

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

**DERRICK MITCHELL**

**APPELLANT**

**VS.**

**NO. 2010-CP-0327-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**

**DERRICK MITCHELL**

**APPELLANT**

**VS.**

**NO. 2010-CP-0327-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Derrick Mitchell seeks appellate review of summary denial of his motion for post-conviction collateral relief filed on July 6, 2009, in the wake of a guilty plea entered on January 8, 2007, to a single count of sale of cocaine in lower court cause number LK-06-036. (C.P. at 34; appellee's exhibit A, attached)

At the outset we respectfully point out that the transcript of the plea-qualification hearing, volume 2 of 2, misidentifies both the presiding judge as well as the date of the hearing.

The date of the plea-qualification hearing was January 8, 2007, and not January 11, 2000.

The presiding judge accepting Mitchell's plea of guilty was Andrew K. Howorth and not Henry Lackey.

The plea colloquy found in the transcript is in complete harmony with the documents found in the clerk's papers, volume 1 of 2. It is clear that Mitchell entered a plea of guilty to a single count of sale of cocaine and recidivism in lower court cause number LK-06-036 and was given a ten (10) year sentence.

On January 8, 2007, Mitchell entered a voluntary plea of guilty to a single count charging him with the sale of cocaine. The indictment, in its original form, charged in Count One the sale of cocaine and in Count Two the sale of marijuana, both transactions taking place on the same day. (C.P. at 25-26) Following a written motion by the State filed on January 3, 2007(C.P. at 30-31), the indictment was amended to charge Mitchell as a habitual offender under Miss.Code Ann. 99-19-83. (C.P. at 32-33)

After an apparent plea bargaining deal, the State reduced the charge to one brought under §99-19-81, the lesser habitual. (R. 2-3, 12-14) The Circuit Judge, Andrew K. Howorth, thereafter sentenced Mitchell to serve ten (10) years in the custody of the MDOC. (R. 13-14; C.P. at 27-29)

A separate charge in another cause number - LK 06-316 - was retired altogether, and Count II in the present cause number - LK 06-036 - was, likewise, retired to the files. (C.P. at 13-14)

On July 6, 2009, two (2) years and six (6) months following his voluntary plea of guilty, Mitchell filed a motion for post-conviction collateral relief alleging the amendment to his indictment was defective and his sentence as a habitual offender improper. Mitchell did not seek to vacate his plea of guilty; rather, the relief requested was vacation of the habitual offender portion of his sentence which required him to serve his ten (10) years, day for day, without the benefit of probation or parole. (C.P. at 21)

Mitchell's post-conviction claims assailing the validity of his amended indictment charging him as a habitual offender was waived by Mitchell's voluntary plea of guilty. Accordingly, the circuit judge did not abuse his judicial discretion in finding that Mitchell's motion was plainly without merit pursuant to Miss.Code Ann. 99-39-11(1) and (2).

## STATEMENT OF FACTS

DERRICK MITCHELL appeals from the summary denial of his motion for post-conviction collateral relief filed on July 6, 2009, over two (2) years after his indisputably voluntary plea of guilty on January 8, 2007, to a single count of sale of cocaine.

The target of Mitchell's post-conviction motion was his sentence of ten (10) years which Mitchell contends was improperly imposed in the wake of an improper amendment to his indictment charging him as a habitual offender.

Circuit Judge Andrew K. Howorth found as a fact and concluded as a matter of law that the petitioner's Motion for Post-Conviction Collateral Relief was plainly without merit and should be dismissed summarily for non-support of Mitchell's claims. (C.P. at 34; appellee's exhibit A, attached)

In his appeal to this Court, Mitchell, within the context of allegedly ineffective counsel representing him during his guilty plea, raises two (2) identifiable issues.

**Issue One.** The trial court erred in sentencing Mitchell as a habitual offender "... where the amendment to the indictment was defective and failed to meet statutory and constitutional requirements on setting out required information as to [the] date of judgment in prior convictions."

