IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RODNEY HILLS — APPELLANT

VS. — NO. 2011-CP-0376-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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RODNEY HILLS **APPELLANT**

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PROCEDURAL HISTORY:

On January 26, 2009, Rodney Hills, "Hills" pled guilty to ten counts of narcotics violations. He pled guilty to two counts of possession of cocaine with intent to distribute as a M. C. A. Sect. 99-19-81 habitual offender before the Circuit Court of Pike County, the Honorable David H. Stone presiding. R. 1-25. Hills was given two concurrent sixteen year sentences with four years suspended and five years of post release supervision in the custody of the Mississippi Department of Corrections. R.20-24 ; C.P. 6-8.

Mr. Hills filed a pro se "Motion For Post Conviction relief" which the trial court denied. C. P. 8-39; 47-48.

From denial of his post trial motions, Hills filed a pro se notice of appeal to the Mississippi Supreme Court. C.P. 49.

ISSUES ON APPEAL

I.

WAS IT PLAIN ERROR TO SENTENCE HILLS AS AN HABITUAL OFFENDER?

II.

DID HILLS RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

III.

WAS HILLS DENIED DUE PROCESS AT HIS SENTENCING?

STATEMENT OF THE FACTS

On the January term 2008, Mr. Hills was indicted for sale of cocaine within 1500 feet of a church and conspiracy to distribute cocaine. Hills was indicted as a M. C. A. Sect. 41-29-147, and a M. C. A. Sect. 99-19-81 habitual offender. C.P. 2-7. He was indicted for some "ten" different drug related felonies. They were enumerated in the record by the trial court as follows: "08-252, 08-254, 08-256, 08-258, 08-260, 08-262, 08-264, 08-266, 08- 268, and 08-270." C.P. 2-7; and R. 1.

In addition, the indictment made it clear on its cover page, and in the contents as stated "with clarity and specificity" that the appellant was indicted "with enhanced punishment" both as an M. C. A. Sect. 99-19-81 and also a M. C. A. Sect. 41-29-139 habitual offender for making a cocaine sale within 1,500 feet of a church. C.P. 2-6.

On January 26, 2009, Mr. Hills pled guilty as a M. C. A. 99-19-81 habitual offender before the Circuit Court of Pike County, the Honorable David H. Strong presiding. R. 1-19. He was represented by Mr. Matt Baldridge. R. 1.

The trial court advised and questioned Hills and his counsel about his understanding of the Constitutional rights which he would be waiving by pleading guilty. R. 4-6. The appellant admitted under oath to understanding his rights, and that by pleading guilty he would be waiving them. R. 6. The appellant admitted that he was "satisfied" with the advice and representation provided by his guilty plea counsel. R. 5.

Q. **Are you satisfied with their services?**

A. **Yes, sir, your honor.** R. 5. (Emphasis by appellee).

Hills admitted that his counsel had gone over discovery with him. R. 12. The appellant admitted that he believed that the prosecution could prove him guilty beyond a reasonable doubt. He did not take issue with the evidence stated on the record against him. He admitted that he was guilty

of possession of cocaine with intent to distribute for two of the ten indicted felonies, 08- 262, and 08-266.

> Court: **All right, Mr. Hills, have you heard what the state would seek to prove if your cases went to trial?**
>
> Defendant: **Yes, sir, Your Honor.**
>
> Court: **And if the state were able to prove those things to a jury, do you believe a reasonable jury could find you guilty of all counts to which you have plead guilty?**
>
> Defendant: **Yes sir.** R. 12. (Emphasis by appellee).

The appellant admitted that he was pleading guilty intelligently and knowingly.

> Court: **Has anyone threatened , abused, or promised you anything to cause you to want to plead guilty?**
>
> Defendant: **No, sir, Your Honor.** R. 8. (Emphasis by appellee).

The appellant admitted knowing that he was pleading intelligently and knowingly to two separate indicted charges for possession of cocaine and conspiracy to distribute cocaine. The appellant admitted knowing the maximum twenty year sentences for his various criminal drug crimes, as well as the recommended sentences being offered by the prosecution. R. 6-7.

The recommended sentences were for two sixteen year sentence, much less than the maximum, as well the running of most of the numerous other sentences "concurrently" rather than consecutively. It included dropping two of the ten charges, "count three and four." R. 13-14.

The record reflects that the trial court, after advising Hills and questioning him and his counsel found that the appellant had pled guilty "knowingly, willingly, freely, voluntarily and intelligently" with full awareness that the was pleading guilty as a M. C.A. Sect. 99-19-81 habitual offender. R.16-17; 19. The court also found "there exists a factual basis for the pleas." R. 16.

