

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDRICK RUSSELL

APPELLANT

VS.

NO. 2009-CP-1428-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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PROCEDURAL HISTORY:

On May 9, 2007, Fredrick Russell, "Russell," pled guilty to possession of marijuana with intent to distribute. C.P. 53. After advising Russell, and questioning him and his counsel about his understanding of the felony drug charges, and the consequences of his plea, the trial court found that Russell's plea was voluntarily and intelligently entered. Russell was sentenced to an eight year term and five thousand dollar fine with three thousand suspended. C.P. 53.

On November 26, 2007, Russell filed a pro se motion for post conviction relief. C.P.4-23. This motion was denied by the trial court. C. P. 53-63. The court found there was sufficient evidence from the guilty plea hearing transcript to deny Russell's allegations of an involuntary plea and ineffective assistance of counsel. C.P. 62.

Mr. Russell filed a motion to vacate the trial court's Order. C.P. 47-50. It was also denied. C.P. 72-73.

Mr. Russell filed notice of appeal. C.P. 71.

ISSUES ON APPEAL

I.

DOES THE RECORD SUPPORT THE DENIAL OF THE MOTION TO DISMISS THE TRIAL COURT'S ORDER ON THE MERITS?

II.

DID RUSSELL RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

III.

WAS RUSSELL'S GUILTY PLEA VOLUNTARILY AND INTELLIGENTLY ENTERED?

STATEMENT OF THE FACTS

On March 9, 2007, Russell formally signed a waiver of indictment to possession of marijuana with intent to distribute charge. C.P. 5-6; 53.

On May 9, 2007, Russell pled guilty to possession of 237 grams of marijuana with intent to sell or distribute. C. P. 53. He was represented by Mr. Eric Tiebauer. Russell with the assistance of his guilty plea counsel entered a "Petition To Enter A Guilty Plea." C.P. 55.

The trial court advised Russell and questioned him and his counsel about Russell's understanding of the felony possession with intent drug charge, and the consequences of his plea based upon a proposed negotiated plea agreement. The court advised Russell of his Constitution right to a trial with cross examination, and a right against self incrimination. Russell indicated that he understood he was waiving his rights by pleading guilty. Russell acknowledged knowing the thirty year sentence for possession with intent as well as the recommended eight year sentence with other felony charges dismissed. This included dismissing another pending felony drug sale charge. C. P. 57. Russell admitted that he had not been coerced or promised anything in exchange for his guilty plea. He admitted that he was satisfied with the services provided by his counsel.

While Russell admitted to having seizures and taking medications, he never stated that he was mentally disabled in any way. He admitted neither any impairment or any side effects from any medications he was taking. C.P. 61-62.

In addition, the trial court found, based upon Russell's demeanor and answers to numerous questions, that he was competent to plead guilty. C.P. 60. There was no indication received during the hearing that Russell either did not understand the proceedings, and the charges against him or was mentally incompetent, unbalanced or confused as to the consequences of his plea. This would be based upon his general court room behavior, as well as he and his counsel's answer to relevant

questions. C.P. 62.

After advising and questioning Russell, the trial court found that Russell's plea was voluntarily and intelligently entered. C.P. 60-62.

Russell was sentenced to an eight year term and a fine. Other felony charges were dismissed. C.P. 53.

On November 26, 2007, Russell filed a hand written pro se "petition for post conviction relief." C. P. 4-23. In that motion, Russell claimed an involuntary plea, as well as ineffective assistance of counsel. Affidavits from his Russell's relatives were attached. These relatives allege that Russell was "erroneously" informed by his counsel that he would only have to serve a three year sentence. C.P. 21-23. However, the record reflects that the affidavits were identical to each other, "word for word." See affidavits in record. C.P. 21-23.

And more importantly, there was no affidavit from guilty plea counsel, Mr. Tiebauer. Guilty plea counsel was accused by Russell and his supporters of deception if not out and out incompetence. C.P. 21-23. Russell claimed that guilty plea counsel misrepresented his sentence. C.P. 12.

This motion was denied by the trial court. The court found there was sufficient evidence from the guilty plea hearing transcript to deny Russell's allegations of an involuntary plea and ineffective assistance of counsel. There was no evidence of any misrepresentation of a lesser sentence. C.P. 53-63. This Order was certified as having been filed on "March 13, 2009." C.P. 53.

Russell filed a motion to vacate the trial court's Order. C.P. 47-50. This was certified as having been notarized on "March 24, 2009." C.P. 50. It was denied. C.P. 66-67. The trial court found from the record that while Russell filed a second motion, 2007-171-B, "it was dismissed without prejudice on the petitioner's own motion." R. 67. To the best of the appellee's knowledge

SUMMARY OF THE ARGUMENT

1. The record reflects no basis for considering Russell's alleged second petition for post conviction relief. The trial court found that the record of this cause did not contain any such petition. C.P. 1-90; C.P. 52; C.P. 66-67. Russell's designation of record indicated that he was appealing from the denial of relief in cause number "2007-211-B." C.P. 5; 81. Therefore, Russell's appeal for reconsideration of another alleged supplemental matter without any affidavits or witnesses in support of anything of substance should be dismissed with prejudice.