**Issue Two.** The trial court erred in failing to find that Mitchell was denied the effective assistance of counsel during the sentencing proceedings.

Mitchell's "Petition to Enter Plea of Guilty" is not a matter of record. A transcript of the plea-qualification hearing conducted before Judge Howorth on January 8, 2007, is included in the record at R. 1-15.

## SUMMARY OF THE ARGUMENT

Mitchell, within the context of ineffective counsel, claims “. . . Mitchell’s counsel allowed Mitchell to be sentenced as a habitual offender without any possibility of parole on the basis of a faulty and unconstitutional amendment to the indictment.” (Brief For Appellant at 11)

While it is true that Mitchell and his lawyer confessed the amendment charging Mitchell as a life time habitual offender, we note with profound interest the State amended the indictment further to reduce the charge “. . . from life time habitual to day for day habitual, that is [99-19-83] to [99-19-81] and LK 06-316 is retired all together and count II of LK 06-036 which is the instant matter is similarly retired.” (R. 13)

This was a part and parcel of a bargain struck by Mr. Levidiotis and the State. (R. 5-6)

Judge Howorth found as a fact that Mitchell was a habitual offender and, pursuant to the State’s recommendation, sentenced Mitchell “. . . as a habitual offender under the lessor [sic] habitual statute to a term of ten (10) years in an institution to be designated by the Department of Corrections.” (R. 14)

Defense counsel cannot be found ineffective because he negotiated for Mitchell a real meal deal.

“This court reviews the denial of post-conviction relief under an abuse of discretion standard.” **Philips v. State**, 856 So.2d 568, 570 (Ct.App.Miss. 2003).

It is enough to say that a review of the findings of fact and conclusions of law reached by Judge Howorth should result in a finding the trial court did not abuse its judicial discretion in finding that Mitchell’s post-conviction complaint was plainly without merit.

By entering a voluntary plea of guilty, Mitchell admitted all the elements of the charge and, at the same time, waived all non-jurisdictional defects contained in the indictment, including the date



of the prior judgments.

“The burden is upon [Mitchell] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief.” **Bilbo v. State**, 881 So.2d 966, 968 (¶3) (Ct.App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000). Mitchell has failed to do so here.

When reviewing the trial court’s decision to deny a petition for post-conviction relief, an appellate court will not disturb the trial court’s factual findings unless they are found to be clearly erroneous. **Brown v. State**, 731 So.2d 595, 598 (¶6) (Miss. 1999).

“A trial judge’s finding will not be reversed unless manifestly wrong.” **Hersick v. State**, 904 So.2d 116, 125 (Miss. 2004).

“However, where questions of law are raised the applicable standard of review is *de novo*,” i.e., afresh or anew. *Id.*

Mitchell has failed to make out a *prima facie* post-conviction showing he was denied the effective assistance of counsel during his guilty plea for failing to object to the amendment.

Counsel’s performance, contrary to Mitchell’s position, was neither deficient nor did any deficiency prejudice Mitchell. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State**, 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State**, 736 So.2d 500 (Ct.App.Miss. 1999). It cannot be said that but for counsel’s failure to do this or to do that Mitchell would not have entered his plea of guilty.

## ARGUMENT

**MITCHELL’S VOLUNTARY PLEA OF GUILTY  
TO THE SALE OF COCAINE WAIVED  
AND/OR FORFEITED HIS RIGHT TO ASSAIL  
IN A POST-CONVICTION ENVIRONMENT  
ALL NON-JURISDICTIONAL DEFECTS IN HIS  
INDICTMENT, INCLUDING THE DATE OF  
THE PRIOR JUDGMENTS.**

**MITCHELL WAS NOT DENIED EFFECTIVE  
ASSISTANCE OF COUNSEL BECAUSE  
COUNSEL NEGOTIATED A LESSER  
SENTENCE UNDER A LESSER STATUTE.**

Mitchell argues the amendment made on the day of his plea to the habitual offender portion of his indictment failed to describe the previous convictions with the required particularity.

