

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

**ALAN M. AVANT**

**APPELLANT**

**VS.**

**NO. 2009-CP-0680**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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### **STATEMENT OF THE ISSUES**

- I. Avant was correctly indicted as a violent habitual offender and it was within the discretion of the prosecutor to charge Avant with armed robbery as an habitual offender and to subsequently allow Avant to plead guilty to the crime of armed robbery without enhancement for his status as an habitual offender.
- II. Avant's Plea was Supported by a Sufficient Factual Basis.
- III. The trial court was well within its authority to impose Avant's sentence consecutively to the federal sentence he was serving at the time of his trial.
- IV. The trial court was not required to advise Avant of his right to a direct appeal of his sentence and therefore was not in error.
- V. Avant received constitutionally effective assistance of counsel and is unable to satisfy either prong of *Strickland*.

### **STATEMENT OF THE CASE**

On or about November 1, 2004, Alan M. Avant was indicted for armed robbery by the Leake County Grand Jury. He was charged as an habitual offender. On January 18, 2006, Avant filed his plea petition for the crime of armed robbery and pleaded guilty to the crime of armed robbery before the Circuit Court of Leake County. (C.P. 49-51) On January 19, 2006, Avant was sentenced to serve a term of fifteen (15) years in the custody of the Mississippi Department of Corrections to run consecutively with the sentence he was serving in Federal custody. (C.P. 71) On December 1, 2008, Avant filed a Motion for Post Conviction Collateral Relief in the Leake County Circuit Court. (C.P. 2) The Circuit Court denied and dismissed Avant's Motion for Post-Conviction Relief on April 16, 2009. (C.P. 35)

## **SUMMARY OF THE ARGUMENT**

Avant was correctly indicted as a violent habitual offender and it was within the discretion of the prosecutor to charge Avant with armed robbery as an habitual offender and to subsequently allow Avant to plead guilty to the crime of armed robbery without enhancement for his status as an habitual offender. While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. Corbitt v. New Jersey, 439 U.S. 212 (1978).

The indictment, which was read during the plea hearing, was specific as to the elements of the crime of armed robbery. After the trial judge read the indictment aloud, he asked Avant if he committed the crime charged in the indictment. Avant responded, “Yes.” Therefore, there was a sufficient factual basis to support Avant's conviction for armed robbery. Further, due to consultation with his lawyer, review of the evidence against him, and participation in interviewing witnesses, Avant was “intimately familiar” with the State’s proof against him.

The Mississippi Supreme Court has stated that “sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute.” Beamon v. State, 9 So.3d 376, 380 (Miss.2009) (quoting Wall v. State, 718 So.2d 1107, 1114 (Miss.1998)). Further, the general rule in this state is that a sentence cannot be

disturbed on appeal so long as it does not exceed the maximum term allowed by statute. Corley v. State, 536 So.2d 1314, 1319 (Miss.1988).

Avant contends that the trial court committed reversible error when it failed to advise him of his right to appeal his sentence through a direct appeal. Mississippi Code Annotated section 99-35-101 (Rev.2007) states that “[a]ny person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty.” See Cook v. State, 990 So.2d 788, 793 (Miss.Ct.App.2008) FN1. However, a defendant may directly appeal the sentence given as a result of that plea even though a conviction from a guilty plea may not be directly appealed. Trotter v. State, 554 So.2d 313, 315 (Miss.1989). Nevertheless, a trial court is not required to inform the defendant of his right to direct appeal his sentence after he enters a guilty plea. Cook, 990 So.2d at 793. Thus, this issue is without merit.

Avant cannot meet either prong of *Strickland*. That is, he cannot show that his counsel was deficient or that he was in any way prejudiced by this deficiency. His counsel’s assistance was within the range of reasonable professional assistance. Further, Avant offered nothing other than his own affidavit to support his claim and therefore it must fail. Finally, Avant’s counsel procured for him a plea bargain which spared Avant the possibility of life in prison without parole. There is no merit to Avant’s claim of ineffective assistance of counsel.

