

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 2000-CP-01414-COA**

LARRY BANKS A/K/A ISMAIL MOHHADDOA

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 08/04/2000
TRIAL JUDGE: HON. JOHN M. MONTGOMERY
COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: PRO SE
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY: FORREST ALLGOOD
NATURE OF THE CASE: CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION: POST-CONVICTION RELIEF DENIED
DISPOSITION: AFFIRMED-10/02/01
MOTION FOR REHEARING FILED: 11/8/2001; denied 1/8/2002
CERTIORARI FILED: 2/4/2002; denied 4/18/2002
MANDATE ISSUED: 10/23/2001; 5/9/2002

BEFORE KING, P.J., BRIDGES, AND IRVING, JJ.

KING, P.J., FOR THE COURT:

¶1. On January 29, 1999, Larry Banks, a/k/a Ismail Mohhaddoa, was indicted for selling cocaine by an Oktibbeha County grand jury. On November 3, 1999, Banks pled guilty to the charge, and the court accepted his guilty plea. Banks was sentenced to serve a term of five years in the custody of the Mississippi Department of Corrections and fined \$5,000. On March 16, 2000, Banks filed a motion for post-conviction relief, which was denied. Aggrieved by this decision, Banks now appeals assigning the following as error: (1) whether his second arrest and indictment on charges previously no billed violated his constitutional rights and (2) whether he was afforded effective assistance of counsel.

FACTS

¶2. On June 11, 1998, a narcotics officer and Wilbur Clark, a confidential informant for the Starkville Police Department, were riding in a vehicle equipped with audio and video monitors. The two men stopped and Larry Banks approached the car. Clark asked Banks for cocaine in exchange for forty dollars. Banks got into the rear passenger side of the car and handed Clark a rock-like substance later identified as

cocaine. In exchange for the cocaine, Clark paid Banks forty dollars. The camera mounted inside the vehicle recorded this transaction. Police arrested Banks for selling crack cocaine, within 1500 feet of Westside Park.

¶3. Later, Officer Mark Ballard, who was familiar with the people and area where this transaction took place, was asked to view the videotapes. Officer Ballard recognized the man on the videotape as Banks, who sometime used the alias Ismail Mohhaddoa. Officer Ballard had arrested Banks before and recognized a baseball cap on the videotape as the same one worn during a previous arrest of Banks.

¶4. Banks was bound over to the Grand Jury of Oktibbeha County under the name Ismail Mohhaddoa. The grand jury returned a no bill. Banks was released on August 18, 1998, and advised that he was subject to arrest again upon the discovery of new evidence. Eight months later police arrested Banks again on the same charge. This time the grand jury returned a true bill.

¶5. Banks was provided appointed counsel, which he sought unsuccessfully to have dismissed. Banks also sought, without success, dismissal of the charges because they were the same charges from the same facts, which the grand jury had declined to indict.

¶6. Banks, who initially entered a not guilty plea, subsequently entered a plea of guilty. The court, having found that his guilty plea was freely, voluntarily, knowingly and intelligently given, sentenced Banks to serve five years in the custody of the Mississippi Department of Corrections and fined him \$5,000.

ISSUES AND ANALYSIS

I.

Whether his second arrest and indictment on charges previously no billed violated his constitutional rights.

¶7. Banks contends that the court did not have jurisdiction to arrest and indict him a second time for selling cocaine since his second arrest arose from the same set of facts as his previous arrest. This, Banks suggests, was violative of the double jeopardy protections of the federal constitution. In rebuttal, the State argues that jeopardy does not attach to grand jury proceedings.

¶8. The Fifth Amendment to the United States Constitution prohibits a person from being prosecuted twice for the same offense. Article 3, § 22 of the Mississippi Constitution provides: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution." Adhering to the holding of *Martin v. State*, 766 So. 2d 812 (¶8) (Miss. Ct. App. 2000) (citing *Jones v. State*, 398 So. 2d 1312, 1317 (Miss. 1981)), we rule that double jeopardy "[o]nly attaches when the jury has been empaneled and sworn"

¶9. A jury was never impaneled or sworn in this case. Initially, Banks was arrested for selling cocaine and the Oktibbeha Grand Jury returned a no bill on this charge. However, eight months later, Banks was arrested again for selling cocaine. This time the grand jury returned a true bill. Therefore, jeopardy did not attach to these proceedings.

¶10. We hold that the trial court did not err in denying Banks' motion to dismiss.

II.

Whether Banks was afforded effective assistance of counsel.

¶11. In his motion for post-conviction relief, Banks seeks reversal of his conviction and sentence based on ineffective assistance of counsel. Banks asserts that his court-appointed counsel was a threat to him because he (1) informed the judge of Banks' basis for dismissal of the charges, (2) refused to conduct discovery and (3) spied on him on behalf of the district attorney.

¶12. However, Banks has failed to establish an ineffective assistance of counsel claim. He failed to show (1) a deficiency of counsel's performance that was (2) sufficient to constitute prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶13. The Post-Conviction Relief Act requires motions for post-conviction relief to be pled with specificity and to include affidavits which state facts and how or by whom these facts will be proven. Miss. Code Ann. § 99-39-9 (Rev. 2000). If the motion does not conform to this standard, then the court may dismiss the motion. Miss. Code Ann. § 99-39-11 (Rev. 2000). Banks submitted an affidavit with his motion for post-conviction relief. However, it did not contain names of anticipated witnesses or the substance of their testimony. Nor were affidavits submitted by any potential witnesses. Banks provided only general statements in his motion. Banks' vague allegations alone are not enough to warrant reversal of his conviction. *Perkins v. State*, 487 So. 2d 791, 793 (Miss. 1986). *See also Smith v. State*, 490 So. 2d 860 (Miss. 1986) (dismissing defendant's post-conviction relief motion because he failed to meet the pleading requirements of Miss. Code Ann. § 99-39-9(1)(e)). The trial judge was not in error in dismissing Banks' motion.

¶14. THE JUDGMENT OF THE OKTIBBEHA COUNTY CIRCUIT COURT DENYING POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS ARE ASSESSED TO OKTIBBEHA COUNTY.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, IRVING, MYERS, CHANDLER AND BRANTLEY, JJ., CONCUR.