IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2020-CP-00105-COA

RUSSELL HALEY **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	01/16/2020
TRIAL JUDGE:	HON. M. JAMES CHANEY JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RUSSELL HALEY (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BRITTNEY SHARAE EAKINS
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
DISPOSITION:	AFFIRMED - 07/20/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., GREENLEE AND McDONALD, JJ.

GREENLEE, J., FOR THE COURT:

¶1. Russell Haley appeals from the Warren County Circuit Court's denial of his motion for post-conviction collateral relief (PCR). Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. In October 2015, a Warren County grand jury indicted Haley on two counts of child exploitation in violation of Mississippi Code Annotated section 97-5-33(5) (Rev. 2014). Haley's trial was initially set for May 2016 but was continued twice after Haley requested additional time to review discovery, prepare for trial, and pursue plea negotiations. The court set a deadline of February 24, 2017, for Haley to enter a plea. That date was later continued to March 3, 2017. The court's order stated that if Haley missed the deadline, he would have

to proceed to trial or enter an open guilty plea. The State offered a plea deal recommending forty years in the custody of the Mississippi Department of Corrections (MDOC) with thirty-five years suspended and five years to serve. Haley also would have been required to register as a sex offender and pay all costs, fees, and assessments, including $1,000 to the crime victim's fund, a $50,000 fine, and $1,000 to the children's fund.

¶3. On March 6, 2017, Haley appeared to enter a guilty plea. Haley asked the court to defer sentencing to allow him to donate a kidney to a personal friend, Malcolm Davis. The State did not oppose the request for continuance. However, the State informed the court that it was unfamiliar with the court's policy on deferred sentencing and would defer to the court. The court informed Haley that it was the court's policy to only defer sentencing when a defendant enters an open guilty plea. After conferring with his attorney and confirming that he understood, Haley entered an open plea. The trial court accepted Haley's guilty plea and ordered a presentence investigation report. At a hearing on June 30, 2017, the judge sentenced Haley to forty years in the custody of the MDOC, with ten years to serve and thirty years suspended.

¶4. Haley filed a timely pro se PCR motion claiming that his plea was involuntary, he received ineffective assistance of counsel, and a condition of his post-release supervision was "overbroad." In support of his claims, Haley attached a written statement from his wife, Patricia Davis. However, the circuit court found no merit to Haley's PCR motion. Aggrieved, Haley appeals.

STANDARD OF REVIEW

¶5. Absent a finding that the circuit court's decision was clearly erroneous or an abuse of its discretion, we will not reverse a circuit court's denial or dismissal of a PCR motion. *Lawrence v. State*, 293 So. 3d 848, 851 (¶6) (Miss. Ct. App. 2019). When reviewing issues of law, the proper standard of review is de novo. *Id.*

DISCUSSION

¶6. Haley challenges the voluntariness of his guilty plea on several grounds and he requests that his plea be set aside. Haley claims that his plea was involuntary because (1) the circuit court participated in the plea-bargaining process; (2) the court made unfulfilled promises; (3) he did not have enough time to consider the plea offer; and (4) he did not receive a presentence investigation report or presentence hearing. Haley also claims that he received ineffective assistance of counsel and that the court imposed an "overbroad" condition regarding his post-release supervision.

I. Whether Haley's guilty plea was involuntary.

¶7. "A guilty plea is binding where it is entered voluntarily, knowingly, and intelligently." *Hill v. State*, 60 So. 3d 824, 828 (¶11) (Miss. Ct. App. 2011) (citing *Alexander v. State*, 605 So. 2d 1170, 1172 (Miss. 1992)). "A plea will be deemed to meet this standard where 'the defendant is advised concerning the nature of the charge against him and the consequences of the plea.'" *Id*. (quoting *Mason v. State*, 42 So. 3d 629, 632 (¶7) (Miss. Ct. App. 2010)). Haley "bears the burden of proving by a preponderance of [the] evidence that [his] guilty plea was involuntary." *Roby v. State*, 282 So. 3d 477, 481 (¶10) (Miss. Ct. App. 2019). He failed to meet his burden. We again state that "[g]reat weight is given to statements made

under oath and in open court . . . ." *Berry v. State*, 230 So. 3d 360, 364 (¶11) (Miss. Ct. App. 2017). Therefore, "[a] defendant may not rely on bare assertions in his brief." *Neal v. State*, 186 So. 3d 378, 381 (¶6) (Miss. Ct. App. 2016) (citing *Watson v. State*, 100 So. 3d 1034, 1038 (¶10) (Miss. Ct. App. 2012)).

