

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY NICK

APPELLANT

VS.

NO. 2009-CP-0339

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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STATEMENT OF THE ISSUES

- I. Nick's conviction for aggravated assault as the result of his guilty plea was legal and by pleading guilty he waived his right to a speedy trial.
- II. Nick is not entitled to post-conviction collateral relief.
- III. The trial court was correct in denying Nick's Motion for Post Conviction Collateral Relief.
- IV. Nick cannot satisfy either prong of *Strickland* and received constitutionally effective assistance of counsel.
- V. There is no statute of limitations for the prosecution of rape, sexual battery or aggravated assault and Nick's conviction for aggravated assault was correctly upheld by the trial court.

STATEMENT OF THE CASE

On December 13, 2001, Anthony Nick was indicted on two counts, forcible rape and sexual battery. The indictment charged that on November 3, 2000, Anthony Nick:

COUNT ONE

did wilfully unlawfully , feloniously and forcibly rape and ravish [P.R.], a female fourteen years of age or above, without the consent and against the will of [P.R.]

COUNT TWO

did wilfully, unlawfully and feloniously engage in sexual penetration with [P.R.], a human being, without her consent, by inserting his penis into the rectum of [P.R.]

On September 13, 2005, Nick waived indictment and pleaded guilty to a charge on information of the aggravated assault of [P.R.]¹ (C.P. 4,5) Counts one and two of the indictment were remanded to the file.² (Tr. 17) Nick was sentenced to 20 years in the custody of the Mississippi Department of Corrections to run consecutive to Nick's prior sentences which he was serving at the time of the plea hearing. (Tr. 19-20)

On August 7, 2006, Nick filed a Motion for Post Conviction Collateral Relief. On April 20, 2009, the trial court denied Nick's Motion for Post Conviction Collateral Relief. The instant appeal ensued.

¹Hinds County Circuit Court Cause No. 05-0-917

²Hinds County Circuit Court Cause No. 01-1-601

SUMMARY OF THE ARGUMENT

Nick's conviction for aggravated assault as the result of his guilty plea was legal and by pleading guilty he waived his right to a speedy trial. "[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin." *Madden v. State*, 991 So.2d 1231, 1237(¶ 25) (Miss. App. Ct. 2008). Nick waived his right to a speedy trial upon pleading guilty. Therefore, this issue is without merit.

Nick is not entitled to post-conviction collateral relief. The charges of rape and aggravated assault are exempted from the two year statute of limitations for criminal prosecution. The two year statute of limitations as to the charge of sexual battery was tolled by the issuance of the indictment only thirteen months after the crime was committed. Finally, Nick waived any defenses arising from the statute of limitations when he pled guilty to aggravated assault on September 13, 2005.

The trial court was correct in denying Nick's Motion for Post Conviction Collateral Relief. With nothing but his own bare affidavit to support his factual claims, Nick did not meet the standard for an evidentiary hearing. His Motion for Post Conviction Collateral Relief was without merit on its face and was properly dismissed by the trial court.

Nick cannot satisfy either prong of *Strickland* and cannot overcome the strong presumption that he received constitutionally effective assistance of counsel. "A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin." *Madden v. State*, 991 So.2d 1231, 1237 (Miss. Ct. App. 2008) (quoting *Anderson v. State*, 577 So.2d 390, 391-92 (Miss. 1991)). Nick has failed to prove his counsel was deficient for not pursuing a speedy trial

because, upon entering a guilty plea, Nick waived his right to a speedy trial.

