

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ARTURO AQUIRRE MORENO

APPELLANT

VS.

NO. 2009-CP-1001

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. MORENO DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.
- II. THE REMAINDER OF MORENO'S CLAIMS ARE NOT PROPERLY BEFORE THE COURT.

STATEMENT OF FACTS

On August 5, 2005, Arturo Moreno pleaded guilty to one count of DUI manslaughter and two counts of DUI mayhem. Exhibit 1. He subsequently filed a motion for post-conviction relief which was summarily denied by the trial court. The trial court's denial of post-conviction relief was affirmed by the Mississippi Court of Appeals on October 30, 2007. *Moreno v. State*, 967 So. 2d 701 (Miss. Ct. App. 2007). In affirming the trial court's denial of post-conviction relief, the Court found that Moreno, who was represented at the trial court level by Edwin Pittman, Jr., had not received ineffective assistance of counsel. *Id.* at 704 (¶5).

On August 1, 2008, Moreno filed a second petition for post-conviction relief which was denied by the trial court as successive writ barred that same week. C.P. 18-97. Moreno never

appealed the denial of his second motion for post-conviction relief.

On October 2, 2008, the Mississippi Supreme Court adopted the Mississippi Commission on Judicial Performance's recommendation that attorney Pittman be publicly reprimanded for representing Moreno in the DUI manslaughter/DUI mayhem case after having signed an arrest warrant and order setting bond in the same matter in his capacity as municipal court judge. *Miss. Comm. on Judicial Performance v. Pittman*, 993 So. 2d 816 (Miss. 2008).

On March 16, 2009, Moreno filed in the Mississippi Supreme Court a motion for leave to proceed in the trial court. The Court granted the motion, finding that "*Mississippi Commission on Judicial Performance v. Edwin L. Pittman, Jr.* is an intervening decision, which removes the successive writ bar imposed by Miss. Code Ann. § 99-39-27(9)." C.P. 125. Accordingly, the Court ordered an evidentiary hearing to determine whether Moreno received effective assistance.

The evidentiary hearing was held on September 4, 2009. Moreno repetitively testified at the hearing that he only pleaded guilty because Pittman told him he would be deported to Mexico if found guilty. T. 10-11, 13, 16, 18. He claimed that Pittman never explained the pros and cons of entering a plea versus going to trial and never advised him of the potential sentences he faced upon entering a guilty plea. T. 10, 11.

Dr. Karen Austin, the interpreter who translated conversations between Moreno and Pittman prior to the entry of the guilty plea and who served as an interpreter during the guilty plea hearing and the evidentiary hearing also testified at the evidentiary hearing. Dr. Austin testified that prior to the hearing Pittman spent three hours urging Moreno to plead not guilty and proceed to trial. T. 22. Dr. Austin further testified that Pittman was very clear when he advised Moreno, through her translation, to plead not guilty. T. 23. She also did not remember the issue of deportation being addressed by either Pittman or Moreno. T. 24.

At the conclusion of the evidentiary hearing, the trial court found that Moreno had met neither prong of *Strickland*. The trial court found that Moreno entered his plea against the advice of counsel. Accordingly, Moreno's third motion for post-conviction relief was denied by the trial court. Moreno now appeals that denial of relief.

SUMMARY OF ARGUMENT

Moreno fails to meet either *Strickland* prong in claiming that he received ineffective assistance of counsel. Moreno's argument rests on the fact that defense counsel was reprimanded for violating the Rules of Judicial Conduct in his representation of Moreno. However, such a finding proves neither deficient performance or prejudice in defense counsel's representation of Moreno.

Moreno's attempt to raise issues other than the single issue specified by the court's order granting leave is procedurally barred.

ARGUMENT

I. MORENO DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

In order to prevail on a claim of ineffective assistance of counsel, Moreno must show that defense counsel rendered deficient performance which resulted in prejudice. *Morris v. State*, 29 So.3d 98, 101 (¶6) (Miss. Ct. App. 2010). A petitioner who has entered a guilty plea and claims ineffective assistance of counsel must show that “trial counsel committed ‘unprofessional errors of substantial gravity,’ without which he would not have pled guilty.” *Id.* (quoting *Cole v. State*, 918 So.2d 890, 894 (¶10) (Miss. Ct. App.2006)).

Moreno claims that Pittman’s presiding over proceedings involving the same charges against which Pittman subsequently represented Moreno satisfies the first *Strickland* prong of deficient performance. The Commission’s findings, affirmed by the Mississippi Supreme Court, were that Pittman violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 4D(1) of the Code of Judicial Conduct of Mississippi Judges by representing Moreno after having signed the arrest warrant and other orders in the same matter. *Pittman*, 993 So. 2d at 818 (¶5). Collectively, the Court found that the violations “constituted willful misconduct and conduct prejudicial to the administration of justice which brings the judicial office into disrepute,” and that “Pittman’s conduct gave the appearance of impropriety.” *Id.* at 818, 819 (¶¶12, 18). However, the Court found that Pittman “did not attempt to impede or interfere with the judicial process.” *Id.* at 820 (¶21). As a result of the violations, Pittman was publicly reprimanded and assessed costs in the amount of \$100. *Id.* at 820-21 (¶24).

