IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL GIBSON — APPELLANT

VS. — NO. 2009-CP-1966-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI **APPELLEE**

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PROCEDURAL HISTORY:

On February 2, 2006, Michael Gibson, "Gibson" plead guilty to a lesser charge of robbery and shooting into a dwelling before the trial court of Jackson County, the Honorable Robert Krebs presiding. C.P. 16-18. Mr. Gibson was given eight year concurrent sentences in the custody of the M. D.O. C.. Four years were suspended and he was to be placed on probation for a term of three years. C.P. 18.

On August 31, 2007, the trial court revoked Gibson's probation for having committed another felony, and failure to pay fees, in violation of the terms of his probation. C.P. 21. Gibson was sentenced to serve the "remainder of his original sentence." C.P. 21

Gibson and his guilty plea counsel filed a "Motion to Clarify Revocation Sentence. C.P. 21-25. This was based upon Gibson's claim of receiving an allegedly excessive sentence after revocation and the breach of an alleged plea agreement. C.P. 23-25. That motion was denied. C.P.16-18. The trial court also eliminated from the sentencing order the clause probation for a term of three years. C.P. 16-18.

Gibson filed notice of appeal. C.P. 39.

ISSUES ON APPEAL

I.

IS GIBSON'S MOTION BARRED AS A SUCCESSIVE WRIT?

II.

DID THE STATE OR COURT BREECH A PLEA AGREEMENT WITH GIBSON?

II.

DID GIBSON RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE FACTS

Mr. Gibson was indicted by a Jackson County Grand Jury for armed robbery. C.P. 18. On February 2, 2006, Michael Gibson pled guilty to a reduced charge of robbery and shooting into a dwelling before the trial court of Jackson County, the Honorable Robert Krebs presiding. C.P. 16-18. Gibson was represented by Mr. Robert E. Rudder. C.P. 16; 22.

After advising and questioning Gibson and his counsel, the trial court accepted his guilty pleas as voluntarily and intelligently entered. Mr. Gibson was given eight year concurrent sentences in the custody of the M. D. O. C.. The sentencing order stated the following: "Eight years concurrent, four years was suspended, four years to serve, with the last three years to be served on post release supervision." C.P. 16.

On August 31, 2007, the trial court revoked Gibson's probation for violation of the terms of his probation. C.P. 18-25. Gibson was charged with "possession of controlled substance with intent." Gibson was sentenced to serve the "remainder of original sentence." C.P. 21

Mr. Rudder, Gibson's guilty plea counsel, with Gibson's participation, filed a "Motion to Correct/ Clarify Revocation Sentence. " This was to determine "the exact amount of time defendant is to serve." C.P. 21. This was in September 25, 2007. C.P. 16.

This was based upon Gibson's claim of receiving an allegedly excessive sentence after revocation and the breach of an alleged plea agreement. C.P. 23-25. That motion was denied. C.P.16-18. The trial court also eliminated from the sentencing order the clause probation for a term of three years. C.P. 16-18.

Mr. Gibson filed a pro se "Motion for Post Conviction" relief. C.P. 2-13. This was in September 30, 2009. C.P. 6. He argued that after his revocation, his remaining sentence should have been only three years. He also argued that the trial court allegedly breached a plea bargain agreement when it acquiesced in his receiving more than a three year sentence. C.P. 2-12. That motion was denied. C. P.16-18.

Mr. Gibson filed notice of appeal. C.P. 39.

SUMMARY OF THE ARGUMENT

I. This motion should be dismissed. The record reflects that this is a second or successive writ. C.P. 21-25; 2-10. The substance of both motions was directed at receiving a reduced three year sentence. This was based upon an ambiguity in one portion of a sentencing order. See M.C. A. Sect. 99-39-23 (6) which bars "a second or successive writ."

II. The record reflects no basis for finding any breech of agreement by the state or trial court. **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983). There is no record support for finding either that a plea bargain existed or that if it did, there was an understanding that after revocation, Gibson would be required to serve only three years. The record also does not reflect any detrimental reliance by Gibson.

The appellee would submit that the record supports the trial court's denial of relief to Gibson's "Motion For Post Conviction relief." C.P. 2-12; 16-17. Any ambiguity in a sentencing order does not provide a basis for finding either agreement, or breech of an agreement between the prosecution and Gibson, much less detrimental reliance.

III. There is a lack of evidence of either deficient performance or prejudice to Gibson's attempt to have his sentence shortened in the record. The record reflects that trial counsel filled a motion to clarify Gibson's revocation sentence on his behalf. C.P. 21-22. Gibson's motion for post conviction relief is based upon a favorable interpretation of an ambiguity in one portion of a sentencing order, along with an alleged breach of a plea bargain agreement. C.P. 2-12. However, he has no record support of such an agreement, and a lack of evidence as to any deficiency in the professional services provided by his trial counsel. **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997).

