

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DARRELL W. PHILLIPS**

**APPELLANT**

**VS.**

**NO. 2009-CP-0252-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

Darrell W. Phillips filed a *pro se* "Motion to Correct Judgment and Sentence" in the Circuit Court of DeSoto County. The circuit court summarily dismissed the motion finding it without merit. Aggrieved, Phillips appealed.

## STATEMENT OF THE FACTS

Darrell W. Phillips was indicted April 5, 2006 for felony shoplifting for stealing a case of cigarettes. (CP 47). The indictment was amended to charge Phillips as a § 99-19-81 habitual offender. On March 5, 2008, Phillips pled guilty and was sentenced to serve five (5) years in the Mississippi Department of Corrections ("MDOC") followed by five (5) years of post-release supervision and to payment of a \$1,000 fine. (CP 37-47).

On October 24, 2008, Phillips filed a pro se Motion to Correct Judgment and Sentence claiming a lack of evidence to support a felony charge, breach of the plea agreement, ineffective assistance of counsel and various due process violations. Pursuant to Miss. Code Ann. § 99-39-11(2), the court summarily denied the request for relief and dismissed the motion by order dated December 18, 2008. (CP 24-27). Aggrieved by denial of his motion, Phillips appealed raising the following issues.

1. The trial court erred in ruling the items may or may not have been put on the shelf does not mean they were worth market value.
2. The trial court erred by concluding that the indictment was not specious and lacks statutory elements.
3. The trial court erred when it stated "No mention was made regarding a concurrent sentence at plea and sentencing hearing."
4. The trial court erred when it ruled Phillips submitted no sworn affidavits to support his claims.
5. The trial court erred when it stated in its ruling that the decision to release Phillips is now an executive decision with the Department of Corrections.
6. The trial court erred by ruling counsel of record was not ineffective.
7. The trial court is in error by refusing to rule on defendants appeal of drug court denial of the reserved right.
8. The trial court erred when it ruled defendant is not eligible for time served while he was in jail in Tennessee before his plea.

## **SUMMARY OF THE ARGUMENT**

The trial judge properly dismissed Phillips' motion for post conviction relief. On appeal, Phillips failed to demonstrate that the trial judge was clearly erroneous in his ruling. Issues regarding sufficiency of evidence to support a felony shoplifting charge were waived upon Phillips entering a guilty plea. Post conviction relief is not the proper means to seek credit for time served in Mississippi jails. Phillips failed to prove his attorney's performance was deficient. Phillips had no right to be admitted to the 17th Judicial District drug court. Phillips was not entitled to receive credit for time he spent in a Tennessee jail while waiting to be brought to Mississippi to face the subject criminal charges.

## ARGUMENT

A circuit court's denial of post-conviction collateral relief will not be reversed absent a finding that the court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150(¶ 3) (Miss.Ct.App.2002). However, when reviewing issues of law, this Court's proper standard of review is de novo. *Brown v. State*, 731 So.2d 595, 598(¶ 6) (Miss.1999). The State adopts, as part of its argument, Judge Chamberlin's thorough findings and well reasoned decision as set forth in his order of December 18, 2008. (CP 24-27).

### **I. Issues regarding sufficiency of evidence to support a felony shoplifting charge were waived upon Phillips entering a guilty plea.**

The law is well settled in Mississippi jurisprudence that “[a] valid guilty plea admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.” *Brooks v. State*, 573 So.2d 1350, 1352 (Miss.1990) (citing *Houston v. State*, 461 So.2d 720, 723 (Miss.1984)). A guilty plea also waives any evidentiary issue. *Jefferson v. State*, 855 So.2d 1012, 1014 (¶ 11) (Miss.Ct.App.2003) (citing *Bishop v. State*, 812 So.2d 934, 945 (¶ 39) (Miss.2002)).

Phillips argues that the evidence offered by the State only proved misdemeanor shoplifting and not felony shoplifting. A review of the petition and plea hearing indicate that Phillips' guilty plea was freely and voluntarily made. During the plea, Phillips admitted to the allegations charged and to the facts offered by the State. (Plea Petition at CP 41; Plea Transcript at CP 55-58; 90). The court was entitled to rely on Phillips' statements during the guilty plea. The State would submit that issues related to the factual proof in support of Phillips' felony shoplifting conviction were waived when Phillips plead guilty.



## **II. Phillips' guilty plea was valid.**

Sentencing is within the discretion of the trial court and not subject to appellate review if it is within prescribed statutory limits. *Owens v. State*, 809 So.2d 759, 760 (¶ 3) (Miss.Ct.App.2002). The sentence for grand larceny has no mandatory minimum sentence and has a maximum sentence of ten (10) years in prison and a \$10,000 fine. Miss.Code Ann. §§ 97-23-93 and 97-17-41. (Rev.2006). Phillips' sentence of five (5) years to serve followed by five (5) years post release supervision plus a \$1,000 fine and costs was within the statutory guidelines and therefore proper.