¶8. For ease of discussion, we address each of Haley's assertions below.

A. Whether the circuit judge impermissibly engaged in the plea-bargain negotiations.

¶9. Haley claims that his plea was rendered involuntary when the judge impermissibly participated in the plea-bargaining process, which coerced him into pleading guilty. Specifically, Haley claims that the judge presented a plea deal that "the Judge preferred," and that in turn Haley felt that if he did not accept the judge's deal, he "would be risking punishment." He asserts that the judge went further than merely informing the parties of the court's policy regarding deferred sentencing, but instead claims the judge suggested and "formulated a plan of action."

¶10. Mississippi law is clear that a "trial judge shall not participate in any plea discussion." MRCrP 15.4(b). However, the judge may set a "cut-off date for plea discussions and may refuse to consider the recommendation after that date." *Id*. Furthermore, any "recommendation [made] to the [circuit] court for a particular sentence . . . will not be binding upon the court." MRCrP 15.4(a)(2)(B). Therefore, whether to accept or reject a plea agreement falls within the circuit judge's discretion. *See* MRCrP 15.4(a)(2)(C). Our supreme court has explained the role of the judge in regard to the plea bargaining process, stating as follows:

> While a trial judge must control the sentencing phase of a criminal trial and has the responsibility and duty of approving or disapproving a recommendation by the prosecutor, he should never become involved, or participate, in the plea[-]bargaining process. He must remain aloof from such negotiations. The trial judge always must be circumspect and unbiased, at all times displaying neutrality and fairness in the trial, and consideration for the constitutional rights of the accused.

Magee v. State, 759 So. 2d 464, 470 (¶16) (Miss. Ct. App. 2000) (quoting *Ferns v. State*, 370 So. 2d 930, 933 (Miss. 1979)).

¶11. In the present case, the judge did not involve himself in the plea-bargaining process. Initially, the State recommended that Haley serve forty years in the custody of the MDOC, with thirty-five years suspended and five years to serve. Haley would also have been required to register as a sex offender and pay all costs, fees, and assessments, including $1,000 to the crime victim's fund, a $50,000 fine, and $1,000 to the children's fund. At Haley's plea hearing, in addition to the State's plea offer, Haley requested a deferred sentence so that he could donate a kidney to a friend. While the State did not oppose a continuance, the State explained to the court that it was unfamiliar with the court's policy on deferred sentencing and would leave the decision to the court. At that moment, the court informed Haley that it was its policy to only defer sentencing if the defendant entered an open guilty plea. The court explained that Haley could enter an open plea and defer sentencing or continue with the plea deal he negotiated with the State, leaving the ultimate decision in Haley's hands. Haley decided to take an open plea after discussing it with both his attorney and his wife. The court did not make any statements that could be perceived as participating in the plea process or as pressuring Haley to decide one way over another. Furthermore, a defendant pleading guilty

out of fear that he will receive a harsher sentence does not render the plea involuntary. *Mayhan v. State*, 26 So.3d 1072, 1076 (¶13) (Miss. Ct. App. 2009). By advising Haley of the court's policy and informing him of his choices, the judge was acting within his authority and discretion. Accordingly, there is no merit to this claim.

