IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALLEN HENDERSON — APPELLANT

VS. — NO. 2009-CP-1824

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE APPELLANT'S SENTENCES ARE LEGAL.

II. THE APPELLANT'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY GIVEN.

III. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

IV. THE APPELLANT WAS PROPERLY ADVISED REGARDING HIS RIGHT TO APPEAL.

V. THE APPELLANT WAS NOT ENTITLED TO A COMPETENCY HEARING.

STATEMENT OF THE FACTS

The Appellant, Allen D. Henderson, was indicted for the murder of Kayla Polk and for child abandonment for leaving Kaela Polk, a nine-month-old child, in the vehicle with her deceased mother, Kayla Polk. (Record p. 36). The Appellant pled guilty to the lesser charge of manslaughter for the death of Ms. Polk and to child abandonment on July 28, 2009. He was sentenced to serve

twenty years on the manslaughter conviction and sentenced to seven years with five suspended and two to serve on the child abandonment conviction with the sentences to run consecutively. (Record p. 94).

The Appellant filed a Motion for Post Conviction Collateral Relief on September 21, 2009 arguing that he was entitled to post-conviction relief based upon five separate claims: his sentence was improper; his plea was not knowingly, voluntarily, and intelligently given; he received ineffective assistance of counsel; he was not properly informed of his rights to appeal; and he should have received a competency hearing. (Record p. 2 - 3). The trial court subsequently ordered that the case file be expanded to include a certified copy of the Appellant's entire criminal file including the transcript of his plea hearing. (Record p. 38). The file was expanded and the trial court entered an order dismissing the Appellant's motion. The Dismissal Order specifically held that after reviewing the file, the trial court found that "it plainly appears from the face of the above mentioned motion that petitioner is not entitled to any relief." (Record p. 127). It is from this Order that the Appellant appeals.

SUMMARY OF THE ARGUMENT

The trial court's dismissal of the Appellant's Motion for Post-Conviction Collateral Relief should be affirmed as the record supports the trial court's dismissal. The Appellant's sentences are within the statutory guidelines and are therefore, valid and legal. Additionally the record evidences that his plea was knowingly, voluntarily, and intelligently made and the Appellant was fully advised of all his rights as required by law.

The Appellant did not establish that he was denied effective assistance of counsel. He wholly failed to meet the two-prong test of *Strickland* and indicated that he was satisfied with his counsel's representation in both his Petition to Enter a Guilty Plea and at his guilty plea hearing. Further, the

Appellant was not entitled to a competency hearing.

ARGUMENT

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)) (*emphasis added*). The trial court's dismissal of the Appellant's Motion for Post-Conviction Collateral Relief was not clearly erroneous for the reasons set forth below.

I. THE APPELLANT'S SENTENCES ARE LEGAL.

The Appellant first argues that he "has suffered a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where trial court imposed the maximum sentence allowed by the statute for the offense in which plea was entered without having considered that there was no firm evidence to support that Appellant actually killed Kayla Brenn Polk and there was evidence which pointed to the possibility that Polk died as a result of an epileptic seizure." (Appellant's Brief p. 4). "Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Gibson v. State,* 731 So.2d 1087, 1097 (Miss. 1998) (citing *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996)). The Appellant was convicted of manslaughter and sentenced pursuant to Miss. Code Ann. §97-3-25 which reads as follows:

> Any person convicted of manslaughter shall be fined in a sum not less than five hundred dollars, or imprisoned in the county jail not more than one year, or both, or in the penitentiary not less than two years, nor more than twenty years.

The Appellant was sentenced to serve twenty years on this charge which is within the statutory guidelines. He was also convicted of child abandonment and sentenced pursuant to Miss Code Ann §97-5-1 which states that the maximum sentence for such conviction is seven years. The Appellant

was sentenced to seven years with five suspended and two to serve on this charge. That sentence is also within the statutory guidelines. Accordingly, the Appellant's sentences are valid and legal.

II. THE APPELLANT'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY GIVEN.

The Appellant next argues that his "guilty plea was an unknowing, involuntary and unintelligent wavier of fundamental rights, entered in violation of the Fourteenth Amendment due process of law clause." (Appellant's Brief p. 4). "The question of whether a plea was voluntarily and knowingly made is a question of fact" and "[t]he petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to relief." *Davis v. State,* 758 So.2d 463, 466 (Miss. Ct. App. 2000) (citing *McClendon v. State*, 539 So.2d 1375, 1377 (Miss.1989)).

