Annotated section 99-19-83 to the lesser habitual under Mississippi Code Annotated section 99-19-81. The State also recommended that Joiner receive four (4) years incarceration on the felony fleeing and a consecutive fifteen (15) years on the strong armed robbery, both as a lesser habitual.

In the subject cause, the court dismissed the felon in possession charge and ordered the “felony fleeing lifetime habitual” charge reduced to “felony fleeing maximum habitual”. (CP Supp. Vol. 1, 2). In Cause Number LK07-133, the court reduced the armed robbery lifetime habitual to strong armed robbery, lesser habitual. After thoroughly questioning Joiner, the circuit judge accepted Joiner’s pleas and sentenced him in accordance with the State’s recommendations. (CP Supp. Vol. 1, pages 4-25).

In the petition and during the plea hearing, Joiner acknowledged his guilt of the crimes charged, as well as the constitutional rights he would be waiving by pleading guilty; he further acknowledged that he was pleading guilty as a habitual offender, and that he knew the possible sentences he might receive. (CP Supp. Vol. 1, pages 5, 10, 11, 16, 17).

On May 22, 2008, Joiner filed a Petition for Post-Conviction Collateral Relief (CP 3-40). On July 14, 2008, Joiner filed an Amendment to Petition for Post-Conviction Collateral Relief. (CP 41-50). The request for relief was summarily denied in an order dated January 15, 2009. (CP 51). Feeling aggrieved, Joiner appealed.

ISSUES

- I. **Whether Joiner was properly charged as a habitual offender;**
- II. **Whether Joiner was properly sentenced as a habitual offender; and**
- III. **Whether Joiner was denied effective assistance of counsel.**

SUMMARY OF ARGUMENT

The trial court properly denied Joiner's petition for post conviction relief. Joiner's guilty plea waived all non-jurisdictional defects in the indictment. A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects to an indictment, and the only exceptions to this rule are if the indictment fails to state an essential element of the crime charged or if there exists no subject matter jurisdiction. *Elliott v. State*, 993 So.2d 397 (Miss.App.2008). Neither of these exceptions applies under the facts in this case.

Joiner was properly sentenced pursuant to Mississippi Code Annotated section 99-19-81. The State's burden of proof was lessened by Joiner's guilty plea; the State provided sufficient evidence of his habitual status.

Joiner failed to meet the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984) in proving his counsel was deficient.

ARGUMENT

PROPOSITION I: JOINER WAS PROPERLY CHARGED AS A HABITUAL OFFENDER.

In his first assignment of error, Joiner contends that he was not properly charged as a habitual offender under Count I of a two count indictment. Joiner asserts he was charged as a habitual offender under Count II of the indictment, felon in possession of a deadly weapon, however, Count II was dismissed pursuant to a plea agreement. Joiner freely admits that the agreement was for him to plead guilty to Count I as a habitual offender pursuant to Miss. Code Ann. Sec. 99-19-81 in exchange for the dismissal of Count II. However, Joiner claims the indictment failed to “fully notif[ied] the defendant of the nature and cause of the accusation.” (Appellant’s brief at page xiii).

On the day of Joiner’s plea and sentencing, defense counsel submitted an agreed motion and order to the court which it subsequently entered, reducing the charge of “felony fleeing lifetime habitual” to that of “felony fleeing maximum habitual.” (CP Supp.Vol 1, page 2).

Any non-jurisdictional defect in Joiner’s indictment was waived when Joiner entered his voluntary plea of guilty. *Jones v. State*, 878 So.2d 254 (Miss.App.,2004), *Elliott v. State*, 993 So.2d 397, 398 (Miss.App.2008) *Foster v. State*, 716 So.2d 538, 539 (Miss. 1998). The supreme court held in *Brandau v. State*, 662 So.2d 1051(Miss.1995) that any such defect was one of form, non-jurisdictional and curable by amendment. Failure to object to the form of his indictment waived the issue. *Brandau* at 1054. Having failed to raise this issue at the time of his plea, Joiner waived the issue. See *Buford v. State*, 756 So.2d 815, 816(¶ 4) (Miss.Ct.App.2000).

