

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**GLENN M. KELLY**

**APPELLANT**

**VS.**

**NO. 2009-CP-1753-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 N [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 21, 2008, Glenn M. Kelly, “Kelly” pled guilty to statutory rape before the Circuit Court of Hinds County, the Honorable Billy Bridges presiding. Kelly was sentenced to serve five years with four years 363 days suspended. “One day to serve.” C.P. 19. There was a no contact with the victim order stated as part of the terms of his probation. Five years of probation. C.P. 19; 21.

On July 23, 2009, Kelly filed a pro se “Motion for Post Conviction” relief. C.P. 29-36. The trial court denied relief. C.P. 45.

Kelly filed notice of appeal. C.P. 47.

**ISSUE ON APPEAL**

**I.**

**WAS KELLY'S PLEA VOLUNTARILY AND INTELLIGENTLY ENTERED?**

**II.**

**DID KELLY RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?**

**III.**

**WAS KELLY ENTITLED TO RELIEF BASED UPON AN ALLEGED MISTAKE OF THE GIRL'S AGE AND HER CONSENT?**

### **STATEMENT OF THE FACTS**

In July, 2006, Mr. Glenn M. Kelly was indicted by a Hinds County Grand jury for statutory rape of a female at least fourteen years of age but under sixteen years old under M. C. A. Sect. 97-3-65(1)(a). She was “more than thirty six months younger” than Kelly who was an adult male twenty eight years of age. The victim was not Kelly’s wife. C.P. 3; 22.

On May 21, 2008, Mr. Kelly pled guilty to statutory rape before the Circuit Court of Hinds County, the Honorable Billy Bridges presiding. Kelly with the benefit of counsel had filled out and filed a sworn “Petition To Enter A Guilty Plea.” C.P. 22-25. Kelly admitted that he was guilty of having intercourse with a female fourteen years of age, and more than thirty six months younger than himself. C.P. 24.

Kelly’s guilty plea counsel “certified” that he was satisfied that Kelly understood the contents of his petition, and that he was executing the petition knowingly and voluntarily. C.P. 25.

After advising and questioning Kelly and his guilty plea counsel, the trial court found that Kelly’s guilty plea was voluntarily and intelligently entered.

Kelly was sentenced to serve five years with four years 363 days suspended. One day to serve and five years of probation. There was also a “no contact” with the child victim order and registration as a sexual offender as part of the terms of probation. C.P. 19; 21.

On July 23, 2009, Kelly filed a “Motion for Post Conviction” relief. In his motion, Kelly alleged not knowing the age of the fourteen year old girl, Ms. Candance Richardson, with whom he admitted to having sexual relations. C.P. 30. Kelly had no affidavits other than one from the victim and mother of his child. C. P. 29-36. The trial court denied relief. C.P. 45.

Kelly filed notice of appeal. C.P. 47.

### SUMMARY OF THE ARGUMENT

1. The record reflects that Kelly's plea was accepted as voluntarily and intelligently entered.

The record reflects that Kelly admitted under oath as stated in his Petition that he was guilty of statutory rape of Ms. Candace Richardson. C.P. 24. He admitted that he understood the elements of the felony. He admitted that the victim was at least fourteen and under sixteen and more than thirty six months younger than him. He admitted that he had sexual relations with her. C.P. 24. His guilty plea counsel "certified" that he believed that Kelly understood the contents of his guilty plea petition and was pleading guilty voluntarily and intelligently to statutory rape. C.P.25.

Kelly's admissions under oath contradict the claims he made in his motion for post conviction relief. **Gable v. State**, 748 So. 2d 703, 706 (Miss. 1999).

Therefore, the appellee would submit that the trial court correctly denied his motion without a hearing. C.P. 45. This issue is lacking in merit.

2. The record reflects that Kelly received effective assistance of counsel. There is no affidavit from Kelly or any other proposed witness indicating that his guilty plea counsel mislead him in anyway as to the elements of statutory rape, or to the factual basis of the plea as it related to Kelly.

Kelly admitted under oath that he understood the elements of statutory rape and was guilty of the felony. C.P. 24. Additionally, the record reflects that as a result of guilty plea counsel's efforts on Kelly's behalf, Kelly only received "a one day" to serve sentence. C.P. 21. In addition there was a requirement that he register as a sexual offender and to have no contact with the victim. C.P. 21.

His guilty plea counsel can not be faulted for Kelly's having violated the terms of his probation and therefore being presently incarcerated.

Therefore, the appellee would submit that Kelly failed to meet his burden of proof under "the

UPCCR act, M. C. A. Sect. 99-39-1 et seq., for showing either “deficient” performance or “prejudice” to his defense as a result. This related issue is also lacking in merit.

