

IN The Court Of Appeals Of The State Of Mississippi

FILED

COPY

Jessie J. McGee

MAR 21 2007

vs.

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Appellant

State Of Mississippi

No. 2006-~~75~~-02139-C.O.A.

Respondent

Motion For Past-Conviction Collateral Relief

Comes Now, petitioner, pro se and files this
his motion for Past-Conviction Collateral
Relief Pursuant to Mississippi Code Ann.
section 99-39-1 et seq, and in support
thereof would show unto this Honorable
Court the following to wit:

Pursuant to Mississippi
Uniform Past-Conviction Collateral Relief
Act, Miss Code Ann section 99-39-1 through
99-39-29 (Supp 1992), a petitioner is entitled
to an in court opportunity to prove his
claims are "substantially showing denial of
a state or federal right." *Horton v State*,
525 So.2d 764, 767 (Miss 1991).

"Jurisdiction"

The petitioner is properly before this Court pursuant to the applicable law and statutes of the State of Mississippi.

(1.)

Statement of Claims or Grounds Upon Which Motion is Based

Issue One:

Whether Appellant should have got sentenced or resented under Article section 41-29-149?

Issue Two:

Whether the Circuit Court Judge abused his discretion when he denied appellants motion for resentencing with his status as a first time offender?

Issue Three:

Whether the ten(10) year sentence appellant received was excessive for his status as a first time offender?

(2)

FACTS

On or about March 16, 2005, the defendant herein pled guilty to sale of crack cocaine, and was sentenced by the Circuit Court of Copiah County on the 4th day of April, 2005, to serve a term of Ten (10) years in the custody of the Mississippi Department of Corrections. Appellant states his sentence is excessive by him being a first time offender at the age of 63 years old.

Appellant pray this Honorable Court will grant him a hearing on this matter. Appellant have lived in Mississippi all his life and he pray this Honorable Court will Order Copiah County Circuit Court to grant him a hearing on this matter.

Respectfully Submitted

Jessie Mc Gee 110829

C.M.C.F.

P.O. Box 88550

Pearl, MS 39288

(3)

Proceeding in which Appellant was Convicted

Appellant was indicted around or about October 2004, for sale of cocaine. Thereafter Appellant entered a guilty plea on or about March 16, 2005, to one (1) count of sale of cocaine, controlled substance, and received a Ten (10) year sentence by Honorable Lamar Pickard to serve (10) years in the custody of the Mississippi Department of Corrections.

The sentencing proceeding was reported by official Court reporter, Theresa Lundy on same day.

(41)

Issue One:

Whether appellant should have got sentenced or re-sentenced under Article section 41-29-149?

Appellant alleges as a first time offender he should have got sentenced under article section 41-29-149.

Appellant was sixty three (63) years old upon his first conviction.

Section 41-7-47 provide in part:

(1) The judge of any circuit court may place an offender on a program of earned probation after a period of confinement as set out herein...

(2)(a) Any Circuit court... may upon its own motion, acting upon the advice and consent of the Commissioner at the time of the initial sentence after the defendant has been delivered to the custody of the department to which he has been sentenced suspend the further execution of the sentence

(5.)

and place the defendant on earned probation, except if the defendant has been confined for a felony on a previous occasion in any Court or Courts of the United States...

The authority granted in this subsection shall be exercised by the Judge who imposed sentence on the or his successor.

Here, Mr. McGee is a first offender within the meaning of the law. This Hon Court would be justified in its conduct if it were to reverse and Remand appellants case for and extraordinary hearing.

Moreover, appellant properly ask this Honorable Court to Order Copiah County Circuit Court to consider a alternative placing him in a rehabilitative program as provided under Miss Code Ann § 41-29-100 (1991) in view of the fact he was a first time offender, and never received the benefits afforded or allowed under the law.

(6)

"It is clear that the intent and purpose of the legislative was to promote the rehabilitation of persons convicted of offenses under the uniform Controlled Substance law by providing for incarceration of such persons in facilities separate from the state penitentiary, and the several county jails or county farms...."

Appellant alleges he is a first time offender, Appellant alleges he was using drugs at the time of his arrest, and that his conviction should have only been a possession of cocaine.

Appellant ask this Honorable Court to grant him and exoneratory hearing on this matter.

Respectfully Submitted

Jessie Mc Lee 110829

C.M.C.F. A-1 Blane

P.O. Box 88550

Pearl, MS 39288

(7)

Issue Two:

Whether the Circuit Judge abused his discretion when he denied appellants motion for resentencing with his status as a first time offender?

Appellant alleges the Copiah County Circuit Judge abused his discretion when he denied appellants motion for resentencing with his status as a first time offender.