Accordingly, this assignment of error is without merit.

PROPOSITION II: JOINER WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER.

In his second assignment of error, Joiner claims the State failed to prove his habitual offender status for sentencing, as required in section 99-19-81. Joiner cites *Vince v. State*, 844 So.2d 510 (Miss. Ct. App. 2003) to support the requirement of section 99-19-81 that the State carries the burden of proof of all elements of a crime and habitual offender status. The court in *Short v. State*, 929 So.2d 420, 426 (Miss. Ct. App. 2006), agreed that a certified copy of the judgment of conviction is the best evidence to establish habitual offender status. *Vince*, 844 So.2d at 517 (¶22). However, the state is not limited to that form of proof of prior convictions. *Short*, 929 So.2d at 426. Habitual offender status may be established by the defendant's "admission of prior felony convictions." *Id.* at 426, quoting *Sanders v. State*, 786 So.2d 1078, 1082 (¶ 14) (Miss. Ct. App. 2001); *Jones v. State*, 747 So.2d 249, 252 (Miss. 1999).

In *Evans v. State*, 988 So.2d 404, 405-06 (Miss. Ct. App. 2001), another case cited by Joiner, the defendant relied on *Vince* to support the requirement of Section 99-19-81. The court found that the defendant in *Vince* went to a full trial, whereas the defendant in *Evans*, like Joiner in the present case, pleaded guilty. *Id.* at 405-06. When a defendant pleads guilty, the burden of proof is lessened, and all the trial court needs is "enough [evidence] that the court may say with confidence the prosecution could prove the accused guilty of the crime charged." *Id.*, quoting *Corley v. State*, 585 So.2d 765, 767 (Miss. 1991).

During Joiners' plea colloquy. Judge Howorth asked Joiner the following:

COURT: Mr. Joiner, in Cause Number LK07-133, the Court has before it a petition to enter a plea of guilty as a lesser habitual offender to the crime of strong armed robbery. Is that correct?

DEFENDANT: Yes, sir.

COURT: And in Cause Number LK07-399, which is, of course, also the State of Mississippi versus Albert Joiner, Jr., I have a petition to enter a

plea of guilty to the crime of felony fleeing of a law enforcement officer as a lesser habitual offender. Is that also correct?

DEFENDANT: Yes, sir.

(CP Supp. Vol. 1, page 5)

....

COURT: Did your attorney go over all the elements of the crimes that you're pleading guilty to with you and are you telling me that you're guilty of all of those elements?

DEFENDANT: Yes, sir.

COURT: Are you telling me then that you are, in fact, guilty of the crime of felony fleeing of a law enforcement officer, as well as strong armed robbery?

DEFENDANT: Yes, sir.

COURT: And in each of these two cases also are you telling me that you realize and understand that you qualify for habitual offender status and that you're going to be sentenced, if the Court accepts your guilty plea, as what we call a lesser habitual offender which will mean that the time you receive you will have to serve day-for-day? Do you understand that?

DEFENDANT: Yes, sir.

(CP Supp. Vol. 1, page 9, 10)

....

COURT: Now, if the Court accepts your guilty plea in these two cases, they also will go on your record and they will be added to the felonies you already have on your record. You already qualify as a habitual offender, and you will continue to qualify as a habitual offender. Once you get out of the penitentiary, any other felony you're charged with, you can take these charges as well as your other prior felonies, and use them against you to make your punishment worse, to enhance it. Do you understand what I'm telling you?

DEFENDANT: Yes, sir.

COURT: I expect to receive a recommendation in your case, and that's going to be that the Court sentence to you to habitual time. It's 15 years to serve in one case and 4 years to serve in the other case consecutive for a total of 19 years which will be served as a habitual offender day-for-day. Do you understand that recommendation?

(CP Supp, Vol. 11).