The purpose of the Code of Judicial Conduct is “to establish standards for ethical conduct of judges.” Preamble to the Code of Judicial Conduct. The Committee’s findings, adopted by the Mississippi Supreme Court, in the *Pittman* case pertain only to Pittman’s conduct as a municipal court judge. Pittman’s “fail[ure] to uphold the integrity and independence of the judiciary” does not

translate to a finding that Pittman was not functioning as the counsel guaranteed by the Sixth Amendment in his representation of Moreno. In attempting to show deficient performance in his appellate brief, Moreno simply hangs his hat on the fact that Pittman was reprimanded for violating the Code of Judicial Conduct and fails to point out how Pittman was deficient in his representation of Moreno.

At the evidentiary hearing, Moreno was more specific in his allegations. His complaints against Pittman were lack of communication prior to the hearing, failure to present certain evidence in court, failure to explain the pros and cons of entering a plea versus going to trial, and a very repetitive claim that Pittman advised him that he were found guilty he would be deported to Mexico. T. 7-13. However, Dr. Austin testified that she translated conversations between Moreno and Pittman, one of which lasted approximately three hours, in which Pittman repeatedly advised Moreno to plead not guilty and proceed to trial. Dr. Austin's testimony is corroborated the transcript of Moreno's guilty plea hearing in which Pittman stated the following.

Your Honor, let me report to the Court. I represent Mr. Moreno. We went over the facts extensively today. I went over some of the details - - well, all of the details and technicalities of it. I went over the fact that the intoxilyzer, when he registered .205, and that if he was not read his rights to the intoxilyzer in Spanish and to which he told me that he did not understand his rights just as for as the intoxilyzer went, but he told me and was very adamant that he wanted to plead guilty today, knowing that there might be some defenses, but because he was driving the vehicle, and he had been drinking.

Exhibit 1 at 21-22. The record refutes Moreno's assertion that he was not counseled regarding his alternatives. The record also shows that Moreno was adamant about entering a guilty plea against the advice of counsel.

Moreno's claim that Pittman failed to present certain evidence in court is essentially an attack

on the State's evidence against him.¹ One who enters a guilty plea waives the right to challenge the sufficiency of the State's evidence against him. *Thornhill v. State*, 919 So.2d 238, 241 (¶13) (Miss. Ct. App. 2005) ((citing *Swift v. State*, 815 So.2d 1230, 1234 (¶13) (Miss. Ct. App. 2001))).

Moreno's claim that he was advised he would be deported to Mexico if found guilty was also refuted by Dr. Austin's testimony. Additionally, the trial court informed Moreno on the record prior to accepting his plea that he would be sentenced by the court if he was found guilty either at trial or through a plea, only the trial court makes the sentencing decision, and that he faced twenty five years on each count if found guilty. T. 12-13. Even if Moreno's allegation that Pittman gave him erroneous information was true, "the law is clear that, in instances where it is alleged that an attorney gave faulty advice or misinformation in the time preceding the plea hearing, the error is cured if the defendant unequivocally is given the correct information and indicates his understanding of it during the hearing itself." *Henderson v. State*, 769 So.2d 210, 214 (¶12) (citing *Schmitt v. State*, 560 So.2d 148, 153 (Miss.1990); *Riley v. State*, 748 So.2d 176 (¶ 6) (Miss. Ct. App. 1999)).

Moreno failed to show at the evidentiary hearing that Pittman rendered deficient performance. On appeal, he simply rests on the fact that Pittman was reprimanded for violating the Code of Judicial Conduct. Again, Pittman's failure to uphold the integrity of the judiciary does not equate to a finding that Pittman was not functioning as the counsel guaranteed by the Sixth Amendment in his representation of Moreno.

Because attorney Pittman did not render deficient performance, Moreno also cannot show prejudice. In fact, Moreno fails to articulate in his appellate brief how he was prejudiced by

¹Specifically, Moreno complains, "I wanted to tell him that the girl who was driving had also been drinking and that she was the one who ran the red light, not me. And that they were laying all the blame on me and they never tested her for alcohol. He knew what I wanted to do, and he never presented it in court." T. 7.

Pittman's alleged deficient performance. The trial court correctly found that Moreno failed to establish either *Strickland* prong. Accordingly, the trial court's denial of post-conviction relief should be affirmed.

II. THE REMAINDER OF MORENO'S CLAIMS ARE NOT PROPERLY BEFORE THE COURT.

In addition to Moreno's claim of ineffective assistance of counsel, Moreno raises two additional issues in his appellate brief, although the issues were not raised at the evidentiary hearing, nor could they have been. The Mississippi Supreme Court's order granted leave for the determination of a single issue: ineffective assistance of counsel. C.P. 125. "This Court has held on several occasions that the only issues properly considered are those issues for which the case was initially remanded." *Burns v. State*, 879 So.2d 1000, 1003 (¶9) (Miss. 2004). Accordingly, the remainder of Moreno's issues on appeal are barred from appellate review.

CONCLUSION

For the foregoing reasons, the trial court's denial of post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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 10th day of August, 2010.


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