B. Whether the court made unfulfilled promises to Haley.

¶12. Haley next contends that his plea was the product of unfulfilled promises made by the circuit court. He claims several promises were made to him including "the promise to honor the plea bargain, the promised PSR report and [the] opportunity to address its contents, [the] promise of no witnesses, etc[.]"[1] In particular, Haley claims that it was his and his attorney's understanding that by entering the open plea, he would be accepting the terms of the State's plea recommendation. However, the plea transcript does not support Haley's contention. At the plea hearing, the following colloquy occurred:

> [COURT]: Well, the - - off the top of my head, the - - I think the only time I have accepted a plea and deferred sentencing - - or at least I know the time or two that I have done that, it has been when it's been an open plea, and so I've accepted the plea and given some time for a presentence investigation, people to write letters, and all of that kind of stuff.
>
> And so would your client be amendable to pleading? It would be an open plea, and then we could defer sentencing, if the State has no objection.
>
> [COUNSEL]: Judge, I believe he would. I think we want to accept the benefit of the agreed upon plea bargain that we've

[1] Haley also mentions promises that were made by the court that were fulfilled, which include: "(1) the promise of a continuance, (2) the promise to dismiss count two, and others."

negotiated back and forth with the State on, and we made our arrangements to have an answer and have everything signed, sealed, and delivered Friday afternoon on the deadline. We previously got the deadline extended by an order to the Court, and we have paid close attention to those deadlines for that reason.

[COURT]: Okay. So I guess what I'm saying is, if were to defer sentencing, it would be for an open plea. So would you rather the sentence being deferred and realize it would be an open plea, or would you rather just go forward with this whatever recommendation the State has and go forward and just do it today?

[COUNSEL]: If I understand the Court, if we go forward today, the Court would not allow him to have sentencing deferred to be able to donate a kidney?

[COURT]: If the sentencing would be deferred, the sentencing would be an open plea deferral. That's what I was trying to say; in other words, when I've accepted pleas and not issued sentencing, it's been when it's been an open plea, and there's been time for a presentence investigation report, and there's some flexibility in when the sentencing would be set for, but the plea would already be entered.

[COUNSEL]: I understand that, Judge.

[COURT]: Okay. And so if you want to do that, then I'm inclined to do so. If we want to - whatever it is you've negotiated with the State, if you want to stick with that, then the sentencing would not be delayed, and we'd go ahead and do it today.

The record further suggests that Haley knew what he was agreeing to:

[COURT]: Now, back to *State of Mississippi versus Haley*. What says the defendant?

[COUNSEL]: Your Honor, I conferred with my client. I explained that under the Court's options, giving him this morning, that

he could accept the plea this morning. He would be sentenced under the recommendation, and, under those circumstances, it would be highly unlikely he would be able to donate a kidney for his friend.

Under the other circumstances, he - - that the Court would take the plea this morning, but the sentencing would be deferred, and it would be an open plea; in other words, the sentencing would be totally up to the discretion of the Court, within the statutory maximum. He understands that, I believe.

Do you not, Rus?

[HALEY]: Yes. Yes.

[COUNSEL]: He talked with his wife about that, who is present here with him this morning. He advises me, Your Honor, that he will take that risk in order to save his friend's life and donate the kidney. That's what he wants to do.

Is that right, Rus?

[HALEY]: Yes, it is. Yes, it - -

[COURT]: Okay.

The court continued to clarify any misunderstandings, specifically asking Haley:

[COURT]: Do you understand, Mr. Haley, now that the Court will determine your sentence and that sentence could be the maximum amount allowed by law? Do you under - -

[HALEY]: Yes.

[COURT]: - - stand that?

[HALEY]: Yes, sir.

¶13. The record demonstrates that the court thoroughly explained to Haley that he could go to trial, accept the State's plea offer, or enter an open guilty plea and defer sentencing.

The court also repeatedly explained to Haley that the court had full discretion to accept or reject any sentence recommendations by the State. The court allowed Haley to consult with his attorney and his wife following the court's explanation on its policy. Afterwards, on the record, Haley confirmed that he understood the court's policy, his options, and he stated that he wanted to enter an open plea. Therefore, Haley's argument that he thought he was accepting the benefit of the State's recommendation when he pled guilty, based on a promise made by the circuit court, is without merit.

¶14. Haley also claims that the court promised that there would be no witnesses called at his sentence hearing. The transcript of the guilty-plea hearing belies Haley's claim. During the plea hearing, the court stated:

> [COURT]: You've also got the right under the Sixth Amendment to the Constitution to confront any witnesses, who might testify against you or bring charges against you. This right of confrontation takes place, for instance, during a trial, when your attorney would have the right to cross examine each witness the State calls.
>
> Your attorney would have the right to challenge or object to the introduction of any evidence, but, now, if you plead guilty, there is no trial. The State doesn't call any witnesses, and, therefore, you lose your right to confront those witnesses.
>
> Do you understand that?
>
> [HALEY]: Yes.