Pursuant to Mississippi Code Ann §41-29-149 regardless of the penalties provided herefore for the violation of the penalties of any section or portion of this article, the Judge of the court of jurisdiction of any defendant may in his discretion, suspend such penalty, or portions thereof, for any person charged with a first offense.

(8.)

Petitioner Jessie Mcbee is a first time offender, he's (63) sixty three years old, Appellant pray this Hon Court will take under consideration he's was a first time offender, and Order the trial Court to resentence him under Miss Code Ann § 41-29-149(b).

41-29-149(b) states a person convicted under this article or under any prior law superseded by this Article for a violation of the law regarding controlled substances shall be eligible for parole just as in any other criminal convictions as provided by section 47-7-3.

Appellant alleges under 41-29-149(c) that he meets the requirement of this section. Any person who was convicted and/or who is still serving a sentence in the Mississippi State Penitentiary for a first offense under any prior law superseded by this Article, may petition the Court for resentencing under this provisions of this Article.

(9)

Appellant further alleges for the purpose of the sentencing provisions of Article, Miss Code Ann § 41-29-149(c). *Kyzer v. State*, 271 So.2d 390 (Miss 1972).

A first offense shall be deemed to be and include any offense, offenses, act, or acts prohibited by said law, committed prior to a first indictment under said law or under prior law superseded by said law.

Appellant alleges the Copiah County Circuit Court Judge abused his discretion when he refuse appellant a rehabilitation center for and alternative as a first time offender. *Smith v. State*, 248 So.2d 436 (Miss 1971).
(*Nichols v. State*, Miss 2000) Appellant pray this Honorable Court will Remand his case for a hearing on this matter.

(10.)

Issue Three:

Whether the ten(10) year sentence appellant received was excessive for his status as a first time offender?

Appellant alleges his sentence is disproportionate for the crime of sale of cocaine. Appellant states his sentence was excessive for a first time offender.

Appellant plead guilty to the crime charged against him.

In *King v. State*, 857 S.O.2d 702, 732 (P108) (Miss 2003) The Mississippi Supreme Court ruled that pleading guilty is reason to support receiving a lesser sentence.

Appellant was (62) fifty two years old before he had any run in with the law, he alleges his (10) ten year sentence is excessive for his back ground. Appellant should have been afforded a rehabilitation center for the punishment for sale of cocaine as a first time offender.

Pursuant to Section 47-7-47

(11.)

Appellant alleges he had a drug problem, and not a drug dealer. Appellant had a habit he was trying to keep up. Possession of a controlled substance, being a lesser included crime of a sale of a controlled substance, merges into the sale charge. See *Laughter v. State*, 241 So. 2d, 641, 644 (Miss 1970).

Appellant plead guilty to sale of a controlled substance and was sentenced to a (10) ten year sentence as a first time offender at the age of (62) sixty two years old. Appellant alleges his (10) ten year sentence was outside of the statutory guidelines as a first time offender.

This Hon Court states in *Franklin v. State*, 723 So. 2d 702, 732 (P.6) Miss Ct App 2000. Held: "We, as an appellate court, must afford sentencing courts with 'substantial deference' in determining sentences. Given the fact

(12)

that appellant had a drug problem, and not a drug dealer his sentence is excessive for a first time offender.

Appellant alleges as a first time offender he should have been afforded probation or sentenced to a drug rehabilitative program.

In view of the fact that the legislature had enacted a comprehensive narcotics law known as the Uniform Controlled Substances law which materially reduced the penalty imposed on first offenders, and had also repealed Code 1942, § 6866, under which the defendant was sentenced to seven years following a conviction for the unlawful sale of L.S.D. while the conviction of the defendant, who was 22 years of age and a first offender, would be affirmed, the case would be remanded to the trial court for an imposition of a sentence in accordance with the provisions of the new law. Smith v. State, 248 So.2d 434 (Fla. 5th D., 1971).

(13)

Appellant states sentencing is within the complete discretion of the trial court, and he believes the Judge of Copiah County Circuit Court abused his discretion when he sentenced appellant to a (10) ten year sentence as a first time offender for sale of a controlled substance. *Pittus v. State*, 278 So.2d 778 (Miss. 1973).

Therefore Appellant ask this Honorable Court to Remand this case for a hearing on this matter

Respectfully Submitted

Jessie Mae Lee 110829

C. M. C. F. A-1 B. J. J.

P.O. Box 88550

Pearl, MS 39288

(14)

Verification of Petitioner

I, Jessie J. Mabree, the above pro-se petitioner in the foregoing petition, do hereby affirm and state the following to Wit:

I.