The order of the circuit judge summarily denying post-conviction relief should be affirmed for the following reasons.

**Waiver of Claim(s).**

Because Mitchell entered a valid plea of guilty, he waived any non-jurisdictional defects in his indictment or information. **Drennan v. State**, 695 So.2d 581, 584 (Miss. 1997) (“[A] valid guilty plea . . . admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment [or information] against a defendant.”), citing various cases; **Hunt v. State**, 11 So.3d 764 (Ct.App.Miss. 2009); **Swift v. State**, 6 So.3d 1108 (Ct.App.Miss. 2008), reh denied, cert denied 11 So.3d 1250 (2009), cert denied 130 S.Ct. 100 (2009).

There are two exceptions where a guilty plea does not waive a defect in an indictment: (1) failure to charge an essential element of a *criminal offense* and (2) subject matter jurisdiction. **Morgan v. State**, 966 So.2d 204 (Ct.App.Miss. 2007) Neither one of the two exceptions applies here because “Sections 99-19-81 and 99-19-83 of the Miss.Code Ann. are not *criminal offenses* and only affect sentencing.” **Osborne v. State**, 404 So.2d 545, 548 (Miss. 1981).

The “[e]ntry of a guilty plea is, itself, an act of waiver of all defects in the indictment that could have been cured by amendment.” **Smith v. State**, 880 So.2d 1094, 1099 (Ct.App.Miss. 2004).

In **Shinall v. State**, 832 So.2d 1291 (Ct.App.Miss. 2002), a defendant charged with robbery,

by entering a guilty plea, waived any alleged discrepancy in the indictment as to the exact date of the offense.

Mitchell's indictment, as it originally stood, clearly identified the jurisdiction as the Circuit Court of Lafayette County. The amendment, almost as clearly, identifies the jurisdiction of prior convictions as "this court" which properly denotes the jurisdiction as being the Circuit Court of Lafayette County. Admittedly, neither the motion to amend nor the amendment itself contains the date of the prior convictions, but both describe with specificity the nature of the offense for which Mitchell was convicted, and both state that he was sentenced to serve, and did serve, one year or more in the custody of the MDOC. (C.P. at 32-33)

In addition to all this, the circuit court cause numbers of both of the prior convictions are contained in the amendment, *viz.*, LK98-265B and LK98-331D. This clearly provided Mitchell and his lawyer with access to the dates of the judgment and was sufficient to inform Mitchell of the specific prior convictions upon which the State relied and to which the defendant ultimately confessed. (R. 13) *See Franklin v. State*, 766 So.2d 16 (Ct.App.Miss. 2000), reh denied.

It is well settled that a plea of guilty operates to waive and/or forfeit all non-jurisdictional rights and defects incident to trial. **Rowe v. State**, 735 So.2d 399 (Miss. 1999); **Anderson v. State**, 577 So.2d 390, 392 (Miss. 1991); **Dennis v. State**, 873 So.2d 1045 (Ct.App.Miss. 2004).

A valid guilty plea admits all the elements of a formal charge and operates as a waiver of all non-jurisdictional defects in a criminal case. **Edmondson v. State**, 17 So.3d 591 (Ct.App.Miss. 2009); **Swift v. State**, *supra*, 6 So.3d 1108 (Ct.App.Miss. 2008), reh denied, cert denied 11 So.3d 1250 (2008), cert denied 130 S.Ct. 100 (2009).

The failure to include the date of the prior judgments in the habitual offender amendment to the indictment is, at best, a non-jurisdictional defect which is waived by a voluntary plea of guilty.

Mitchell himself told Judge Lackey, "I'm just pleading guilty because I want to plead." (R. 5)

A valid guilty plea operates as a waiver of all non-jurisdictional defects contained in an indictment or information against an accused. **Bowling v. State** 12 So.3d 607 (Ct.App.Miss. 2009); **Edmondson v. State**, *supra*, 17 So.3d 591 (Ct.App.Miss. 2009); **Swift v. State**, *supra*, 6 So.3d 1108 (Ct.App. Miss. 2008), reh denied, cert denied 11 So.3d 1250 (2008), cert denied 130 S.Ct. 100 (2009).

