

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES ANTHONY SWILLEY

APPELLANT

VS.

NO. 2011-CP-1198-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS.

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STATEMENT OF THE CASE

On July 25, 2011, JAMES ANTHONY SWILLEY entered a plea of guilty in the Circuit Court of Copiah County to felony shoplifting, Lamar Pickard, Circuit Judge, presiding.

Swilley was arrested outside a local Wal-Mart store and charged with stealing several rib-eye steaks which were found by an off-duty police officer concealed underneath Swilley's shirt. (R. 4-6; C.P. at 24; Brief of Appellant at unnumbered pages 2, 6)

Following a plea-qualification hearing at which Swilley freely admitted his guilt, Swilley was sentenced to serve four (4) years in the custody of the MDOC. (C.P. at 28) The record reflects this was Swilley's third shoplifting offense within a seven (7) year period of time. (C.P. at 48)

On or about September 16, 2011, Swilley filed, *pro se*, a pleading styled "Interlocutory Appeal" in which he argued that the rib-eyes and photographs thereof should have been suppressed because they were the product of an illegal stop and search of his person and seizure of the steaks concealed underneath his shirt. Judge Pickard treated the motion as a petition for post-conviction relief and summarily denied same on the ground Swilley, "having been placed under oath, did

voluntarily and intelligently enter a plea of guilty to Felony Shoplifting.” (C.P. at 12; appellee’s exhibit A, attached.)

Judge Pickard summarily denied post-conviction relief on the ground Swilley’s claims were plainly or manifestly without merit. *See* appellee’s exhibit A, attached.

STATEMENT OF FACTS

James Swilley, a forty-three (43) year old African-American male, resident of Hazlehurst and a high school graduate with a year of college (C.P. at 44), entered a plea of guilty on July 25, 2011, to shoplifting rib-eye steaks from a Wal-Mart store in Hazlehurst on February 13, 2011. (C.P. at 52)

Swilley was subsequently indicted for felony shoplifting.

On the 18th day of July, 2011, an omnibus hearing at which Swilley was represented by counsel was conducted in the Circuit Court of Covich County, Lamar Pickard, Circuit Judge, presiding. (R. 3-14) During the hearing Swilley litigated a motion to suppress the “meats,” as well as the “fruits,” of an allegedly illegal search. (R. 4-14)

Tracy Smith, an off-duty police officer, testified at the hearing he observed Swilley with a bulge underneath his shirt as Swilley walked out of Wal-Mart. (R. 5, 9) Smith followed Swilley and watched “. . . him raise his shirt up and put the items in a bag.” (R. 5)

Q. [CROSS-EXAMINATION BY THE PROSECUTOR:]
And where did this bag come from?

A. [BY OFFICER SMITH:] As I was behind him, I saw him take the bag out of his pocket, and he started taking the items out and putting it in a bag and walking up the hill.

Q. And this was outside the store?

A. Outside the store. (R. 10)

Smith, who suspected a crime of some sort was being committed in his presence, followed

Swilley to a parking lot at the Piggly Wiggly where on-duty officers intercepted Swilley, searched him, and placed him under arrest for suspected shop-lifting. (R. 7-8)

Upon being caught red-handedly with the stolen items in his possession, Swilley made the following comment in Tracy Smith's presence: "Trace, you could have let me go." (R. 8-9)

Following the overruling one week later on July 25th of Swilley's motion to suppress (R. 14, 16), Swilley, after consulting with his lawyer, elected to enter a plea of guilty. (R. 18-19)

A copy of the plea-qualification hearing is found in the record at R. 14-29.

A copy of Swilley's "Petition to Enter Plea of Guilty" is a part of the record at C.P. 44-51.

During his plea-qualification hearing conducted on July 25, 2011, Swilley, under the trustworthiness of the official oath (R. 19), informed the circuit judge he was pleading guilty because he was, in fact, guilty of the charge. (R. 19) Swilley, with an awareness he was waiving or giving up his right to appeal (C.P. 45-46), acknowledged, time and again, he was, in fact, guilty of the crime charged. (R. 19, 25, 28)

Swilley now claims the search of his person and subsequent arrest were illegal because there was "... not sufficient probable cause for the police officers to arrest and search Swilley for more than weapons on a *Terry* pat down." (Brief of Appellant at unnumbered page 3)

Swilley, in a nutshell, argues he was subjected to an unreasonable search and seizure of the rib-eye steaks he was observed removing from underneath his shirt.

