

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT E. HICKS

APPELLANT

VS.

NO. 2009-CP-1100-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On June 20, 2006, Robert E. Hicks, “Hicks” plead guilty to burglary of a dwelling before the Circuit Court of Tate County the Honorable Andrew Baker presiding. R.E. 51-63. After advising and questioning Hicks, the trial court found his plea was voluntarily and intelligently entered. R.E. 62-63.

At a separate sentencing hearing, Hicks was given a twenty year sentence in the custody of the Mississippi Department of Corrections. C. P 27-38; 48 : R.E. 74.

On December 12, 2008, Hicks filed a pro se motion for post conviction relief. C.P. 13-23. In that motion Hicks claimed ineffective assistance, due process violations, and alleged misconduct by trial counsel and the trial court erred in sentencing him. C.P. 14. The trial court denied relief. C.P. 78-80. From that denial of relief, Hicks filed notice of appeal. C.P. 81.

STATEMENT OF FACTS

In July, 2005, Hicks was indicted along with Mr. George Martin, an habitual offender co-defendant , for conspiracy to commit burglary of an occupied dwelling, burglary, grand larceny and possession of a firearm as a previously convicted felon on January 21, 2005 . Hicks had a previous manslaughter conviction. C.P. 44-47 ;78.

On June 20, 2006, Hicks plead guilty to burglary of a dwelling before the Circuit Court of Tate County the Honorable Andrew Baker presiding. R.E. 51-63. Hicks was represented by Mr. Gil Baker. Hicks with the benefit of his counsel had gone over the contents of a guilty plea petition. He had signed that document, indicating he understood the relevant information contained therein. This petition to enter a guilty plea was filed in this cause. R.E. 53; 56-57.

The trial court advised Hicks of the Constitutional rights he was waiving by pleading guilty. R. E. 58-61. Hicks indicated that he understood that he was waiving these rights by pleading guilty. R. E. 61. Among those rights were his right to a trial with cross examination of witnesses and a right against self incrimination. Hicks also stated that he understood the maximum twenty five sentence for burglary of a dwelling. R. E. 53.

Hicks indicated that he had not been promised anything or coerced into pleading guilty, and that he was pleading guilty of his own free will. R.E. 61-62. Hicks admitted that he was “satisfied with the work and services that has been furnished by Mr. Baker.” C.P. 62.

Hicks did not take issue with the prosecution’s statement of the factual basis of the burglary charge. It clearly indicated Hicks participated with Mr. Martin in the burglary of a dwelling charge. His counsel believed the prosecution had sufficient evidence for bringing this prosecution. C.P. 56. Hicks understood that the prosecution had agreed to not include the other indicted charges as part of the guilty plea requirements.

After advising and questioning Hicks and his guilty plea counsel, the trial court found his plea was voluntarily and intelligently entered. R.E. 62-63.

At a separate sentencing hearing, Hicks was given a twenty year sentence in the custody of the Mississippi Department of Corrections. C.P. 48. Hicks was provided with a copy of a victim impact statement. Both Hicks and his counsel addressed the court prior to his being sentenced. They both requested “leniency” for Hicks prior to his actually being sentenced to twenty years incarceration. C. P 27-38; 48.

On December 12, 2008, Hicks filed a pro se motion for post conviction relief. C.P. 13-23. In that motion, Hicks claimed ineffective assistance of counsel, due process violations, prosecutorial misconduct, and the trial court allegedly erred during sentencing. C.P. 14.

The trial court denied relief. C.P. 78-80. From that denial of relief, Hicks filed a pro se notice of appeal. C.P. 81.

In Hicks’ pro se appeal brief he raises issues not previously addressed to the trial court. This included an alleged defective indictment, and a related jurisdictional issue. Both issues are based upon the failure of the indictment to explicitly include “intent” to burglarize the Triplett’s dwelling in its statement of the charge. Appeal brief page 1-36.

SUMMARY OF ARGUMENT

1. The record reflects that the trial court correctly determined that Hicks plea' was voluntarily and intelligently entered. R.E. 62-63. The record from the guilty plea and sentencing hearing support that conclusion. R. E. 51-63; C. P 27-38; 48. **Wilson v. State**, 577 So. 2d 394, 396-97 (Miss. 1991).

The record does not reflect any prejudice to Hicks as a result of the trial court accepting the victim impact statement at a separate sentencing hearing. R. E. 67. Nor was there evidence of any harm by the state's recommendation of a maximum sentence. R. E. 34. The record reflects the prosecution agreed to drop other indicted felony charges. Additionally, Hicks did not receive a maximum sentence. Rather he received only a twenty year sentence. C.P. 48.