¶15. When the court said the State would not call any witnesses, it was not referring to the sentencing hearing. Mississippi Rule of Criminal Procedure 26.4(c) allows both the prosecuting attorney and the defendant to present evidence at the sentencing hearing

regarding "any matter that the court deems probative on the issue of sentencing." At the sentencing hearing, not only did the State call a witness but Haley also presented three witnesses of his own. This issue is without merit.

C. Whether Haley had time to adequately consider the open plea offer.

¶16. Haley claims his plea was invalid because he did not have enough time to consider the offer. Haley claims that he was only given "five to ten minutes" to confer with his attorney regarding the open plea.

¶17. The transcript reflects that Haley was given time to discuss the open plea with both his attorney and his wife. As mentioned above, once Haley was back on the record, the judge asked for Haley's decision. Haley's counsel told the court that he explained Haley's options to him, and Haley confirmed that he understood. Counsel then told the court that Haley had decided "that he [would] take that risk in order to save his friend's life and donate the kidney." We note that Haley did not request additional time to confer with his attorney. The record is also devoid of any indication that he was rushed in any way during the proceedings. Because Haley had time to confer with counsel, he failed to request additional time, and he chose to "take that risk," this issue is without merit.

D. Whether Haley received a presentence investigation report and hearing.

¶18. Next, Haley claims that his guilty plea was involuntary because he did not receive a presentence investigation report or presentence hearing. Haley contends that by not receiving the presentence report or hearing his defense was prejudiced since he was unable to verify

or challenge any statements found within it. He further claims that had he been granted a hearing, he would have had the "chance to clear up the Judge's admitted misunderstanding[.]"

¶19. Under Mississippi Rule of Criminal Procedure 26.3(a), "[a] copy of [a presentence investigation] report shall be delivered to both the prosecutor and the defendant or the defense attorney within a reasonable time prior to sentencing so as to afford a reasonable opportunity for verification of the material." Haley repeatedly claims that neither he nor his counsel received the presentence report. However, all parties were aware that the court ordered a presentence report. The court also informed the parties that if they wanted to have their input documented in the report, they could contact the Department of Probation and Parole. Haley admitted that he and his counsel sent their input for the presentence report. Furthermore, Rule 26.3(a) requires the report be given to either the defendant or the defendant's attorney. There was no sworn testimony or affidavit that Haley's attorney did not receive the presentence report.

¶20. We note that it is disputed by Haley that he and his attorney received the report. Even if we determined that they had not, Haley was required to prove that by not receiving the report he suffered actual prejudice. *Griffin v. State*, 824 So. 2d 632, 635 (¶5) (Miss. Ct. App. 2002) (citing *Wiley v. State*, 750 So. 2d 1193, 1208 (¶58) (Miss. 2000)). Other than his own bare assertions, Haley has not presented any evidence that he was prejudiced by not receiving the report.

¶21. Haley also claims the circuit court should have ensured that he received and discussed

the presentence report with his attorney. However, the Mississippi Rules of Criminal Procedure do not require circuit judges to verify that a defendant or his counsel received or discussed his presentence report. The judge found this claim to be meritless and noted that neither Haley nor his attorney objected or informed the court that they had not received the report or that they wanted to oppose any portion of it.

¶22. We agree. Neither Haley nor his counsel objected at the hearing. "A [circuit] judge will not be found in error on a matter not presented to him for decision." *Ballenger v. State*, 667 So. 2d 1242, 1256 (Miss. 1995). Therefore, this claim is without merit.