The problem with this argument is that Swilley, by entering a voluntary plea of guilty to shoplifting the steaks, waived and or forfeited his constitutional right to raise Fourth amendment claims, including an allegedly unlawful stop, search, seizure and arrest of his person. **Mason v. State**, 42 So.3d 629 (Ct.App.Miss. 2010); **Battaya v. State**, 861 So.2d 364 (Ct.App.Miss. 2003).

This claim is "procedurally barred." **Jones v. State**, 922 So.2d 31, 33 (¶5) (Ct.App.Miss.

2006).

The circuit judge, Lamar Pickard, found as a fact and concluded as a matter of law “. . . that the Petitioner at the time of said [guilty] plea, was fully apprised of the nature of the charges against him and all the facts and circumstances surrounding said charges, and having been placed under oath, did voluntarily and intelligently enter a plea of guilty of Felony Shoplifting . . .” (C.P. at 12; appellee’s exhibit A, attached)

We respectfully submit Judge Pickard was neither manifestly wrong nor clearly erroneous in his fact finding and legal conclusion that Swilley’s claims were plainly without merit. The court did not, we opine, abuse its judicial discretion in summarily denying post-conviction relief.

The truth of the matter is that Swilley’s voluntary plea of guilty to stealing the steaks operated to waive all non-jurisdictional defects or insufficiencies in his indictment, if any, as well as all rights or defects which are incident to trial. This includes Swilley’s Fourth Amendment claim he was subjected to an illegal stop and search of his person, illegal seizure of the rib-eyes concealed underneath his shirt and his allegedly illegal arrest.

In his appellate brief Swilley frames the issue as follows:

“Swilley’s arrest was unlawful and not pursuant to probable cause and the evidence obtained as result of the illegal search of Swilley was inadmissible and that this cause should be reversed and Swilley discharged.” (Brief of Appellant at unnumbered page 8)

This claim was decided adversely to Swilley’s position by Judge Pickard. *See* appellee’s exhibit A, attached, where the court held “. . . that it plainly appears from the face of the Petition and the prior proceedings in said Cause, that the Petitioner is not entitled to any collateral relief. . .” (C.P. at 12)

This decision was neither clearly erroneous nor manifestly wrong.

SUMMARY OF THE ARGUMENT

After moving to suppress the evidence and losing, Swilley elected to enter a plea of guilty to stealing the steaks. The record reflects that Swilley was advised he could appeal his case if he went to trial and lost. Swilley, however, decided to plead guilty. The record also shows Swilley was advised that pleading guilty waived his rights to an appeal. (C.P. at 45-46)

Judge Pickard did not err in finding that Swilley's Fourth Amendment claims were devoid of merit on their face.

The conclusion reached, under the circumstances, was not an abuse of judicial discretion.

This is because a valid plea of guilty operates as a waiver of all non-jurisdictional rights or defects which are incident to trial as well as all defects or insufficiencies in an indictment. **Jefferson v. State**, 556 So.2d 1016, 1019 (Miss. 1989); **Anderson v. State**, 577 So.2d 390, 391 (Miss. 1991).

Included in this class of waivable rights are "those [rights] secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Sections 14 and 26, Article 3, of the Mississippi Constitution of 1890." **Anderson v. State**, 577 So.2d 390, 391 (Miss. 1991) [emphasis supplied]. See also **Sanders v. State**, 440 So.2d 278, 283 (Miss. 1983).

Add to this list of valuable rights Swilley's right to a Fourth Amendment claim he was the target of an unlawful stop, search, and seizure of the steaks found in his possession and seizure of his person as well. **Bailey v. State**, 19 So.3d 828 (Ct.App.Miss. 2009), cert dismissed 24 So.3d 1038 (2010); **Garcia v. State**, 14 So.3d 749 (Ct.App.Miss. 2009), reh denied, cert denied 15 So.3d 426 (2009); **Burns v. State**, 984 So.2d 1024 (Ct.App.Miss. 2008), reh denied; **Davis v. State**, 967 So.2d. 1269 (Ct.App.Miss. 2007); **Battaya v. State**, *supra*, 861 So.2d 364 (Ct.App.Miss. 2003); **Hentz v. State**, 852 So.2d 70 (Ct.App.Miss. 2003), reh denied, cert denied 860 So.2d 315 (2003);

Johnson v. State, 788 So.2d 830 (Ct.App.Miss. 2001).

Although his argument appears sincere and reasonably well researched, Swilley, in the end, has failed to establish by a preponderance of the evidence he was entitled to any relief resulting from his conviction via voluntary guilty plea to stealing several steaks.