In order for a guilty plea to be deemed voluntary, the defendant must be advised of the nature of the charges against him and understand the consequences of entering a guilty plea, including the minimum and maximum penalties he faces. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992); URCCC 8.04(A)(4)(b)). The transcript of the guilty plea hearing and the Petition to Enter Guilty Plea clearly illustrate that the Appellant was informed of the nature of the charges against him and their consequences. For example, the following statement was made in his Petition to Enter a Guilty Plea:

> 6. . . . . My attorney has counseled and advised me on the nature and elements of the charge, on any and all lesser-included charges and on all possible defenses that I might have in this case. My attorney advises me and I understand that the elements of the charge to which I am pleading are as follows: *killing of a human being without malice not in necessary self defense also abandoning a 9 month old child.*
>
> 7. I wish to plead guilty and request the court to accept my plea of guilty on the basis of the following: on the date(s) set forth in the indictment or bill of information, I did, in Rankin County Mississippi, willfully, unlawfully, feloniously *kill without malice Kayla Polk (best interest plea) and abandon a 9 month old child.*
>
> 8. I know that if I plead guilty to this charge, the sentence may be *2* years (minimum) to *20* years (maximum) incarceration . . . *child abandonment 0*

(minimum) to 7 years (maximum). . . .

(Record p. 81) (*parts in italics were handwritten*). Additionally, the following testimony was given during the plea hearing:

> THE COURT: With respect to count one, and the charge of manslaughter, those elements are on or about July 27, 2006, in Rankin County, Mississippi, you did willfully, unlawfully, feloniously kill a human being Kayla Brianne Polk, without malice, in the heat of passion, but in a cruel or unusual manner, not in necessary self defense. Do you understand those elements?
>
> THE APPELLANT: Yes, sir.
>
> THE COURT: With respect to count two, those elements are on or about July 27, 2006, in Rankin County, Mississippi, you did unlawfully, feloniously, purposefully and knowingly abandon Kealya Polk, a female child who was nine months old at the time, leaving said child in a vehicle with her deceased mother. Do you understand those elements?
>
> THE APPELLANT: Yes, sir.

(Record p. 100). The Appellant was also advised of the rights he would be waiving when pleading guilty. (Record p. 100 - 101). He was further advised of the minimum and maximum sentences he faced with regard to both counts. (Record p. 101 - 103). The State stated the following when asked for the factual basis for the pleas:

> On count one, the Pearl Police Department was notified on the 28th day of July, 2006, by a custodian of a day care, that he had found a body in a vehicle, which was parked at the day care. The Pearl Police Department responded, and that body was later identified as Kayla Polk. The Pearl Police Department then contacted the Simpson County authorities, as Ms. Polk resided in Simpson County. In talking with the friends of Ms. Polk, authorities were able to determine that on the weekend of her death, that she had spent time with Mr. Henderson. Officers then began to search local hotels and determine that Mr. Henderson and Ms. Polk had checked into a hotel room in Pearl. Mr. Henderson was arrested. Ms. Polk, an autopsy was performed. Dr. Steven Hayne said that this case was consistent with strangulation. Mr. Henderson did admit to being with Ms. Polk and admitted to moving the body, but he denied that he was actually the individual who did in fact strangle and kill Ms. Polk. . . . Judge in count two, again on the 28th day of July, at a time in which Ms. Polk's body was found in her vehicle, which was located there at the daycare, also found in the vehicle was Ms. Polk's minor child, who was nine months old, at the age of the time in which she was left. She was left alone in the vehicle with her deceased

> mother, being Ms. Kayla Polk. Again, officers were able to determine through their investigation, and with help from the Simpson County authorities, that Mr. Henderson was in fact the individual who loaded Ms. Polk up in the vehicle, as well as Ms. Polk's child. He then abandoned the child there in the car, and the child was discovered later the next day on the 28th of July, again, by the same custodian who had come to work that day.

(Record p. 104 - 105). Both the Appellant and his attorney stated on the record that they had no disagreement with the factual basis as given by the State. (Record p. 105 - 106).

The Appellant did enter what is commonly referred to as an Alford plea or a "best interest plea" with regard to the manslaughter charge. "An *Alford* plea allows a defendant to avoid the risk of conviction at trial by pleading guilty without admitting to actual guilt of the crime charged." *In re Shelton,* 987 So.2d 938, 939 (Miss. 2008). This Court noted in *Bush v. State*, that the United State Supreme Court previously "found no constitutional error in accepting a guilty plea despite a protestation of innocence, when the defendant knowingly and intelligently concluded that his best interests required entry of a guilty plea and the trial judge made a determination on the record that there was strong evidence of actual guilt." 922 So.2d 802, 805 (Miss. Ct. App. 2005) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). As noted by this Court in *McNickles v. State*, when there is an *Alford* plea, the defendant is not required to admit that he actually committed the crime, but instead "it is sufficient that [the defendant] was aware of the charge against him and the proof to be offered by the State. 979 So.2d 693, 697 (Miss. Ct. App. 2007). The record evidences that the Appellant was aware of the charges against him and the proof that the State planned to offer as shown above. There was also evidence that he concluded that it was in his best interest to plead guilty:

> THE COURT: With respect to count one and the manslaughter charge, are you pleading guilty because you believe that based on the evidence the State would present at trial, the probability of your conviction is more likely than your acquittal, and you

wish to take advantage of the plea bargain offered by the State?