3. While Kelly filed no affidavit from himself or his counsel concerning the claims in his motion, he did include an affidavit from the victim of this crime. That affidavit alleged that the victim did not reveal that she was under age to Kelly and that she consented to have sexual relations with him. C.P. 34-36.

The Mississippi Supreme Court has stated that neither consent nor an alleged mistake as to the age of the victim is a defense to statutory rape. **Phillipson v. State** 943 So.2d 670, 672 ( ¶9- ¶10 ) (Miss. 2006).

The juvenile female victim’s affidavit, and Kelly’s statement in his motion in which he denies for the first time on appeal knowing the victim’s true age and that she consented therefore is of no avail.

The appellee would submit that these claims do not provide a basis for relief.



## ARGUMENT

### PROPOSITION I

#### **THE RECORD REFLECTS THAT KELLY'S PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.**

In his Motion, Kelly argues that his guilty plea was not voluntarily and intelligently entered in the Circuit Court of Hinds County. He argues that he allegedly pled guilty reluctantly while continuously protesting his innocence. C.P. 30. He believes that since he allegedly did not know the age of the female child victim and that she consented that he could not therefore be guilty of statutory rape. Appellant's brief 1-10..

To the contrary, the record reflects that Kelly admitted in his "Petition To Enter A Guilty Plea" that he understood the elements of the statutory rape charge. He also admitted that he not only understood the elements for the felony but also that he was guilty of having committed it.

As stated in his Petition:

My lawyer advises me that the elements of the charge to which I am pleading guilty are as follows: **willfully, unlawfully and feloniously have sexual intercourse with a female fourteen years of age at the time when she was more than 36 months younger than the defendant.**

**I submit the following facts which I state to be true, and feel that all of the above elements are proven by these facts: "I am guilty of the charge in the indictment." Therefore, I am guilty and ask the Court to accept my plea of guilty.** I understand that I am presenting this petition under oath and under penalty of perjury for any false statements contained therein. C.P. 24. (Emphasis by appellee).

In addition, his guilty plea counsel filed "a certification" indicating that he had "discussed all the contents of the foregoing petition," and was "satisfied" that the defendant understood these contents and that he was executing the petition to enter a guilty plea knowingly and voluntarily. C.P. 25.

In **Gable v. State**, 748 So. 2d 703, 706 (Miss. 1999) the court affirmed the trial court's dismissal of Gable's contentions without a hearing. The Court relied upon **Mowdy v. State**, 638 So. 2d 738, 743 (Miss 1994).

Great weight is given to statements made under oath and in open court during sentencing. **Young**, 731 So. 2d 738, 743 (Miss. 1994). The transcript of Gable's guilty plea hearing belies his current contentions. Furthermore, Gable produced no affidavits other than his own contradicting his earlier sworn statements. Because the only support offered by Gable is his own affidavit which is contradicted by unimpeachable documents in the record, we conclude that an evidentiary hearing was not required. Accordingly, we affirm the trial court's judgment denying Gable post conviction relief.

In the instant cause, there was no affidavit from Kelly. The only affidavit was from the victim of this statutory rape, Ms. Candace Richardson. C.P. 34-36. That affidavit indicates that she was born on June 17, 1990. She alleges that she consented to the sexual relations with Kelly, and allegedly told him that she was eighteen years old rather than fourteen, C.P. 34-36.

Her affidavit is based upon two faulty assumptions. The assumptions are that consent and ignorance of the victim's age are a defense to the statutory rape. They are not.

The sworn Petition quoted above indicates that the hearsay allegations of the victim with whom Kelly had a "no contact" sentencing order is an attempt at contradicting his admissions under oath of being consciously and knowingly guilty of statutory rape. C.P. 38.

As stated in that Petition, the elements of statutory rape are that a defendant had sexual relations with a victim who was under sixteen and thirty six months younger than the defendant. The record reflects that admitted that he understood these elements, and the victim was fourteen and more than thirty six months younger than he was. C.P. 24.

Therefore, the appellee would submit that the trial court correctly found that his guilty plea was voluntarily and intelligently entered. C.P. 45. This issue is therefore lacking in merit.

## PROPOSITION II

### **THE RECORD REFLECTS THAT KELLY WAS GIVEN EFFECTIVE ASSISTANCE OF COUNSEL.**

In his pro se motion Kelly argues he was not given effective assistance of counsel. He argues that he allegedly maintained and protested his innocence to his attorney at his guilty plea hearing. He allegedly told him that he did not knowingly commit the crime of statutory rape because he did not know that the child victim was under sixteen years of age. Motion, page

To the contrary, the record reflects that there are no “affidavits of witnesses,” or a statement of “good cause why they could not be obtained.” M. C. A. Sect. 99-39-9 (1)(e). There was no affidavit from Kelly or his guilty plea counsel who would necessarily be knowledgeable about Kelly’s claim of protesting his innocence at his guilty plea hearing in this motion.