## ARGUMENT

- I. **Avant was correctly indicted as a violent habitual offender and it was within the discretion of the prosecutor to charge Avant with armed robbery as an habitual offender and to subsequently allow Avant to plead guilty to the crime of armed robbery without enhancement for his status as an habitual offender.**

Avant contends that the “prosecution knew there was no evidence to prove such violent habitual status,” and that the charge of violent habitual offender pursuant to Mississippi Code Annotated Section 99-19-83 (1972, as amended) was made in an effort to coerce him to plead guilty to armed robbery. It is plain from the record that Avant’s prior convictions warranted the imposition of Mississippi Code Annotated Section 99-19-83 (1972, as amended), which mandated that if Avant was convicted of armed robbery, the circuit court judge must impose a life sentence. The indictment clearly alleges that Avant had the following prior convictions:

- 1) a charge of felony burglary, in Circuit Court of St. Clair County, Illinois, Cause No. 00-CF-228, on May 16, 2000, for which he received a sentence of three (3) years in the Illinois State Penitentiary; and,
- 2) a charge of felony robbery, in the Circuit Court of St. Claire County, Illinois, Cause No. 01-CF-1044 on March 26, 2003, for which he was sentenced to four (4) years in the Illinois State Penitentiary.

Further, Avant admitted these convictions as well as a third conviction during his plea hearing. The following colloquy took place during the plea hearing:

- Q. (The Court) So let me begin with this. Tell me about your prior criminal felony convictions; state court, federal court, just tell me what – how you’ve been involved with the law?



- A. (Avant) Sir, I have a firearms charge, I have a burglary charge, and I have a robbery charge.
- Q. Are you on probation for any of those?
- A. No, sir.
- Q. That's state court in the State of Illinois, from what I - -
- A. Yes, sir. I have a felony charge that's running, as we speak.
- Q. Where were you in Federal custody, I assume, before you came here?
- A. Yes, sir.
- Q. Where?
- A. Some of everywhere. I left from U.S.P. Hazelton in West Virginia. That's where I was.
- Q. What sentence were you serving there, and for what crime?
- A. I think I got 63 months for felony possession of a firearm.
- Q. How long had you served that?
- A. I've been serving that since September, 2004.
- Q. Do you understand that whatever we do here today, that sentence will be consecutive to this, or this will be consecutive to that sentence?
- A. Yes, sir.
- Q. It will be in addition to that?
- A. Yes, sir.
- Q. So that, once you're returned to West Virginia, and you complete that, you will come down here, if I accept this plea, and you will serve this sentence?

A. Yes, sir.

(C.P. 55-57)

A defendant charged with a “serious offense,” one for which he could be sentenced to more than six months in custody, is guaranteed the right to a jury trial under the United States Constitution. Ude v. State, 992 So. 2d 1213, 1217 (Miss. Ct. App. 2008) (citation omitted). A defendant, however, does not have a “constitutional right to a plea bargain.” Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) (citing Allman v. State, 571 So. 2d 244, 254 (Miss. 1990)). In Stevenson v. State, 325 So. 2d 113, 115-16 (Miss. 1975), the Mississippi Supreme Court not only found it “obvious . . . that the discretion of a prosecutor and his power to plea bargain is constitutionally permissible[,]” but also opined that without such “prosecutorial discretion and plea bargaining, our system of justice could not

In Corbitt v. New Jersey, 439 U.S. 212 (1978), the United States Supreme Court had rejected a claim that, because a plea of nolo contendere might produce a lesser sentence than going to trial (which could result in mandatory life imprisonment), the New Jersey statutes imposed an unconstitutional burden on the defendant’s right to trial by jury. Rodriguez, 162 F.3d at 152 (citing Corbitt, 439 U.S. at 214-15, 218). The Court explained that:

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices is an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Id. (quoting Corbitt, 439 U.S. at 220-21).