On February 26, 2009, Hills was given a separate sentencing hearing as an M. C. A. Sect. 99-19-81 habitual offender. R. 19-25. The record reflects that the appellant and his counsel had previously been given documentation as to the prior convictions, in the form of "actual prior sentencing orders," which they acknowledged receiving. R. 7.

Neither the appellant nor his counsel took issue with that documentation or with the fact that these were the appellant's previous convictions for which he received and had been sentenced to serve a sentence of at least a year in the penitentiary. R.7 ; 19-25.

The record reflects that the trial court gave the appellant the sentences as recommended by the prosecution at the guilty plea hearing. R. 21-24.

On August 9, 2010, the appellant filed a pro se "motion for post conviction relief," claiming that he received an illegal sentence. C.P. 8-39. He alleged his habitual criminal sentences were improper because the indictment against him did not included a statement of the dates of judgment for each of his prior felonies for which he was sentenced to a year or more.

The trial court denied relief. C.P. 47-48. The trial court found that there was sufficient evidence for finding that the prior felony convictions and sentences were stated with sufficient "certainty and particularity" to put the appellant and his experienced guilty plea counsel on notice as the crimes qualifying him for enhanced sentencing as a M. C .A. Sect. 99-19-81 habitual offender. C.P. 2-5; 47-48.

From the denial of relief, the appellant filed notice of appeal to the Mississippi Supreme Court. C.P. 49.

SUMMARY OF ARGUMENT

1. The record reflects that the trial court found that the appellant was properly sentenced with more than adequate documentation as an Sect. 99-19-81 habitual offender. C.P. 47-48. The court found that the indictment stated with "clarity and particularity" the separate felony drug offenses for which the appellant had previously been convicted on separate occasions and for which he had been sentenced to serve "separate terms of a year of more" in prison. C.P. 2-6; 47-48.

The record also reflects that the appellant and his experienced counsel admitted under oath, based upon discovery and abundant documentation, that the appellant did qualify for enhanced sentencing as a M. C.A. Sect. 99-19-81 "habitual offender." R. 7; 16 .

The record reflects that the appellant acknowledged under oath that he knew he was pleading guilty as a M. C. A. Sect. 99-19-81 habitual offender to two specific possession of cocaine with intent to distribute offenses which occurred on two separate occasions. R. 1-25; 16.

The record reflects the indictment stated with clarity and particularity the prior felony convictions which qualified the appellant for enhanced sentencing. C.P. 2-5. **Mitchell v. State** 58 So.3d 59, 61 -62, (Miss. Ct. App. 2011); and **Benson v. State,** 551 So. 2d 188, 195 (Miss. 1989).

2. The record reflects that the appellant received effective assistance of counsel. The appellant is serving two concurrent sixteen year sentences instead of consecutive sentences for ten different felony convictions. R. 20-24. His counsel negotiated a very favorable sentence which included the dropping of two of the charges. R. 12. The record reflects that the appellant admitted that he was "satisfied" with the services provided by his counsel. R. 5.

The appellant admitted that he was guilty of the two possession of cocaine with conspiracy to distribute crimes. He did not take issue with the prosecution's statement of the facts it was prepared to prove in the event of a trial. R. 12.

The appellant and his counsel did not object or take issue with the prosecution's statement of or documentation for the appellant's prior offenses which qualified him for enhanced sentencing. R. 7; 20-24. **Hannah v. State**, 943 So 2d 20, 24 (¶ 6)(Miss. 2006) ; **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991).

3. The record reflects that the appellant received due process of law. His indictment stated with clarity and particularity his numerous prior felony convictions. C.P. 2-5. He was given discovery, as well as an experienced guilty plea counsel and a separate sentencing hearing with documentation about his prior felony sentences.

The appellant admitted that he was guilty of having committed these drug possession with conspiracy to distribute felonies. He did not take issue with the prosecution's statement as to the time, dates, nature of the felony and the fact that the appellant was "separately sentenced to serve a year or more" on each of those previously committed felony crimes which were committed at separate times and places. **Rose v. Clark**, 478 U.S. 570, 579, 92 L. Ed. 2d 460, 471, 106 S. Ct. 3101 (1986).

ARGUMENT

PROPOSITION I

THE RECORD INDICATES THAT HILLS KNOWINGLY PLED GUILTY AS AN HABITUAL OFFENDER TO THE SAME FELONIES LISTED IN HIS INDICTMENT WITH FACTUAL SPECIFICITY.

Mr. Hills argues that his M. C. A. Sect. 99-19-81 habitual offender sentence was improperly imposed and should be vacated. It should be vacated because his indictment did not include the date of judgments for his previous felonies as required by Rule 11.03(1) of the Uniform Rules of Circuit and County Court, "the URCCC." Hill argues that this was plain error, and that he received illegal sentences which should be vacated. Appellant's pro se brief page 1-14.