In *Jones*, 747 So.2d at 250, the defendant pled guilty as a habitual offender and was

sentenced in accordance with Section 99-19-81. Jones' sworn guilty plea petition, wherein he accepted the accused charges and admitted awareness of his constitutional rights, listed two previous felony convictions. *Id.* In affirming Jones' sentence as a habitual, the Mississippi Supreme Court held the record showed Jones' admission in the petition of "two previous felonies arising out of two separate incidents" was sufficient; the record showed that the defendant was "aware of his eligibility for sentencing as an habitual offender." *Id.* at 252.

Joiner acknowledged that he was pleading guilty as a habitual offender and that he would have to serve day-for-day of the entire 19 year sentence. The Petition to Enter Guilty Plea also acknowledges that Joiner was informed by his lawyer of the "maximum and minimum punishment which the law provides for the offense charged in the indictment." While the guilty plea petition in the case *sub judice* acknowledges that Joiner is pleading guilty to felony fleeing, lesser habitual, it does not list the prior felony convictions. However, in the petition in Cause Number LK LK07-133, entered at the same time as the case *sub judice*, Joiner listed his prior felony convictions of grand larceny, simple assault on law enforcement officer, attempted armed robbery, and burglary. (Exhibit "A"). This meets the standard applied in *Short, Sanders, and Jones*.

Joiner pled guilty to the charges and admitted to being a habitual offender, lessening the State's burden of proof. The requirements of Section 99-19-81 were met, and Joiner was properly sentenced. This issue is without merit.

Joiner never alleges he did not know he was pleading guilty to felony fleeing as a habitual offender. Joiner received the benefit of his bargain, the charge of felon in possession of a deadly weapon was dismissed; the armed robbery charge was reduced to strong armed robbery, and he was allowed to plead as a lesser habitual offender under Section 99-19-81 instead of Section 99-19-83. It should be noted that Joiner is also appealing denial of post conviction relief on the armed robbery

charge presently pending before this Court in 2009-CP-220-COA. Joiner should not be allowed to rescind that bargain and still reap the benefits.

PROPOSITION III: JOINER WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL.

Joiner argues that he received ineffective assistance of counsel. Joiner claims that he could not have been sentenced as a habitual offender under the facts in the record had his attorney not allowed the plea to go forward without proof or evidence of prior convictions to support enhanced punishment. The record does not support Joiner's argument.

This is the same attorney who was able to convince the prosecutor to dismiss a separate charge of possession of a deadly weapon by a convicted felon, reduce an armed robbery charge to strong armed robbery and recommend that Joiner receive a total of 19 years as a lesser habitual under Section 99-19-81, instead of life as a habitual offender under Section 99-19-83.

To prevail on an issue of ineffective assistance of counsel, Joiner 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). Both elements of the test must be proven by the defendant. *Brown v. State*, 626 So.2d 114, 115 (Miss. 1993). "There is a strong, yet rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104

In the context of a guilty plea, Joiner 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 not have been sentenced as a habitual offender. See *Alexander v. State*, 605 So.2d 1170, 1173 (Miss.1992). Joiner wholly fails in his burden of proof. 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." In *Ford v. State*, 708 so.2d 73 (Miss.1998), the court held that a post conviction motion "cannot be supported when the record clearly belies every allegation Petitioner makes in his Post-Conviction Relief Motion."

Joiner was originally represented by a court-appointed attorney and later retained counsel. During the plea colloquy, Judge Howorth asked Joiner:

COURT:	And you or your family has retained Mr. Wall?
DEFENDANT:	Yes, sir.
COURT:	And you've had ample opportunity to meet with him and confer with him about all these charges that you're pleading guilty to?
DEFENDANT:	Yes, sir.
COURT:	And you're satisfied that he has spent the time with you to adequately and properly represent you and advise you?
DEFENDANT:	Yes, sir.
COURT:	And you're satisfied with his services?
DEFENDANT:	Yes, sir.

(CP 25-26).