THE APPELLANT: Yes, sir.

(Record p. 106). "Solemn declarations in open court carry a strong presumption of verity." *Truitt v. State,* 958 So.2d 299, 301 (Miss. Ct. App. 2007) (quoting *Harris v. State*, 806 So.2d 1127 (Miss. 2002)). As such, the record fully establishes that the Appellant's plea was knowingly, voluntarily, and intelligently given.

III. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Appellant also argues that his counsel was "ineffective in plain violation of the Sixth Amendment." (Appellant's Brief p. 4). The standard of review for such claims is as follows:

> Claims of ineffective assistance of counsel are judged by the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-part test set out in *Strickland* is whether counsel's performance was deficient and, if so, whether the deficiency prejudiced the defendant to the point that "our confidence in the correctness of the outcome is undermined." *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987). . . . A strong but rebuttable presumption exists that "counsel's conduct falls within a broad range of reasonable professional assistance." *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). To overcome this presumption, the defendant must show that "but for" the deficiency a different result would have occurred. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Richardson v. State, 769 So.2d 230, 234 (Miss. Ct. App. 2000) (*emphasis added*). In the case at hand, the Appellant's claim that he received ineffective assistance of counsel fails for three reasons.

First, he wholly failed to meet the requirements of *Strickland* set forth above in that he failed to show how the outcome would have been different but for his counsel's assistance. With regard to the second prong of the *Strickland* test, the Appellant simply argued that his counsel's representation prejudiced his "guilty plea in such a way as to mandate a reversal of the plea as well as the sentence imposed." (Appellant's Brief p. 24). A blanket assertion that the outcome would have been different but for counsel's representation, without explanation, is simply not enough to

meet the above referenced standard.

Secondly, the Appellant failed to meet the first prong of *Strickland* as well. The Appellant alleges that his counsel was deficient in that he "convinced him that he should plead guilty and that if he did not he would be convicted and imprisoned for a long period of time." (Appellant's Brief p. 10). However, the Petition to Enter a Guilty Plea and transcript of the guilty plea hearing rebut this allegation:

> 4. My attorney has advised me as to the possibilities of my acquittal or conviction on the charge against me, and has thoroughly discussed all aspects of my case with me. My attorney has counseled and advised me, and has made no threats or promises of any type or kind to induce me to enter this plea of guilty. The decision to seek entry of this plea was mine alone, based on my own reasons, and free from any outside influences.

(Record p. 82 - 83)

THE COURT:	After your discussions with your attorney, are you the one that decided to plead guilty?
THE APPELLANT:	Yes, sir.
THE COURT:	Are you telling the court that you're freely and voluntarily admitting your guilt to the crime you are pleading guilty to?
THE APPELLANT:	Yes, sir.

(Record p. 106).

THE COURT:	But I just want to make sure that you want to do it, and I think you do. I think you're just a little confused. But I want the record to be very clear that nobody is forcing you to do this?
THE APPELLANT:	Absolutely not.

(Record p. 114). He also argues that his counsel was deficient in failing to fully investigate the crime. He specifically contends that "he was not competent to enter such plea and that his attorney never sought the appropriate tests, investigation, findings, consultation with witnesses, and investigation of likely suspects such as the estranged boyfriend of the victim Polk, and mental qualifications of petitioner before advising a plea of guilty." (Appellant's Brief p. 10). He further

contends that his counsel "never investigated the medical history of Polk before advising petitioner to plead guilty." (Appellant's Brief p. 11). "While counsel has a duty to make reasonable investigations, they do not, by any means, have to be completely exhaustive." *Shorter v. State*, 946 So.2d 815, 820 (Miss. Ct. App. 2007) (citing *Wiley v. State*, 517 So.2d 1373, 1379 (Miss. 1987)). "Counsel's decisions in this area along with trial strategy are given a large measure of deference." *Id.* Furthermore, the Mississippi Supreme Court has held that "a defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what the investigations would have revealed and specify how it would have altered the outcome of trial or how such additional investigations would have significantly aided his cause at trial." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (*emphasis added*). The Appellant's Motion for Post-Conviction Collateral Relief does not state with any kind of particularity what the investigations he claims his counsel should have undertaken would have revealed or how they would have significantly altered his case. He only makes vague assertions with no evidence to back them up. Furthermore, the Mississippi Supreme Court "has implicitly recognized in the post-conviction relief context that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss. 1995)(quoting *Brooks v. State*, 573 So.2d 1350, 1354 (Miss.1990)).