In **Miller v. State**, 973 So.2d 319 (Ct.App.Miss. 2008), the Court held that Miller waived any argument his indictment for the sale of cocaine was defective where no argument was made that his plea of guilty was invalid. The same appears to be true here.

In **Cannon v. State**, 918 So.2d 734, 742 (Ct.App. Miss. 2005), we find the following language also applicable here:

The supreme court has held that amendments to charge habitual status are not viewed as a matter affecting the substance of the offense and are allowed under URCCC Rule 7.09. *Burrell v. State*, 726 So.2d 160 (¶4) (Miss. 1998). Accordingly, this Court has followed that precedent and found that such amendments affect only sentencing and not the substance of the underlying offense. *Williams v. State*, 766 So.2d 815, 817 (¶5) (Miss.Ct.App. 2000), *Anderson v. State*, 766 So.2d 133, 135 (¶¶ 4-5) (Miss.Ct.App. 2000). We refuse to stray from such holdings and thus find this issue without merit.

See also **Shumaker v. State**, 956 So.2d 1078 (Ct.App.Miss. 2007), quoting from **Swington v. State**, 742 So.2d 1106, 1118 (¶44) (Miss. 1999) ["Prior offenses used to charge a defendant as an habitual offender are not substantive elements of the offense charged."]

Mitchell, by pleading guilty after conferring with his attorney in the witness room and being, by all appearances, satisfied with the deal that was reached (R 5-6), waived his claims which were non-jurisdictional in nature and only affected his sentencing. Mitchell could have received life under 99-19-83; instead he got ten (10) years, day for day, under 99-19-81.

Mitchell, by voluntarily pleading guilty, has failed to demonstrate “a claim that is *procedurally alive which substantially shows that he has been denied a state or federal right.*”

**Horton v. State**, 584 So.2d 764, 767 (Miss. 1991).

**Ineffective Assistance of Counsel.**

Mitchell also presents his arguments targeting an improper amendment to his indictment within the context of allegedly ineffective counsel.

We note first of all that Mitchell has never - no, not once - contested or disputed the prior felony convictions and/or sentences used to enhance the duration of his most recent sentence. There was no contemporaneous and specific objection to the introduction of prior convictions. We note also the defendant confessed the amendment to the life time habitual status. (R. 13) Mitchell’s complaint is devoid of merit for these reasons, if for none other. **Torrey v. State**, 891 So.2d 188 (Miss. 2004) [Amendment to indictment in order to charge defendant under §99-19-91 was proper where at trial defendant neither disputed nor contested the prior felony sentences introduced by the State.]

In any event, defense counsel’s performance was not deficient for the following reasons:

During the plea-qualification hearing, Mr. Levidiotis made the following observations:

BY MR. LEVIDIOTIS: Just for purposes of making an absolutely clean record, came in today, we confessed the amendment to life time habitual offender, the State made a motion to reduce it from life time habitual to day for day habitual, that is “Big Bitch” to “Little Bitch” and LK 06-316 is retired all together and count II of LK 06-036 which is the instant matter is similarly retired. (R. 13)

The trial judge accepted the recommendation made by the State that the court sentence Mitchell to serve ten (10) years. (R. 13-14)

There was no deficiency in defense counsel’s performance and no prejudice to Mitchell.

## CONCLUSION

Miss.Code Ann. § 99-39-11 reads, in its pertinent parts, as follows:

\* \* \* \* \*

(2) *If it plainly appears* from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, *the judge may make an order* for its dismissal and *cause the prisoner to be notified*.

