

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FORREST THOMAS, III

APPELLANT

VS.

NO. 2010-CA-1730

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. Thomas received constitutionally effective assistance of counsel.
- II. The Bill of Information provided the required notice of the charge of kidnapping.

STATEMENT OF THE CASE

Thomas was indicted by the September 2005 Washington County Grand Jury for Murder in Cause Number 2005-322. On or about May 18, 2007, days before the pending trial, Thomas pled guilty to the lesser included offense of manslaughter with a twenty (20) year sentence. He also pled guilty to kidnapping under a Bill of Information in Cause No. 2007-199 with a fifteen (15) year sentence to run consecutively, for a total of thirty-five (35) years. On May 14, 2010, Thomas filed his Motion for Post Conviction Collateral Relief which was denied by the trial court on October 7, 2010. The instant appeal ensued.

STATEMENT OF THE FACTS

On June 7, 2005, the victim Kimberly Norton Thomas (hereinafter "Kimberly") was in the backyard of her home located at 2440 Turin Street Greenville, Mississippi, with her two minor children, Maryah and Trenton Thomas. The petitioner, Forrest Thomas, III, (hereinafter Thomas), was the biological father of the children. Thomas and Kimberly were divorced and an active restraining order was on file at the time of the incident. Kimberly was talking on the telephone with a friend, while supervising her children in the backyard playing in a swimming pool. Thomas arrived at Kimberly's residence, jumped the backyard fence and shot her point blank in the head while her children watched. Thomas then took both children from Kimberly's residence to his mother's home. Thomas also took Kimberly's lifeless body and put it in a ditch on

Archer Range Road in Washington County. Once Kimberly's friend heard the commotion via telephone, he immediately called police for a check on Kimberly's well being.

When police arrived and searched the backyard they found blood, brain matter and skull fragments scattered around the backyard and a pool filled with what appeared to be bloody water. There was no sign of Kimberly or the children. Finally, on June 10, 2005, with the concerted effort of both the Greenville Police Department and the Washington County Sheriff's Department, Kimberly's decayed body was found on Archer Range Road in Washington County.

SUMMARY OF THE ARGUMENT

The record of the proceedings reflects that Thomas responded affirmatively when asked whether he was satisfied with the representation his counsel had provided. He also denied being pressured, threatened, and/or promised anything to enter the guilty plea against his will. He provided no legal or factual basis to support his claim of ineffective assistance of counsel. This issue is without merit and the trial court's denial of Thomas's Motion for Post Conviction Collateral Relief should be affirmed.

In *Magyar v. State*, 18 So.3d 808 (Miss. 2009); 18 So.3d 851 (Miss.Ct.App.2008), the Mississippi Supreme Court held that the requirement to register as a sex offender is a collateral consequence of a guilty plea and the trial court will not be put in error for failing to advise of the registration requirements before accepting a guilty plea. *Id* at 18 So.3d 807, 811-812. Therefore, Thomas's argument that his plea was not voluntarily given because he was not informed of the sex offender registry is without merit.

The act of force of killing the children's mother during the continuous transaction of kidnapping is a taking against the will of the mother. The murder itself was used to effectuate

the taking against her will. This issue is analogous to a case in which the Mississippi Supreme Court affirmed a robbery conviction holding that robbing a corpse in close proximity to the death of the victim is still robbery. *Arthur v. State*, 735 So.2d 213, 219 (Miss.1999). In fact, the Mississippi Supreme Court was appalled by the defendant's contention that because the victim was rendered unconscious by his own actions, there could be no robbery from his presence. *Wheeler v. State*, 826 So.2d 731, 735 (Miss. 2002). The court held that there is nothing to suggest that the victim must be aware that his personal property is being taken, and certainly a victim's lack of awareness due to the perpetrator's actions does not take the actions of the defendant outside of the robbery statute. *Id.* Kidnapping is not a specific intent crime; therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnapping as opposed to the actual intent to kidnap. *Milano v. State*, 790 So.2d 179 (Miss. 2001); *Brown v. State*, 749 so.2d 204 (Miss. 1999). Similar to an indictment for robbery, the taking of the two minor children was against the will of their mother and the petitioner used lethal force to effect the kidnapping. Based on the foregoing, this argument is without merit, and the trial court's dismissal of Thomas's Motion for Post-Conviction Collateral Relief should be affirmed.

