

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCO S. RAINE

APPELLANT

VS.

NO. 2009-CP-1878

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCO S. RAINE

APPELLANT

vs.

CAUSE No. 2009-CP-01878-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Jackson County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

By indictment filed 15 December 2006, the prisoner was charged with having uttered a check in the amount of \$19,864 for the purchase of an automobile while knowing at the time that there were not sufficient funds for the payment of the check. (R. Vol. 1, pg. 28). On 5 December 2007, after having previously entered a guilty plea to the charge of the indictment, the prisoner was sentenced to a term of two years imprisonment, to run concurrently with sentences imposed in Harrison County, with thirteen months to serve and the remained on post - release supervision. (R. Vol. 1, pp. 26 - 27).

On 8 September 2009, the prisoner filed a motion in post - conviction relief in the Circuit Court. In this filing, the prisoner alleged that his guilty plea was involuntary because he was not informed of all of the elements of the felony charged against him, and that his attorney had been ineffective in her representation of him. It appears that the essential complaint was that the prisoner believed that the date on the check had been altered but that his attorney told him that the only thing the State had to prove was that he did not have sufficient funds on deposit to cover the check when he wrote the check. The prisoner, in his pleadings, alleged that the giving of a post -dated check, agreed to be accepted by the payee thereof, would not violate the law, and that his attorney was ineffective for having failed to know of or inform him of that rule.

The prisoner then embarked upon a lengthy allegation of fact to the effect that the car salesman had agreed to accept a post - dated check but that the dealership made the salesman deposit the check earlier than agreed. It was alleged that the salesman then altered the date of the check. (R. Vol. 1, pp. 2 - 25).

Relief on the prisoner's motion was denied without an evidentiary hearing by order filed 16 October 2009, the Circuit Court finding that the prisoner had been adequately advised during the plea hearing and that he made a knowing and voluntary waiver of his rights, and entered a plea of guilty. (R. Vol. 1, pg. 40). The notice of appeal was filed on 29 October 2009. (R. Vol. 1, pg. 41). The prisoner did not include in the record before this Court any transcript of the plea colloquy or any petition to enter a guilty plea.

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WITHOUT AN EVIDENTIARY HEARING

As we have stated above, the Appellant was sentenced in the case at bar to a term of two year imprisonment, with thirteen years to serve and the balance in post - release supervision. Sentence was imposed on 5 December 2007, and it was to be served concurrently with sentences imposed in Harrison County. The Appellant is in custody of the Department of Corrections at this time. While this record does not show this, the Mississippi Department of Corrections indicates that the Appellant serving some ten sentences. We have not been able to determine whether the Appellant has completed his sentence in the case at bar, though it does not seem likely that he has been released on post - supervision release on the sentence at bar given the fact that he has other sentences to serve. We would assume, without conceding, that the rule set out in *Edmondson v. State*, 17 So.3rd 591 (Miss. Ct. App. 2009) would be thought applicable. On the other hand, since the current version of Miss. Code Ann. Section 99-39-5(1) focuses on sentence rather than custody, there may not be an issue to consider. From all we can determine, the Appellant is still at least partially under sentence for the felony involved in the case at bar.

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where it plainly appears from the face of the motion and the prior proceedings in the case that the movant is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Supp. 2009). The standard of review here applicable to cases of this kind is familiar. This Court will not disturb a Circuit Court's denial of such relief absent a showing that the Circuit Court was clearly in error. Questions of law, however, are reviewed *de novo*. *Simmons v. State*, 784 So.2d 985, 987 (Miss. Ct. App. 2001).

The Appellant's first claim is that his plea of guilty was involuntary because he was erroneously advised by his attorney of the elements of the felony he was convicted of, which was the uttering of a bad check as defined by Miss. Code Ann. Section 97-19-55 (Rev. 2006). However, when one considers the argument presented in support of this claim, it becomes apparent that the Appellant is not so much asserting that he was erroneously advised as to the elements of the felony as much as he is asserting that he had a viable defense to the charge.

The Appellant claims that he bought an automobile at the price of nearly \$20,000.00 by giving a post -dated check to the salesman. The Court is expected to believe that a dealership would accept a check known at the time that it was no good, but might be good at some point later, and yet the Appellant got possession of the car. In any event, the Mississippi Supreme Court has held that where by the agreement of the parties involved a check is post - dated, the most the drawer of the check has done is represent that there will be sufficient funds in the account from which to pay the check on that future date. The Court held that it is not a violation of Section 97-19-55 to issue a check on a certain date, knowing that sufficient funds do not exist to pay the check on that date, where the drawer and payee have agreed that the check will only be presented for payment at some future date. *Henderson v. State*, 534 So.2d 554 (Miss. 1988).

This claim by the Appellant amounts to a claim that he had a good defense to the charge. However, that claim in no way supports the notion that the Appellant was not advised of the elements of the charge. The Appellant has not provided a petition to enter a guilty plea and not provided a transcript of the guilty plea. There is nothing to show that the Appellant was not properly advised of the elements of the felony by his attorney, or the Circuit Court during the plea colloquy. There is a presumption that the Circuit Court's acceptance of the guilty plea was correct. *Cogle v. State*, 966 So.2d 827, 831 (Miss. Ct. App. 2007)(citing *Branch v. State*, 347 So.2d 957 (Miss.

1977)). It was the Appellant's burden to demonstrate error -- not merely to allege it. Since there has been no showing that the Appellant was not advised of the elements of the felony, the Circuit Court may not be held in error for having denied relief on that allegation.

A valid guilty plea operates to waive all non - jurisdictional defenses to a charge. *Taylor v. State*, 766 So.2d 830 (Miss. Ct. App. 2000). Furthermore, under the Post - Conviction Relief Act, the failure to litigate this alleged defense operates as a waiver of it. Miss. Code Ann. Section 99-39-21(1) (Rev. 2007). The Appellant's plea acted as a waiver of the alleged defense he sets out in his papers here.

As to the ineffective assistance of counsel claim, this claim is based upon the notion that the Appellant's attorney did not explain the elements of the felony or failed to consider the Appellant's alleged defense, that defense being that there was a mutual agreement between the car dealer and the Appellant that the Appellant's check would not be presented for payment until some time after the date written on the check.

There is nothing but the Appellant's affidavit to support this claim. That is insufficient to require an evidentiary hearing. *Attaberry v. State*, 11 So.3rd 166 (Miss. Ct. App. 2009). The trial court thus committed no error in refusing to grant an evidentiary hearing on this claim.

CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

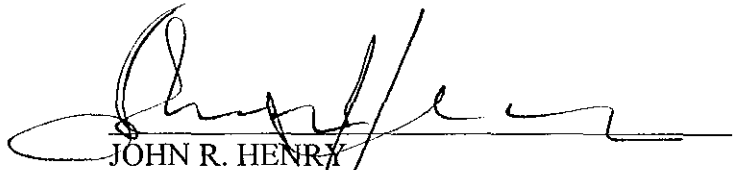
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 9th day of July, 2010.



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