The record reflects that Hills' indictment stated with particularity the nature of the offenses constituting the previous convictions. The record reflects that the indictment also stated the sentencing dates and accompanying orders for the appellant's numerous prior felony drug convictions in Pike County as well as the book and page numbers in the records of the Circuit Court Clerk where the separate sentences of a year of more could be found. C.P. 2-7.

In **Mitchell v. State** 58 So.3d 59, 61 -62 (Miss. Ct. App. 2011), the Court relied upon **Benson v. State**, 551 So. 2d 188, 195 (Miss. 1989) . The Court found that although the dates of judgments of the prior felonies were not included in the indictment, that there was sufficient specific information as to the nature, description, the court, the cause numbers of the prior felonies and the actual specific orders giving separate sentences of a year or more given for each felony conviction. This was sufficient to put the appellant on notice to defend himself should there have been any problem with this public information.

> ¶ 10. In accord with **Benson**, we find in the instant case that even though the date of judgment for each prior conviction was not provided in the amendment to Mitchell's indictment, all the information contained therein afforded Mitchell access to the date

of judgment. The amendment provides the nature and description of each prior felony conviction; it indicates the court in which each conviction was adjudicated; it states the sentence given by the court for each conviction and that Mitchell served one year or more for each sentence; and it provides the cause number for each case.
¶ 11. All this fairly enabled Mitchell to defend against the State's habitual-offender charge if Mitchell so chose. Mitchell did not.
¶ 12. As previously mentioned, Mitchell told the circuit court that he knew and understood he was pleading guilty as a habitual offender. And Mitchell indicated to the circuit court that he knew the State would recommend a ten-year sentence to the court. This issue is without merit.

In addition, the record indicated that the appellant indicated under oath that he knew he was pleading guilty under a plea agreement as a M.C. A. Sect. 99-19-81 habitual offender based upon the aforesaid enumerated separate felonies. R. 16.

The record indicates that Hills stated under oath that he was pleading guilty as a M. C.A. Sect. 99-19-81 habitual offender. He pled guilty specifically to 08-262-PKS, for possession of .1-2 grams of cocaine and conspiracy to distribute and specifically to O8-266-PKS , for possession of 2-10 grams of cocaine and conspiracy to distribute as a M. C. A. Sect. 99-19-81 habitual offender R. 16.

Court: **In 08-262-PKS, to the offense of possession of .1-2 grams of cocaine, enhanced by a prior conviction as 19-81 habitual criminal?**

Defendant: **Guilty, Your Honor.**

Court: In 08-264-PKS...

Byrd: I'm sorry, Your Honor. Also in 262 there is conspiracy as well.

Court: **I'm sorry, as well as conspiracy in 262.**

Defendant: **Guilty, Your Honor.**

Court: in 08-264-PKS, to the offense of sale of cocaine?

Defendant: Guilty, Your Honor.

Court: **In 08-266-PKS, to the offense of possession of 2-10 grams of cocaine as a**

19-81 habitual criminal?

Defendant: **Guilty, Your Honor.** R. 16. (Emphasis by appellee).

The record reflects that the trial court found that Hills' pleas were "knowingly, freely, voluntarily and intelligently entered." R. 16-17. The appellant admitted that he had not been coerced or promised anything in exchange for his guilty plea. He admitted that he knew he was waiving his Constitutional rights to a trial by jury with cross examination, and a right against self incrimination.

The appellant admitted knowing the maximum sentences for his numerous drug related offenses as well as the recommended sentences being offered in a plea agreement with the prosecution. This included the dropping of two of the ten felony drug charges. R. 1-25.

And crucially for the appellant's argument on appeal, the record cited indicates that the appellant's experienced counsel stated under oath that based upon discovery, he believed that the appellant qualified for enhanced sentencing as a M. C. A. Sect. 99-19-81 habitual offender. R. 7.

> Court: **And for the record, I know it's going to be put on the record, but is there any question, Mr. Baldridge or Mr. Byrd, that Mr. Hills does, in fact, qualify as a 19-81 habitual?**
>
> Byrd: **No, Your Honor. He was indicted as such and copies of the prior sentencing orders have been attached. None by the state, your Honor.**
>
> Baldridge: **No objection to the 19-81.** (Emphasis by appellee).

After the trial court advised and questioned both Hill and his counsel, he found with record support that his guilty pleas were voluntarily and intelligently entered with a factual basis for his plea. R. 16. The record clearly indicates, as found by the trial court, that the previous felonies for which the appellant was separately sentenced to serve a year or more were stated with clarity and particularity.

This issue is lacking in merit.

PROPOSITION II.

