

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

**CEDRIC SMITH**

**APPELLANT**

**VS.**

**NO. 2010-CA-1951 COA**

**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**

**CEDRIC SMITH**

**APPELLANT**

**VS.**

**NO. 2010-CA-19510COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF ISSUES**

- I. SMITH KNOWINGLY AND VOLUNTARILY WAIVED INDICTMENT.
- II. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION.
- III. A SUFFICIENT FACTUAL BASIS EXISTED FOR THE TRIAL COURT'S ACCEPTANCE OF SMITH'S PLEA OF GUILT TO THE CHARGE OF STATUTORY RAPE.
- IV. THE RECORD POSITIVELY ESTABLISHES THAT SMITH WAS ADVISED OF THE ELEMENTS OF THE CRIME CHARGED.
- V. SMITH RECEIVED CONSTITUTIONALLY EFFECTIVE COUNSEL.

## STATEMENT OF FACTS

Thirty-five-year-old Cedric Smith was the head baseball coach at Poplarville High School. C.P. 101. He began a text-messaging relationship with A.H., a fourteen-year-old student. C.P. 124. After months of texting, Smith picked the young girl up near her home, drove her to the school baseball field, and had sex with her in his car. C.P. 125. The incident was investigated first by school officials, then the Poplarville Police Department. C.P. 126.

Smith was charged by bill of information with statutory rape. C.P. 152. He subsequently entered an *Alford* plea. C.P. 128. Smith was sentenced to twenty years, with a mere seven to serve. C.P. 159.

## **SUMMARY OF ARGUMENT**

The record shows that Smith knowingly and voluntarily waived indictment and consented to being criminally proceeded against by bill of information. The evidence of such comes from Smith's Waiver of Indictment and statements made during the plea hearing.

The Circuit Court of Pearl River County had jurisdiction to accept Smith's plea. Both the bill of information and the prosecutor's recitation of factual basis alleged that the rape of the victim occurred in Poplarville which is in Pearl River County.

The prosecutor's recitation of the facts the State intended to prove if Smith proceeded to trial established the factual basis necessary for the trial court to accept Smith's guilty plea.

Smith's claim that he was not advised of the elements of the crime charged is contrary to the record. Smith swore in his waiver of indictment and plea petition that defense counsel advised him of the elements of statutory rape. Smith also admitted in open court that defense counsel advised him of the elements of the crime. Finally, Smith was also advised of the elements of the crime charged through the indictment and the prosecutor's lengthy recitation of the factual basis.

Smith's claim of ineffective assistance of counsel is both contrary to the record and supported by nothing more than his own affidavit. He fails to prove either deficient performance or prejudice.

## ARGUMENT

### I. SMITH KNOWINGLY AND VOLUNTARILY WAIVED INDICTMENT.

Smith claims that his conviction for statutory rape is unconstitutional because he was not indicted by a grand jury for statutory rape. It is well-settled that Article 3, Section 27 of the Mississippi Constitution “allows for criminal proceedings by criminal information where a defendant represented by counsel has waived indictment by sworn statement.” *Berry v. State*, 19 So.3d 137, 138 (¶7) (Miss. Ct. App. 2009). See also *Diggs v. State*, 46 So.3d 361, 364-65 (¶¶8-9) (Miss. Ct. App. 2010) (citing *Edwards v. State*, 995 So.2d 824, 826 (¶¶7-8) (Miss. Ct. App. 2008)). Where a defendant waives indictment, “the bill of information serve[s] as the functional equivalent of an indictment.” *McCullen v. State*, 786 So.2d 1069, 1075 (¶12) (Miss. Ct. App. 2001). Smith waived indictment and consented to being criminally proceeded against by bill of information. C.P. 152-53. Accordingly, his claim that his conviction is unconstitutional because he was not indicted by a grand jury necessarily fails.

Smith also claims that although he waived indictment, he did so involuntarily. Smith does not bother to tell the Court how or why the waiver was involuntary. For instance, he does not suggest that he was coerced into signing the waiver, nor does he claim that some mental handicap prevented him from understanding what he was signing, nor does he provide any other explanation for his bare claim of involuntariness. Even had Smith offered some explanation for his assertion, it would necessarily fail because any claim that he involuntarily waived indictment is contrary to the record.