The *Rodriguez* Court, thus, concluded that while the sentencing differential which resulted from the plea process at issue “exacts a high price from those who exercise their constitutional right to trial[,] . . . the price is not high enough to constitute a constitutional violation.” Id. It is only “when a prosecutor discriminates against defendants based on impermissible criteria such as race or religion is a prosecutor's discretion subject to review and rebuke.” Id. at 153.

In Hersick v. State, 904 So. 2d 116 (Miss. 2004), the Mississippi Supreme Court was presented with the converse situation. Prior to trial, the defendant had been offered a plea bargain by the State, which offered to recommend a sentence of ten years, with five years suspended. Id. at 127. The defendant rejected the offer and exercised his right to trial by jury. Upon his conviction, the State recommended the maximum sentence of ten years, which the court imposed. On appeal, the defendant contended that the imposition of a heavier sentence than was offered to him pretrial was a direct result of his exercise of his constitutional right to jury trial. The State responded that, rather than being punished for going to trial, the defendant had been offered an opportunity to help himself by pleading guilty and accepting responsibility for his crime, which he had refused. Id. at 128. The Mississippi Supreme Court held that:

Whether the defendant takes responsibility for his or her actions is a fair consideration for the trial court in sentencing. We find nothing in the record that demonstrates the trial court imposed the maximum sentence to punish [the defendant] for exercising his right to a jury trial.

Id.

In the instant case, Avant argues that the charge of habitual offender pursuant to

Mississippi Code Annotated Section 99-19-83 (1972, as amended), was included in the indictment merely to induce him to plead guilty to armed robbery. However, the record clearly shows, by Avant's own admission, that Avant did indeed have three prior felony convictions and had been sentenced to and served separate terms of a year or more for each of those convictions. (C.P. 32; 55-57)

Consequently, just as the loss of a generous plea bargain and the institution of a more severe sentence is not "punishment for going to trial" for a defendant who elects to exercise his right to trial, neither is the offer a favorable plea bargain, for which the defendant must choose to waive is right to trial, an attempt to "coerce, manipulate, and improperly induce" a defendant to plead guilty. It is, rather, a constitutional tool in the prosecutor's toolbox. Avant's constitutional right to trial by jury was not violated.

Avant contends that the "prosecution knew there was no evidence to prove such violent habitual status," however, he did not offer any proof other than his own affidavit for this assertion. Further, the indictment set out two felonies, one a felony burglary and the other a felony robbery, that satisfied the requirements of Mississippi Code Annotated Section 99-19-83 (1972, as amended). Avant admitted to these two convictions on the record during the plea hearing. Avant further contends that the trial court erred by failing to make a finding on the record at the plea hearing as to the violent nature of his convictions. These convictions are clearly sufficient to satisfy Mississippi Code Annotated Section 99-19-83 (Miss. 1972, as amended), since, in Magee v. State, 542 So.2d 228 (Miss.1989) the Mississippi Supreme Court held the robbery is a violent crime for purposes of the violent habitual offender statute.

Avant cites URCCC 8.04 8.04(A)(3) for its requirement that "before the trial court may

accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea.” He further cites Corley v. State, 585, 765, 767 (Miss. 1991) for the requirement that the trial court must have before it substantial evidence that the accused did commit the legally defined offense to which he is offering the plea. However, Avant was not pleading guilty to being a violent habitual offender, and therefore, the trial court was not required to establish a factual basis for Avant’s status as a violent habitual offender. Avant pled guilty to armed robbery, and the trial court, reading from the indictment, read the specific factual elements of that crime into the record and asked Avant if he was guilty of those elements and therefore the crime of armed robbery, to which Avant replied, “Yes.” The trial court therefore completely satisfied the requirement for establishing a factual basis for Avant’s plea of guilty to the charge of armed robbery.

