

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DONDRA HAMILTON

APPELLANT

VS.

NO. 2009-CP-1523

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This appeal is taken from the Circuit Court of Lee County, which denied Dondra Hamilton's motion for post-conviction relief. In its order denying relief, the circuit court set out the preliminary procedural history of this case as follows:

This matter comes before this Court on Petitioner's Motion for Post-Conviction Relief filed pursuant to Miss. Code Ann. § 99-39-1, *et. Seq.* On November 29, 2007, the Petitioner entered a plea of guilty in Lee County Cause Number CR07-019 to a charge of possession of cocaine greater than two grams with intent to sell, transfer or distribute within 1500 feet of a church. On the same date, Petitioner entered a plea of guilty in Lee County Cause Number CR06-775 to a charge of sale of cocaine. In CR07-019, the Petitioner was sentenced to a term of sixty years in the custody of the Mississippi Department of Corrections with fifty years suspended leaving ten to serve to be followed by five years of post-release supervision. In CR06-775, the Petitioner was sentenced to thirty years with ten suspended. Two two sentences were to run concurrent. Petitioner was also ordered to pay a fine and court cost.

The Petitioner has now filed a Petition for Post-Conviction Relief claiming several grounds for the relief sought including (1) denial of his rights of due process; (2) invalid indictment; (3) *ex post facto* sentencing; (4) ineffective assistance of counsel; and (5) receiving a sentence in excess of the statutory maximum for the charges. The Court having

review[ed] the motion and record finds that the Petition contains no grounds for the relief sought, [is] not well taken and therefore is **DENIED**.

(C.P.45)

Aggrieved by the judgment rendered against him, Hamilton has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

The circuit court properly found that Hamilton's motion for post-conviction collateral relief was plainly devoid of merit. Accordingly, the circuit court properly denied he motion without a hearing. The judgment entered below should be affirmed.

PROPOSITION:

THE CIRCUIT COURT DID NOT ERR IN DENYING HAMILTON'S PETITION FOR POST-CONVICTION COLLATERAL RELIEF WITHOUT A HEARING

In its order denying post-conviction relief, the circuit court considered all the claims asserted by Hamilton and concluded that they plainly lacked merit. At the outset, the state submits that these claims represent the only issues properly before this Court at this juncture. *Rivers v. State*, 807 So.2d 1280, 1281 (Miss. App. 2002); *Patterson v. State*, 594 So.2d 606, 609 (Miss.1992); *Gardner v. State*, 531 So.2d 805, 808-09 (Miss.1988). Moreover, the circuit court's disposition of Hamilton's motion is not subject to reversal "absent a finding" that it "was clearly erroneous." *Taylor v. State*, 766 So.2d 830, 832 (Miss. App. 2000), citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss.1999). Accord, *Black v. State*, 963 So.2d 47, 48 (Miss. App. 2007).

Hamilton contended first that his due process rights were violated by the officers' conducting a search without a warrant and questioning him without giving him the *Miranda*

warnings. Next, he alleged defects in the indictments returned against him. The circuit court rejected these argument with the following finding and conclusion:

The Mississippi Supreme Court has stated that a plea of guilty waives all non-jurisdictional rights or defects which are incident to trial. *Jones v. State*, 747 So.2d 249 (Miss.1989). Any defects in a search warrant, or lack thereof, or receipt of *Miranda* warnings would be included in this rights. The Court took great steps to determine if the Petitioner understood that he was waiving all his procedural rights upon entering his pleas of guilty. The record is void of any evidence that the Petitioner did not understand the proceeding or the rights he was waiving.

Petitioner next asserts that the indictment in CR06-775 and CR07-019 were defective. This argument must fail. By entering a plea of guilty, Petitioner waived his argument as to defects in the indictment. *Von Brock v. State*, 794 So.2d 279, 280 (Miss.2001).

(C.P.46)

This ruling is supported by the record (C.P.28-30) and applicable case law. See also *Hunt v. State*, 11 So.3d 764, 768 (Miss. App. 2009). No error has been shown in the court's rejection of Hamilton's first and second claims for relief.

Hamilton went on to contend that his sentences amounted to *ex post facto* sentencing by the court. The circuit court denied this claim with the following analysis:

Specifically, Petitioner asserts that he should be eligible for resentencing under Mississippi Code Annotated § 41-29-149 and that failure to do so results in an *ex post facto* sentence. This statute gives the trial court discretion in the reduction or suspension of a sentence for a first time offender. However, the statute does not make a reduction mandatory.

(C.P.46)

The statute in question provides in pertinent part the following

a) Regardless of the penalties provided heretofore for the violation of any section or portion of this article, the judge

of the court of jurisdiction of any defendant **may, in his discretion**, suspend such penalty, penalties, or portions thereof, for any person charged with a first offense.

(emphasis added)

The circuit court correctly found that this language gave discretion to reduce a sentence for a first-offender but that it was not mandatory. Thus, no error has been shown in the court's denial of Hamilton's third claim for relief.

Additionally, Hamilton contended that he received ineffective assistance of counsel.

The circuit court rejected this claim with the following reasoning:

The Petitioner does not provide any evidence to support this claim. Furthermore, the Petitioner does not provide any reason why his counsel was ineffective. To establish such a claim, Petitioner bears the burden of showing that counsel's representation was deficient and that the Petitioner suffered prejudice from that deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner has wholly failed to meet this burden. Upon being questioned by this Court regarding whether he was satisfied with the legal services and advice of his attorney as well as whether he felt he had been adequately represented, Petitioner responded that he was satisfied. Now, Petitioner offers nothing more contradictory in his motion. Petitioner cannot make a valid claim for ineffective assistance of counsel if the only proof he has concerning deficient performance of his counsel is his own statement. See *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). Furthermore, upon questioning by the Court, the Petitioner stated that he did in fact commit the offenses alleged in the indictment.

(C.P.46-47)¹

¹ During the plea colloquy, the defendant testified that he was satisfied with the services provided by his attorney and that he thought he had been properly advised and represented. (C.P.33)

Again, the state submits the court's finding and conclusions are supported by the record (C.P.33) and controlling case law. See also *Buckhalter v. State*, 912 So.2d 159, 162 (Miss. App. 2005), and *Gable v. State*, 748 So.2d 703, 706 (Miss.1999).

Finally, the state submits the circuit court correctly found that the sentences imposed were within the statutory limits. Hamilton's final claim for relief was properly denied.

CONCLUSION

The state respectfully submits that Hamilton's motion for post-conviction collateral relief was properly denied without a hearing. The judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 12th day of March, 2010.


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