There is no statute of limitations for the prosecution of rape or aggravated assault, Nick waived any defenses based on the statute of limitations when he pled guilty and the two year statute of limitations as to sexual battery was tolled on December 13, 2001, when Nick was indicted 13 months after the offense. On November 3, 2000, Nick hid in the apartment of P.R. When she came home from work, he brutally attacked her, causing her severe injuries. On December 13, 2001, Nick was indicted for rape and sexual battery in the matter of the attack on P.R. In order to escape prosecution for rape and sexual battery, on September 13, 2005, Nick opted to accept a plea bargain in which he would enter an open plea of guilty to a charge of aggravated assault by information in exchange for the charges of rape and sexual battery being remanded to the file. The charge of aggravated assault had a much lesser maximum penalty than the charges of rape and sexual battery. Therefore, Nick waived any defense based on the statute of limitations as to all three charges. Further, aggravated assault and rape are exempted from the two year statute of limitations for prosecution of criminal offenses. Additionally, as to the charge of sexual battery, the statute of limitations was tolled on the day Nick was indicted, December 13, 2001, 13 months after he committed the offense on November 3, 2000. This issue is without merit and the trial court correctly denied Nick's Motion for Post Conviction Collateral Relief.

ARGUMENT

I. Nick's conviction for aggravated assault as the result of his guilty plea was legal and by pleading guilty he waived his right to a speedy trial.

It is well established that "a guilty plea waives the right to a speedy trial, whether that right is of constitutional or statutory origin." *Hardin v. State*, 966 So.2d 844, 847 (Miss. Ct. App. 2007) (citing *Rowe v. State*, 735 So.2d 399, 400 (Miss.1999)). Although Nick argues that he was

not made aware of the circumstances of his guilty plea, the record shows that he signed a petition to enter a guilty plea which clearly stated Nick understood that he waived his right to a speedy trial. (C.P. 5)

Nick argues that his right to a speedy trial was violated because his guilty plea, which acts as a waiver of the right to a speedy trial, was not made voluntarily and intelligently because he was coerced into pleading guilty. However, the record reflects that Nick's guilty plea was voluntarily and intelligently made. A plea is considered "voluntary and intelligent" if the defendant knows the elements of the charge against him, understands the charge's relation to him, what effect the plea will have, and what sentence the plea may bring. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992). During the plea colloquy, Nick was informed of the charge against him, the effect of the plea, the rights he would waive if he pleaded guilty, and the possible sentence he could receive.

Further, "[t]o survive summary dismissal, a collateral attack on a facially correct plea must include supporting affidavits of other persons." *Turner v. State*, 961 So.2d 734, 736(¶ 3) (Miss. Ct. App. 2007) (citing *Baker v. State*, 358 So.2d 401, 403 (Miss.1978)). The only support Nick provides for his contention that his plea was involuntary is his own affidavit which contains nothing more than a bare allegation with no supporting facts.

"[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin." *Madden v. State*, 991 So.2d 1231, 1237 (Miss. Ct. App. 2008) (quoting *Anderson v. State*, 577 So.2d 390, 391-92 (Miss.1991)). Nick has failed to prove that his plea was invalid and, therefore, he has waived his right to a speedy trial.

II. Nick is not entitled to post-conviction collateral relief.

Nick argues that he is entitled to post conviction collateral relief because he alleges that “it was imposed upon information which was instituted by the prosecution long after the statutory time limitations for prosecution had elapsed and was used as a deliberate design to circumvent the statute of limitations on prosecution.”

This argument fails for many reasons, but primarily because the charge of aggravated assault is exempted from the two year statute of limitations for criminal prosecutions. Further, the original charge of rape is also exempted from the two year statute of limitations. In 2000, on the date Nick violently attacked P.R., the statute of limitations for criminal acts in Section 99-1-5 (Rev.2000) provided:

A person shall not be prosecuted for any offense, with the exception of murder, manslaughter, **aggravated assault**, kidnaping, arson, burglary, forgery, counterfeiting, robbery, larceny, **rape**, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(c) or exploitation of children as described in Section 97-5-33, unless the prosecution for such offense be commenced within two (2) years next after the commission thereof, but nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

Further hindering Nick’s efforts at relief, Mississippi courts have long held that “[a] valid guilty plea admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects, including the statute of limitations in a criminal case. *Laster v. State*, 975 So.2d 240, 242 (Miss. Ct. App. 2007) (citations omitted); *Edmondson v. State*, 17 So.3d 591

(Miss. Ct. App. 2009). A statute of limitations claim is an affirmative defense, which may be waived upon the entry of a valid guilty plea. *Id.* The Waiver of Indictment signed by Nick under oath and the record of the plea hearing clearly establish that Nick's plea was valid and therefore waives Nick's right to assert any defenses based on the statute of limitations.

