

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CP-00823-COA

**DONALD FOSTER ESTES A/K/A DONALD
ESTES A/K/A DONALD F. ESTES A/K/A
DONALD FOSTER ESTES JR.**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT:	05/08/2012
TRIAL JUDGE:	HON. ROBERT P. CHAMBERLIN
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DONALD FOSTER ESTES (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	MOTION FOR POST-CONVICTION RELIEF DISMISSED
DISPOSITION:	AFFIRMED: 07/16/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., MAXWELL AND FAIR, JJ.

FAIR, J., FOR THE COURT:

¶1. On April 7, 2006, Donald Foster Estes entered the Kroger in Southaven, Mississippi. He approached the pharmacy counter, lifted his shirt to show the pharmacist a toy pistol, and demanded that she give him the painkiller Lortab. She gave Estes the Lortab, and he exited the store.

¶2. Estes was indicted by a DeSoto County grand jury for armed robbery under Mississippi Code Annotated section 97-3-79 (Rev. 2006). Estes pleaded guilty and was

sentenced to twenty years, with twelve years to serve in the custody of the Mississippi Department of Corrections and eight years of post-release supervision, five of those eight years reporting.¹

¶3. On March 14, 2012, Estes filed a PCR petition in the DeSoto County Circuit Court. The petition was dismissed on May 8, 2012. Estes now appeals, arguing his counsel was ineffective for: (1) allowing Estes to enter a guilty plea when the State could not prove the elements of armed robbery; (2) failing to move to suppress Estes’s statements; (3) failing to investigate Estes’s case and prepare a defense; and (4) failing to subject the State’s case to meaningful adversarial testing. We will address issues one, three, and four together, as they are related.

STANDARD OF REVIEW

¶4. When this Court reviews the trial court’s dismissal of a PCR petition, we “will not disturb the trial court’s factual findings unless they are found to be clearly erroneous. However, where questions of law are raised[,] the applicable standard of review is de novo.” *Terry v. State*, 755 So. 2d 41, 42 (¶4) (Miss. Ct. App. 1999) (internal quotations omitted).

¹ On April 9, 2006, Estes robbed the Walgreen’s pharmacy in Olive Branch, Mississippi with the same toy pistol, again demanding Lortab. Estes pleaded guilty to that robbery as well, and the judge ordered Estes’s sentences to run concurrently. On August 10, 2011, Estes filed a petition for post-conviction collateral relief (PCR) relating to that conviction. The petition was denied on December 6, 2011, which this Court affirmed in *Estes v. State*, 2012-CP-00071-COA, 2013 WL 599933, at *3 (¶16) (Miss. Ct. App. Feb. 19, 2013). Estes’s PCR petition in today’s case is nearly identical, with the exception of the statement of the facts (dates of offenses two days apart and names of pharmacies differ). In both PCR petitions, Estes refers to events that took place with the same attorney and at the same plea hearing.

When a defendant pleads guilty, “he must show unprofessional errors of substantial gravity.” The defendant must show his counsel’s conduct “proximately resulted in his guilty plea, and but for counsel’s errors, he would not have entered the plea.” *Cole v. State*, 918 So. 2d 890, 894 (¶10) (Miss. Ct. App. 2006).

DISCUSSION

¶5. To succeed on an ineffective-assistance-of-counsel claim, the petitioner must satisfy the two-pronged test laid out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So. 2d 468 (Miss. 1984). “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 477 (quoting *Strickland*, 466 U.S. at 687).

1. Deadly Weapon

¶6. Estes contends that the State could not prove each element of the armed robbery, and therefore, his counsel was ineffective for allowing him to plead guilty. Specifically, Estes claims that the State could not prove that he put the pharmacist “in fear of immediate injury to his person by the exhibition of a deadly weapon,” because he had a toy pistol and not a “deadly weapon.” Estes also argues that his counsel was ineffective for failing to prepare a defense against the State’s contention that he possessed a deadly weapon, and that because of that failure, the State’s case was not subject to a meaningful adversarial testing.

¶7. When Estes pleaded guilty, he “waive[d] his constitutional right[] against self-incrimination, [his right] to confront witnesses, and the requirement to have each element

of the offense proved beyond a reasonable doubt.” *Bishop v. State*, 812 So. 2d 934, 945 (¶39) (Miss. 2002).

¶8. The only element of the offense that Estes contends the State could not prove was the requirement of a “deadly weapon.” Relying on *Gibby v. State*, 744 So. 2d 244 (Miss. 1999), Estes asserts that because he showed the pharmacist a toy pistol, she could not have “definite knowledge” that a deadly weapon existed. The Mississippi Supreme Court overruled *Gibby* in *Dambrell v. State*, 903 So. 2d 681, 683 (¶6) (Miss. 2005), holding that “when a defendant makes an overt act and a reasonable person would believe that a deadly weapon is present, there is no requirement that a victim must actually see the deadly weapon in order to convict pursuant to . . . [section] 97-3-79.”

¶9. Furthering the holding of *Dambrell*, this Court in *Lyons v. State*, 942 So. 2d 247, 250-51 (¶¶13-16) (Miss. Ct. App. 2006), upheld an armed-robbery conviction where the defendant produced a note saying he had a gun. The Court noted that this was an overt act that led the victim to reasonably believe the defendant did possess a deadly weapon, which satisfied the purposes of section 97-3-79. Additionally, this Court stated in *Trammell v. State*, 62 So. 3d 424, 428-29 (¶¶16-17) (Miss. Ct. App. 2011), “[t]he fact that [the victim] never saw the weapon [was] of no matter” because the defendant had produced a note saying he had a gun, and the victim testified that she feared for her life.

¶10. At the plea hearing, the State asserted it could prove that the pharmacist was “in fear of immediate injury to her person by the exhibition of a deadly weapon, to wit, a gun.” When questioned by the court if Estes disagreed with anything the State claimed it could

prove, Estes answered, “No, sir.”

¶11. Estes has not shown that his counsel’s performance was deficient, as required under *Strickland*. Furthermore, he has not shown that his counsel’s allegedly deficient performance “proximately resulted in his guilty plea, and [that] but for counsel’s errors, [he] would not have entered the plea.” *Cole*, 918 So. 2d at 894 (¶10). This issue is without merit.

2. Estes’s Statements

¶12. Estes argues that his counsel was ineffective for failing to move to suppress his statements because they were not voluntarily given, as he was under the influence of drugs.

¶13. This Court has found that “a plea of guilty waives any evidentiary issue.” *Jefferson v. State*, 855 So. 2d 1012, 1014 (¶11) (Miss. Ct. App. 2003) (*citing Bishop v. State*, 812 So. 2d 934, 945 (¶39) (Miss. 2002)). This waiver includes his “constitutional rights against self-incrimination.” *Bishop*, 812 So. 2d at 945 (¶39).

¶14. Estes only makes bare assertions that his statements were involuntary. He offers no argument that but for his counsel’s errors, he would not have entered the plea. This issue is without merit.

¶15. THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY DISMISSING THE PETITION FOR POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO DESOTO COUNTY.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL AND JAMES, JJ., CONCUR.