## **II. Avant’s Plea was Supported by a Sufficient Factual Basis.**

Avant claims that no factual bases existed for the trial court’s acceptance of his guilty plea. “Before the trial court may accept a plea of guilty, the court must determine that ... there is a factual basis for the plea.” URCCC 8.04(A)(3). The reviewing court must look to the entire record to determine if such a factual basis exists. Drake v. State, 823 So.2d 593, 594 (Miss.Ct.App.2002) (citing Corley v. State, 585 So.2d 765, 767-68 (Miss.1991)). The mere fact that the factual basis does not provide all the details which may be produced at trial does not make the guilty plea invalid. Id. The Mississippi Court of Appeals has held that, “if sufficiently specific, an indictment or information can be used as the sole source of the factual basis for the plea.” Id. (quoting U.S. v. Hinojosa-Lopez, 130 F.3d 691, 695 (5th Cir.1997) (overruled on other grounds)).

During the plea hearing, the trial court read aloud the indictment which alleged that Avant willfully, unlawfully and feloniously took cash in excess of Ten Dollars (\$10.00) from Michael Weaver, an employee of Walnut Grove Finance, LLC. Further, it alleged that the taking was against the will of Michael Weaver and that Weaver was put in fear of immediate injury to his person by the exhibition of a firearm, a deadly weapon. After the reading of the indictment, the circuit court asked Avant if he committed the crime charged in the indictment. He responded, "Yes." (C.P. 58-59)

Further, counsel for the defendant stated at trial,

As regards what the State could prove at trial, my client is familiar with the written discovery that has been provided. He has participated with me in interviewing some witnesses in this case, as well. I believe he is intimately familiar with what it appears the State of Mississippi would attempt to offer at trial, and based on that knowledge, I believe, again, he's standing here offering a knowing, free and voluntary plea.

Here, as in *Drake*, the indictment was specific as to the crime charged. Avant's indictment provided all of the elements of the offense of armed robbery. Those elements included: "(1) feloniously take or attempted to take another's personal property; (2) from the person or from the presence; (3) against the person's will; (4) by violence to his person, or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon." Clayton v. State, 946 So.2d 796, 804 (Miss.Ct.App.2006) (citing Miss.Code Ann. § 97-3-79) (Rev.2000).

The indictment was specific as to the elements of the crime of armed robbery and, therefore, there was a sufficient factual basis to support Avant's conviction for armed robbery. Further, due to consultation with his lawyer, review of the evidence against him, and participation in interviewing witnesses, Avant was "intimately familiar" with the State's proof

against him. Thus, this issue has no merit.

**III. The trial court was well within its authority to impose Avant's sentence consecutively to the federal sentence he was serving at the time of his trial.**

This assignment of error is beyond the purview of appellate courts since a party's "failure to cite any authority in support of a claim of error precludes this Court from considering the specific claim on appeal." Grenada Living Ctr., L.L.C. v. Coleman, 961 So.2d 33, 37 (Miss.2007). However, should the Court determine to address the merits of this issue despite this bar, the Mississippi Supreme Court has stated that "sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." Beamon v. State, 9 So.3d 376, 380 (Miss.2009) (quoting Wall v. State, 718 So.2d 1107, 1114 (Miss.1998)). Further, the general rule in this state is that a sentence cannot be disturbed on appeal so long as it does not exceed the maximum term allowed by statute. Corley v. State, 536 So.2d 1314, 1319 (Miss.1988). Finally, it is within the trial court's discretion whether multiple sentences will run concurrently or consecutively. Miss.Code Ann. § 99-19-21(1) provides:

When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

The sentence imposed by the trial judge in the present case is within the limits set by statute, and the decision to have the sentence run consecutively with the sentence Avant was serving for the Federal charge of felony possession of a firearm. was within the sound discretion of the judge. The trial judge did not abuse his discretion and the rulings of the lower court should be affirmed.