In addition to the waiver of any challenge based on the statute of limitations effected by Nick's guilty plea, the two year statute of limitations on criminal prosecutions was tolled as to charge of sexual battery upon the filing of the indictment only 13 months after the crime was committed. The brutal attack on P.R. was committed on November 3, 2000, and the indictment was filed on December 13, 2001, only 13 months later, tolling the two year statute of limitations.

Finally, it is clear from the record that Nick was offered a beneficial plea agreement which he wisely took. Nick faced potential sentences of life imprisonment for forcible rape and thirty (30) years imprisonment for sexual battery, which could have resulted in a sentence of *life plus (30) thirty years*. His plea bargain to the single charge of aggravated assault limited his maximum sentence to twenty years. This was a sweetheart deal for Nick and was not an effort by the prosecution to circumvent the statute of limitations.

This issue is without merit and the trial court's denial of Nick's Motion for Post Conviction Collateral should be affirmed.

III. The trial court was correct in denying Nick's Motion for Post Conviction Collateral Relief.

Nick's Motion for Post Conviction Collateral Relief was without merit on its face. Nick claimed ineffective assistance of counsel did not attach any affidavit but his own to support that claim. In cases involving post-conviction collateral relief, "where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." *Vielee v. State*, 653 So.2d 920,

922 (Miss.1995). Further, Nick waived his right to a speedy trial and any defenses he might have had under the statute of limitations.

Further, "[t]o survive summary dismissal, a collateral attack on a facially correct plea must include supporting affidavits of other persons." *Turner v. State*, 961 So.2d 734, 736(¶ 3) (Miss. Ct. App. 2007) (citing *Baker v. State*, 358 So.2d 401, 403 (Miss.1978)). The only support Nick provides for his contention that his plea was involuntary is his own affidavit which contains nothing more than a bare allegation with no supporting facts. The trial court had before it, among other things, Nick's sworn Petition to a Plea of Guilty in which Nick acknowledged that he was waiving all of the constitutional rights, including the right to a speedy and public trial by jury, listed therein. (C.P. 5-6) It was not error to rely on this sworn declaration to determine that Nick's plea was valid.

Additionally, at the plea hearing in which Nick pled guilty to aggravated assault, Nick gave his sworn statement that he was satisfied with the advice and counsel he received from his lawyer and that he had no complaints against his lawyer; his sworn statement that he understood the rights he was waiving by pleading guilty; his sworn admission that he did in fact violently assault the victim; and, his sworn statement.

With nothing but his own bare affidavit to support his factual claims, Nick did not meet the standard for an evidentiary hearing. His Motion for Post Conviction Collateral Relief was without merit on its face and was properly dismissed by the trial court.

IV. Nick cannot satisfy either prong of *Strickland* and received constitutionally effective assistance of counsel.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with the defendant to prove 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, 104 S.Ct. 2052. 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, 104 S.Ct. 2052.

As stated earlier, “[a] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial including the right to a speedy trial, whether of constitutional or statutory origin.” *Madden v. State*, 991 So.2d 1231, 1237 (Miss. Ct. App. 2008) (quoting *Anderson v. State*, 577 So.2d 390, 391-92 (Miss.1991)). Nick has failed to prove his counsel was deficient for not pursuing a speedy trial because, upon entering a guilty plea, Nick waived his right to a speedy trial.

“In order to prevail on the issue of whether his defense counsel's performance was ineffective, [the petitioner] must prove that his counsel's performance was deficient and that he was prejudiced by counsel's mistakes.” *Kinney v. State*, 737 So.2d 1038, 1041 (Miss. Ct. App. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Nick’s counsel at the trial level is presumed to be constitutionally effective. Through the efforts of his counsel, Nick received the benefit of a plea bargain that capped his potential sentence at 20 years. The two counts for which he was originally indicted, forcible rape and sexual battery, were remanded to the file. These two charges have significantly greater penalties than aggravated assault. The maximum sentence for forcible rape is life imprisonment and the maximum sentence for sexual battery is 30 years. Nick clearly benefitted from his plea bargain

and therefore he cannot overcome the presumption that his counsel was constitutionally effective.