Joiner then admitted to the court that the factual basis for both charges, as recited by the State, was correct. (CP 27-28). The plea hearing transcript negates Joiner's assertions of ineffective assistance of counsel. Based upon a review of the record, Joiner failed to meet both prongs of *Strickland*. Under the Supreme Court's ruling in *Foster v. State*, 716 So.2d 538 (Miss.,1998), this issue is without merit.


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 Lafayette County denying Albert Joiner, Jr.'s motion for post-conviction relief and request to be re-sentenced without the habitual offender status.

Respectfully submitted,

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IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

LAFAYETTE COUNTY

STATE OF MISSISSIPPI

FILED

VS

OCT 18 2007

Albert Joiner Jr

Mary Alice Busby
CIRCUIT CLERK

CAUSE NUMBER

LK-07-133

BY

D.C.

PETITION TO ENTER PLEA OF GUILTY

The defendant herein, being duly sworn, states in Open Court under oath that:

1. My full true name is Albert Willie Joiner Jr.

My age is 38 years and I completed 7 years in school and _____ years in college. I can read and write. I am mentally competent to make this petition. I understand should the plea of guilty herein tendered not be accepted and a trial follow that admissions made herein or during any hearing on this petition would not be admissible against me in trial.

2. I am represented by Mike R. Wall, an attorney who has been court appointed /retained by me.

3. I plead guilty to the charge(s) of

armed robbery with

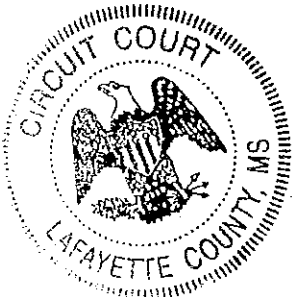
strongly weapon

strong armed robbery

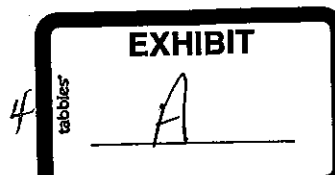
as set forth in the indictment/or criminal information in this cause number.

4. I have told my lawyer all of the facts and circumstances known to me about the charge(s)

asserted in the indictment. I believe my lawyer is fully informed on all such matters. My lawyer has



Ellie Blah PC
6-25-09



advised me of the nature of the charge(s) and the possible defenses that I may have to the charge(s).

5. I understand that I may plead "not guilty" and may persist in that plea and that (a) the Constitution guarantees me the right to a speedy trial by jury, (b) the right to see, hear and cross examine all witnesses called to testify, (c) the right to use the power and processes of the Court to compel the production of evidence including the attendance of any witnesses in my favor, (d) the right to have the presence and assistance of a lawyer at all stages of the trial and any appeal, (e) the right to testify in my own defense, (f) the right to a jury verdict of all twelve jurors before I could be found guilty, (g) I understand that if I plea not guilty and demand a jury I would be by law presumed innocent of the charge(s) at the outset of a jury trial and that presumption would remain with me until removed by competent and credible evidence, and am proven guilty beyond a reasonable doubt and to the satisfaction of twelve jurors.

6. I do not have to testify against myself and I have the right against self incrimination and the right to remain silent at all times; that if I should be convicted after a jury trial, I would have an absolute right to appeal to the Mississippi Supreme Court with assistance of counsel, and at no cost to me should I be determined to be financially unable to pay for same. I understand that by pleading guilty I am admitting that I did commit the crime charged in the indictment and that I am waiving all the rights set forth in this paragraph and in paragraph number five (5) of this Petition.

7. At this time I am not under the influence of drugs or alcohol nor suffering from any mental disease.

8. I declare that no officer or agent of any branch of government nor any other person has made me any promises or inducements of any kind to me or within my knowledge to anyone else that I will receive a lighter sentence, probation, early release or any other form of leniency if I plead "guilty". I have not been beaten, threatened, mentally or physically forced, intimidated or coerced in any manner

to plead guilty to the crime charged against me. I offer my plea of "guilty" freely and voluntarily and of my own accord and with full understanding of all matters set forth in the indictment herein and in this Petition, and this plea is with the advice and consent of my lawyer.

