

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OLIVER OTIS MCCRAY

APPELLANT

VS.

NO. 2011-CA-0220

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. MCCRAY'S INDICTMENT WAS NOT DEFECTIVE.
- II. MCCRAY DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF FACTS

On January 26, 2007, Oliver Otis McCray robbed and killed Tony Porter. C.P. 1, T. 8-10. McCray had prior felony convictions occurring out of separate transactions for grand larceny and receipt of stolen property, and he served more than one year imprisonment for each conviction. C.P. 1. As a result, McCray was indicted as a habitual offender for one count of robbery, one count of murder, and one count of possession of a firearm by a previously convicted felon. C.P. 1-2. McCray was originally appointed counsel after claiming to be indigent, but later retained private counsel. C.P. 5, 13. Defense counsel negotiated a plea deal with the State, which allowed McCray to plea to robbery and a reduced charge of manslaughter. C.P. 75-79. After entering a knowing, voluntary, and intelligent plea in the Circuit Court of Wilkinson County, McCray was sentenced to serve consecutive sentences of twenty years for manslaughter and fifteen years for robbery. C.P. 83-84. McCray subsequently filed a motion for post-conviction relief which was summarily denied by the trial court. C.P. 132-33, 138-141.

SUMMARY OF ARGUMENT

McCray's indictment was not defective. The certified copy of McCray's indictment in the official record shows that it was in fact signed by the foreman of the grand jury. Even had it not been signed, McCray waived all non-jurisdictional defects in the indictment upon the entry of a valid guilty plea.

McCray's claim of ineffective assistance of counsel is supported only by his own self-serving affidavit. His claims also contradict sworn statements he made in open court at the guilty plea hearing. Accordingly, his ineffective assistance claims necessarily fail.

ARGUMENT

I. MCCRAY'S INDICTMENT WAS NOT DEFECTIVE.

McCray claims that his indictment was defective because it was not signed by the foreman of the grand jury or the circuit clerk. First, it should be noted that in his motion for post-conviction relief filed in the trial court, McCray's entire argument regarding his indictment was stated as follows. "Petitioner's indictment is defective. Because petitioner's indictment is defective, the trial court lacked jurisdiction to accept Petitioner's guilty plea." C.P. 132. McCray, through counsel, could not be bothered to elaborate on his claim. Only now for the first time on appeal does McCray explain that his indictment was allegedly defective because it was not signed by the foreman of the grand jury or the circuit clerk. Because McCray significantly expands on appeal the argument raised in the trial court, his claim could be deemed procedurally barred. See *Bartolo v. State*, 32 So.3d 522, 531 (¶37) (Miss. Ct. App. 2009).

If McCray's argument is not barred, it is certainly without merit. McCray, through counsel, asks this Court to consider an unsigned, unfiled, uncertified copy of his indictment which he has attached to his brief as "Exhibit A." McCray's copy is not part of the official record and cannot be considered on appeal. *Fairley v. State*, 812 So.2d 259, 263 (¶10) (Miss. Ct. App. 2002). The official record shows that McCray's indictment was in fact signed by both the foreman of the jury and the circuit clerk. Further, even if McCray had been correct in his assertion that his indictment had not been signed by the foreman of the grand jury, McCray would have waived the nonjurisdictional defect upon the entry of his valid guilty plea. *Clark v. State*, 54 So.3d 304, 308 (¶9) (Miss. Ct. App. 2011). Therefore, McCray's first assignment of error is both frivolous and without merit.

II. MCCRAY DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

McCray claims that he received ineffective assistance of counsel because trial counsel failed to object to perceived deficiencies in the indictment, failed to investigate, and allegedly promised McCray that he would receive a twenty year sentence if entered a plea of guilt to murder and robbery. McCray offers only his own self-serving affidavit to support his claim of ineffective assistance of counsel. Where a post-conviction relief petitioner offers only his own affidavit to support his claim of ineffective assistance of counsel, the claim is automatically deemed to be without merit. *Vielee v. State*, 653 So.2d 920, 922 (Miss. 1995). Accordingly, McCray's claim must fail. The State will however, briefly address the alleged deficiencies of trial counsel.

The State has already shown that McCray's claim that his indictment was defective is meritless. As such, defense counsel did not render deficient performance in that regard.

As to McCray's claim that defense counsel failed to investigate the charges, our reviewing courts have repeatedly held that "[a] defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what the investigation would have revealed and specify how it would have altered the outcome of trial." *Woodward v. State*, 843 So.2d 1, 18 (¶46) (Miss. 2003). McCray fails to meet this requirement.

Finally, McCray claims that defense counsel promised that if he pleaded guilty to manslaughter and robbery, that his sentences would be ordered to run concurrently, resulting in twenty years imprisonment, rather than the thirty-five he actually received. McCray's plea petition clearly states that no one had made any promises to him to induce him to enter a guilty plea. C.P. 77. McCray also swore in his plea petition that "I understand neither my attorney nor any other person can represent to me that I will receive any particular sentence if I plead guilty. The final decision as to the sentence(s) rests with the Court." C.P. 77. McCray also swore in open court that

his attorney fully explained the plea petition to him, and that he understood everything in the plea petition. T. 7. McCray swore in open court that he was aware of the maximum sentences for each charge, and that he understood that the Court could run the sentences consecutively. T. 10-11. Armed with this knowledge, McCray made a knowing, voluntary, and intelligent decision to plead guilty to the reduced charges. Where an appellant's unsupported claims on appeal contradict sworn statements made in open court, reviewing courts place greater weight on the statements made under oath. *McNeal v. State*, 951 So.2d 615, 615 (¶8) (citing *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999)).

For the foregoing reasons, McCray's ineffective assistance of counsel claims are without merit.

CERTIFICATE OF SERVICE

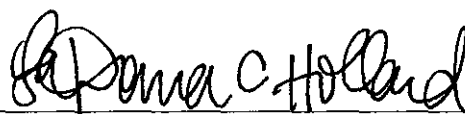
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 7th day of December, 2011.



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