

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1999-CP-01604-COA**

TERRY W. SIMMONS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 12/03/1999
TRIAL JUDGE: HON. FRANK A. RUSSELL
COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: PRO SE
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: DIEDRE MCCRORY
NATURE OF THE CASE: CRIMINAL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION: 12/03/1999: PCR DENIED 12/03/1999
DISPOSITION: AFFIRMED-11/21/00
MOTION FOR REHEARING FILED: ; denied 2/6/2001
CERTIORARI FILED:
MANDATE ISSUED: 12/12/2000; recalled 1/16/2001; 2/27/2001

BEFORE KING, P.J., MOORE, AND THOMAS, JJ.

KING, P.J., FOR THE COURT:

¶1. Terry Simmons perfected this appeal from an order of the Circuit Court of Lee County Mississippi denying his motion for post-conviction relief. Simmons pled guilty to conspiracy to sell, transfer or distribute cocaine and possession of cocaine. The court sentenced Simmons to twenty years on the conspiracy charge and three years on the possession charge, to be served concurrently in the custody of the Mississippi Department of Corrections. These sentences were suspended pending Simmons's completion of one year of house arrest. Simmons raises the following allegations of error which are taken verbatim from his brief: (1) appellant [sic] presented ineffective assistance of counsel that charged his counsel with providing him with misinformation concerning the length of sentence, where counsel told Mr. Terry W. Simmons, that he would be sentence [sic] to one year on the charge of conspiracy to sell, transfer or distribute cocaine not a twenty year sentence, (2) whether the trial court committed compound errors when it allowed Simmons to plead guilty to twenty years on a conspiracy charge in which Simmons was never indicted on and allowing the counsel to use false charge of "poss. of marijuana [sic] with intent enhanced" in cause No. 97-413, and (3) the court erred when it sentence [sic] Terry W. Simmons in a multi-count indictment since count II of the indictment came after the phrase "against the peace and dignity of the state" in violation of article 6.8169 of the Mississippi Constitution.

FACTS

¶2. The Grand Jury of Lee County Mississippi indicted Simmons on one count of possession of a controlled substance and one count of conspiracy to sell, transfer or distribute a controlled substance. Simmons pled guilty to both charges. Simmons was sentenced to serve twenty years on the conspiracy charge and three years on the possession charge. Both sentences were suspended pending his completion of one year of house arrest. If Simmons successfully completed the house arrest program, the trial court would review Simmons's sentence and place him on probation. However, Simmons violated the conditions of his house arrest and was remanded to the Mississippi Department of Corrections for incarceration. A year later Simmons filed his motion for post-conviction relief with the Lee County Circuit Court. The motion was denied. Simmons, aggrieved by the court's ruling, perfected this appeal.

ANALYSIS AND CASE LAW

¶3. While Simmons has raised several issues, he has failed to place a complete record before the court for review. Simmons has the responsibility of providing a record in support of the issues raised. *Roberts v. State*, 761 So. 2d 934 (¶3)(Miss. Ct. App. 2000) *see also Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995). Simmons failed to include a transcript of the plea hearing in the designation of the record. The Court's decisions cannot be based on assertions found in briefs but must be based on facts found in the record. *Id.*; *Colenburg v. State*, 735 So. 2d 1099 (¶ 6) (Miss. Ct. App. 1999). "Facts asserted to exist must and ought to be definitely proved and placed before [the court] by a record, certified by law; otherwise, we cannot know them." *Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983).

¶4. As part of the record, Simmons did provide a copy of the sentencing hearing. While that portion of the record is relevant, it does not address the issue of the voluntariness of Simmons's plea and the effective assistance of counsel as a transcript of the plea hearing would do. That transcript would provide the Court with a view of the trial court's effort to ascertain the voluntariness of Simmons's plea, and his satisfaction with the service of counsel.

¶5. Motions for post-conviction relief must include affidavits that state facts and how or by whom those facts will be proven. Miss. Code Ann. §99-39-9(Rev. 1994). Simmons's motion included an affidavit from an anticipated witness as well as an affidavit composed by himself. Those affidavits must not be considered in a vacuum, but must be considered along with transcripts of the plea hearing. "Claims by [Simmons], even if supported by affidavit, that are contradicted by the record of the plea acceptance hearing may be disregarded by the trial court." *McCuiston v. State*, 758 So. 2d 1082 (¶9) (Miss. Ct. App. 2000). Without a complete copy of the record, this Court is unable to determine whether any of the claims presented have merit. Simmons failure to place the necessary record before the Court is a procedural bar to consideration of his claims. *Roberts*, 761 So. 2d at (¶ 3).

¶6. JUDGMENT OF THE LEE COUNTY CIRCUIT COURT DENYING POST-CONVICTION RELIEF IS HEREBY AFFIRMED. LEE COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, IRVING, LEE, MOORE, MYERS, PAYNE, AND THOMAS, JJ., CONCUR.