

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARICUS IVY

APPELLANT

VS.

NO. 2009-CP-0227-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the denial of Maricus Ivy's motion for post-conviction collateral relief from the Circuit Court of Lee County, Mississippi, Honorable Paul Funderburk presiding. Maricus Ivy (Ivy) was indicted for two counts of sexual battery in cause number CR04 359. CP 17-18.¹ On August 24, 2005, Ivy pled guilty to both count of sexual battery. CP. 23-28. The trial court sentenced Ivy to thirty (30) years on each count, with fifteen (15) years suspended and fifteen (15) years to serve followed by five (5) years of post-release supervision. CP 19-28.

Ivy filed a *pro se* petition for post-conviction relief asking the court to reverse the sentences in the sexual battery cases. CP. 2-6. By an opinion and order dated January 20, 2009, Judge

¹Additionally, the grand jury indicted Ivy on two counts of kidnaping in cause number CR04-358. The court accepted Ivy's guilty pleas to the kidnaping charges at the same time as accepting the pleas to the sexual battery charges. CP. 24; Plea Tr. 11-13; 23. According to Ivy, he did not seek post conviction relief on the kidnaping charges.

Funderburk summarily denied Ivy's petition. CP 29-30. Aggrieved, Ivy appealed.

STATEMENT OF THE ISSUES

- I. Whether Ivy waived the argument of a defect in the indictment?
- II. Whether there was a factual basis for the court to accept Ivy's guilty pleas?
- III. Whether Ivy received ineffective assistance of counsel?

SUMMARY OF THE ARGUMENT

Ivy wholly fails to prove that the trial court acted in error in denying his motion for post conviction relief. Ivy waived his claim of a defect in the indictment when he pled guilty. The trial court found a factual basis for accepting Ivy's guilty pleas. Ivy's attorney provided effective assistance of counsel. Ivy fails to show that there was a legitimate basis or reasonable evidence to provide him with the relief requested therefore the trial court's denial of post conviction relief should be affirmed.

ARGUMENT

An appellate court's standard of review on a denial of a motion for post conviction relief is well established. We will not reverse the trial court unless we find that the court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150. (Miss.Ct.App.2002). Questions of law are reviewed *de novo*. *Brown v. State*, 731 So.2d 595, 598(¶ 6) (Miss.1999).

ISSUE I. IVY WAIVED ANY ARGUMENT OF A DEFECTIVE INDICTMENT.

In his first assignment of error Ivy argues the indictment charging him with two counts of sexual battery was void for failure to state the Mississippi Code section he violated. As a result of this defect, Ivy argues, the court lacked jurisdiction to accept his guilty plea or to sentence him.

As a general rule a guilty plea waives all non-jurisdictional defects contained in an indictment.” *Brown v. State*, 772 So.2d 411 (¶ 9) (Miss.Ct.App.2000); *Von Brock v. State*, 794 So.2d 279 (Miss.2001). Mississippi's law dictates only two exceptions in which a voluntary guilty plea does not waive a defect. If an indictment fails to charge a necessary element of a crime or if there exists no subject matter jurisdiction, then a guilty plea does not constitute a waiver.”

Ivy waived any claim to a defective indictment when he entered his guilty plea. This issue is without merit.

ISSUE II. A FACTUAL BASIS EXISTED FOR THE TRIAL COURT TO ACCEPT IVY'S GUILTY PLEAS TO SEXUAL BATTERY.

Ivy makes broad assertions about there not being a factual basis for the trial court to accept his guilty pleas to the two counts of sexual battery. Ivy argues that because the prosecution did not have DNA evidence or a rape kit to prove penetration and that because he only faced one count of sexual battery in pretrial proceedings, there was a lack of factual basis that he committed the crimes to which he pled guilty. This assignment of error is totally without merit.

The Mississippi Supreme Court upheld the summary dismissal of a motion for post conviction relief in *Smith v. State*, 636 So.2d 1220 (Miss. 1994), ruling that when the transcript from court proceedings and a motion for post conviction relief contradict each other, the motion is “practically rendered a sham.” In *Ford v. State*, 708 So.2d 73 (Miss.1998), the Supreme 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.”

As the trial court noted in its denial of the post conviction relief, there was a “factual basis for the Petitioner’s pleas of guilty. The Petitioner testified, under oath, that he did in fact commit the offenses.” CP 30. The plea hearing transcript negates Ivy’s assertions. CP 24-25; Tr 12-13; 15-16. Solemn declarations in court carry a strong presumption of veracity. *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999).

ISSUE III. IVY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Ivy asserts that he was denied effective assistance of counsel. He asserts that his attorney failed to object to a void indictment, and coerced him into pleading guilty to two counts of sexual battery when there was no factual basis for the guilty plea. Ivy argues no factual basis for his guilty plea existed because there was no DNA evidence to support the sexual battery charges. Ivy rambles on about being initially charged with only one count of sexual battery in pretrial matters and yet pled guilty to two counts.

Ivy offers only his bare assertions as proof that he was denied adequate representation. Ivy failed to provide affidavits or proposed testimony of other witnesses to support his contentions. There is no indication in the record other than Ivy’s allegations that his trial counsel’s performance was deficient. In fact, the record supports the exact opposite. At the plea hearing, Ivy told the judge under oath that he was satisfied with counsel’s performance. (CP 26; Tr 18).

To prove a claim of ineffective assistance, a defendant must show (1) that his defense counsel's performance was deficient, and (2) that the deficient performance was prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant bears the burden of proving both prongs of *Strickland* and faces a rebuttable presumption “that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by counsel are strategic.” *Edwards v. State*, 615 So.2d 590, 596 (Miss.1993) (citing *Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985)). In the context of a guilty plea, Ivy must demonstrate that his attorney’s performance fell below the range of competence demanded of attorneys 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).

Our appellate courts routinely hold that post-conviction claims of ineffective assistance are properly dismissed where the defendant offers only his affidavit in support of his allegations. See, e.g., *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995); *Brooks v. State*, 573 So.2d 1350, 1354 (Miss.1990); *Hargett v. State*, 864 So.2d 283, 285(8) (Miss.Ct.App.2003). A post-conviction-relief motion unsupported by affidavits other than the petitioner's own fails to meet the pleading requirements of Mississippi Code Annotated section 99-39-9 and, thus, is deficient on its face and properly dismissed without an evidentiary hearing. See, e.g., *Robertson v. State*, 669 So.2d 11, 13 (Miss.1996).

In the case *sub judice*, the trial judge did not err in summarily dismissing Ivy’s claim of ineffective assistance. Ivy offered only his bare assertions as proof that he was denied effective assistance of counsel; he provided no affidavits or proposed testimony of other witnesses to support his contentions. Ivy wholly failed to prove both prongs of the *Strickland* test. 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 Lee County denying Maricus Ivy's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

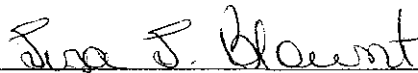
I, Lisa Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 18th day of June, 2009.



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