HILLS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The appellant argues that he received ineffective assistance of counsel. He argues that he did not receive effective assistance because his trial counsel did not raise with the trial court the fact that the indictment against him did not include a separate statement of the dates of judgment against him as required by the requisite Rule 11.09 of the URCCC dealing with enhanced punishment for a defendant. Appellant's brief page 14-18.

As stated above, the record reflects that the appellant's indictment included the date, nature of the prior felony convictions , the court and the book and page number where the sentencing orders for each of the numerous prior drug related separate felony conviction for which he was sentenced to serve a year or more could be found. C. P. 2-5. In addition, as shown with cites to the record his counsel admitted that the prosecution had provided sufficient documentation for establishing that the appellant qualified for enhanced sentenced. R.7.

It was upon this basis that the trial court found that the appellant had knowingly and intelligently pled guilty before the trial court as a M. C. A. Sect. 99-19-81 habitual offender. R. 16-17.

The record reflects the appellant admitted under oath that he knew that he was waiving his right to a jury trial, and that he knew the maximum sentences which he could receive by pleading guilty as well as the recommended sentences being offered by the prosecution. This included not sentencing him to the maximum, as well as retiring two of the ten drug charges, and not running all of his sentences consecutively. R. 1-24.

For the appellant 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). Hill 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 the appellant. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, the appellant must show that there is a reasonable probability that but for the errors of his counsel, the sentences 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 his counsel, the result of the appellant's guilty plea would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

The appellee would submit that the record does not indicate that trial counsel's representation "fell below an objective standard of reasonableness." **Hannah v State**, 943 So 2d 20, 24 (¶ 6)(Miss. 2006). There was also no evidence that but for the alleged unprofessional conduct the result of the proceeding would have been different. .

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that trial counsel erred in assisting the appellant in pleading guilty to two counts of possession of controlled substance and conspiracy to distribute as an 99-19-81 habitual offender.

The prior felony convictions and separate sentences were well documented. They were clearly stated in the indictment and guilty plea counsel admitted along with Hills that the appellant did qualify for enhanced 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.

The record reflects the appellant stated under oath that he was "satisfied with the services" provided by his counsel. R. 5. The appellee would submit that the record reflects effective assistance of counsel. As a result of his counsel's representation, the appellant is enjoying two sixteen year concurrent sentences. R. 20-22.

This is much less than what he could have received, given the evidence against the appellant, his admissions of being guilty as charged and the fact that his sentences could have been run consecutively rather than concurrently. All of these sentences if run concurrent could have amounted to a very long sentence. The appellant's guilty plea counsel also negotiated an agreement which resulted in "counts three and four" of the ten charges being dropped. R. 13.

This issue is also lacking in merit.

PROPOSITION III

THE RECORD REFLECTS HILLS RECEIVED DUE PROCESS OF LAW.

The appellant argues that he was denied due process of law. He was denied due process since he alleges that the dates of judgments for his numerous prior convictions were not included in his indictment, and/or at his sentencing hearing. The appellant faults not only the Grand Jury, but also his trial counsel and the trial court for this alleged confusing sentencing situation. Appellant's brief page 18-25.

To the contrary, as shown with cites to the record under previous propositions, the record reflects that the appellant was placed on notice as the nature of his previous drug convictions, as well as the dates, times, and nature of the possession of cocaine and conspiracy to distribute cocaine crimes for which he was pleading guilty as an M. C. A. Sect. 99-19-81 habitual offender. The record reflects that the indictment also included the court, the date of sentencing, the cause numbers, the book and page number where the appellant's previous numerous sentencing orders could be found. The record reflects that his counsel was provided copies of "the Orders of Sentencing." R. 7.

In **Rose v. Clark**, 478 U.S. 570, 579, 92 L. Ed. 2d 460, 471, 106 S. Ct. 3101 (1986), the Court stated that if an appellant had counsel and was tried by an impartial adjudicator there was s a "strong presumption" that he received a fair trial. Any error which might have occurred would be merely considered harmless error.

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. When a reviewing court can find that the record developed at trial establishes guilty beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." **Delaware v Van Arsdall**, 475 US, at 682, 89 L Ed 2d 674, 106 S Ct 1431; **United States v**

Hasting, supra, at 508-509, 76 L Ed 2d 96, 103 S Ct 1974.

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. The appellant's two concurrent sentences as a M. C. A. Sect. 99-19-81 habitual criminal should be affirmed, as found by the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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:

Honorable David H. Strong, Jr.
Circuit Court Judge
Post Office Drawer 1387
Mccomb, MS 39649

Honorable Dee Bates, Jr.
District Attorney
284 East Bay Street
Magnolia, MS 39652

Rodney Hills, #R0986
MCCF
Post Office Box 528
Columbia, MS 39429

This the 2nd day of December, 2011.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680