IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 2000-CA-01199-COA

DEMONT BURKS A/K/A DEMONT DONNELL BURKS **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	06/16/2000
TRIAL JUDGE:	HON. LARRY EUGENE ROBERTS
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GAIL P. THOMPSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	E. J. MITCHELL, III
NATURE OF THE CASE:	CIVIL - POST CONVICTION RELIEF
TRIAL COURT DISPOSITION:	POST-CONVICTION COLLATERAL RELIEF DENIED
DISPOSITION:	AFFIRMED - 11/20/2001
MOTION FOR REHEARING FILED:	1/3/2002; denied 3/12/2002
CERTIORARI FILED:	4/15/2002; denied 7/18/2002
MANDATE ISSUED:	8/8/2002

BEFORE SOUTHWICK, P.J., LEE, AND MYERS, JJ.

MYERS, J., FOR THE COURT:

¶1. Demont Burks pled guilty to the offense of robbery on June 3, 1997, in the Circuit Court of Lauderdale County, Mississippi, Circuit Judge Larry Roberts presiding. The plea was accepted and the sentence of fifteen years in the custody of the Mississippi Department of Corrections was imposed. This sentence was suspended by the trial court and Appellant was placed on five years reporting probation. Burks subsequently violated the terms of his probation resulting in the suspended sentence being revoked and reinstated on February 27, 1998. A motion for post- conviction relief was filed and summarily denied by the trial court. Burks raises the following issues on appeal:

1. WHETHER THE TRIAL COURT ERRED BY FINDING THAT DEFENDANT'S GUILTY PLEA WAS VOLUNTARILY ENTERED AND BY DENYING HIS PETITION FOR POST-CONVICTION RELIEF;

2. WHETHER THE TRIAL COURT ERRED IN ACCEPTING DEFENDANT'S GUILTY PLEA WHEN THERE WAS AN INSUFFICIENT FACTUAL BASIS TO FIND APPELLANT GUILTY OF ROBBERY; AND

3. WHETHER DEFENDANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE ENTRY OF THE GUILTY PLEA.

STATEMENT OF FACTS

¶2. On June 28, 1996, Demont Donnell Burks was indicted for the robbery of three gold rings belonging to Belinda Randle from the person of Krystal Lewis. Lewis was Burks' girlfriend at the time of the robbery. As stated above, Burks pled guilty to this crime and accepted a fifteen-year sentence which was suspended and was subsequently placed on five years reporting probation.

¶3. At the plea hearing, the trial judge cautioned Burks that the prosecution was setting him up and that a violation of his probation however slight would result in the revocation of the suspended sentence and the reinstatement of the fifteen-year sentence. During the entry of Burks' guilty plea there was some confusion as to whether Burks actually robbed Lewis. The trial judge was about to order a jury trial to resolve the matter when Burks declared that he wanted to take the plea agreement. The trial judge then proceeded to question Burks at length concerning whether the plea agreement was voluntary and not the product of coercion. Burks then admitted that he did by force or threat thereof compel Lewis to give Burks the three rings. Throughout this entire process, Burks was represented by counsel who had gone through the plea agreement with Burks and explained the consequences of any violation thereof. Burks violated his probation and as the trial court predicted, the fifteen-year sentence was reinstated.

STANDARD OF REVIEW AND LEGAL ANALYSIS

1. WHETHER THE TRIAL COURT ERRED BY FINDING THAT DEFENDANT'S GUILTY PLEA WAS VOLUNTARILY ENTERED AND BY DENYING HIS PETITION FOR POST-CONVICTION RELIEF.

¶4. The standard of review concerning the voluntariness of guilty pleas is that in order to be set aside, the findings of a trial court sitting without a jury must be clearly erroneous. *Weatherspoon v. State*, 736 So. 2d 419, 421 (¶5) (Miss. Ct. App. 1999). The guilty plea must be knowing and voluntary and the entire record of the entry of the plea must be examined. *Id.* Burks admitted under oath at the entry of his guilty plea that he understood that he was being charged with robbery and that he was admitting his guilt to that charge. Burks was informed of the maximum and minimum sentences that could be imposed. Burks had the advice of counsel throughout this proceeding. Burks stated that he was entering this guilty plea of his own free will and without coercion. There was a discrepancy in the record concerning whether Burks robbed Lewis or whether the three gold rings were a gift from Lewis to Burks. Burks resolved this confusion by stating repeatedly under oath that he did the crime after being informed by the trial court that his trial could begin that very afternoon. "The burden of proving that a guilty plea is involuntary is on the defendant and must be proven by a preponderance of the evidence." *Id.* at 422 (¶8). Upon a full examination of the record of the entry of Burks' guilty plea, it is clear that the guilty plea was entered voluntarily and Burks has failed to meet this burden.