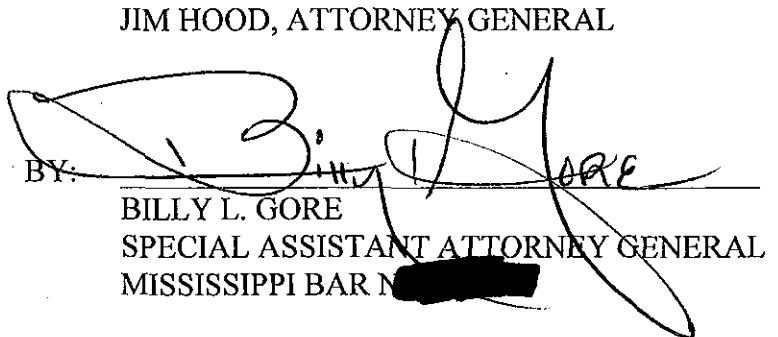
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It does, he did, and he was. **Garlotte v. State**, 530 So.2d 693 (Miss. 1988) ["This case presents an excellent example of the appropriate use of the summary disposition provision of §99-39-11(2)]; **Falconer v. State**, 832 So.2d 622 (Ct.App.Miss. 2002) ["(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without merit."].

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the guilty plea voluntarily entered by Derrick Mitchell or his sentence as a habitual offender imposed in its wake. Accordingly, the judgment entered in the lower court summarily denying Mitchell's motion for post-conviction collateral relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

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IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

DERRICK MITCHELL

PETITIONER

V.

CAUSE NO. L09-428

THE STATE OF MISSISSIPPI

RESPONDENT


ORDER DENYING RELIEF REQUESTED

This cause is before the Court by virtue of the filing by Petitioner of a Motion for Post-Conviction Collateral Relief. The Court considered the relief requested in the document, pursuant to Miss. Code Ann. Sec. 99-39-11(1) and (2).

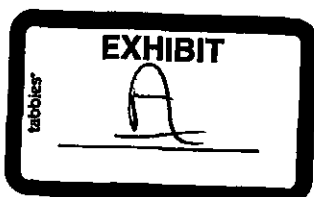
After reviewing the document filed by the Petitioner, as well as the court file in this case, the Court finds it plainly appears from the face of the motion, exhibits, and prior proceedings that the Petitioner is not entitled to any relief. Therefore, the Court is of the opinion the requested relief is not well taken and hereby DENIED.

The Clerk is ordered to provide a copy of this Order to the Petitioner.

SO ORDERED and ADJUDGED, this the 25<sup>th</sup> day of January, 2010.

  
ANDREW K. HOWORTH  
CIRCUIT COURT JUDGE

FILE THIS THE 25 DAY OF Jan, 2010  
MINUTE BOOK 68 PAGE 531  
MARY ALICE BUSBY, CIRCUIT CLERK  
BY AR D.C.



## **CERTIFICATE OF SERVICE**

I, Billy L. Gore, 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:

**Honorable Andrew K. Howorth**

Circuit Judge, District 3  
1 Courthouse Sq.  
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Oxford, MS 38655

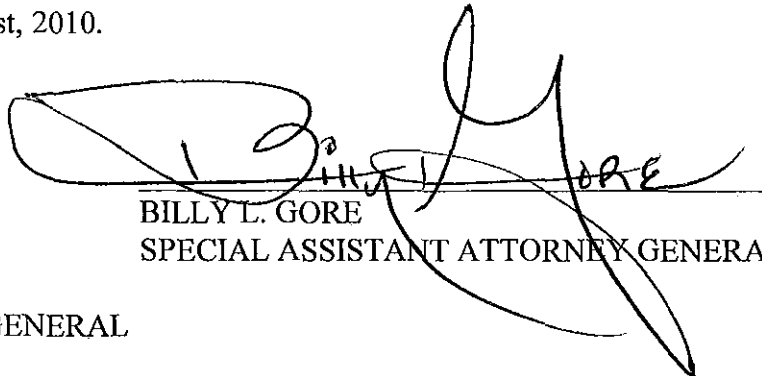
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