Other related issues mentioned by Hicks in his motion, such as an alleged prosecutorial and judicial misconduct were waived when he pled guilty. Motion. C.P. 12-24.

2. The record reflects that Hicks received effective assistance of counsel. R. E. 51-63. Hicks admitted that he had not been promised anything or coerced and that he was "satisfied with the work and services that's been furnished" by his guilty plea counsel. R.E. 61-62.

There is a lack of evidence of any improper conduct or inadequate advice or counsel. The record reflects that Hicks was provided with a copy of the victim impact statement prior to his being sentenced. C.P. 28-29. There is no requirement that it be notarized. See M. C. A. Sect. 99-19-157, 159 and 161. Therefore, there was no basis for his counsel to have objected to its admission. Hicks has never taken issue with anything contained in the victim impact statement. **Swindle v. State** 881 So. 2d 174, 178 (¶20) (Miss. 2004).

In addition, there were no affidavits or any other evidence in the record indicating "when" the victim statement was provided to guilty plea counsel or to Hicks. M. C. A. 99-39-9 (1) (d) (e). The record also reflects that Hicks and his counsel addressed the court prior to sentencing on his own

behalf. Hicks asked for “leniency of the court.” C.P. 76-77.

Therefore, there is no evidence that any negligence, inaccurate advice or misconduct by guilty plea counsel prejudiced Mr. Hicks’ defense to the charge.

3. Other related issues raised for the first time in Hicks’ pro se appeal brief were waived. Appeal brief, R.E. 1-36. **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988). The record reflects that Hicks was indicted for conspiracy to burglarize and well as for burglary, grand larceny and possession of a hand gun by a previously convicted felon. In addition, he admitted he participated in the burglary under oath before the trial court. C.P. 76.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT HICKS' PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.

Hicks complains by implication that his guilty plea was not voluntarily entered before the Circuit Court. He believes that it was not voluntarily entered because his counsel did not timely provide him with an opportunity to review and/or object to the introduction of the victim impact statement prior to his receiving his twenty year sentence. Pro se motion for post conviction relief, C.P. 12-23, Appeal brief page 1-36.

To the contrary, the record indicates that the trial court concluded, after reviewing the guilty plea hearing transcript, that Hicks' petition was without merit. He also found that Hicks' plea had been voluntarily entered. R.E. 62-63. The record reflects that the trial court had presided over that previous guilty plea hearing. R. E. 51-77.

As stated by the trial court in denying relief:

The Court, having reviewed the pleadings and both of the court files, finds that Hicks' petition is without merit and should be dismissed pursuant to M. C. A. Sect. 99-39-11(2), without the benefit of a hearing.

Hicks was indicted along with a co-defendant in July of 2005 in criminal cause CR2005-67BT for conspiracy, burglary of a dwelling, grand larceny and a felon in possession of a firearm. On June 20, 2006, Hicks entered an open plea of guilty, pursuant to **N.C. v. Alford**, to the burglary of a dwelling charge. The court remanded other counts and another charge. C.P. 78. (Emphasis by appellee).

In **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss. 1992), this Court found, in accord with **Boykin v. Alabama**, 395 U. S. 238, 242 (1969), that a defendant must be advised and understand "the nature of the charge against him and the consequences of the plea." This is necessary if the plea is to be accepted on the record as voluntarily and intelligently entered.

A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. **Myers v. State**, 583 So. 2d 174, 177(Miss. 1991). A plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea. See **Wilson v. State**, 577 So. 2d 394, 396-97(Miss. 1991). Specifically, the defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. **Boykin v. Alabama**, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Rule 3.03 of the Uniform Criminal Rules of Circuit Court Practice additionally requires, inter alia, that the trial judge "inquire and determine" that the accused understands the maximum and minimum penalties to which he may be sentenced.

The record from the guilty plea hearing indicated that Hicks acknowledged under oath knowing the twenty five year maximum sentence for burglary of a dwelling. C.P. 53. He admitted knowing that he was waiving his right to a jury trial with cross examination of witnesses, and a right against self incrimination. C.P. 57-62. He also admitted that he had not been promised a lenient sentence or been coerced into pleading guilty. C.P. 61-62. Hicks did not take issue with the prosecution's statement of what it was prepared to prove in the event of a trial. He also admitted when he requested "leniency" that he had participated in the burglary. C.P. 56; 76.

There were no affidavits included with Hicks' petition about anyone with knowledge about "when" the victim impact statement was received by the prosecution and or the defense prior to sentencing. Pro se petition, C.P. 12-23. The record reflects that Hicks was present and did not object when the prosecution stated for the record that a copy of the victim impact statement had been provided to Hicks' guilty plea counsel. C.P. 67.