**IV. The trial court was not required to advise Avant of his right to a direct appeal of his sentence and therefore was not in error.**

Avant contends that the trial court committed reversible error when it failed to advise him of his right to appeal his sentence through a direct appeal. Mississippi Code Annotated section 99-35-101 (Rev.2007) states that “[a]ny person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty.” See Cook v. State, 990 So.2d 788, 793 (Miss.Ct.App.2008) FN1. However, a defendant may directly appeal the sentence given as a result of that plea even though a conviction from a guilty plea may not be directly appealed. Trotter v. State, 554 So.2d 313, 315 (Miss.1989). Nevertheless, a trial court is not required to inform the defendant of his right to direct appeal his sentence after he enters a guilty plea. Cook, 990 So.2d at 793. Thus, this issue is without merit.

**V. Avant received constitutionally effective assistance of counsel and is unable to satisfy either prong of *Strickland*.**

Avant also argues that he received ineffective assistance of counsel during the plea proceedings. To prove ineffective assistance of counsel, Avant 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 Avant 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 of counsel claim is without merit.” Vielee v. State, 653 So.2d 920, 922 (Miss.1995).

Specifically, Avant states that his counsel was ineffective due to advising Avant to “plead guilty to armed robbery or he would be sentenced to life without parole if he were to proceed to trial.” His only claim of prejudice is that he entered a guilty plea as a result of his counsel's conduct. Avant argues that he should have been informed that the “habitual offender” charges against him were improper because he was not a violent habitual offender. Avant argues that his defense counsel failed to know the law in regard to armed robbery and as a result failed to correctly advise him of the law regarding his sentence. However, the record does not reflect any misunderstanding or improper conduct the part of Avant’s counsel.

Pursuant to Mississippi Code Annotated Section 99-19-83 (1972, as amended), Avant was properly indicted as an habitual offender. Section 99-19-83 provides:

99-19-83. Habitual criminals: life imprisonments

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

By his own admission at the guilty plea hearing, Avant had two previous felony convictions in Illinois, a felony burglary conviction for which he received a sentence of 3 years and a felony robbery conviction for which he received a sentence of 4 years, as set out in the

indictment. The record further reflects that at that time he entered his guilty plea, he had been convicted in Federal court of possession of a firearm by a felon and was in the midst of serving a 64 month sentence. These convictions are clearly sufficient to satisfy Mississippi Code Annotated Section 99-19-83 (Miss. 1972, as amended), since, in Magee v. State, 542 So.2d 228 (Miss.1989) the Mississippi Supreme Court held the robbery is a violent crime for purposes of the violent habitual offender statute.

Since Avant met the qualifications for habitual violent offender pursuant to Mississippi Code Annotated Section 99-19-83 (Miss. 1972, as amended), had he been convicted of armed robbery, the trial court would have been required to sentence him to life imprisonment under the statute. Therefore, based on the record, Avant's attorney's assistance falls within the range of reasonable professional assistance. Further, even if there were an error in his attorney's assistance, Avant provides no proof of his allegations other than his own affidavit.

Further, Avant's claims on appeal are completely contradicted by the record. His signed plea petition states that he was fully satisfied with the competent advice and help of his counsel. Avant stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. There is a strong presumption of validity of statements made under oath. Mowdy v. State, 638 So.2d 738, 743 (Miss.1994). Avant's counsel was able to secure a plea bargain which spared Avant the possibility of life in prison without parole. There is no merit to Avant's claim of ineffective assistance of counsel. The trial court's denial of Avant's Motion for Post Conviction Relief should be affirmed.

**CONCLUSION**

The issues raised by the Appellant, Alan Avant, are without merit and the trial court's dismissal and denial of the Appellant's Motion for Post Conviction Relief should be affirmed.

Respectfully submitted,

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## 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:

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This the 5<sup>th</sup> day of February, 2010.

  
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