Smith signed a waiver of indictment which explicitly stated, “I understand that I am entitled to have this matter presented to a lawfully constituted and impaneled grand jury of this county and district for a determination of whether an indictment should be returned against me herein, and I

hereby expressly waive my right to be proceeded against by indictment and consent to being proceeded against by information.” C.P. 153. The waiver also stated that Smith’s attorney fully advised him of his rights and of the nature of the charges against him and that Smith was “freely and voluntarily executing this waiver . . . .” C.P. 153. Smith acknowledges in his brief that he executed the waiver. Appellant’s brief at 1, 2. At the plea hearing, Smith informed the trial court that he was a college graduate and had no problem reading or writing. C.P. 101. As such, the record affirmatively shows that Smith was advised of his right to have his case presented to a grand jury for indictment and that he knowingly waived that right.

For the foregoing reasons, Smith’s first assignment of error is without merit.

## **II. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION.**

Smith correctly notes that jurisdictional issues may be raised for the first time on appeal. Smith incorrectly asserts that State offered no proof that the rape occurred in Pearl River County, and therefore the Circuit Court of Pearl River County was without jurisdiction to accept his plea.

The bill of information alleged that the rape occurred in Pearl River County. C.P. 152. Additionally, at the plea hearing the State recited the facts it intended to prove if Smith exercised his right to go to trial. In reciting its factual basis, the prosecutor stated that the fourteen-year-old victim was a student in Poplarville and that the thirty-five-year-old Smith was a coach and teacher in Poplarville. C.P. 124. On the night of the rape, Smith picked the victim up near her Poplarville home and drove her to the school baseball field where he had sex with her. C.P. 125. Smith disposed of the used condom in front of the Poplarville Police Station on their way back to the victim's house. C.P. 124-125. Poplarville school officials turned over to the police a report in which the victim stated that she and Smith had sex on school grounds. C.P. 126. This Court can take judicial notice of the fact that Poplarville is in Pearl River County. The bill of information along with the factual basis recited by the prosecutor at the plea hearing shows that the Circuit Court of Pearl River County had jurisdiction to accept Smith's guilty plea.



### **III. A SUFFICIENT FACTUAL BASIS EXISTED FOR THE TRIAL COURT'S ACCEPTANCE OF SMITH'S PLEA OF GUILT TO THE CHARGE OF STATUTORY RAPE.**

A trial court must ensure that a factual basis exists before the court may accept a guilty plea. URCCC 8.04(A)(3). Reviewing courts must ensure that the record contains facts which are "sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." *Lott v. State*, 597 So.2d 627, 628 (Miss. 1992) (quoting *United States v. Oberski*, 734 F.2d 1030, 1031 (5th Cir. 1984)).

Smith's claim that there was an inadequate factual basis because the State did not prove that there was penetration confuses the issue of an adequate factual basis for the acceptance of a guilty plea with the sufficiency of the State's proof. However, the entry of a valid guilty plea relieves the State of the burden of proving each element of the offense charged beyond a reasonable doubt and bars Smith from attacking the sufficiency of the State's evidence. *Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989).

Smith was charged with violating Mississippi Code Annotated §97-3-65(1)(a) which proscribes persons age seventeen and older from having sexual intercourse with a child who is both under the age of sixteen and thirty-six or more months younger than the accused. Miss. Code Ann. §97-3-65(1)(a). At the plea hearing, the State gave a very lengthy and detailed statement of the facts it intended to prove if Smith elected to proceed to trial. Among those facts were that Smith was thirty-five years old and the victim was fourteen years old when "he had sex with her." C.P. 124, 125.

A factual basis for a guilty plea exists where the State recites facts which constitute the crime charged. *Brown v. State*, 989 So.2d 882, 884 (¶9) (Miss. Ct. App. 2007) (citing *Corley v. State*, 585 So.2d 765, 767 (Miss. 1991)). The State's recitation of facts, if proven, constitutes statutory rape.

Accordingly, Smith's claim that no factual basis was established for the acceptance of his guilty plea is without merit.

#### **IV. THE RECORD POSITIVELY ESTABLISHES THAT SMITH WAS ADVISED OF THE ELEMENTS OF THE CRIME CHARGED.**

Smith claims that his guilty plea was involuntary because the trial court did not explain the elements of the crime charged before accepting his plea. Although the trial court judge did not explain the elements of statutory rape to Smith, the record as a whole shows that Smith was advised of the elements of statutory rape prior to entering his guilty plea.

