

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER M. BYRNE

APPELLANT

VS.

NO. 2009-CP-0985-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 Christopher M. Byrne's Petition for Post-Conviction Relief from the Circuit Court of Desoto County, Mississippi, Honorable Robert P. Chamberlin presiding.

STATEMENT OF THE FACTS

The Grand Jury of Desoto County indicted Christopher A. Byrne for one count of felony shoplifting. The State amended the indictment to charge him with one count of conspiracy, one count of felony shoplifting and one count of attempted felony shoplifting, all as a habitual offender under Miss. Code Ann. § 99-19-81. CP 83-93.

On December 5, 2007, Byrne entered a guilty plea to conspiracy to commit felony shoplifting as a habitual offender under Miss.Code. Ann. Section 99-19-81 and subsequently received five years in the Mississippi Department of Corrections, a fine and costs. Byrne also entered a guilty plea to attempted shoplifting and received ten years post release supervision. CP 94-97. The court remanded the third count of felony shoplifting to the files. (CP 99-149 Plea hearing transcript).

During the plea hearing, Byrne acknowledged his guilt of the crimes charged, as well as the constitutional rights he would be waiving by pleading guilty; he further acknowledged that he was pleading guilty as a habitual offender, and that he knew the possible sentences he might receive. (CP 99-149).

Byrne filed a Petition for Post-Conviction Collateral Relief claiming the lower court erred in sentencing him as a habitual offender. (CP6-62). The request for relief was summarily denied in an order dated May 8, 2009. (CP 68-69). Feeling aggrieved, Byrne appealed.

ISSUES

- I. Whether Byrne was properly sentenced as a habitual offender;
- II. Whether Byrne was entitled to an evidentiary hearing; and
- III. Whether Byrne was denied effective assistance of counsel.

SUMMARY OF ARGUMENT

Byrne pled guilty to the charges and admitted to being a habitual offender. The State met its burden of proving Byrne to be a habitual offender under Mississippi Code Annotated section 99-19-81. For the purposes of habitual offender status pursuant to section 99-19-81, whether Byrne actually served time in prison is irrelevant. *Davis v. State*, 5 So.3d 435 (Miss.App.,2008). The requirements of section 99-19-81 were met, and Byrne was properly sentenced as a habitual offender.

Byrne was not entitled to an evidentiary hearing. The trial court was not required to hold an evidentiary hearing on Byrne's motion for post conviction relief based on whether Byrne served his previous sentences in a Tennessee correctional facility or local facility.

Byrne failed to meet the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984) in proving his counsel was deficient.

ARGUMENT

PROPOSITION I: BYRNE WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER.

In his first assignment of error, Byrne claims that he was improperly sentenced as a habitual offender because the State failed to prove that he had been convicted twice previously of a felony within the meaning of section 99-19-81 of the Mississippi Code of 1972, as amended. The State used Byrne's felony convictions from Tennessee as the basis for sentencing him as a habitual offender in the case *sub judice*. Byrne contends that he served his Tennessee sentences in a workhouse and not a Tennessee Department of Corrections facility; therefore, he does not qualify as a habitual offender.

In *Wilhite v. State*, 791 So.2d 231 (Miss.App.2000) this Court interpreted a Tennessee workhouse to be a state penal institution for the purposes of the habitual offender statute. Wilhite, like Byrne, was convicted in the state of Tennessee of separate felonies brought and arising out of separate incidents at different times and was sentenced to separate terms of one year or more. Wilhite had contended that because she was sentenced to serve less than her full sentence in Tennessee and the time was served in a "workhouse," she did not qualify for sentencing as a habitual offender.

Byrne argues that in *Wilhite* this Court upheld the circuit court's finding of habitual offender status because Wilhite failed to support her contention with authority that the "workhouse" in Tennessee was not a state penal institution. Byrne claims the letter from the Tennessee Department of Corrections supported his position but the trial court refused to question him on the prior convictions. The letter stated Byrne never spent time in a state facility and all his charges were

considered “jail time.” The State submits Byrne’s allegations are inaccurate. On two separate occasions during the plea hearing, the circuit judge asked Byrne about being a habitual offender. Byrne readily admitted the convictions and qualifying as a habitual offender. (CP 107; 115). Habitual offender status may be established by the defendant’s “admission of prior felony convictions.” *Id.* at 426, quoting *Sanders v. State*, 786 So.2d 1078, 1082 (¶ 14) (Miss. Ct. App. 2001); *Jones v. State*, 747 So.2d 249, 252 (Miss. 1999).