9. My lawyer has informed me as to the maximum and minimum punishment which the law provides for the offense charged in the indictment. The maximum punishment which the Court may impose for this crime that I am charged with is 1.5 years and \$ _____ fine. The minimum punishment is 3 years imprisonment. (If multi-count indictment, addendum may be attached specifying count number, charge with maximum and minimum punishment)

I 0. (a) No agreements have been reached with regard to a recommended sentence as a result of so-called "plea-bargaining" Neither my attorney nor any other person has represented to me that I will receive any particular sentence if I plead guilty. The final decision as to the sentence rests with the Court.

I 0. (b) As a result of plea bargaining, my attorney and I have reached an agreement with the District Attorney's Office concerning my offer to plead guilty to the charge(s) listed in paragraph three. It is my understanding that the District Attorney will recommend to the Court that I receive a sentence as follows or see attached plea agreement:

~~19-00-709~~ Hob. 1

15-0-15 to run consecutive with

L/C 07-339

I understand that there are no side agreements or other promises. I understand that this agreement is not binding on the Court and that if my guilty plea is accepted by the Court, the Court may impose the same sentences if I had pleaded "not guilty" and had been found guilty by a jury.

11. I do understand that no one can assure me of parole or early release. I understand that if I am sentenced for an armed robbery or attempted armed robbery by displaying a firearm committed after January 1, 1977, or if sentenced on an armed robbery by displaying a deadly weapon committed after July 1, 1982, I will not be eligible for parole on any sentence less than ten years and will not be eligible for parole on any sentence above ten years until I have served ten years. I understand that if I am sentenced as a habitual criminal, I will not be eligible for parole. I understand that if I am sentenced for a sex crime, I will not be released on parole until I have been examined by a psychiatrist.

12. I understand that if I am not eligible for parole, I will not receive "good time credits. I also understand that this Court has no control over the giving of earned time or good time. I understand that this process is governed by the Mississippi Department of Corrections.

13. Any persons convicted of a sex crime shall not be released on parole except for a person under the age of nineteen (19) who has been convicted under section 97-3 -67.

14. Any person convicted of a sex crime shall not be eligible to receive earned time.

15. No person shall be eligible for parole who shall on or after October 1994, be convicted of robbery, attempted robbery or carjacking as provided in Section 97-3-1154 et seq through the display of a firearm or drive by shooting as provided in section 97-3-109. This provision shall also apply to persons who shall commit robbery, car jacking, drive by shooting on or after 10-1 -94 through the display of a deadly weapon.

Since persons sentenced under these provisions are ineligible for parole, they will also be ineligible to receive earned time allowances.

16. I believe that my lawyer is competent and has done all that anyone could do to counsel and assist me, and I am fully satisfied with the advice and help he has given me.

17. My lawyer has advised me of the elements of the charge to which I am pleading. I submit that all the elements are proven by the true facts. Therefore, I am guilty and ask the Court to accept my plea of guilty.

18. I understand that I am presenting this petition under oath and under penalty of perjury for any false statements contained herein. I have not been encouraged by any person to answer falsely any question in this petition in order to have this plea accepted.

19. I understand that my plea of guilty may be withdrawn at any time during a hearing on this petition prior to the acceptance of the plea by the Court.

20. I have not previously been convicted of any felony, except grand larceny
simple assault on law enforcement officer (2 cts), attempted
armed robbery, burglary
587-25-9709
SOCIAL SECURITY NUMBER

4/10/69
DATE OF BIRTH

B
RACE

Oxford MS
PLACE OF BIRTH
M
SEX

DEFENDANT'S ADDRESS 1506 B Chalmers Oxford MS 38655
(Physical)

DEFENDANT'S MAILING ADDRESS: _____

Signed by me in the presence of my lawyer, this the 18 day of October, 20 07

Albert James
DEFENDANT