A guilty plea is valid only if it is entered into “voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.” *McNeal v. State*, 951 So.2d 615 (¶6) (Miss. Ct. App. 2007). A plea is voluntary when the defendant has been informed of the nature of the charges against him and the consequences of entering a guilty plea. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992)). The defendant must be informed of the minimum and maximum prescribed penalties and the constitutional rights forfeited by entering a guilty plea. *Id.*

Regarding the trial court’s duty to ensure that the a guilty plea petitioner is aware of the elements of the crime to which he is pleading guilty, this Court has recognized the following.

The United States Supreme Court has “never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.

*Simoneaux v. State*, 29 So.3d 26, 34 (Miss. Ct. App. 2009) (quoting *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005)). Where the trial court does not advise the defendant of the elements of the crime charged, the plea is still voluntary where the defendant is advised of the elements by defense counsel, the charging instrument, the plea petition, and/or the factual basis cited on the record by the prosecutor. *Id.*; *Williams v. State*, 31 So.3d 69, 79 -80 (¶¶29-33) (Miss. Ct. App. 2010).

In the present case, the bill of information laid out all of the elements of the crime of statutory rape. C.P. 152. Smith gave a sworn statement in his Waiver of Indictment that defense counsel explained the elements of the crime charged. C.P. 153. In Smith's plea petition he again acknowledged that defense counsel advised him of the elements of the crime charged. C.P. 154. As previously stated, the prosecutor's detailed on-the-record factual basis laid out the element so the crime of statutory rape. C.P. 124-127. Finally, Smith swore in open court that his attorney explained the bill of information and the crime charged to him, that he read and understood the plea petition and the crime charged, and that he did not need the bill of information read to him because he fully understood the nature of the crime charged. C.P. 96-97, 101, 118.

Because the record as a whole shows that the elements of the crime of statutory rape were explained to Smith by his attorney and also explained by the prosecutor, Smith's claim of involuntariness must fail.

## **V. SMITH RECEIVED CONSTITUTIONALLY EFFECTIVE COUNSEL.**

Smith claims that he received ineffective assistance of counsel because defense counsel allegedly failed to inform him of the elements of the crime charged, erroneously advised him of the “rape shield laws,” failed to explain what a *Alford* plea is, failed to explain the effects of waiving indictment, and “erroneously told Mr. Smith that the State had actual possession of hundreds of alleged text messages between Mr. Smith and the alleged victim.”

As previously shown, Smith’s claim that defense counsel failed to inform him of the elements of the crime charged is contrary to the record, as is his claim that he was not advised of the effects of waiving indictment. C.P. 96-97, 101, 118 153, 154. Smith’s claim that defense counsel did not explain the meaning of an *Alford* plea is also contrary to the record. The plea petition explicitly advised Smith of the meaning and effects of an *Alford* plea. C.P. 154. Additionally, at the plea hearing, defense counsel stated that he advised Smith that it was in his best interest to enter a plea because “there is a strong probability that if he went to trial in this case, he would be found guilty beyond a reasonable doubt by credible evidence.” C.P. 123. Smith agreed with that assessment, and further stated that he was pleading guilty because it was in his best interest. C.P. 123, 128.

The remainder of Smith’s claims are supported only by his own affidavit. There is no evidence in the record to support Smith’s assertion that defense counsel erroneously explained the rape shield laws or that defense counsel was incorrect in his alleged assertion that the State had hundreds of text messages between Smith and the victim. Our reviewing courts have repeatedly stated that a post-conviction relief claim of ineffective assistance of counsel supported only by the defendant’s own affidavit is automatically deemed meritless. *Barnes v. State*, 51 So.3d 986, 989 (¶7) (Miss. Ct. App. 2010) (citing *Brooks v. State*, 573 So.2d 1350, 1354 (Miss. 1990).

Smith fails to prove deficient performance, much less prejudice. As such, his ineffective

assistance claim necessarily fails.

## CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "La Donna C. Holland", written over a horizontal line.

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## CERTIFICATE OF SERVICE

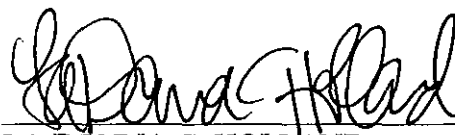
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 15th day of June, 2011.



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