I am the petitioner in the foregoing original motion styled as "Motion for Post Conviction Relief."

II.

I have read the foregoing motion and all statements and other readings herein attached are true and correct to the best of my knowledge, information and belief.

III.

I believe that I am entitled to the relief as requested in said motion.

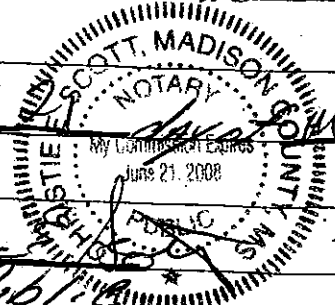
Jessie Mabree 110829
Petitioner

State of Mississippi
County of Rankin

Personally appeared before me, the undersigned authority in and for said jurisdiction, the within named petitioner, who after first being by me duly sworn, stated on oath that statements set forth in the above and foregoing are true and correct as therein stated.

Sworn to and subscribed before me this
March, 2027.

Christa
Notary Public



APPLICATION TO PROCEED IN FORMA PAUPERIS
IN THE COURTS OF THE STATE OF MISSISSIPPI

Jessie J. McGee

PETITIONER

VS.

CAUSE NO: 2006-TS-02139-C.P.A.

STATE OF MISSISSIPPI

RESPONDENT

I, Jessie McGee, an inmate within the Mississippi Department of Corrections, request this Honorable Court to allow me to proceed without prepayment of costs and declare that I am unable to pay the fees and am entitled to proceed as a Pauper. In support thereof, I would show the following, to-wit:

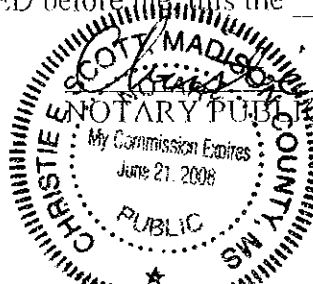
1. I receive income, if any, in the amount of \$ 0 per week/ month/ year.
2. I have the amount of \$ 0 in a checking and/or savings account located at 0.
3. List all other assets such as real estate, bonds, notes, etc.
 - a. N/A
 - b. N/A
 - c. N/A

STATE OF MISSISSIPPI

COUNTY OF Rankin

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for said jurisdiction, the within named Petitioner, who, after first being by me duly sworn, stated on oath that the statements set forth in the above and foregoing are true and correct as therein stated.

SWORN TO AND SUBSCRIBED before me, this the 21 day of March, 2007.



**FINANCIAL AUTHORIZATION
TO BE COMPLETED BY PETITIONER**

Authorization for Release of Institution Account Information
and Payment of the Filing Fees

I, Jessie J. McGee, MDOC# 110828
authorize the Clerk of Court to obtain, from the agency having custody of my person,
information about my institutional account, including balances, deposits and withdrawals.
The Clerk of Court may obtain my account information from the past six (6) months and
in the future, until the filing fee is paid. I also, authorize the agency having custody of
my person to withdraw funds from my account and forward payments to the Clerk of
Court, in accord with section 47-5-76 of the Mississippi Code Annotated.

3-21-07
Date

Jessie McGee
Signature of Petitioner

IT IS THE PETITIONER'S RESPONSIBILITY TO HAVE THE APPROPRIATE
PRISON OFFICIAL COMPLETE AND CERTIFY THE CERTIFICATE BELOW

**CERTIFICATE
(Inmate Accounts Only)
TO BE COMPLETED BY AUTHORIZED OFFICER**

I certify that the Petitioner named herein has the sum of \$ _____
on account to his credit at _____, MDOC Facility, where
he is confined. I further certify that the Petitioner has the following securities to his
credit according to the records of said institution: _____

I further certify that during the last six (6) months the
Petitioner's average monthly balance was \$ _____

I further certify that during the last six (6) months the
Petitioner's average monthly deposit was \$ _____

I further certify that Petitioner has made the following withdrawals within
the past thirty (30) days: _____

Telephone Number

Authorized Officer of Inmate Accounts

Date

Print Name of Authorized Officer

PC

will forward original upon completion

CERTIFICATE OF SERVICE

This is to certify that I have this date, caused to be mailed, via United States Mail,
postage pre-paid, a true and correct copy of the above and foregoing Pleading to:

Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205

Attorney General for Mississippi
P.O. Box 220
Jackson, MS 39205

SO CERTIFIED, this the 21 day of MARCH, 20 07.

Jessie Mc Kee
Petitioner

110829
MDOC #

P.O. Box 88550 A.M.C.F.
Address

PRACI, MS. 39288
Address