Mississippi Code section 99-19-81 provides

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 separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

In the case *sub judice*, the certified pen pack from the State of Tennessee admitted into evidence specifically states that Byrne was committed to the Tennessee Department of Corrections. (CP 37). The State submits under *Wilhite* it is irrelevant where Byrne served his time for purposes of section 99-19-81. *Id.* An individual is not required to have actually served any prison time in order to be sentenced as a habitual offender. *Davis v. State*, 5 So.3d 435 (Miss.App.,2008) As the statute does not require Byrne to have served time, but only that he was sentenced to separate terms of one (1) year or more, he qualified as a habitual offender and was properly sentenced. This issue is without merit.

PROPOSITION II: BYRNE WAS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Byrne argues that the trial court should have granted him an evidentiary hearing on his motion for post-conviction collateral relief. The supreme court has held, a post-conviction collateral relief motion which “meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief.” *Marshall v. State*, 680 So.2d 794, 794 (Miss.1996) (citing *Alexander v. State*, 605 So.2d 1170, 1173 (Miss.1992)). Here, Byrne alleged no set of facts in his motion that would entitle him to relief.

The trial court is not required to grant an evidentiary hearing on every petition it entertains. *McMillian v. State*, 774 So.2d 454(¶ 6) (Miss.Ct.App.2000). “If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.” Miss.Code Ann. Section 99-39-11(2) (Rev.1994). The purpose of an evidentiary hearing is for the court to receive evidence in order to make findings of fact. *Lyle v. State*, 756 So.2d 1(¶ 7) (Miss.Ct.App.1999).

As previously argued, it is irrelevant where Byrne served his sentence. As argued below, Byrne was afforded effective assistance of counsel. No additional evidence was necessary for the trial court to determine Byrne was clearly not entitled to the requested relief.

**PROPOSITION III: BYRNE WAS AFFORDED EFFECTIVE ASSISTANCE
OF COUNSEL.**

Byrne argues that he received ineffective assistance of counsel. Byrne claims that because he did not qualify as a habitual offender his trial counsel's failure to investigate the Tennessee convictions and to defend him against the State's use of impermissible evidence to enhance his sentence was ineffective assistance of counsel.

Great weight is given to statements made under oath and in open court during sentencing.... There should be a strong presumption of validity of anyone's statement under oath. *Davis* 5 So.3d at 438. During the plea hearing, Byrne acknowledged he was satisfied with the services his attorney provided him. (Plea hearing at CP114).

To prevail on a claim that assistance of counsel was ineffective requires a showing that counsel's performance was deficient and that the defendant was prejudiced by counsel's mistakes. *Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The burden is on the defendant to bring forth proof which demonstrates that both prongs of the Strickland test are met. *Moody v. State*, 644 So.2d 451, 456 (Miss.1994). There is a strong but rebuttable presumption that counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 456. Accordingly, appellate review of counsel's performance is "highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

Byrne failed to meet his burden in proving deficiency and prejudice. Under the application of *Wilhite* and *Davis*, actual incarceration in a state-run penal facility is not required to be sentenced as an habitual offender under Miss. Code Ann. § 99-19-83. Therefore, there is nothing for Byrne's trial

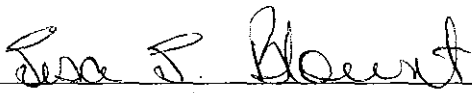
counsel to investigate or defend against. There is no deficiency or prejudice for any supposed inaction on this point by Byrne's counsel. See *Anderson v. State*, 766 So.2d 133 (Miss.App.,2000).

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 Desoto County denying Christopher M. Byrne's motion for post-conviction relief and request to be re-sentenced without the habitual offender status.

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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This the 16th day of September, 2009.



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