

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KP-00764 COA

ROBERT LITTLE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JANNIE M. LEWIS

COURT FROM WHICH APPEALED: HUMPHREYS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PRO SE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: NOEL D. CROOK

NATURE OF THE CASE: CRIMINAL: OUT OF TIME APPEAL

TRIAL COURT DISPOSITION: DENIAL OF OUT OF TIME APPEAL

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

PER CURIAM:

Robert Little, having been convicted for the sale of cocaine and sentenced to twenty-five years in the custody of the Mississippi Department of Corrections, filed a motion for leave to file an out-of-time appeal with the Circuit Court of Humphreys County. The circuit court denied Little's motion. On appeal, Little raises two issues: (1) whether the Circuit Court of Humphreys County erred in denying Appellant's motion for an out-of-time appeal; and (2) whether Appellant was denied effective assistance of counsel.

The Mississippi Supreme Court has held that in order for a movant to prove his right to an out-of-time appeal, he must show by a preponderance of the evidence that he asked his attorney to appeal within the time allowed for giving notice of an appeal, and he must show that the attorney failed to perfect the appeal, and that such failure was through no fault of the movant. *Dickey v. State*, 662 So. 2d 1106, 1107 (Miss. 1995) (citations omitted). In the present case, Little made no such showing. Little presented the court with no affidavits supporting his contention that he had asked his attorney to perfect an appeal. The only evidence the court had before it was an affidavit signed by Little waiving his right of appeal. Little attempts, in this appeal, to raise factual issues regarding his illiteracy and his alleged revocation of the waiver. We note that these issues were not raised with the trial court and are therefore waived. Miss. Code Ann. § 99-39-21(1) (1972). We find that the trial court was correct in its determination that Little waived his right of appeal when he signed the affidavit indicating his desire to forego an appeal.

Little contends in his second issue before this Court that his attorney was ineffective because he failed to perfect an appeal within the time allowed. The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), set forth a two-pronged test for determining ineffective assistance of counsel: Defendant/Appellant must show "(1) deficiency of counsel's performance (2) sufficient to constitute prejudice to the defense." *Dickey*, 662 So. 2d at 1109. The Mississippi Supreme Court in *Dickey v. State* addressed this same issue and concluded that an attorney's performance could not be deemed deficient absent a showing by the appellant that an agreement regarding the perfection of an appeal had ever been reached. *Id.* The present case turns on similar facts. Here, as in *Dickey*, Little also fails the first prong of the *Strickland* test in that he did not present any evidence that he had asked his attorney to perfect an appeal. To the contrary, evidence was before the court in the form of an affidavit that Little had voluntarily waived his right to an appeal. Therefore, we cannot find the performance of Little's attorney to have been deficient.

THE JUDGMENT OF THE HUMPHREYS COUNTY CIRCUIT COURT TO DENY APPELLANT'S MOTION FOR AN OUT-OF-TIME APPEAL IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HUMPHREYS COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