¶23. Haley further challenges the action of the court in imposing the sentence without conducting a presentence hearing. This contention is incorrect. Under Mississippi Rule of Criminal Procedure 26.4(a), if a presentence report is ordered, "the sentencing hearing shall not be conducted until copies thereof have been furnished or made available to the court and the parties." As mentioned above, the court ordered a presentence investigation report and referenced the report at the sentencing hearing held on June 30, 2017, during which the judge heard testimony from both parties before sentencing Haley. Haley states that he was prejudiced by the court having a sentencing hearing when he had not received a copy of the presentence investigation report. However, as discussed earlier, other than making this assertion, Haley has failed to produce any evidence that he did not receive the report or that he was actually prejudiced. This issue is without merit.

II. Whether Haley received ineffective assistance of counsel.

¶24. Haley's assertion that his guilty plea was involuntarily given is intertwined with his

assertion that he received ineffective assistance of counsel. Throughout his brief, Haley claims that his attorney was ineffective for various reasons, including his attorney's alleged failures to challenge the validity of the search warrant; to suppress a defective indictment; to produce the presentence investigation report or object to its absence; to properly investigate his case; to meet with him prior to sentencing; to consult with him prior to agreeing to an alternate plea; or to request more time for him to consider making an open plea.

¶25. Generally, "a voluntary guilty plea waives claims of ineffective assistance of counsel, except insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea." *Worth v. State*, 223 So. 3d 844, 849 (¶17) (Miss. Ct. App. 2017). Therefore, "to obtain post-conviction relief a petitioner who pled guilty must prove that his attorney's ineffective performance proximately caused the plea—i.e., that but for counsel's errors, the petitioner would not have entered the plea." *Id*. The petitioner must provide proof beyond the petitioner's own conclusory assertions. *Id*. at 849-50 (¶17).

¶26. Thus, in order to prevail on an ineffective assistance of counsel claim, Haley must show: "(1) that his counsel's performance was deficient, and (2) that this alleged deficiency prejudiced his defense." *Thompson v. State*, 119 So. 3d 1007, 1009 (¶5) (Miss. 2013) (quoting *Goff v. State*, 14 So. 3d 625, 655 (¶121) (Miss. 2009)). There is "a rebuttable presumption that trial counsel is competent and his performance was not deficient." *Id*. "Additionally, [Haley] must show that there is a reasonable probability that, but for the errors of his counsel, the judgment would have been different." *Id*. Furthermore, "[w]hen a

defendant's assertions of ineffective assistance of counsel are substantially contradicted by the court record of the proceedings, the court may disregard such assertions." *Neal v. State*, 186 So. 3d 378, 384 (¶20) (Miss. Ct. App. 2016) (citing *Elliott v. State*, 41 So. 3d 701, 709 (¶25) (Miss. Ct. App. 2009)).

¶27. Haley offers nothing to support his ineffective-assistance claims, which are contradicted by his own sworn statements during his plea hearing. In his brief, Haley claims that "five to ten minutes was barely enough time for counsel to advise [him] to take the offer or lose the opportunity to donate to Mr. Davis." However, under oath, Haley stated that he believed his attorney had properly represented and advised him. Haley confirmed that he had no complaints about his attorney. During the plea hearing, the circuit court asked Haley the following questions:

> [COURT]: Mr. Haley, are you satisfied with the services of your attorney?
>
> [HALEY]: Yes.
>
> [COURT]: He hadn't threatened you or promised you anything to make you enter a plea?
>
> [HALEY]: No.
>
> [COURT]: And that he's properly represented you?
>
> [HALEY]: Yes.

¶28. Haley's claim that he received ineffective assistance of counsel is substantially contradicted by his own sworn statements in court. Other than his bare assertions, Haley has

not shown that his counsel was ineffective.[2]

¶29. Furthermore, Haley claims that his counsel was ineffective because (1) he failed to suppress a defective indictment and (2) the search warrant in his case was not based on probable cause. We find that both of these claims are meritless. "[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial." *McDonald v. State*, 180 So. 3d 780, 786 (¶21) (Miss. Ct. App. 2015); *see also Collins v. State*, 311 So. 3d 1285, 1291 (¶16) (Miss. Ct. App. 2021), *reh'g denied* (June 29, 2021) (finding that defendant waived his post-conviction claim that indictment was defective when he pled guilty); *Buckley v. State*, 119 So. 3d 1171, 1173 (¶6) (Miss. Ct. App. 2003) (finding that evidentiary issues were waived by a valid guilty plea, including "constitutional rights against any unreasonable search or seizure"); *Ivy v. State*, 103 So. 3d 766, 770 (¶16) (Miss. Ct. App. 2012) (holding that a defendant's claim that a search warrant did not contain sufficient information was waived by a defendant's guilty plea). This issue is without merit. *See, e.g.*, *McCray v. State*, 107 So. 3d 1042, 1046 (¶15) (Miss. Ct. App. 2012) (holding that unsupported claims of ineffective assistance that are overwhelmingly contradicted by prior sworn statements may be dismissed without an evidentiary hearing).