The record reflects the trial court clarified its sentencing order in answer to guilty plea counsel's original motion. C.P. 16-17.

Therefore, there is a lack of evidence of either deficient performance or prejudice to Gibson's defense reflected in the record of this cause.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THIS PRO SE MOTION SHOULD BE BARRED AS A SUCCESSIVE WRIT.

The record reflects that this is an appeal from the denial of a pro se motion for post conviction relief. C.P. 39. The first "motion to clarify revocation sentence" was filed with assistance of guilty plea counsel. C.P. 21-25. It was denied by the trial court. C.P. 16-17.

In **Field v. State** 856 So.2d 492, 494 (Miss. App. 2003), the court found that Field was attempting to appeal from the trial court's denial of a second motion for post conviction relief. It was therefore barred by M.C. A. Sect. 99-39-23 (6).

> As stated in the statute, there are exceptions to the second or successive writ bar. Field asserts none of them in his brief nor do any apply to the case at bar. Lacking a demonstration that the facts in Field's case are excepted from the procedural bar, the trial court did not err when it denied relief and dismissed Field's motion.

Although Gibson's second motion stated it was "A Motion For Post Conviction Collateral Relief," the substance of the motion deals with Gibson's alleged improper sentence. This is based upon the statement in his original sentencing order about his allegedly having three years of post release supervision. Pro se Motion page 2-15. C.P. 2-12.

Gibson admitted that a previous "Motion to Correct/ Clarify Revocation Order" had been filed to secure relief. C.P. 10. In the trial court's Order denying relief, it stated that Gibson's pro se motion was a second motion. C.P. 17.

The record reflects that while there are exceptions for filing a second motion, such as "newly discovered evidence" or "intervening decisions," none of these exceptions would seem to apply in the instant cause. M.C. A. Sect. 99-39-23(6).

Therefore, the appellee would submit that this motion should be dismissed as a second or successive writ.

PROPOSITION II

THE RECORD DOES NOT REFLECT ANY BREACH OF AGREEMENT BY THE STATE. THE RECORD REFLECTS THAT AFTER REVOCATION GIBSON'S SENTENCE WAS THE REMAINDER OF HIS ORIGINAL EIGHT YEAR SENTENCE.

In Gibson's pro se "motion for post conviction relief," he argued that the prosecution violated the terms of an alleged plea agreement. Gibson argued that the prosecution violated the terms of a plea agreement when it claimed a mistake was made as to the correct period for time to be served after Gibson's revocation. Gibson argued that this was plain error, and that the trial court should have granted him relief. Gibson argued that the state and court should have known as a result of this plea agreement that he would be required only to serve three years after revocation.

Mr. Gibson opined that since his sentencing order stated that he had four years to serve with the last three years of the sentence to be on post release supervision, that he only had three years remaining on his original sentence when he was revoked. Motion, page 2-12; Appeal brief page 1-4.

To the contrary, the record reflects that while there may have been some ambiguity in the wording of Gibson's original sentencing order, the trial court clarified that ambiguity in response to Gibson's counsel's "Motion To Clarify Revocation Sentence." C.P. 16; 18, 21.The trial court also had stricken from the original order the section that stated that the last three years of the suspended sentence would be served on post release supervision. C.P. 16.

As stated in the trial court's order denying relief.

> On September 25, 2007, Mr. Gibson's attorney filed a "Motion to Correct /Clarify Revocation Order" alleging that Gibson could only be revoked to a term of three years. The Court denied the motion stating that the court did not specifically limit the amount of time which could be revoked and that the quoted language was included by mistake and should be stricken. **Gibson filed a pro se motion alleging the same claim on June 8, 2009 which was again denied by this court on August 25, 2009. The issue has been denied twice before, therefore, this claim is without merit.** C.P. 16-17. (Emphasis by appellee).

In **Garlotte v. State** , 915 So. 2d 460, 466 (Miss. App. 2005), the Court found there was no detrimental reliance by Garlotte. There was also no implied promise on the part of the prosecution. This was for the prosecution recommending against Garlotte receiving any parole release. The record reflected that this issue was not covered in any previous plea agreement.

> Because Garlotte's sentence did not include a guarantee of parole release, the state's sentencing recommendation did not imply that the district attorney would henceforth refrain from impacting his parole release. Since the plea agreement did not include a promise that the prosecution would never recommend against Garlotte's parole release, the district attorney did not breach the agreement by sending the letter opining that Garlotte should never be paroled.