Basically, Phillips claims the sentence he received is not the sentence he agreed to serve. He contends the court should have followed the plea agreement he made with the State. Phillips has failed to provide evidence of any other agreement, but even if he did, the trial court was not bound by the agreement. During the plea hearing, Phillips acknowledged understanding that when he plead guilty the trial court could accept his plea and sentence him to the maximum allowed by statute. (Plea transcript at CP 88) Phillips understood the court was not bound by a negotiated plea and is now prohibited from complaining otherwise. *Id.*

**III. The decision of when to release Phillips from MDOC custody is not properly before this Court.**

Phillips contends the trial court erred when it held that the decision to release him is an executive decision with the Department of Corrections. Phillips has failed to present to this Court any viable argument or any authority in support of his argument that the trial court erred for failing to rule on when he should be released. This Court has stated on numerous occasions that it is not required to address issues not argued or supported with authority or citations to the record. See *Edwards v. State*, 800 So.2d 454, 468 (Miss.2001).

Notwithstanding the lack of authority or citations argument, this court previously held that a motion for post-conviction relief is not the proper means by which to seek credit for time served. *Murphy v. State*, 800 So.2d 525, 527-28(¶ 10) (Miss.Ct.App.2001). In accordance with the ruling in *Leech v. State*, 994 So.2d 850 (Miss.App.,2008) Phillips should first seek relief from within the administrative system of the Mississippi Department of Corrections, and if relief is denied, then turn to the courts for relief.

#### **IV. Phillips was provided effective assistance of counsel.**

Phillips claims he was denied effective assistance of counsel in that his trial counsel was ignorant of the law; lacked due diligence in investigating his mental condition; gave false and misleading information to defendant, lied and fabricated plea documents and used intimidation and scare tactics. Phillips claims he has been “prejudiced by trial counsel’s ineffectiveness” but fails to state how he was prejudiced.

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. The rule is that a trial judge may rely heavily on prior statements made under oath. *Simpson v. State*, 678 So.2d 712, 715 (Miss.1996); *Smith v. State*, 636 So.2d at 1224.

To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The burden of proof rests with the defendant to show both prongs. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). Under *Strickland*, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To overcome this presumption, “[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. In cases involving post-conviction collateral relief, “where a party offers only his affidavit, then his ineffective assistance claim is without merit.”

*Vielee v. State*, 653 So.2d 920, 922 (Miss.1995).

In direct contradiction to his claims of deficiency, Phillips stated in his plea petition that he believed his lawyer was competent and had done all anyone could do to counsel and assist him, and that he was satisfied with the help his attorney had given him. (Petition at CP 41). This approval was again shown by Phillips' testimony in response to the lower court's questioning. (Plea transcript at CP 90-91). Notwithstanding the admissions contained within Phillips' motion; he failed to offer any affidavits or additional proof in support his claim of ineffective assistance of counsel other than his own beliefs. Phillips failed both prongs of the Strickland test. Therefore, the trial court's dismissal of Phillips' motion was proper and should be affirmed.

**V. Phillips does not have a right to participate in drug court.**

Phillips contends he had a right to have his case transferred to the 17<sup>th</sup> Judicial District drug court and therefore the trial court erred by refusing to rule on his appeal of a denial to attend drug court. Phillips failed to present to this Court any viable argument or any authority in support of his argument. This Court stated on numerous occasions that it is not required to address issues not argued or supported with authority or citations to the record. See *Edwards v. State*, 800 So.2d 454, 468 (Miss.2001).

Further, in *Jim v. State*, 911 So.2d 658 (Miss.App.,2005) this Court held the defendant did not have a right to transfer his case to drug court. After conviction of a drug crime, the trial court sentenced Jim to two (2) years incarceration and the Regimented Inmate Discipline Program. Jim appealed claiming the court's failure to send the case to the Eighth Circuit Drug Court violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This Court held that the Mississippi Legislature created the drug courts in part to "reduce the alcohol-related and drug-related court workload." Miss.Code Ann. § 9-23-3. However, the Code intentionally refrained from creating a right by expressly stating, "A person does not have a right to participate in drug court under this chapter." Miss.Code Ann. § 9-23-15(4)." *Id.*

In accordance with the ruling in *Jim*, Phillips does not have a right to transfer his case to drug court nor does he have a equal protection claim since no one has the right to attend the drug court. This issue is without merit.

**VI. The trial court did not err in failing to credit Phillips with time served in Tennessee.**

Phillips argues that the trial court erred in failing to award him credit for time served in jail in Tennessee. The State would submit that Mississippi Code Annotated section 99-19-23, which allows prisoners credit for time served in another jurisdiction while awaiting trial, does not apply to Phillips' time served in Tennessee. The Mississippi Supreme Court previously ruled on this issue in *Holland v. State*, 418 So. 2d 73 (Miss. 1982) holding § 99-19-23 has no application to time served in another state while an accused is awaiting return to Mississippi to face criminal charges. Accordingly, this issue is without merit.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this Court to affirm the judgment of the Circuit Court of DeSoto County denying post-conviction relief to Darrell W. Phillips.

Respectfully submitted,

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## CERTIFICATE OF SERVICE


I, Lisa L. 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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