IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAWANDA DILLON — APPELLANT

VS. — NO. 2009-CP-1228-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant was indicted for Murder in the death of Boris E. Jackson. (Cp.25) Subsequently as part of plea negotiations the indictment was amended to Manslaughter and defendant pled guilty. (Cp. 26, 144 (order amending)). Defendant, aided by counsel, pled guilty and was sentenced. (C.p. 145).

A motion for post-conviction relief was filed in February 2009. (Cp.3-32). The trial court denied the petition with extensive findings of fact and conclusions of law. (Cp. 34-38).

A notice of appeal was timely filed. (C.p. 40).

STATEMENT OF FACTS

The victim and defendant were fighting, defendant got in a car drove behind her victim, sped up, swerved, and knocked over a stop sign before running over Boris Jackson. She then put her car in reverse backing over Jackson, turned her car around and ran over him again, turned around and ran over him again, then opened the door to look at his body. A witness would have testified that Jackson screamed "you done hit me once" before she made her second, third, and fourth passes. (Order of trial court denying PCR, c.p. 35-36). She was, justifiably, indicted for murder. As part of a plea agreement the charges where reduced and defendant quite willingly pled guilty to avoid a potential life sentence.

Aggrieved she filed for post conviction relief, which was denied and is now appealing that ruling before this reviewing court.

SUMMARY OF THE ARGUMENT

I.

Defendant had Constitutionally effective assistance of counsel.

The trial court specifically found there were no instances of deficient performance nor any prejudice. Defendant did not meet either prong of *Strickland.*

II.

The trial court was not required to inform defendant of any right to appeal the sentence after entry of a plea of guilty.

Trial courts are not required to inform the defendant of their right to direct appeal a sentence after entry of a guilty plea.

III.

The record is replete with evidence that defendant was competent and thinking clearly when she entered her plea.

The trial court addressed the issue in the order denying relief. Further it is supported by a psychiatric report in the record, and testimony elicited by defense of a psychologist at sentencing hearing. Such satisfies the 'hearing' requirement under the rationale of *Hearn* and *Sanders.*

IV.

The trial court correctly accepted defendant's *Alford* plea.

There was evidence of actual guilt, no claim of innocence and there was a real benefit to pleading to the lesser offense of Manslaughter.

V.

There is no 'cumulative' error warranting the granting of any relief.

It is the position of the State there being no individual error not even the raising of an "harmless" error there can be no collective addition to reach cumulative error.

ARGUMENT

I.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

In this initial allegation of error defendant asserts she had ineffective assistance of counsel. The trial court specifically and directly addressed this issue in all its forms – specifically that under the *Strickland* analysis the actions of her attorney singly and collectively did not meet the first prong. Consequently, failing on either prong the claim is without merit. (Order denying relief, pg. 34-37).

The trial court, out of an abundance of caution went further and addressed the second *Strickland* prong of prejudice. Specifically noting the record supports all conclusions of defendant ***to the contrary***. (Order denying relief, pg. 37, 2nd full paragraph).

> In order for a contested fact to require an evidentiary hearing it must be material. Moreover, where an affidavit is belied by unimpeachable documentary evidence in the record such as, for example, a transcript or written statements of the affiant to the contrary, to the extent that the court can conclude that the affidavit is a sham, no hearing is required. (emphasis added).
>
> *King v. State*, 679 So.2d 208, 211 (Miss. 1996).

It is worth noting with reference to this first claim that there was a conspiracy and no evidence sufficient to support murder to indict – the trial court in his enunciated facts clearly has enough facts to support a grand jury finding probable

cause to indict defendant.

Based upon the comprehensive order of the trial court denying relief and the reference to the facts the State will rely upon the facts, reasoning and rationale of the trial court.

On appeal, defendant has added nothing to counter or support the position of conspiracy or to counter her willingness to knowingly plead guilty to manslaughter.