III. Whether the court's sentencing conditions were overbroad.

¶30. Haley's final claim is that the court erred when it issued an "overbroad" post-release

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[2] Both the State and Haley mention a witness statement executed by Haley's wife, Patricia Haley. While Patricia's statement appears to support Haley's claims that his attorney was too busy to meet with or answer Haley's calls, the statement is entirely handwritten, does not purport to have been sworn to before a person with the authority to administer oaths, and it does not bear a notarial seal.

supervision condition that prohibited Haley from visiting casinos.

¶31. Mississippi law allows a "circuit court to preclude a defendant from doing a legal act so long as it bears a nexus to his crime of conviction, and he is given adequate notice." *Necaise v. State*, 57 So. 3d 53, 59 (¶18) (Miss. Ct. App. 2011). In *Necaise*, this Court found reversible error when a circuit court revoked Necaise's post-release supervision because there was no nexus between Necaise's conviction for touching a child for lustful purposes and the condition prohibiting him from visiting casinos. *Id*. Unlike in *Necaise*, we find that a nexus does exist between Haley's conviction for exploitation of a minor and his prohibition from visiting casinos.

¶32. Heather Owens, a Louisiana State Police Master Trooper, discovered in May 2015 that an internet protocol (IP) address was being used at the El Dorado Casino in Bossier City, Louisiana to download and distribute child pornography. After an investigation, the Louisiana Gaming Agents discovered that an Aaron Brown had stayed at the hotel on all the dates that the child pornography had been downloaded. A review of the hotel surveillance identified Brown's vehicle. After running the vehicle's license plate through a law enforcement database, law enforcement determined the vehicle was registered to Russell Haley, who resided in Gulfport, Mississippi.

¶33. On August 5, 2015, an undercover investigation was conducted by Investigator Jay Houston, in connection with the Mississippi Attorney's General Office, to find users who agreed to participate in the downloading and distribution of images depicting child sexual abuse. After identifying a user who agreed to participate in the stated activity, Investigator

Houston proceeded to track the IP address assigned to that user. The IP address was leased by AT&T to Legends Gaming LLC in Vicksburg, Mississippi. Investigator Houston contacted Master Trooper Owens and confirmed that the IP address was traced to a hotel room located at the Diamond Jacks casino. The room's occupants had the same Gulfport address used in Master Trooper Owens' investigation and the same vehicle from the surveillance tape was found in the casino's parking lot. Investigator Houston with help from the Mississippi Gaming Commission determined that a Patricia Davis and Edward Anthony had the same Gulfport address listed as the suspect from Master Trooper Owens' investigation. The phone number associated with the room was also registered to Russell Haley.

¶34. Haley stated that the downloads occurred inadvertently during the course of file sharing music. At the sentencing hearing, the judge acknowledged Haley's explanation but stated:

> [T]he defendant has apparently engaged in a pattern of - - course and conduct, going to different casinos in different states, using false names, and false internet profiles for no other apparent reason then the deliberate desire to satisfy and feed the despicable habit.

¶35. Based on our review of the record, we find a nexus existed between Haley's conviction and the condition implemented by the circuit court. Haley committed his crimes at the Diamond Jacks casino using their internet services. It is also worth noting that it appears that he had previously engaged in the same conduct at other casinos in other states. This issue is without merit.

CONCLUSION

¶36. After reviewing the record, we find no error in the circuit court's denial of Haley's PCR motion. We therefore affirm the circuit court's judgment.

¶37. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., WESTBROOKS, McDONALD, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR. WILSON, P.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.