The record contains Russell's pro se motion to amend of February 19, 2009. C.P. 30-32. However, it added nothing of substance to his previous claims of involuntary plea and ineffective assistance.

The appellee would submit that there is no evidence the trial court "impeded" Russell from filing any supplemental motion. C.P. 67. **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983).

2. The record reflects that Russell's guilty plea was voluntarily and intelligently entered. The record from the guilty plea hearing indicated that Russell acknowledged knowing the maximum thirty year sentence for his felony, as well as the recommended eight year sentence offered by the prosecution. C.P. 57. This was an agreement for an eight year sentence and the dropping of two other felony drug charges for which Russell could have also been prosecuted and sentenced. One such pending charge was a "sale" charge. C.P. 53.

Brown admitted on the record that he had not been promised a lesser sentence. C. P. 57-68.

Although given an opportunity to address any claim of disability, mental or otherwise, the record reflects Brown did not do so. C.P. 59-62. The appellee would submit that the transcript of the guilty plea hearing indicates that Brown understood "the nature of the proceedings against him and the consequences of his plea." **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss. 1992).

3. The record reflects that guilty plea counsel, Mr. Eric Tiebauer, negotiated a favorable plea agreement with the prosecution. C.P. 57. Although the maximum sentence for possession with intent was thirty years, Russell was only given an eight year sentence with two other pending charges dropped. C.P. 53. There was no record support for Russell's claim of having been promised a lesser three year sentence.

Although Russell's motion included affidavits from his wife and family members, they were "identical" in wording and content. C.P. 21-23; 55. The trial court found based upon the record that the guilty plea hearing transcript contradicted Russell's claims about a promise of a more lenient three year sentence. C.P. 53-63.

The record supports the trial court's finding of no evidence of deficient performance or prejudicial impact on Russell's defense to the charge. **Bailey v. State**, 760 So. 2d 781, 783 (Miss. App. 2000).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE TRIAL COURT CORRECTLY DENIED A MOTION TO DISMISS ITS PREVIOUS ORDER.

In his appeal brief, Russell argues that the trial court interfered with his being able to file another petition, apparently to supplement that previously filed on "November 26, 2007." C.P. 5. While he alleges that there was another brief filed, and that some communication about this alleged brief occurred, the trial court found there was nothing in the record indicating that such a brief was made a permanent part of the record. C.P. 67. Appeal brief page 1-6.

The appellee would submit that contrary to Russell's claims, there is nothing in the record which supports his allegations. C.P. 1-90. **Mason**, 440 So. 2d 318, 319 (Miss. 1983).

The record reflects that Russell's motion for post conviction relief was denied by the trial court. The court found there was sufficient evidence from the guilty plea hearing transcript to deny Russell's allegations. This was for claims of an involuntary plea and ineffective assistance of counsel. C.P. 53-63. This Order denying Russell's motion for post conviction relief was certified as having been filed on "March 13, 2009." C.P. 53.

Russell filed a motion to vacate the trial court's Order. C.P. 47-50. This was certified as having been notarized on March 24, 2009. C.P. 50. It was filed with the trial court on "March 26, 2009." C.P. 47. In that motion Russell alleged that another or second motion for post conviction relief had been filed. C.P. 48. However, the letter from the trial court attached indicated that: "The Court records do not indicate that a second petition for post conviction relief was ever filed." C.P. 52.

This motion to dismiss the trial court's previous Order was denied. C.P. 66-67. The trial

court later found from the record that Russell did “temporarily” file a second motion. It was docketed as “2007-171-B.” However, as stated by the court in its Order: “it was dismissed without prejudice on the petitioner’s own motion.” R. 67.

As stated in the trial court’s Order denying Russell’s motion to dismiss its previous Order on the merits:

Upon discovery of the docketing error and the petition filed in this cause, 2007-211-B, this Court ruled upon the merits of the petition, resulting in the denial of petitioner’s request for post conviction relief on March 13, 2009. The petition now argues in his motion to vacate the order denying petition for post conviction collateral relief, that the docketing error has somehow impeded his pursuit of post conviction remedies. **The court is of the opinion that the docketing error was harmless, and presented no obstacle for the petitioner in seeking post conviction relief. The court ruled on the merits of the petition for post conviction relief in this matter. Further the petition for post conviction relief filed by petitioner in cause no. 2007-171-B was voluntarily dismissed without prejudice on the petitioner’s own motion.** C.P. 66-67. (Emphasis by appellee).

