

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY EVANS

APPELLANT

VS.

NO. 2009-CP-0524-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 Circuit Court of Hinds County wherein defendant was indicted for capital murder, in the course of armed robbery; aggravated assault; felon in possession of a firearm (C.p. 2-3). Defendant petitioned the trial court to plead guilty to Manslaughter with a gun and Aggravated assault. The trial court sentenced defendant to 20 years for the manslaughter and 15 years for aggravated assault the sentences to be served consecutively. (C.p. 10-11).

In December 2008 defendant filed a motion for post-conviction relief (C.p. 27-84, petition, exhibits). The motion was denied by the trial court on March 9th 2009.

Defendant timely noticed this instant appeal. (C.p. 86).

STATEMENT OF FACTS

Defendant and two other in conspiracy entered the City Food Mart store in the first judicial district of Hinds County. All three men were armed. One man jumped the counter and shot one of the clerks (not killing him). [This was all caught on videotape.] Defendant Evans chased after one of the other clerks out of the store, shooting the clerk in the stomach and killing him on the pavement. The other two gunmen remained in the store demanding money. (Transcript of guilty plea, pp.6-7).

SUMMARY OF ARGUMENT

I. & III.

DEFENDANT WAIVED ANY SUPPOSED DISCOVERY VIOLATION WHEN HE PLED GUILTY.

There was no discovery violation and defendant's guilty plea included a valid waiver of any evidentiary deficiencies or discovery claims.

II.

TRIAL COUNSEL WAS NOT INEFFECTIVE. DEFENDANT WAS INDICTED AS AN HABITUAL OFFENDER AND PLED GUILTY AS ONE.

Defendant was properly indicted as an habitual offender, knowingly petitioned the court admitting a prior conviction. Defendant has not shown deficient performance or prejudice.

IV.

THE TRIAL COURT RULED CORRECTLY IN DENYING DEFENDANT'S REQUEST FOR TRANSCRIPTS.

Defendant failed to demonstrate some specific need which would require the State to furnish free copies of trial records for use in collateral proceedings.

V.

DEFENDANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING.

The trial court had sufficient records to dismiss the petition without need of the transcript of the guilty plea.

ARGUMENT
I. & III.
DEFENDANT WAIVED ANY SUPPOSED DISCOVERY
VIOLATION WHEN HE PLED GUILTY.

Defendant claims he was denied his due process rights because he didn't find out the State was going to call his co-defendant's as witnesses at his trial. This claim is raised as the first and third issue in error. The State will respond once for both issues.

The record clearly indicates the reasons defendant pled guilty. He was to get a much reduced sentence, from a potential of two mandatory life sentences to the maximum sentence for each charge. Additionally, one charge was dropped (felon in possession of firearm) with no revocation of prior sentences. (Tr. 6-9).

The law is clear, a valid guilty plea waives any evidentiary or discovery issues.

¶ 12. Campbell argues his convictions should be set aside because he was not provided discovery. The record reveals that a motion for discovery was filed by Campbell's attorney on April 3, 2002. The trial court took judicial notice of the fact that the district attorney's office in the fifth circuit court district routinely provides discovery to defense attorneys as soon as a motion is filed, and without the necessity of entering a court order. However, the record is silent as to whether discovery was received.

¶ 13. In addition, as noted above, a "valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial." *Anderson v. State*, 577 So.2d 390, 391 (Miss.1991). Since we hold below that Campbell's guilty plea was valid, we find this issue to be without merit.

Campbell v. State, 878 So.2d 227 (Miss.App. 2004).

The State would ask this reviewing Court to adopt the rationale of *Campbell*, where there was no evidence of discovery being received and yet the court held the guilty plea to be valid.

Sub judice, defendant admits he knew about the witnesses 10 days before trial. Additionally, the apparent motivation for the dropping of charges from Capital Murder down to manslaughter was for defendant's health issues and an effort to save and local taxpayer expense. See, *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 316 (Miss. 1992), citing – R. Posner, *Economic Analysis of Law* 572-74 (3d ed. 1986)(Economic motivation for legal decisions). Defendant knew what the evidence was (it was caught on video) and he eagerly accepted the offer and got just what he was told.

Consequently, there was no discovery violation and defendant's guilty plea included a valid waiver of any evidentiary deficiencies or discovery claims.

No relief should be granted based on this allegation of error.

II.
**TRIAL COUNSEL WAS NOT INEFFECTIVE. DEFENDANT
WAS INDICTED AS AN HABITUAL OFFENDER AND PLED
GUILTY AS ONE.**

Next defendant claims he was denied effective assistance of counsel in that had his attorney done some research he would have found the habitual portion of the indictment defective and he would not be sentenced as an habitual offender.

Interesting, defendant petitioned the court to plead guilty. (Petition to Enter a Plea of Guilty, c.p. 13-16). This petition was signed and acknowledged by defendant. Paragraphs 11 and 17 of petition cover this issue. He knew he was indicted as an habitual offender and acknowledged such. Further he acknowledged a prior felony conviction.

The law is clear:

¶ 12. In order to be sentenced as a habitual offender, the State is required to properly indict the accused as a habitual offender, then prove the prior offenses by competent evidence beyond a reasonable doubt, and provide the accused a reasonable opportunity to challenge the State's proof. *Madden v. State*, 991 So.2d 1231, 1236(¶ 20) (Miss.Ct.App.2008) (citation omitted). **However, when the accused makes a valid decision to forego his or her right to a criminal trial and instead pleads guilty to the principal offense as a habitual offender, he or she waives the right that the prosecution must prove the prior offense(s) beyond a reasonable doubt.** *Id.* (citing *Jefferson v. State*, 556 So.2d 1016, 1019 (Miss.1989)).