> ¶ 2. Smith first argues that he did not voluntarily and intelligently enter his guilty plea due to the ineffectiveness of his counsel. "Our standard of review pertaining to voluntariness of guilty pleas is well settled: 'this Court will not set aside findings of a trial court sitting without a jury unless such findings are clearly erroneous.' [. . .] The burden of proof is on the defendant to prove both prongs, and the adequacy of counsel's performance as to its deficiency and prejudicial effect should be measured by a totality of the circumstances. Ratliff v. State, 752 So.2d 416(¶ 6) (Miss.Ct.App.1999). However, there is a strong, yet rebuttable, presumption that the actions by the defense counsel were reasonable and strategic. Id.
>
> *Smith v. State,* 845 So.2d 730, 731 (Miss.App. 2003).

Based upon the prevailing deferential standard of review, the comprehensive order of the trial court as amply supported by the record on appeal the State would ask that no relief be granted.

II.
THE TRIAL COURT WAS NOT REQUIRED TO INFORM DEFENDANT OF ANY RIGHT TO APPEAL THE SENTENCE AFTER ENTRY OF A PLEA OF GUILTY.

In this allegation of error defendant asserts she was denied her due process right because the trial court failed to inform her of a right to direct appeal of a sentence given upon a guilty plea – at the time she pled guilty. (The law has since been changed).

Be that as it may, after the filing of her brief a case was decided which is clearly and succinctly addresses this claim, to wit:

> ¶ 17. . . . 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(¶ 11). Thus, this issue is without merit.

Cherry v. State, 24 So.3d 1048, 1053 (Miss.App. 2010)(Emphasis added).

Accordingly, no relief should be granted on this allegation of trial court error as the court was not in error under the rationale of *Cherry* and *Cook*.

III.
THE RECORD IS REPLETE WITH EVIDENCE THAT DEFENDANT WAS COMPETENT AND THINKING CLEARLY WHEN SHE ENTERED HER PLEA.

Defendant asserts she was not afforded a hearing after there was an ***agreed*** order for a psychiatric evaluation. C.p. 79-80. The trial court had seen the report. (C.p. 162). (Psychiatric Report, c.p. 131-142). After the guilty plea and before sentencing the examining forensic scientist testified at the hearing.

> ¶ 20. While instructive, Hearn is distinguishable from our case today. In Hearn, a court-appointed psychiatrist "testified at trial as to Hearn's competency and was subjected to cross-examination." Hearn, 3 So.3d at 730. Specifically, during trial testimony, one of the examining physicians testified that he and two other medical experts "unanimously concluded that Hearn was competent to stand trial." Id. at 729. ***Since "Hearn was afforded the opportunity to present competing evidence" this Court determined that the purpose of Rule 9.06 was satisfied by this Court. Id. at 730.***
>
> *Sanders v. State,* 9 So.3d 1132, 1137 (Miss. 2009)(emphasis added).

So, at the time of the guilty plea and sentencing, it would appear the State and defense agreed to have the defendant evaluated. The evaluations (there appear to have been two done – one by Chris Lott and one by Keith Caruso (c.p. 131-142)). The court was aware of these reports and Chris Lott testified at her sentencing. Earlier, the trial court after extensive questioning had determined that defendant Dillon had knowingly, willingly, freely, voluntarily and intelligently entered her guilty plea pursuant to *Alford* and that there exists a factual basis for her plea. C.p. 156.

And finally, in the order denying post conviction relief the trial court specifically found "... the record is replete with evidence that Dillon was competent and thinking clearly when she entered her plea. C.p. 35.

Accordingly, based upon the entire record the court did make a judicial determination that defendant was competent. Further, there is nothing in the record to indicate otherwise even now.

No relief should be granted on this allegation of trial court error.

IV.
THE TRIAL COURT CORRECTLY ACCEPTED DEFENDANT'S *ALFORD* PLEA.

Continuing the challenge to her conviction for running down Mr. Jackson with her Buick, defendant now asserts the trial court should not have accepted her *Alford* plea as it was not legally appropriate to her circumstances.

In this argument defendant has adopted, whole cloth, the concurring opinion and rationale expressed in *Elliott v. State*, 2009 WL 3588552, 11(Miss.App. 2009)(dec. Nov. 3, 2009).

First of all there is no doubt there was a factual basis, there were eye-witnesses (in addition to her three children in the Buick). In the motion denying post-conviction relief the judge reiterated a harrowing fact statement that would support not only manslaughter but murder.