The Court of Appeals will not disturb a trial court's dismissal of a motion for post-conviction relief unless it was clearly erroneous. **Mayhan v. State**, 26 So.3d 1072 (¶6) (Ct.App.Miss. 2009), reh denied, cert denied, citing **Williams v. State**, 872 So.2d 711, 712 (¶2) (Ct.App.Miss. 2004). *See also* **Buckhalter v. State**, 912 So.2d 159, 160 (¶1) (Ct.App.Miss. 2005)[“When reviewing a lower court's decision to deny a petition for post-conviction relief, [this Court] will not disturb the trial court's factual findings unless they are found to be clearly erroneous.”]

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING SUMMARILY POST-CONVICTION RELIEF BECAUSE SWILLEY'S FOURTH AMENDMENT CLAIMS WERE WAIVED BY SWILLEY'S VOLUNTARY PLEA OF GUILTY AND ARE PROCEDURALLY BARRED. THEY WERE PLAINLY WITHOUT MERIT AS WELL.

During his plea-qualification hearing conducted on July 25, 2011, Swilley, under the trustworthiness of the official oath (R. 3), informed the circuit judge he was pleading guilty because he was, in fact, guilty of the charge. (R. 19) Swilley acknowledged, time and again, he was, in fact, guilty of the crime charged. (R. 19, 25, 28) His petition to enter plea of guilty acknowledges in paragraph 14 this was his third shop lifting offense within a seven year period. (C.P. at 48)

“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the

deprivation of his constitutional rights that occurred prior to the entry of the guilty plea.” **Bailey v. State**, 19 So.3d 828, 830 (¶9) (Ct.App.Miss. 2009) [Plea of guilty to possession of hydrocodone waived any unreasonable search and seizure claim.]

The following language found in **Jones v. State**, 922 So.2d 31, 33 (Ct.App.Miss. 2006), is dispositive of Swilley’s present complaint:

The State contends this entire Fourth Amendment issue is procedurally barred. The State is correct. A guilty plea waives the right to raise Fourth Amendment challenges on appeal. *Smith v. State*, 845 So.2d 730, 732 (¶5) (Miss.Ct.App. 2003). The reason is explained by the United States Supreme Court:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of his constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

* * * * *

Gross controls our decision here. Like *Gross*, Jones filed a motion to suppress evidence based on illegal search and seizure. Jones also based his decision to plead guilty on the fact that the trial court denied his motion to suppress. The record shows that Jones was advised that he could appeal this ruling, but he nevertheless decided to plead guilty. The record shows he was also advised that pleading guilty waived his rights to appeal. Once he pled guilty, he gave up his right to appeal this evidentiary ruling. His plea served as a break in the chain of events leading up to his plea, including any evidentiary ruling he may have had cause to challenge.

We find that the guilty plea waived this challenge, and Jones may not raise this issue through a motion for post-conviction relief.

The same is equally true here.

We find in **Anderson v. State**, *supra*, 577 So.2d 390, 391 (Miss. 1991), the following language also applicable to Swilley's complaint:

Moreover, we have recognized that a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial. *Ellzey v. State*, 196 So.2d 889, 892 (Miss. 1967). We have generally included in this class "those [rights] secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Sections 14 and 26, Article 3, of the Mississippi Constitution of 1890." *Sanders v. State*, 440 So.2d 278, 283 (Miss. 1983); *see also Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989). We take this opportunity to specifically include in that class of waivable or forfeitable rights the right to a speedy trial, whether of constitutional or statutory origin.

This view is in accord with that of our sister states. [citations omitted]

This rule also prevails in the federal arena. [citations omitted; emphasis ours]

Add to this list of valuable constitutional rights Swilley's right to a Fourth Amendment claim he was the target of an unlawful stop, search, and seizure of the rib-eye steaks found in his possession and seizure of his person as well. **Bailey v. State**, 19 So.3d 828 (Ct.App.Miss. 2009), cert dismissed 24 So.3d 1038 (2010); **Garcia v. State**, 14 So.3d 749 (Ct.App.Miss. 2009), reh denied, cert denied 15 So.3d 426 (2009); **Burns v. State**, 984 So.2d 1024 (Ct.App.Miss. 2008), reh denied; **Davis v. State**, 967 So.2d 1269 (Ct.App.Miss. 2007); **Battaya v. State**, *supra*, 861 So.2d 364 (Ct.App.Miss. 2003); **Hentz v. State**, 852 So.2d 70 (Ct.App.Miss. 2003), reh denied, cert denied 860 So.2d 315 (2003); **Johnson v. State**, 788 So.2d 830 (Ct.App.Miss. 2001).