In addition, there is a lack of record evidence indicating what impact having the victim impact statement sooner would have had upon the sentence which Hicks received in the instant cause. The record reflects that both Hicks and his counsel requested "leniency" from the trial court prior to sentencing. C.P. 65-77.

In other words, Hicks' petition included totally no support for any of his claims about how the alleged untimely reception of victim impact statement was harmful to his sentence. This is not sufficient for meeting the burden of proof and pleading requirements under the Uniform Post Conviction Collateral Relief Act. See M. C. A. Sect. 99-39-9(1) (d)(e).

In **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant's affidavit.

In examining applicable case law, it is further shown that Lindsay's claims are without merit. The only affidavits in the record that suggest appellant's counsel was deficient are those filed by Lindsay. This is not enough to prove ineffective assistance. In a case involving Post Conviction Relief, this Court has held, "that where a party offers only his affidavit, then his ineffective assistance for counsel claim is without merit." **Vielee v. State**, 653 So. 2d 920, 922 (Miss 1995) See also **Brooks v. State**, 573 So. 2d 1350 (Miss. 1990); **Smith v. State** , 490 So. 2d 860 (Miss. 1986).. Since that is all that the appellant offers, his claim of ineffective assistance must fail.

The appellee would submit that based upon the record cited, the trial court correctly found that Hicks' guilty plea was freely and voluntarily entered. This issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECT THAT HICKS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Hicks argues that he received ineffective assistance of counsel. He believes that the failure of his guilty plea counsel to object to the indictment and to the introduction of the victim impact statement and/or to furnish with a copy at an earlier date was evidence of a lack of due diligence on his behalf in the instant cause. Pro Se Motion For Post Conviction Relief, C.P. 12-23.

To the contrary, the record reflects that Hicks' counsel was provided with a copy of the victim impact statement prior to the actual sentencing. There was no objection from Hicks who was present at the time.

Ms. Laura Triplett did, in fact, prepare a victim impact statement and she asked that I provided a copy to the court. **A copy has been provided to both Mr. Martin and Mr. Hicks attorneys.** C.P. 67. (Emphasis by appellee).

The record also reflects that Hicks never objected, personally or through counsel, to the statement of the burglary charge, the factual statement of what the prosecution could prove should there be a trial, or to the accuracy of the facts contained in one of the victim's impact statement. R.E. 51-63.

Hicks was provided with a copy of the statement prior to his being sentenced. His remarks to the trial court requesting "leniency" indicates that he was familiar with its contents. R.E. 67-68. Hicks has yet to file an affidavit indicating any factual inaccuracies in the victim impact statement.

In **Swindle v. State** 881 So. 2d 174, 178 (¶20) (Miss. 2004), the Supreme Court found failure to object to introduction of victim impact statement was not evidence of ineffective assistance.

¶20. Regardless of when it was furnished, Swindle has provided us with no evidence

or indication that, had the statement been provided earlier, a different result would have obtained. Nor does he present us with evidence indicating that the victim impact statement was, in any respect, inaccurate. Thus, his claim of ineffective assistance of counsel for failure to object to the victim impact statement is without merit.

The **Strickland** standard for ineffective assistance of counsel, 466 U. S. at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) requires both a showing of deficient performance and prejudicial impact. It is applicable to the entry of a guilty plea. **Roland v. State**, 666 So. 2d 747, 750(Miss. 1995); **Bailey v. State**, 760 So. 2d 781, 783 (Miss. App. 2000).

This is an exacting standard and therefore demands a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. Unless a defendant can offer evidence supporting both prongs of analysis, it cannot be said that the outcome resulted from a breakdown in the adversary process that renders the result unreliable. **Stringer v. State**, 454 So. 2d 468, 477 (Miss. 1987)(citing **Strickland**, 466 U S at 687, 104 S. Ct. 2052). The burden of proof in the **Strickland** test rests with the defendant who faces a rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. **Walker v. State**, 703 So. 2d 266, 268 (Miss. 1997).