¶ 13. Joiner's indictment delineated five previous felony offenses for which he was convicted. In Joiner's plea petition, which he signed, he admitted that he had been previously convicted of the same felony

offenses set forth in the indictment, which he listed as follows: grand larceny, simple assault on a law enforcement officer (two counts), attempted armed robbery, and burglary.

¶ 14. Thus, having submitted a plea petition to the circuit court in which he admitted to these prior felony convictions and having then entered a valid guilty plea to the principal offense as a habitual offender, we find that the circuit court properly sentenced Joiner as a habitual offender.

Joiner v. State, 2010 WL 432280, 2 -3 (Miss.App. 2010)(decided Feb 9, 2010)(emphasis added).

It is the position of the State defendant was indicted as an habitual offender under two statutory provisions. So, he could have gotten (prosecutorial or judicial discretion), life for each of the offenses as charged and indicted or just the maximum sentence for each.

¶ 6. In his other issue on appeal, Sowell argues that his trial counsel was ineffective for failing to object to the amendment of the indictment charging Sowell as an habitual offender under Section 99-19-83. Sowell must demonstrate that his trial 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). In the context of a guilty plea, Sowell must demonstrate that his counsel'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. *Alexander v. State*, 605 So.2d 1170, 1173 (Miss.1992). Even from the scant record before this Court, it is clear that Sowell's attorney was able to negotiate a reduced sentence for Sowell, from a possible life sentence under Section 99-19-83 to five years under Section 99-18-81. We cannot find that Sowell's trial counsel performed in an ineffective manner. This issue is without merit.

Sowell v. State, 970 So.2d 752, 754 (Miss.App. 2007).

A similar rationale was deemed by the Court to be insufficient to find ineffective assistance where the attorney negotiated from a maximum life sentence to merely the maximum sentence for the offense.

¶ 7. During the plea colloquy Smith stated that he was satisfied with his counsel's representation and his counsel had not pressured him into pleading guilty. The trial court also found that Smith's ineffective assistance of counsel claims were waived by his guilty plea. Furthermore, the trial court also noted that, "Thanks to the work of Smith's counsel, he pled guilty to the crime of burglary of a building as a habitual offender under the 'Little Habitual Offender Statute', and thus received a seven year sentence instead of the aforementioned life sentence." Smith was originally indicted as an habitual offender, which carried a mandatory sentence of life without the possibility of parole. Smith has failed to meet the requirements of Strickland; thus, we find no merit to this issue.

Smith v. State, 928 So.2d 190, 191 (Miss.App. 2005).

Defendant has not shown deficient performance nor prejudice, consequently no relief should be granted based on this allegation of error.

IV.
THE TRIAL COURT RULED CORRECTLY IN DENYING
DEFENDANT’S REQUEST FOR TRANSCRIPTS.

Prior to his filing for post-conviction relief defendant filed a motion for records and transcripts. (C.p. 20-24). The trial court denied the motion (c.p. 26), finding defendant had not demonstrated a need for the transcripts and that he was not entitled to a free transcript, citing *Fleming v. State*, 553 So.2d 505, 508 (Miss. 1989).

Looking to the record, specifically the fill in the blank ‘form’ motion request for records and transcripts — there is no specific individualized reason given for the need for the records.

¶ 5. . . . The trial court will not, however, be found in error for declining to require the State to subsidize a “fishing expedition” by Shanks; the trial court may reasonably require him “to demonstrate some specific need” before requiring the State to furnish free copies of trial records for use in collateral proceedings. See *Fleming*, 553 So.2d at 506[.]

Shanks v. State, 906 So.2d 760, 762 (Miss.App. 2004)(citations omitted).

The trial court found the same to be true in his order denying relief. Consequently, no relief should be granted on this allegation of error.

V.
DEFENDANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING.

In this last allegation of trial court error defendant asserts he was entitled to an evidentiary hearing. Specifically because the trial court could not have had the transcript to review in denying the motion for post-conviction relief.

¶ 18. . . . Generally, when the record does not contain the necessary transcripts, “this Court must presume that the trial court acted properly.” *Bates v. State*, 914 So.2d at 299(¶ 7). Therefore, we find that there was sufficient factual basis to support Conlee's conviction of the transfer of a controlled substance.

Conlee v. State, 23 So.3d 535, 540 -541 (Miss.App. 2009).

It must be noted the trial court denied pursuant to *Miss. Code Ann.* § 99-39-11(2) which means it was ‘dismissed’ as being without merit. Further, the trial court may make such findings based on the record available at the time.

However, not on appeal, we do have the record of the transcript. It is worth noting that defendant, with the transcript before him, does not cite once to the transcript to any point of law or omission that would support his position on appeal.

The State would argue the trial court had sufficient information for consideration, as well as defendant’s petition (and only his supporting affidavit) to dismiss the motion. *Miss. Code Ann.* § 99-39-11(2).

¶ 6. This Court will not disturb a trial court's denial of post-conviction relief unless that court's factual findings are clearly erroneous. *Forshee*

v. State, 853 So.2d 136, 139(¶ 16) (Miss.Ct.App.2003).

Jackson v. State, 986 So.2d 326 (Miss.App. 2007).

Looking to the full record on review only emphasizes the correctness of the trial courts ruling to deny post-conviction relief.

No relief should no be granted based upon this claim of error.

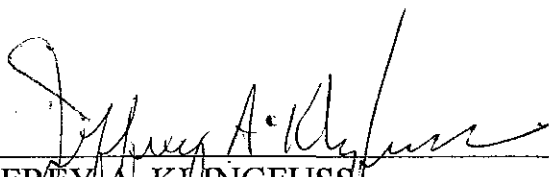
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 30th day of April, 2010.



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