

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD BECKER

APPELLANT

VS.

NO. 2009-CP-0055

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
STATEMENT OF ISSUES	3
SUMMARY OF ARGUMENT	3
ARGUMENT	3
THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION IN POST CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING	3
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Chavez v. United States</i> , 656 F.2d 512 (9th Cir. 1981)	7
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STATE CASES

<i>Cox v. State</i> , 793 So.2d 591, 598 (Miss. 2001)	7
<i>Elliott v. State</i> , 993 So.2d 397 (Miss. Ct. App. 2008)	6
<i>Houston v. State</i> , 840 So.2d 818 (Miss. Ct. App. 2003)	4
<i>Knox v. State</i> , 901 So.2d 1257 (Miss. 2005)	5
<i>Nichols v. State</i> , 955 So.2d 962 (Miss. Ct. App. 2007)	4
<i>Roach v. State</i> , 991 So.2d 641 (Miss. Ct. App. 2008)	3
<i>Smith v. State</i> , 831 So.2d 590 (Miss. Ct. App. 2002)	5

STATE STATUTES

Miss. Code Ann. Section 99-39-11-(2) (Rev. 2007)	3
Miss. Code Ann. Section 99-39-23(6) (Rev. 2008)	4

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**RICHARD BECKER
A/K/A RICHARD EDWARD BECKER**

APPELLANT

vs.

CAUSE No. 2009-CP-00055

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Harrison County, Mississippi, First Judicial District, in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner was indicted on three counts of gratification of lust. (R. Vol. 1, pp. 48 - 49). Kay Wilkerson, Esq. was appointed to represent the prisoner, but, later, Robert Charles Stewart, Esq. was substituted to represent the Appellant. (R. Vol. 1, pg. 51). Some months after this substitution, G. Eric Geiss, Esq. was substituted for Mr. Stewart.

On 2 August 2007, the prisoner executed his "Petition to Enter Plea of Guilty." (R. Vol. 1, pp. 58 - 61). A hearing was held on that day. In addition to the usual enquiries, the Circuit Court asked the prisoner whether he was being treated by a physician for any kind of mental condition. The prisoner responded that he had been prescribed medication for "slight depression and sleeplessness." The prisoner went on to state that he understood what the hearing was about, even without medication. He also stated that he had acquired two years of higher education.

The prisoner expressed satisfaction with his attorneys.

The prisoner denied having been threatened or otherwise coerced into entering a plea of guilty. He also denied having been promised some benefit in return for a guilty plea. The prisoner went on to admit his guilt to the felonies charged against him. When asked why he fondled his daughter, the prisoner stated that he could not explain why he did so. He said that he knew that what he had done was wrong, blamed himself for what he had done, and hoped he would get help for it. The prisoner's plea were accepted. (R. Vol. 2, pp. 2 - 12). The prisoner was sentenced on 10 September 2007. (R. Vol. 2, pg. 13).

On 10 June 2008, the prisoner filed a motion in post - conviction relief, in which he sought to have his convictions set aside. As grounds for relief, he asserted that his attorneys were ineffective, that the Circuit Court should have conducted a competency hearing, and that he was incompetent to enter a plea of guilty "due to being stressed to the point of suicide at all times." (R. Vol. 1, pp. 6 - 10). Relief on this motion was denied, without an evidentiary hearing, on 17 February 2009, the Circuit Court finding that there was no indication that the prisoner was incompetent at the time he entered his pleas and that there was nothing to suggest that his attorneys had been ineffective in their representation of him. The court also noted that the prisoner had previously sought reconsideration of his sentence on the grounds asserted in the

motion in post - conviction relief. (R. Vol. 1, pp. 30 - 33). The prisoner filed his notice of appeal on 4 March 2009. (R. Vol. 1, pg. 35).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where 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 relief. Miss. Code Ann. Section 99-39-11-(2) (Rev. 2007). This Court will not disturb a circuit court's action in this regard absent a finding that the court's findings were clearly erroneous. However, issues of law are reviewed *de novo*. *Roach v. State*, 991 So.2d 641 (Miss. Ct. App. 2008).

Preliminarily, we note that the prisoner, prior to the filing of the motion in post - conviction relief in the case at bar, filed a motion for reconsideration of sentence and a motion to amend the motion for reconsideration of sentence. (R. Vol. 1, pp. 69 - 78). In the motion to amend the motion for reconsideration of sentence, the prisoner claimed that he was mentally incompetent at the time of his pleas. Relief on both motions was denied by the Circuit Court.

(R. Vol. 1, pp. 74; 87 - 88).

While the Circuit Court did not dismiss the motion in post - conviction relief on the basis of the successive writ bar set out in Miss. Code Ann. Section 99-39-23(6) (Rev. 2008), a motion to reconsider sentence has been regarded by this Court as a filing in post - conviction relief. *Houston v. State*, 840 So.2d 818 (Miss. Ct. App. 2003). Since the prisoner's motion to reconsider sentence and amended motion to reconsider sentence were post - conviction relief filings, the filing in the case at bar was successive. The Circuit Court's action in denying relief on the motion in the case at bar should be affirmed for that reason.

Assuming for argument that the instant cause is not subject to the successive writ bar, the Circuit Court committed no error in denying relief on the prisoner's motion.

The prisoner first says that a certain Kay Wilkerson, Esq. was ineffective in her representation of him because she did not request a competency hearing. The prisoner claims that he attempted suicide while in jail and that he appeared in court in a "suicidal garment." According to the prisoner, the attorney should have requested or the Circuit Court should have ordered a competency hearing on account of these alleged facts, facts which have no support in the record.