Finally, when asked during his guilty plea whether he was satisfied with his counsel's representation, he stated that he was. (Record p. 107). As noted above, "great weight is given to statements made under oath and in open court during sentencing." *Ward v. State*, 879 So.2d 452, 455 (Miss. Ct. App. 2003) (quoting *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999)). If the Appellant had any misgivings or questions about his counsel's representation of him or about his case in general he could have voiced them during this hearing. In fact, the trial court gave him that

exact opportunity:

> THE COURT: Are you satisfied with your attorney's representation of you?
> THE APPELLANT: Yes, sir.
> THE COURT: Do you have any complaints you wish to make about him?
> THE APPELLANT: No, sir.

(Record p. 107). Moreover, the Petition to Enter a Plea of Guilty, which the Appellant admits that he signed, states as follows:

> 13. I believe that my attorney has done all that anyone could do to counsel and assist me. I am satisfied with the advice and counsel he has given me. . . .

(Record p. 83). "Similar to sworn statements made before the court, [guilty plea petitions] may be used to discredit post-plea allegations." *Madden v. State,* 991 So.2d 1231, 1235 (Miss. Ct. App. 2008).

Accordingly, the Appellant failed to meet the requirements of *Strickland.* Additionally, the record clearly indicates that the Appellant was satisfied with his counsel's representation of him at the plea hearing.

IV. THE APPELLANT WAS PROPERLY ADVISED REGARDING HIS RIGHT TO APPEAL.

The Appellant further contends that he "was subjected to a denial of due process of law where the trial court failed to advise [him] of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court" specifically noting that he "was never told that, under applicable law, his sentence could be directly appealed to the Supreme Court for direct review." (Appellant's Brief p. 5). The Appellant, however, has no such right. As noted by this Court in *Seal v. State*, Miss. Code Ann. §99-35-101 (Supp.2009), was amended effective July 1, 2008, to prohibit any direct appeal upon entry of a guilty plea. 38 So.3d 635, 638 (Miss. Ct. App. 2010). The Appellant pleaded guilty after July 1, 2008. Therefore, he has no right to appeal his

sentence directly to the Mississippi Supreme Court.

V. THE APPELLANT WAS NOT ENTITLED TO A COMPETENCY HEARING.

Finally the Appellant argues that "the acceptance of the guilty plea entered in this case, where in issues of competency have been raised pursuant to Rule 9.06, prior to the Court's compliance with Rule 9.06, violates the provisions of Rule 9.06 of the Miss. Uniform Rules of County and Circuit Practice." (Appellant's Brief p. 5). "The standard of competency to enter a plea of guilty is the same as that for determining competency to stand trial." *Magee v. State*, 752 So.2d 1100, 1102 (Miss. Ct. App. 1999). The burden of proof rests upon the Appellant "to prove by substantial evidence that [she] is mentally incompetent to [enter a guilty plea]." *Jones v. State*, 976 So.2d 407, 412 (Miss. Ct. App. 2008) (quoting *Richardson v. State*, 767 So.2d 195, 203 (Miss. 2000)). All that is required to demonstrate competency to stand trial or enter a guilty plea is that "the defendant has a rational understanding of the charges against him and the ability to assist his lawyer in preparing the defense." *Magee*, 752 So.2d at 1102.

Under Uniform Rule of Circuit and County Court 9.06, the trial court is only required to order a mental examination if there is a reasonable ground to believe that the defendant is incompetent to stand trial or enter a guilty plea. The Rule states, in part, as follows:

> If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with §99-13-11 of the Mississippi Code Annotated of 1972.

The record indicates that there was no reasonable ground to believe that the Appellant was not competent to enter a guilty plea:

> 1. . . . There is nothing wrong with me physically or mentally which might impair my ability to read and understand his petition or to impair my ability to knowingly, willingly, and voluntarily enter this plea of guilty. I have never been treated for a

mental or nervous condition, disease, disorder. . . .

(Petition to Enter Guilty Plea, Record p. 79).

> 6. Having discussed this matter carefully with the Defendant, I am satisfied that he/she is mentally competent and physically sound, there is not mental or physical condition of which I am aware which would affect his/her ability to understand these proceedings; further, I have no reason to believe that he/she is under the influence of drugs or intoxicants.

(Certificate of Attorney of Record signed by both the attorney and the Appellant, Record p. 85).

> THE COURT: Have you ever been treated for any mental illness or disorder?
> THE APPELLANT: No, sir.

(Guilty Plea Hearing, Record p. 99).

> Q: Do you have any questions concerning your rights or the crime you're pleading guilty to?
> A: No, sir.

(Guilty Plea Hearing, Record p. 107).

Therefore, no mental examination was required.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the trial court dismissal of the Appellant's Motion for Post Conviction Collateral Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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