ARGUMENT

I. Thomas received constitutionally effective assistance of counsel.

Thomas contends that he had ineffective assistance of counsel because his attorney allegedly told him he could "beat" the kidnapping charge on appeal. The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having a just

result. *Foster v. State*, 687 So.2d 1124, 1129 (Miss. 1997) (citing, *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). The test is two pronged: the defendant must demonstrate that his counsel's performance was deficient, and the deficiency prejudiced the defense of the case. *Strickland*, 466 U.S. at 686. Unless a defendant makes both showing, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Stringer v. State*, 454 So.2d 468, 477 (Miss. 1984). The burden of proving both prongs in *Strickland* have been met is on the defendant who faces a rebuttable presumption that his counsel's performance falls within the broad spectrum of reasonable professional assistance. *Walker v. State*, 703 So.2d 226, 268 (Miss. 1997). The *Strickland* test applies to challenges to guilty plea based on ineffective assistance of counsel. *Id.*

In any case, presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Id.* Judicial scrutiny of counsel's performance must be highly deferential. *Foster*, 687 So.2d at 1130. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; in short, defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss. 1985)

In *Reed v. State*, 805 So.2d 608, 610 (Miss.Ct.App.2002), the Supreme Court affirmed a denial of post conviction relief stating that the record demonstrated that the petitioner was provided effective assistance of counsel. The petitioner asserted that he involuntarily and

unintelligently entered into the plea agreement due to his attorney's deficient advice. *Id.* The record however reflected that the petitioner received the plea bargain that the parties had agreed to by the petitioner himself, who testified that he understood the agreement. *Id.* The Court noted that if the petitioner's claims are totally contradicted by the record, the trial judge may rely heavily on the statements made under oath. *Id.*

The record of the proceedings reflects that Thomas responded affirmatively when asked whether he was satisfied with the representation his counsel had provided. He also denied being pressured, threatened, and/or promised anything to enter the guilty plea against his will. He provided no legal or factual basis to support his claim of ineffective assistance of counsel. This issue is without merit and the trial court's denial of Thomas's Motion for Post Conviction Collateral Relief should be affirmed.

II. Thomas's guilty plea was voluntary, knowing and intelligent.

The burden of proving that a guilty plea was not made voluntarily is on the defendant. *Barnes v. State*, 803 so.2d 1271, 1274 (Miss.Ct.App.2002). If this burden is not met, the defendant's plea must be upheld as one that was made voluntarily, knowingly and intelligently. It should be noted that solemn declarations in open court by a defendant carry a strong presumption of verity. *Id.* Further, the record must reflect that the trial court thoroughly discussed with the defendant all of the consequences of a guilty plea, including the waiver of rights, satisfaction with one's attorney and advisement on the maximum and minimum penalties one can acquire for the crime committed. *Id.*

The Court of Appeals and the Mississippi Supreme Court addressed this issue in *Magyar v. State*, 18 So.3d 808 (Miss. 2009); 18 So.3d 851 (Miss.Ct.App.2008). The Mississippi

Supreme Court adopted the reasoning of most jurisdictions, including Nevada, in holding that the totality of the circumstances must demonstrate that a defendant pleaded guilty with knowledge of the direct consequences of his plea. *Id* at 18 So.3d 851, 854. Direct consequences are those ramifications that have a definite, immediate and largely automatic effect on the range of the defendant's punishment. Collateral consequences, by contrast, do not affect the length or nature of the punishment and are generally dependent on either the court's discretion, the defendant's future conduct, or the discretion of a governmental agency. *Id*. Because collateral consequences of a criminal conviction are often limitless, unforeseeable or personal to the defendant, requiring an advisement with respect to every conceivable collateral consequence would impose upon the trial court an impossible, unwarranted and unnecessary burden. *Id*.

