

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRY WILKINS

APPELLANT

VS.

NO. 2009-CP-1711-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. WILKINS FAILS TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.
- II. WILKINS IS PROCEDURALLY BARRED FROM CLAIMING THAT HIS SENTENCE IS UNCONSTITUTIONAL.
- III. WILKINS PLEA WAS ENTERED KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY.
- IV. WILKINS WAIVED THE RIGHT TO COMPLAIN OF A NON-JURISDICTIONAL DEFECT IN THE INDICTMENT UPON ENTERING A VALID GUILTY PLEA.
- V. THE ENTRY OF A VALID GUILTY PLEA WAIVES THE DEFENDANT'S RIGHT TO HAVE THE STATE PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

STATEMENT OF FACTS

On July 2, 2007, Terry Wayne Wilkins pleaded guilty to burglary of a dwelling as a habitual offender. The trial court accepted the State's recommendation of 17.5 years without the possibility of parole. C.P. 86. In exchange for his valid guilty plea, numerous other charges against Wilkins

were remanded to the file. T. 75, 85. Wilkins timely filed a motion for post-conviction relief which was summarily denied by the trial court.

SUMMARY OF ARGUMENT

Wilkins' ineffective assistance claim necessarily fails because it is supported by nothing more than his own assertions.

Wilkins cites no authority which would support his proposition that his sentence is unconstitutional simply because his co-indictee received a lesser sentence. Additionally, the trial court did not abuse its discretion in sentencing Wilkins to 7.5 years less than the maximum sentence available for residential burglary.

Wilkins fails to show that his plea was involuntary. The record shows that he was informed of the nature of the charges against him, the effect of entering a guilty plea, and the minimum and maximum sentences.

Wilkins waived the right to complain of nonjurisdictional defects in the indictment by entering a valid guilty plea. Likewise, he waived the right to have the State prove each element of the offense charged by entering a valid guilty plea.

ARGUMENT

I. WILKINS FAILS TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

In an attempt to show that he received ineffective assistance of counsel, Wilkins puts forth vague assertions that defense counsel failed to investigate after Wilkins allegedly alerted defense counsel to the existence of an unnamed alibi witness. In cases involving post-conviction collateral relief, "where a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). In the present case, Wilkins does not offer even

his own affidavit, as required by Mississippi Code Annotated Section 99-39-9, much less an affidavit from the alleged alibi witness or anyone else. Additionally, a defendant claiming that defense counsel was constitutionally deficient for failure to investigate must “state with particularity what the investigation would have revealed and specify how it would have altered the outcome of trial.” *Woodward v. State*, 843 So.2d 1, 18 (¶46) (Miss. 2003). Again, Wilkins fails to even provide the name of the alleged alibi witness, much less what this unnamed person’s testimony would have shown.

For the foregoing reasons, Wilkins has failed to prove his claim of ineffective assistance of counsel.

II. WILKINS IS PROCEDURALLY BARRED FROM CLAIMING THAT HIS SENTENCE IS UNCONSTITUTIONAL.

Although Wilkins titles his second assignment of error as “Selective Prosecution: Equal Protection Clause,” the substance of Wilkins’ argument is that his co-defendant received a lesser sentence. This issue was not included in Wilkins’ motion for post-conviction relief filed in the trial court. Therefore, he is procedurally barred from raising this issue for the first time on appeal. *Bell v. State*, 2 So.3d 747, 750 (¶12) (Miss. Ct. App. 2009). Wilkins’ failure to cite authority which supports his position that one’s constitutional rights are violated simply because a co-defendant receives a lesser sentence also renders Wilkins’ claim procedurally barred. *Addison v. State*, 957 So.2d 1039, 1041 (¶9) (Miss. Ct. App. 2007). Wilkins’ claim is also without merit. “Sentencing is within the trial court’s discretion and not subject to appellate review if the sentence is within statutory limits.” *Id.* at (¶12).

III. WILKINS PLEA WAS ENTERED KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY.

A plea is voluntary if the trial court informs the defendant of nature of the charges against him, the effect of entering a guilty plea, and the minimum and maximum sentences. *Cross v. State*, 964 So.2d 535, 539 (¶17) (Miss. Ct. App. 2007). Wilkins carries the burden of proof in establishing that his plea was involuntary. *Id.*

A review of the plea transcript shows that the trial court informed Wilkins of the rights he would waive if he entered a guilty plea. C.P. 75-82. Additionally, a factual basis was established when the State announced on the record the facts it intended to prove if Wilkins exercised his right to proceed to trial. C.P. 83-84. Although it does not appear that the trial court stated the minimum and maximum sentence at the hearing, Wilkins was informed of the minimum and maximum sentences through his plea petition. C.P. 91. Wilkins admitted on the record that the signature on the plea petition was his own and that defense counsel had gone over and explained the plea petition and the plea process to him. C.P. 76-77.

For the foregoing reasons, Wilkins fails to show that his plea was involuntary.

IV. WILKINS WAIVED THE RIGHT TO COMPLAIN OF A NON-JURISDICTIONAL DEFECT IN THE INDICTMENT UPON ENTERING A VALID GUILTY PLEA.

Wilkins claims that his indictment was defective because in listing the prior felonies which qualified him as a habitual offender, the indictment contains a scrivener's error as to either the date of the offense or the date of the sentencing. C.P. 97. The entry of a valid guilty plea waives all non jurisdictional defects in the indictment. *Brooks v. State*, 573 So.2d 1350, 1352 (Miss. 1990). Because the scrivener's error of which Wilkins complains does not involve the failure to charge an essential element of the crime or subject matter jurisdiction, he waived the right to complain of the defect upon the entry of his valid guilty plea.

V. THE ENTRY OF A VALID GUILTY PLEA WAIVES THE DEFENDANT'S RIGHT TO HAVE THE STATE PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.



Wilkins complains that the State did not prove his habitual offender status beyond a reasonable doubt. One of the many rights waived by a defendant who enters a guilty plea is the right to have the State prove each element of the offense beyond a reasonable doubt. *Thornhill v. State*, 919 So.2d 238, 241 (¶13)(Miss. Ct. App. 2005). Accordingly, Wilkins' final assignment of error also fails.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court's denial of post-conviction relief.

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 20th day of January, 2010.


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