In **Kline v. State** 741 So.2d 944, 948 (¶15) (Miss. App.1999), the Court affirmed the trial court in finding no evidence of any detrimental reliance on the part of Kline. The trial court was not involved in any plea negotiations with Kline. The trial court informed Kline at guilty plea hearing that he was not bound by any plea agreement he may have made with the prosecution.

> ¶ 15. In view of the foregoing cases, Kline has not shown this Court that she detrimentally relied on the district attorney's recommendation. Detrimental reliance in the context of plea bargaining has been defined by the Mississippi Supreme Court as a "plea bargain with something more, such as where the defendant serves as a witness for the state ... or as an undercover informant...." **Martin v. State**, 635 So.2d 1352, 1356 (Miss.1994). Kline has not shown that she undertook any such detriment in this case.

In the instant cause, there is a lack of record evidence either that a plea bargain existed between Gibson and anyone else, or that there was any breech of that agreement or any detrimental reliance by Gibson. See pro se motion, page 2-12, and pro se appellant's brief page 1-4.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

The record does not reflect any involvement of the trial court in any plea agreement, nor does the record indicate any detrimental reliance on the part of Gibson based upon such an agreement.

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

PROPOSITION III

THE RECORD REFLECTS THAT GIBSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Gibson also argued that he did not receive effective assistance of counsel. He argued that his guilty plea counsel should have reminded the trial court of the alleged plea agreement which indicated that after revocation, he would only be required to serve a three year sentence rather than the what was left on his original sentence. See pro se motion, and pro se appellant's brief.

To the contrary, as shown under proposition II, there was no record evidence of any plea agreement as to Gibson's sentence if he should be revoked. In addition, there was no record evidence that the trial court was aware of any such alleged agreement, or that Gibson relied upon this agreement to his detriment when he pled guilty.

As stated in the trial court's Order denying relief:

> Gibson's attorney filed a motion to correct the revocation order within a month of the revocation hearing, which the judge denied. Aside from Gibson's bare assertions, there is no evidence that counsel's performance was deficient. Further, it is clear from the Court's ruling that the sentencing judge's intent was to sentence Gibson to the remainder of his sentence. Even if counsel's performance was deficient, there was no prejudice. C.P. 17.

For Gibson 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). Gibson 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 Gibson. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Gibson must show that there is a reasonable probability that but for the alleged errors of his counsel, Mr. Robert E. Rudder, the sentence of the trial court 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 guilty plea counsel, Gibson would have received a different sentence. 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 Mr. Rudder erred in having assisted Gibson in pleading guilty, and/or at his revocation hearing and subsequent sentencing.

> As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991): Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

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).

M C A Sect. 99-39-9 (1) (e), requires a statement of the facts in the movant's knowledge, and how facts asserted to exist in the motion "will be proved." This requires "affidavits" of witnesses or a statement of "good cause shown" for why they could not be obtained.

The record contains no affidavit from Mr. Rudder or statement of "good cause shown" for why it could not be obtained. C.P. 2-15.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing 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 cited above indicates that Mr. Rober Rudder assisted in filing a "Motion to Correct/ Clarify Revocation Sentence" on behalf of his client, Mr. Gibson. C.P. 16. This was September 25, 2007. The record also reflects that the trial court ruled on that motion and made it clear that the intent of the original sentence was that Gibson be given concurrent eight years sentences, with four years suspended. There was no intent to limit the amount of time Gibson would serve should he be revoked.

It is implied in Gibson's Motion in June 8, 2009 that his counsel was derelict in his duties. He allegedly knew of some plea agreement concerning the length of his sentence should he be revoked. There is no affidavit from Mr. Rudder included in support of this factual allegation. C.P. 2-12.

The trial court's order removed any ambiguity or confusion over what the remainder of Gibson's original sentence would be after revocation. This made it clear that after Gibson was revoked for a drug felony, the remainder of his sentence would be what remained of his original eight year sentence.

Therefore, there has been no showing of any prejudice to Gibson's attempt in his motion to have his sentence reduced based upon an ambiguity in the original order as he understood it or failure of he or his counsel to disclose any material facts to the trial court at sentencing.

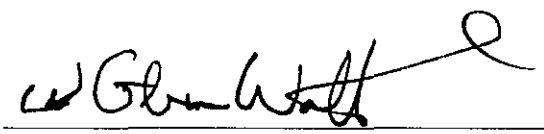
This issue is also lacking in merit.

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: 

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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:

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This the 9th day of July, 2010.

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