As stated in the trial court's Order denying relief:

Regarding the victim impact statement, a statement of one of the victims , Ms. Triplett, was presented to the court at sentencing. **As to Hicks' claim that the victim impact statement was furnished untimely, it is unclear from the record when Hicks and his attorney were furnished Ms. Triplett's statement. At the sentencing hearing, the Assistant District Attorney stated that the statement had already been provided to the defendant and no objection was made.**

M. C. A. 99-19-159 (Rev. 2000), requires disclosure of the victim impact statement to the defendant "at least 48 hours prior to the date of the sentencing. Regardless of when it was furnished, Hicks has provided the court with no evidence or indication that, had the statement been provided earlier, a different result would have obtained. **Nor does he present the court with evidence indicating that the victim impact statement was, in any respect, inaccurate.** **Swindle v. State**, 881 So. 2d 174, 178 (Miss. 2004). Also nothing requires the statement to be notarized. Thus, his claim of ineffective assistance of counsel for failure to object to the victim impact statement is without merit. C.P. 79. (Emphasis by appellee)

The record reflects that as a result of a plea agreement negotiated on his behalf by his guilty plea counsel Hicks was permitted to plead guilty to only one count of a multi count indictment even though he admitted to his previous manslaughter conviction. C.P. 44-47. In addition, Hicks did not receive a maximum sentence but rather received a twenty year sentence. C.P. 48.

Consequently, Hicks should not be heard to complain while enjoying the benefits of his guilty plea counsel's efforts on his behalf. He is enjoying a less than maximum sentence although he had a weapon at the burglary and a previous manslaughter conviction. Had he been tried and found guilty of the other three charges, he could have been imprisoned for a much longer period of time.

The appellee would submit that this issue is also lacking in merit.

PROPOSITION III

OTHER ISSUES WERE WAIVED WHEN HICKS ENTERED HIS GUILTY PLEA.

In his motion, Hicks complained of an alleged violation of his due process rights because he did not have adequate time to review a victim impact statement. This is related to his charge of alleged prosecutorial misconduct since he believed, without record support, that his counsel could have obtained a copy of the statement for his review at an earlier date. And finally, the trial court's alleged error at sentencing was allegedly to have been overly influenced by the victim's statement received at sentencing.

In his appeal brief, he complains of an alleged lack of intent to burglarize included in his indictment. This was not previously raised with the trial court. Pro se appeal brief page 1-36; C.P.13-23.

In **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990), the Court stated that a guilty plea admits "all elements of a guilty charge" and operates as waives of all non-jurisdictional defects contained in an indictment.

Brooks, in the wake of his guilty pleas, assails allegedly defective indictments. A valid guilty plea, however, admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.

As previously stated, the record indicates that Hicks acknowledged knowing that he was waiving his right to a trial with any requirement that the prosecution provide evidence beyond a reasonable doubt of his participation in the burglary of a dwelling. R.E. 58-61. In addition, as stated in the trial court's order denying relief, there was no evidence Hicks took issue with either the prosecution's statement of the facts they were prepared to prove in the event of a trial, or the victim impact statement based upon the owners' statement of encountering the armed burglars at her

dwelling.

In his pro se appeal brief, Hicks attempts to introduce other issues for the first time without having raised them with the trial court. Pro Se Appeal brief page 1-36.

In **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

The issue regarding the constitutionality vel non of Sect. 97-1-1, M. C. A. (1972), was not raised in Gardner's motion for post conviction relief and may not be raise now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983) .

The appellee would submit that Hicks waived factual issues related to his burglary conviction when he pled guilty. He also waived related "intent" issues which he is attempting to raise for the first time in his pro se appeal. Hicks was indicted for conspiracy to burglarize, as well as burglary of an occupied dwelling and grand larceny along with his habitual offender co-defendant Martin. C.P. 44-47. The burglary charge included the element of "intent to commit a crime" after the breaking and entering of the dwelling house of Jeff Triplett and Laura Triplett. C.P. 45.

In addition, in his statement to the trial court, Hicks admitted that he "did participate" in the burglary. This would indicate an admission of intending to burglarize a home, as well as doing the physical actions needed for assisting his co-defendant Martin at the scene of the actual breaking and entering and removing household goods. This occurred in the presence of a woman and her small children who lived in the home. As stated by Hicks in asking for leniency.

I did participate in a crime that did effect—not for money or anything like that, it affected them mentally and it affected them emotionally and I understand that. C.P. 76.

The appellee would submit that these related issues were waived and were lacking in merit, based upon the record from the guilty plea hearing, as found by the trial court. C.P. 78-79.

CONCLUSION

The trial court's Order denying relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script that reads "W. Glenn Watts". The signature is written in dark ink and is positioned above a horizontal line.

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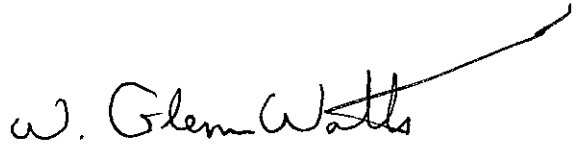
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 5th day of November, 2009.



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