V. There is no statute of limitations for the prosecution of rape, sexual battery or aggravated assault and Nick's conviction for aggravated assault was correctly upheld by the trial court.

On November 3, 2000, Nick hid in the apartment of P.R. When she came home from work, he brutally attacked her, causing her severe injuries. On December 13, 2001, Nick was indicted for rape and sexual battery in the matter of the attack on P.R. In order to escape prosecution for rape and sexual battery, on September 13, 2005, Nick opted to accept a plea bargain in which he would enter an open plea of guilty to a charge of aggravated assault by information in exchange for the charges of rape and sexual battery being remanded to the file. The charge of aggravated assault had a much lesser maximum penalty than the charges of rape and sexual battery. Therefore, Nick waived any defense based on the statute of limitations as to all three charges. Further, aggravated assault and rape are exempted from the two year statute of limitations for prosecution of criminal offenses. Additionally, as to the charge of sexual battery, the statute of limitations was tolled on the day Nick was indicted, December 13, 2001, 13 months after he committed the offense on November 3, 2000.

A valid guilty plea admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects, including the statute of limitations in a criminal case. *Edmondson v. State*, 17 So.3d 591 (Miss. Ct. App. 2009). Nick argues that he should not have been prosecuted because the statute of limitations had run as to the charges against him. However, the entry of Nick's guilty plea waived this defense. "A valid guilty plea admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects[.]" including the statute of limitations in a criminal case. *Laster v. State*, 975 So.2d 240, 242 (Miss. Ct. App. 2007) (citations omitted). A

statute of limitations claim is an affirmative defense, which may be waived upon the entry of a valid guilty plea. *Id.*

In 2000, on the date of the violent attack of P.R., the statute of limitations for criminal acts in Section 99-1-5 (Rev.2000) provided:

A person shall not be prosecuted for any offense, with the exception of murder, manslaughter, aggravated assault, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(c) or exploitation of children as described in Section 97-5-33, unless the prosecution for such offense be commenced within two (2) years next after the commission thereof, but nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

Under Mississippi Code Annotated section 99-1-7 (Rev.2007), “[a] prosecution may be commenced, within the meaning of Section 99-1-5 by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.” (Emphasis added). Therefore, as to the charges of rape and sexual battery the prosecution against Nick commenced on the day that he was indicted, December 13, 2001, thirteen months after he committed the offense, and tolled the statute of limitations. Notably, the two year statute of limitations does not apply to the charge of rape. As to the charge of sexual battery, the statute of limitations was tolled on the day Nick was indicted, December 13, 2001, 13 months after he committed the offense.

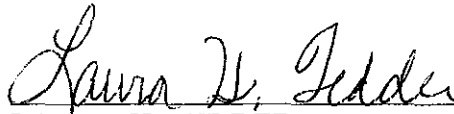
CONCLUSION

The assignments of error presented by Nick are without merit and the trial court's dismissal of Nick's Motion for Post Conviction Relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



LAURA H. TEDDER

SPECIAL ASSISTANT ATTORNEY GENERAL

MISSISSIPPI BAR NO [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

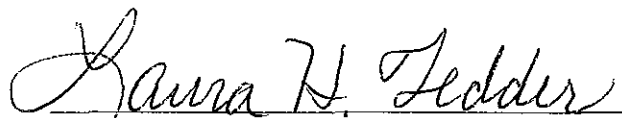
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable W. Swan Yerger
Circuit Court Judge
P. O. Box 22711
Jackson, MS 392225

Honorable Robert Shuler Smith
District Attorney
P. O. Box 22747
Jackson, MS 39225-2747

Anthony Nick, #71647
H.H.R.C.F.
23234 Hwy. 12-E
Lexington, MS 39095

This the 14th day of May, 2010.



LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680