So, there was a legal advantage or benefit. This was part of a deal – everyone was aware of it – it was not a failure of proof, the deal was we could go to trial and you could get life – or you can plead to manslaughter (maximum sentence 20 years), and actually she got, in essence, 14 year. (Current anticipated release in time for Thanksgiving, 2020).

The trial court specifically covered *Alford* with defendant (C.p. 152-53), defendant admitted that if the State went to trial they could prove she was guilty. She answered "Yes, sir." Same recognition of the proof and her guilt, c.p. 155 and then when

specifically if she wanted to plead guilty she again said "Yes." C/p. 156.

There was no assertion of innocence by either defendant or her attorney.

Concluding, there is and was strong eyewitness testimony of guilt (even her children's affidavits could be viewed as evidence of guilt), there was never any assertion of innocence and there was a definite benefit to pleading guilty.

> ¶ 7. The trial court's dismissal of a motion for post-conviction relief will not be disturbed unless the decision is clearly erroneous. Williams v. State, 872 So.2d 711, 712(¶ 2) (Miss.Ct.App.2004).

Elliott v. State, 2009 WL 3588552, 11(Miss.App. 2009)(dec. Nov. 3, 2009).

V.

THERE IS NO 'CUMULATIVE' ERROR WARRANTING THE GRANTING OF ANY RELIEF.

Lastly, defendant asserts the cumulative error should garner her an evidentiary hearing on whether he plea was voluntary.

Well, the trial court that saw her in court and heard her, from her experts and saw the mental evaluations and heard some of the facts that would be offered in proof and asking her question directly (when represented by counsel) didn't feel she deserved an evidentiary hearing.

However, the trial court did summarily dismiss the petition but considered the petition, and exhibits and made extensive findings of fact and conclusions of law in denying relief. (Cp. 34-38).

> ¶ 4. This Court will not disturb a circuit court's factual findings in the denial of a petition for post-conviction relief unless those findings were clearly erroneous. Pullem v. State, 820 So.2d 793, 794(¶ 3) (Miss.Ct.App.2002) (citing Brown v. State, 731 So.2d 595, 598(¶ 6) (Miss.1999)).

Harding v. State, 17 So.3d 1129, 1131 (Miss.App. 2009).

As the State has succinctly and clearly argued in each of the four arguments above there was no error – not even a close call. So it is the position of the State there being no individual error not even the raising of an "harmless" error there can be no collective addition to reach cumulative error.

¶ 13. Lastly, Harding argues that the errors that occurred in her case, taken

together, warrant reversal. Under the cumulative-error doctrine, "individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." Ross v. State, 954 So.2d 968, 1018 (¶ 138) (Miss.2007) (citing Byrom v. State, 863 So.2d 836, 847(¶ 12) (Miss.2003)). Under this reasoning, if there are no individual errors, there can be no cumulative error that warrants reversal. Harris v. State, 970 So.2d 151, 157(¶ 24) (Miss.2007) (citing Gibson v. State, 731 So.2d 1087, 1098(¶ 31) (Miss.1998)). We have found that the circuit court committed no error in accepting Harding's guilty plea; therefore, there can be no cumulative error. This issue is without merit.

Harding v. State, 17 So.3d 1129, 1133 (Miss.App. 2009).

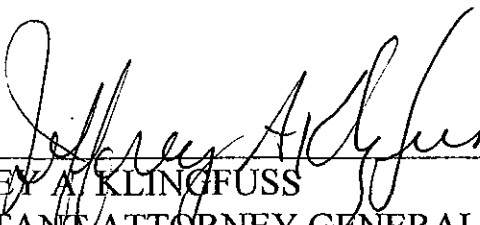
Such rationale has oft been adopted by reviewing courts and the State would as this court to apply the same and deny any relief.

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,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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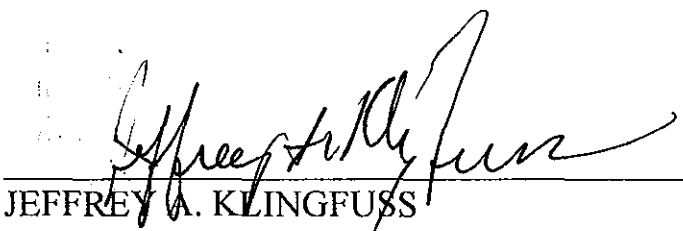
This the 26th day of February, 2010.



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