2. WHETHER THE TRIAL COURT ERRED IN ACCEPTING DEFENDANT'S GUILTY PLEA WHEN THERE WAS AN INSUFFICIENT FACTUAL BASIS TO FIND DEFENDANT GUILTY OF ROBBERY.

¶5. URCCC Rule 8.04(A)(3) requires that in order for the trial court to accept a guilty plea, there must be

a factual basis for the guilty plea. Burks contends that there was not a sufficient factual basis to find him guilty of robbery and therefore no factual basis for Burks' guilty plea existed. Upon review of this issue, this Court must look to the entire record. *Corley v. State*, 585 So. 2d 765, 768 (Miss. 1991). Burks admitted to using force or the threat thereof in obtaining the three gold rings from Lewis. Burks admitted repeatedly that he committed the robbery. The record before this Court also indicated that at the time Burks entered his guilty plea, Burks had in his possession the three gold rings wrongfully taken from Lewis. Upon examination of the entire record, this Court finds that there was more than a sufficient factual basis to find Burks guilty of the robbery of Lewis.

3. WHETHER DEFENDANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE ENTRY OF THE GUILTY PLEA.

¶6. Burks claims that he was not provided effective assistance of counsel at the entry of his guilty plea. For Burks to prevail on this issue, he must prove that the attorney's performance was deficient and that he was prejudiced by counsel's mistakes. *Weatherspoon*, 736 So. 2d at 422 (¶10), citing *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984). At the plea hearing, Burks stated under oath that he had discussed the plea agreement with his attorney, that he understood what he was doing, and that he was satisfied with the advice given to him by the attorney. This clearly indicates that the attorney's performance was not deficient. Even supposing some deficiency in Burks' attorney's representation, Burks was clearly not prejudiced by any error as Burks stated repeatedly under oath that he committed the robbery and that he understood the plea agreement.

¶7. Burks brings the issue of ineffective assistance of counsel before this Court supported only by Burks affidavit. The courts of this State have implicitly held that when a party offers only his affidavit in the context of post-conviction relief because of ineffective assistance of counsel, then the party's claim is without merit. *Vielee v. State*, 653 So. 2d 920, 922 (Miss. 1995). Burks offers no other evidence of ineffective assistance of counsel other than his own affidavit after violating his probation and having the fifteen-year sentence enforced. This is opposed by earlier sworn statements made by Burks at the entry of the guilty plea that he had been advised by his attorney and that he was satisfied with that advice. Burks' sworn statements during the entry of the guilty plea "carry a strong presumption of verity." *Bell v. State*, 754 So. 2d 492, 495 (¶7) (Miss. Ct. App. 1999). Burks was well pleased with his attorney at the time he pled guilty to the robbery and only raised this issue after violating his probation and having the fifteen-year sentence reinstated. The submission by Burks of his own affidavit taken only after violating his probation and being sent to prison does not provide sufficient weight to convince this Court that Burks' contention of ineffective assistance of counsel has merit.

CONCLUSION

¶8. The issues raised by Burks in this appeal are without merit. Upon viewing the record as a whole, it is clear that Burks' plea was freely and voluntarily given, there was a sufficient factual basis upon which to find Burks guilty of the robbery of Lewis, and Burks was given sufficient legal advice by his attorney. The trial judge cautioned Burks that the "sweetheart" deal he was receiving was nothing more than a setup by the prosecution and that any probation violation would result in revocation of the suspended sentence and reinstatement of the fifteen-year sentence. This admonishment by the trial court turned out to be a self-fulfilling prophesy for Burks.

¶9. **THE JUDGMENT OF THE CIRCUIT COURT OF LAUDERDALE COUNTY DENYING**

POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE AND IRVING, JJ., CONCUR. KING, P.J., DISSENTS WITH WRITTEN OPINION JOINED BY CHANDLER, J. BRANTLEY, J., NOT PARTICIPATING.

KING, P.J., DISSENTING:

¶10. I dissent from the majority opinion herein.

¶11. The majority finds that (1) the defendant's plea was done with sufficient knowledge and understanding to be voluntary and (2) the record contained a sufficient factual basis for the guilty plea.

¶12. Having read the record, I do not believe that to be the case.

¶13. Contrary to the majority opinion, Burks does not maintain repeatedly and without equivocation that he did the things charged.

¶14. This reality is seen in the following exchange between the judge and Burks, which constitutes the entirety of the relevant portions of the plea hearing:

* * * *

Q. Demont, let me go over this with you. You say in this petition that I did willfully, unlawfully and feloniously take the personal property belonging to a Belinda Randall, three gold rings from a Crystal Lewis against her will, that is Ms. Lewis' will by holding her down and putting her in fear of immediate injury to her person. Did you do that?

A. **No, sir.**

Q. You did not?

A. **No, sir.**

Q. Well, what happened back on June the 28th, 1996, that resulted in you being charged with a robbery charge? What did you do?