The “designation of record” filed in this cause included all papers filed in cause number “2007-211-B.” “2007-211-B” was docketed as Russell’s motion for post conviction relief based upon a claim of involuntary plea and ineffective assistance of counsel. C.P. 5; 81.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

The record reflects that while an initial docketing error occurred, this error was discovered and corrected. The trial court found any such error was “harmless.” C.P. 67. There was no evidence indicating that this event prevented Russell from exercising any right he had under the state or

federal constitutions. While Russell speaks of another alleged “timely motion,” that motion was never made a part of the certified record. There are no affidavits, or witnesses who would indicate the nature or substance of that motion, if granted a hearing. C.P. 47-50. In addition, the substantive issues concerning an involuntary plea and ineffective assistance were addressed on the merits and found wanting. C.P. 53-63.

Therefore, the appellee would submit that the trial court’s Order rejecting Russell’s motion to dismiss its previous Order on the merits should be affirmed for the reasons cited in this brief. C.P. 66-67.

PROPOSITION II

THE RECORD REFLECTS RUSSELL'S PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.

Russell argued in his "Petition For Post Conviction Relief" that his plea was not voluntarily and intelligently entered. It was not entered because he had been alleged erroneously advised that he would be required to serve only a three year sentence. This alleged misrepresentation induced Russell to plead guilty. In addition, guilty plea counsel was informed of Russell's alleged mental disability for which he was taking medications. This should have been sufficient for guilty plea counsel to understand that Russell lacked the capacity to enter a valid guilty plea to the felony charges. Appellant's brief page 1-12.

The record reflects that the trial court found that Russell's plea of guilty to possession with intent with benefit of counsel was voluntarily and intelligently entered. C.P. 59. The record of this cause indicates credible, substantial evidence in support of that decision.

The record reflects that the trial court advised Brown, and questioned him and his counsel about Brown's understanding of the felony possession with intent drug charges, and the consequences of his plea based upon a negotiated plea agreement. C.P. 53-63.

The court advised Russell of his Constitution right to a trial with cross examination, and a right against self incrimination. Brown indicated that he understood he was waiving his rights by pleading guilty. Brown acknowledged knowing the thirty year sentence for possession with intent as well as the recommended eight year sentence with other felony charges dismissed. C.P. 57. Brown admitted that he had not been coerced or promised anything in exchange for his guilty plea. C.P. 57-58.

While Brown admitted to having seizures and taking medications, when given an

opportunity, he never stated that he was mentally disabled. C.P. 44; 61. The trial court found, based upon Russell's demeanor and answers to questions, that he was competent, mentally and otherwise, to plead guilty. C.P. 60. In addition, the trial court had Russell's "Petition To Enter a Guilty Plea" which had been completed with the benefit of counsel. C.P. 55.

After advising and questioning Russell, the trial court found that Russell's plea was voluntarily and intelligently entered. C.P. 60-62.

Russell was sentenced to an eight year term and a fine including paying court costs. C.P. 53.

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 appellee would submit that there is no evidence of any false inducement to plead guilty contained in the record. The appellee would submit that the record supports the trial court's finding that Russell's plea was voluntarily and intelligently entered.

PROPOSITION III

THE RECORD REFLECTS RUSSELL RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Russell argued in his Petition for post conviction relief that he was denied effective assistance. He was denied such representation allegedly because his guilty plea counsel induced him to plead guilty under false pretenses. Russell argued that he was assured by guilty plea counsel that upon pleading guilty he would only have to serve some three years and six months before being released. Petition for post conviction relief, page 3. C.P. 7.

The record reflects that the trial court found, based upon the transcript of the guilty plea hearing and the petition to enter a guilty plea, that Russell received effective assistance of counsel. While there were allegations of inaccurate and improper inducements used to encourage Russell to plead guilty, there was no record support for that assertion. C.P. 53-63. The record also reflects that Russell stated that he satisfied with the counsel, advice and representation provided by his guilty plea counsel.

In **Hurst v. State**, 811 So.2d 414, 418 (¶15) (Miss. App. 2001), the Court found that Hurst was not entitled to relief. While Hurst claimed he "expected" a lesser sentence, there was no record evidence of "any reliance upon a firm representation of a lesser sentence."

The **Strickland** standard for ineffective assistance of counsel, 466 U. S. at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) which requires both a showing of "deficient" performance and "prejudicial" impact on a defense. There must be evidence of both sufficient for "undermining confidence in the correctness of the outcome." **Roland v. State**, 666 So. 2d 747, 750 (Miss. 1995); and **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).

The appellee would submit that the trial court correctly found no evidence of either deficient performance or of prejudice to any defense which Russell had at the time of his guilty plea hearing or thereafter when he filed his pro se petition for post conviction relief. This issue is also lacking in merit.

CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



W. GLENN WATTS

SPECIAL ASSISTANT ATTORNEY GENERAL

MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

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:

Honorable Robert W. Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, MS 39302

Honorable E. J. (Bilbo) Mitchell
District Attorney
Post Office Box 5172
Meridian, MS 39302

Fredrick Russell #81782
S.M.C.I.
Unit-12; A-61
Post Office Box 1419
Leakesville, MS 39451

This the 17th day of February, 2010.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680