Kelly’s accusations against his guilty plea counsel are stated as follows:

On May 21, 2008, a plea hearing took place. Glenn Kelly, upon advice of his attorney, entered a plea of guilty. Glenn Kelly continued to maintain his innocence by continuously advising his attorney that he was not aware of the age of Candance Richardson and she told him she was 18 years of age. Petitioner firmly asserted that he did not knowingly and intentionally commit any crime. C.P. 30.

For Kelly to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Kelly must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Kelly. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Kelly must show that there is a reasonable probability that but for the errors of his counsel, the outcome of his guilty plea hearing would have been different. **Nicolau v. State**, 612

So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is “a reasonable probability” that but for the alleged errors of his counsel, the result of Kelly’s guilty plea would have been different. This is to be determined from “the totality of the circumstances” involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Kelly’s guilty plea counsel erred in advising and assisting Kelly in pleading guilty. The record reflects that as a result of Kelly’s guilty plea he was required only to serve a day and then was placed on probation.

There was a registration as a sexual offender, a no contact with the victim order as well as commit no additional crimes included as part of his probation. C. P. 38.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, “that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit.” **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998); **Smith v. State**, 490 So. 2d 860 (Miss. 1986). The record contains no affidavit by Kelly or his guilty plea counsel.

In **Johnston v. State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of proving “prejudice” could not be met by merely alleging it.

Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel’s deficient performance. **Earley**, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

The record reflects that a lack of evidence that Kelly's guilty plea counsel misadvised him as to the elements of statutory rape or the sentence he might receive by pleading guilty. Kelly's sentence was merely one day with credit for time served. C.P. 38. Kelly's counsel can not be faulted for the fact that Kelly is presently incarcerated for violating the terms of his probation.

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

### **PROPOSITION III**

#### **KELLY'S GUILTY PLEA PETITION CONTRADICTS HIS UNSUPPORTED CLAIMS FOR RELIEF AND CONSENT AND IGNORANCE IS NOT A DEFENSE.**

As shown with quotes from the record under Proposition I, statements under oath in Kelly's "Petition To Enter A Guilty Plea" contradict the unsworn statements he made in his motion for post conviction relief. C.P.

As stated under proposition I , there were no affidavits from Kelly, his guilty plea counsel or any other witness other than an affidavit from the victim of this statutory rape. C.P. 34-35. In the victim's affidavit she alleges that she consented to having sexual relations with Kelly, and that she did not advise him that she was under age, or fourteen at the time of their sexual activities. She also admits to having a child as a result of Kelly's having had sexual relations with her.

In **Phillipson v. State** 943 So.2d 670, 672 ( ¶9- ¶10 ) (Miss. 2006), the Supreme Court stated that consent is not a defense to statutory rape. In addition, there is also no alleged mistake of age defense. Since statutory rape is "a strict liability" defense.

¶ 9. Phillipson admitted having sexual intercourse with B.G., while insisting it was consensual. Under our laws, a minor that fits the criteria of the statute simply does not have the legal power to consent. The age of a minor is a complete bar to the legal exercise of consent to sexual intercourse. "At the heart of [the statutory rape statute] is the core concern that children should not be exploited for sexual purposes regardless of their 'consent,' " as "[t]hey simply cannot appreciate the significance or the consequences of their actions." **Collins v. State**, 691 So.2d 918, 924 (Miss.1997).

¶ 10. Accordingly, consent is not and cannot be a defense to a charge of statutory rape. Miss. Code Ann. § 97-3-65(2). Statutory rape is also a "strict liability" crime, and a defendant cannot maintain a "mistake of age" defense. **Collins**, 691 So.2d at 923. As a result there are no lesser-included crimes to statutory rape.

The record reflects that Kelly admitted that he was twenty eight years old, and that the victim was fourteen years old. C.P. 24. The victim was therefore fourteen years old and "more than thirty

six years younger” than the defendant. As clearly stated in Kelly’s “Petition To Enter A Guilty Plea” these factual admissions were sufficient for satisfying the elements of statutory rape under M. C. A. Sect. 97-3-65(1)(a). C.P. 24.

As stated in the **Phillipson, supra**, consent and mistake of age is not a defense to statutory rape in this jurisdiction.

This issue is also lacking in merit.

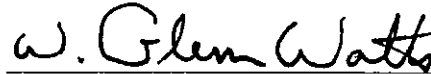
CONCLUSION

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 N [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 W. Swan Yerger  
Circuit Court Judge  
Post Office Box 22711  
Jackson, MS 39225

Honorable Robert Shuler Smith  
District Attorney  
Post Office Box 22747  
Jackson, MS 39225-2747

Glenn M. Kelly  
6770 N. Chapel Hill  
Bolton, MS 39041

This the 8th day of July, 2010.



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W. GLENN WATTS  
SPECIAL ASSISTANT ATTORNEY GENERAL

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