In *Magyar*, the Mississippi Supreme Court held that the requirement to register as a sex offender is a collateral consequence of a guilty plea and the trial court will not be put in error for failing to advise of the registration requirements before accepting a guilty plea. *Id* at 18 So.3d 807, 811-812. Therefore, Thomas's argument that his plea was not voluntarily given because he was not informed of the sex offender registry is without merit.

III. The Bill of Information provided the required notice of the charge of kidnapping.

Thomas waived indictment and accepted the bill of information as the charging instrument on the day he entered his guilty plea. (C.P. 20-21) Therefore, the bill of information serves as the functional equivalent of an indictment. *McCullen v. State*, 786 So.2d 1069, 1075 (Miss.Ct.App.2001). Any challenge of the bill of information fails because the entry of a guilty plea waives of technical and non-jurisdiction issues. *Id* at 74.

The bill of information against Thomas is sufficient in accordance with Rule 7.06 of the

Uniform Rules. So long as from a fair reading of an indictment taken as a whole, the nature and cause of the charge against the accused is clear, the indictment is legally sufficient. *Page v. State*, 607 So.2d 1163 (Miss. 1992). Questions regarding the legal sufficiency of an indictment to charge a particular crime are determined on the face of the indictment without reference to whether proof has been or may be offered in support of the charge. *Id.* Where the language used in the indictment is sufficiently specific to give notice of the act made unlawful and exclusive enough to prevent its application to other acts, it is sufficient. *Parisie v. State*, 848 So.2d 880 (Miss.Ct.App. 2002). In addition, the defense has failed to set forth any authority to support his assertion that the bill of information in this case was defective. The supreme court has repeatedly held that the failure to cite any authority is a procedural bar, and a reviewing court is under no obligation to consider the assignment of error. *McClain v. State*, 625 So.2d 774, 781 (Miss.1993).

Thomas argues that it is impossible to take the children against the will of a corpse. The State could not find a case on point after an exhaustive search of this issue. However, it is the State's contention that the act of force of killing someone during the continuous transaction of kidnapping is a taking against the will of the mother. This issue is analogous to a case in which the Mississippi Supreme Court affirmed a robbery conviction holding that robbing a corpse in close proximity to the death of the victim is still robbery. *Arthur v. State*, 735 So.2d 213, 219 (Miss.1999). In fact, the Mississippi Supreme Court was appalled by the defendant's contention that because the victim was rendered unconscious by his own actions, there could be no robbery from his presence. *Wheeler v. State*, 826 So.2d 731, 735 (Miss. 2002). The court held that there is nothing to suggest that the victim must be aware that his personal property is being taken, and

certainly a victim's lack of awareness due to the perpetrator's actions does not take the actions of the defendant outside of the robbery statute. *Id.*

Moreover, it is important to note that kidnapping is not a specific intent crime; therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnapping as opposed to the actual intent to kidnap. *Milano v. State*, 790 So.2d 179 (Miss. 2001); *Brown v. State*, 749 so.2d 204 (Miss. 1999). Similar to an indictment for robbery, the taking of the two minor children was against the will of their mother and the petitioner used lethal force to effect the kidnapping. Based on the foregoing, this argument is without merit and the trial court's denial of Thomas's Motion for Post-Conviction Collateral Relief should be affirmed.

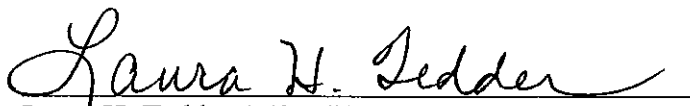
CONCLUSION

The assignments of error presented by the Appellant are without merit and the trial court's denial of the Appellant's Motion for Post-Conviction Collateral Relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

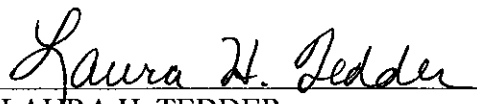
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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