Finally, because Swilley entered a voluntary plea of guilty, he also waived any defenses he might have had to the charge, including any claim he was innocent as well. **Bishop v. State**, 812 So.2d 934, 945 (Miss. 2002); **Taylor v. State**, 766 So.2d 830, 835 (Miss. 2000).

CONCLUSION

It is elementary “[t]he burden is upon [James Swilley] 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).

We respectfully submit the trial judge was neither clearly erroneous nor manifestly wrong in finding that Swilley has failed to do so here.

Judge Pickard found Swilley’s claims to be plainly or manifestly without merit.

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*.

* * * * *

Apparently, it did, he did, and he was. **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 Swilley’s conviction via guilty plea. Accordingly, the judgment entered in the lower court summarily denying James Swilley’s motion for interlocutory relief, treated as a

motion for post-conviction collateral relief, should be forthwith affirmed.

Respectfully submitted,

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~~BY:~~

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IN THE CIRCUIT COURT OF COPIAH COUNTY, MISSISSIPPI

JAMES ANTHONY SWILLEY

VS.

CAUSE NO. 2011-0353

STATE OF MISSISSIPPI

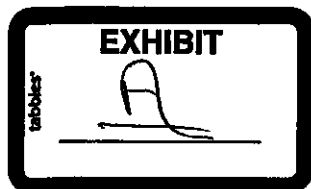
ORDER DENYING
PETITION FOR POST CONVICTION COLLATERAL RELIEF

THIS CAUSE having come before this Court on the Petitioner, James Swilley's, Interlocutory Appeal, taken by this Court as a Petition for Post Conviction Collateral Relief, and Affidavit for Leave to Appeal In Forma Pauperis, all filed with the Circuit Clerk of this Court on the date of September 16, 2011, wherein said Petitioner within the body of his Interlocutory Appeal states that the Petitioner "prays that the evidence obtained as result of the illegal search of the Defendant is suppressed; that all hearsay evidence regarding the labels and photographs be excluded; and that the indictment be dismissed for lack of probable cause to arrest the Defendant on any misdemeanor or felony charge as set forth above".

The Court having thoroughly reviewed the Petitioner's Petition, and being fully advised and aware that on the date of July 25, 2011, the Petitioner herein pled guilty to the crime of Felony Shoplifting, and that the Petitioner at the time of said plea, was fully apprised of the nature of the charges against him and all the facts and circumstances surrounding said charges, and having been placed under oath, did voluntarily and intelligently enter a plea of guilty to Felony Shoplifting, in Copiah County Circuit Court Cause Number 2011-0053CR, State of Mississippi v. James Anthony Swilley. Additionally, the Petitioner herein, in said Cause was sentenced on the date of July 25, 2011, to serve a term of Four (4) Years in the custody of the Mississippi Department of Corrections.

This Court now finds that it plainly appears from the face of the Petition, and the prior proceedings in said Cause, that the Petitioner is not entitled to any collateral relief, and James Swilley's Interlocutory Appeal taken by this Court as a Petition for Post Conviction Collateral Relief, should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Petitioner, James Swilley, is allowed to proceed



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FILED

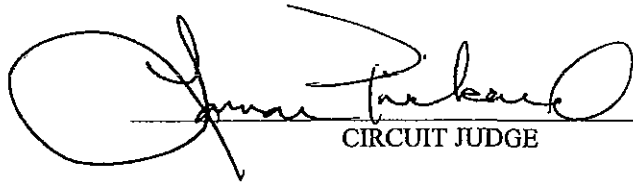
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EDNA E. STEVENS
CIRCUIT CLERK
BY [Signature] D.C.

in an indigent status with the filing of this Petition for Post Conviction Collateral Relief.

IT IS THEREFORE, FURTHER, ORDERED AND ADJUDGED, that the Petitioner, James Swilley's, Interlocutory Appeal, taken by this Court as a Petition for Post Conviction Collateral Relief, filed with the Clerk of this Court on the date of September 16, 2011, is hereby denied.

SO, ORDERED AND ADJUDGED, this the 19th day of September, 2011.


CIRCUIT JUDGE

**A COPY OF THE ORDER HEREIN TO BE MAILED VIA U.S. MAIL, FROM
THE CIRCUIT CLERK OF THIS COURT, TO THE FOLLOWING:**

James Anthony Swilley
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C. M. C. F.
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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of March, 2012.



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