It was the prisoner's burden to establish (1) that counsel was ineffective for having failed to request a competency hearing and (2) that he was prejudiced on account of the lack of such a hearing. He was required to assert this claim with specificity. *Nichols v. State*, 955 So.2d 962 (Miss. Ct. App. 2007).

The prisoner presented nothing to establish that he had attempted suicide while in the county jail and that he was dressed in a "suicidal garment" during a court appearance, other than his own allegation. Moreover, the prisoner utterly failed to allege how or for what reasons any

alleged suicide attempt affected his competency. Absent evidence sufficient to raise a legitimate question concerning the prisoner's competency, the Circuit Court did not err in finding that counsel was not unreasonable in failing to request a competency hearing. *Knox v. State*, 901 So.2d 1257 (Miss. 2005).

In the course of the plea colloquy, the prisoner, under oath, denied the existence of some mental problem which would have suggested that he was not competent to stand trial or to enter a plea. He stated that he had medicine for "slight depression and sleeplessness." The prisoner further stated that he understood what was being done in the plea colloquy. (R. Vol. 2, pp. 2 - 3). A review of the prisoner's answers to questions during the rest of the colloquy do not in the least suggest that he was incapable of understanding the nature and consequences of entering a plea of guilty. In view of these considerations, there was no prejudice to the prisoner that an attorney did not request a competency hearing, assuming for argument that such a hearing should have been requested earlier.

The prisoner denied the existence of a condition that might have resulted in his incompetence to enter a plea. The Circuit Court clearly did not observe anything about the prisoner during the plea colloquy to suggest the necessity for a competency hearing. In view of these considerations, the prisoner's allegations in post - conviction relief were insufficient to raise a legitimate question about his competency at the time of the plea. *Smith v. State*, 831 So.2d 590 (Miss. Ct. App. 2002).

We also note that the prisoner's filing in the Circuit Court contained no affidavits other than his own. (R. Vol. 1, pg. 21). Even there, the only thing of substance sworn to by the prisoner was the claim that he was incompetent when he entered his guilty plea. A Circuit Court does not err in denying relief on an ineffective assistance of counsel claim where that claim is

supported only by the movant's affidavit. *Attaberry v. State*, 11 So.3rd 166 (Miss. Ct. App. 2009).

The prisoner's second complaint is that his third attorney supposedly failed to investigate the case, failed to investigate whether the prisoner was suffering from a mental illness, and did nothing beyond "coach[ing] the prisoner into pleading guilty. There is absolutely nothing in the record to support these allegations, and not even the prisoner's own affidavit supports them. On the other hand, the prisoner stated, under oath, that he was satisfied with his attorneys' representation, that they had answered his questions, and that they investigated his case. (R. Vol. 2, pp. 4 - 5). The Circuit Court committed no error in denying relief on this claim. The only affidavit was the prisoner's. Besides that, the prisoner's claims in post - conviction relief were flatly contradicted by his sworn statements made during the plea colloquy. A circuit court commits no error in denying relief on such a claim were it is belied by the movant's prior sworn statements. *Davis v. State*, 5 So.3rd 435 (Miss. Ct. App. 2008).

The third claim is that the Circuit Court erred by failing to order a competency hearing. The prisoner claims that he had attempted suicide and was in a "suicidal garment" when he appeared before the court. However, he does not allege when this supposedly occurred or for what purpose he was brought before the court. The only thing that can be made out in this respect is that the prisoner was not so attired at the time of his plea of guilty, if only because the prisoner does not claim that. At the plea colloquy, though, the prisoner clearly denied the existence of a defect of mind.

The prisoner's plea of guilty acted as a waiver as to the complaint that the trial court did not order a competency hearing *sua sponte*. *Elliott v. State*, 993 So.2d 397 (Miss. Ct. App. 2008)(Valid plea of guilty waives all non jurisdictional rights or defects). The plea of guilty was

validly made. To the extent that the prisoner actually challenges the plea, on the claim that he was incompetent at the time the plea was entered, this claim is belied by the statements he made in the plea colloquy and by the fact that his post - conviction relief pleadings contained nothing to support any such claim beyond his say-so.

Assuming for argument that the prisoner did not waive the issue of whether the Circuit Court erred in failing to conduct a competency hearing, there is nothing in the record to demonstrate that a hearing under URCCC 9.06 was necessary. The prisoner specifically denied the existence of a mental defect. His answers to the court's questions did not demonstrate any lack of understanding. There was nothing to show a reasonable probability that the prisoner was incapable of making rational decisions. There was no medical evidence to show that such a hearing was necessary. All of this being so, the court committed no error in not having a competency hearing. *Cox v. State*, 793 So.2d 591, 598 (Miss. 2001).

The prisoner cites *Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981) in an attempt to show that there was enough before the Circuit Court to require a competency hearing. However, in *Chavez* there were medical reports and odd courtroom behavior by that individual. The facts of the case at bar are not similar to those in *Chavez*.

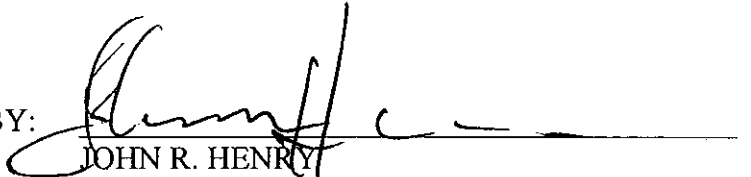
CONCLUSION

The order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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 September, 2009.


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