A. We were talking and she let me keep her rings, and her mother asked her where it was. She didn't want to tell her. And then she told her I had them.

Q. You used the words her and her mother, give me names.

A. Crystal and her mother Belinda.

Q. Okay. Belinda Randall is Crystal's mother?

A. Yes, sir.

Q. And you and Crystal were talking?

A. Yes, sir.

Q. That means verbal conversation like we are talking now?

A. No, sir.

Q. What does talking mean?

A. That means like a boyfriend/girlfriend type thing.

Q. Sexual type relationship?

A. Yes, sir.

Q. Boyfriend and girlfriend?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. What happened?

A. Her momma then come-- Belinda didn't like me.

Q. Okay. So?

A. She pressed charges on me because I had her daughter's ring, and she didn't want me around her daughter.

Q. **How did you come in possession of three gold rings?**

A. **Crystal let me wear the rings.**

Q. Crystal gave them to you?

A. Yes, Sir.

* * * *

Q. Demont, what I am trying to say in a polite way to you, I don't want to -- I don't care whether you go to trial or whether you plead guilty. What I desperately care about is making sure that if I take a guilty plea and find somebody to be guilty, that they did, in fact, do the crime that they are charged with doing?

A. Yes, sir.

Q. I don't want to find somebody guilty that is innocence. What you are telling me is that you are innocent. Therefore, I will let you tell your story to a jury and let 12 jurors decide who they believe and who they don't believe, okay?

A. Can I ask you a question? By me having the rings still in my possession, that means they can find me guilty, don't it?

Q. This gentleman over here will have to convince 12 people, 12 strangers, jurors, beyond a reasonable doubt that you took that jewelry from Crystal Lewis against her will by placing her in fear of receiving some bodily harm. That is a robbery. In other words, you don't give me the rings I am going to beat your brains out, or I am going to shoot you or cut you, and if he can't convince a jury of that, then the jury under their oath would find you not guilty. On the other hand, if he can convince a jury of that beyond a reasonable doubt the jury's duty is to return a verdict of guilty. And if you are found guilty, you're looking at a maximum possible 15 year prison sentence, okay?

A. I want to take a plea, sir.

Q. I can't take your plea if you are innocent, sir?

A. But I already signed the plea.

* * * *

Q. You signed something here under oath, right here. In other words, you told me earlier that's your signature right there, right?

A. Yes, sir.

Q. And this document says I plead guilty, and I request the Court to accept my plea of guilty and to have entered my plea of guilty based upon the following. And it says on or about the 28th day of June, 1996, I, Demont Burks, willfully, unlawfully and feloniously took the personal property of Belinda Randall, that is, three gold rings from Crystal Lewis against her will by holding her down and putting her in fear of immediate injury to her person. And it is signed Demont Burks.

A. Yes, sir.

Q. That's why I am asking you. When I read this it tells me that you admit that you did what you are charged with. Now, here in the courtroom, you are saying you didn't do it. She gave you the rings. Earlier I had you raise your hand and swear to me you would tell me the truth?

A. Yes, sir.

Q. All I want to know is what is the truth?

A. That's the truth, sir.

Q. **Which is truth? She gave them to you or you robbed her? I just want to know what the truth is.**

A. **I robbed her, sir.**

Q. Is that the truth?

A. Yes, sir, that's the truth, sir.

Q. **Well, why did you tell me something different just a minute ago?**

A. **Because I was telling you how the whole story went, sir. that's what you ask me. That's what you asked me, sir.**

Q. I thought I tried to ask you whether or not you did this crime, and--

A. Yes, sir.

Q. --you said no, you didn't.

A. I did the crime, sir.

Q. That she gave it to you?

A. I did the crime.

Q. Sir?

A. Yes, sir, I did the crime.

Q. Are you now telling me the truth?

A. Yes, sir.

Q. Is what you told me earlier a lie?

A. Sir?

Q. **Is what you told me earlier, that is, that she gave you the rings and her momma didn't like you, and her momma wanted to charge you with it a lie?**

A**. I was breaking it down in details, sir. You asked me to tell you everything that happened, sir.**

Q. Demont, I still don't understand what you are saying, Did she voluntarily, of her own free will, without any pressure or coercion or threats give you the gold rings?

A. Did she what, sir?

Q. I'll say it once again. Did Crystal Lewis, your girlfriend, voluntarily, of her own free will, and without any threats or coercion or pressure give you those three rings?

A. No, sir.

Q. Did you take them from her against her will?

A. Yes, sir.

Q. Okay. Do you have any question or anything you don't understand?

A. No, sir.

* * * *

¶15. There is, in my judgment, a sufficient lack of clarity in the totality of Burks' remarks to call into question the voluntariness of his guilty plea or the factual foundation of his plea.

¶16. For these reasons, I would reverse the denial of post-conviction relief.

CHANDLER, J., JOINS THIS OPINION.