

VS.

Cause no. 2007-CP-01051-C
Lower Court # CR 96-317

State of MISSISSIPPI

FILED

Appellee

DEC 10 2007

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SUPREME COURT
COURT OF APPEALS

Brief For Appellant

*EVIDENTIARY HEARING
REQUESTED

Rodney L. Jones

D.O.C. # 79065

32 Alpha

Parchman, Ms. 38738

Pro-se, Rodney L. Jones

He's guilty and been in jail.
Recommend deny.

13

State of Mississippi

Appellee

Cause no. 2007-CF-01051-C2
Lower Court # CR96-317

Certificate of Interested Persons

The undersigned Pro-se litigant of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. State of Mississippi

2. Rodney L. Jones

This the 11th day of Dec, 2007.

Mr. Rodney L. Jones
Rodney L. Jones
Pro-se
#79005

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8 _____ U.S. Const. 14th Amend
 8 _____ U.S. Const. 6th Amend

Other Authorities

6, 8 _____ M.C.R. § 99-19-81
 6 _____ M.C.R. § 47-7-33
 7 _____ M.C.R. § 47-7-35
 7 _____ M.C.R. § 47-7-37

Statutes

8 _____ Bandy v. State, 475 So.2d 486 (Miss. 1986)
 5 _____ Blackledge v. Perry, 417 U.S. 2130, 94 S.Ct. 2098 (1974)
 5 _____ Culberson v. State, 612 So.2d 341, 343-47 (Miss. 1992)
 5 _____ Dillworth v. Johnson, 215 F.3d 497, 500 (5th Cir. 2000)
 8 _____ Gideon v. Wainwright, 372 U.S. 335, 342 (1963)
 8 _____ Gray v. State, 605 So.2d 791-792 (Miss. 1992)
 5 _____ Herbst v. Scott, 42 F.3d 902, 905 (5th Cir. 1995)
 5 _____ Kennedy v. State, 626 So.2d 103, 105 (Miss. 1993)
 9 _____ Keyes v. State, 549 So.2d 949 (Miss. 1989)
 5 _____ Malone v. Cook, 490 U.S. 488, 493-94, 109 S.Ct. 1923, 1926-27 (1991)
 8 _____ Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241 (1975)
 5 _____ Phillips v. State, 427 So.2d 476 (Miss. 1982)
 6 _____ Presley v. State, 792 So.2d 958, 960 (Miss. 1992)
 5 _____ Quinn v. State, 739 So.2d 419, 420 (Miss. App. 1999)
 6 _____ Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971)
 8 _____ U.S. v. Gordon, 156 F.3d 376, 379 (2d Cir. 1998)
 6 _____ White v. State, 556 So.2d 1022 (Miss. 1992)
 7 _____ Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed. 2d 484, 90 S.Ct. 593 (1972)

illegal violation / violation thereof rendered against Petitioner,
an illegal sentence imposed by the Judge abusing his authority
and these violations used for enhancement purposes.

Statement of The Case

This appeal Proceeds from the Circuit Court of Lee County, MISSISSIPPI and an order denying Petition for Post-Conviction relief and to vacate and to Set Aside Conviction and Sentence or in the Alternative for out of Time Appeal against Rodney L. Jones and, from the thirty-five (35) years mandatory sentence following a trial held the 18th day of November 1997, Honorable Frank A. Russell, Circuit Judge Presiding; and Honorable Thomas J. Gardner, III, Circuit Judge Presiding over Post-Conviction, Cause no. CV07-055-GL. Rodney L. Jones is Presently incarcerated with the MISSISSIPPI Department of Corrections at the MISSISSIPPI State Penitentiary.

FACTS

During the August Term, 1991, Petitioner was indicted for three counts of Grand larceny, in cause numbers 21,023, 21,024, 21,027. On the 25th day of October, 1991, Petitioner went before Judge Thomas Gardner to accept a Pre-arranged Plea agreement that was conclusively agreed upon by the Prosecutor and defendant's Counsel. The recommendation consisted of five years on each Charge, that that five years was to be suspended, that

violated that Agreement by forcing Petitioner to Complete the RID Program, Against Petitioners Will. Petitioner informed the Judge that he didn't want to accept the Plea if the Pre-arranged Plea wasn't adhered to. After a brief discussion with Counsel, Petitioner was Coerced into accepting the RID Program. That on this same day and date, Petitioner was ordered to the RID Program and the Court reserved the right of Judicial review in 180 days. That after the Completion of the RID, Petitioner was to be transported to the Greenwood/LeFlore County restitution Center. That after the Completion of the restitution, Petitioner was to be Placed on five years Supervised Probation. That at this same hearing, the Judge Witheld imposition of Sentence Pending Further order of the Court in Cause no's 21,024 and 21,027.

That on the 19th day of October, 1992, Judge Gardner entered an order suspending Petitioner's time because of successfully completing Phase one of the RID Program and ordered that after Completion of the restitution, Petitioner should report immediately to the Court so Specification of the terms of his Probation could be rendered. Petitioner arrived at the restitution on the 19th day of October, 1992. On the 28th day of October, 1992, Petitioner stopped attending the Greenwood/LeFlore Co. restitution Program. On the 30th day of December, 1992, Petitioner was apprehended. Petitioner would call the Courts attention to the fact that he didn't leave the restitution until the 28th of Oct. 1992. That Judge Gardner fabricated an order dated the 23rd day of October 1992, suspending Sentence and Placing Petitioner on Probation. But Petitioner was already at the restitution from the order dated the 19th day of October 1992. The order sending Petitioner to the restitution Center, dated the 14th day of October, 1992 was received at CMC Records Dept. on the 22nd day of October, 1992. The fabricated order allegedly placing Petitioner on Probation and sending him to the restitution is dated the 23rd of October, 1992.

That on the 19th day of January, 1993, Petitioner was heard

That at the bifurcated hearings, the Judge denied Petitioners
witness to give mitigating testimony Pursuant to U.C.C.R. 10.04
Counsel objected to the Proof submitted to Prove Petitioner
was an habitual. The Prosecutor never proved that Rodney L. Jones
was actually the Rodney L. Jones convicted of the previous felonies.

sentence by the Court Violating a probation that was never imposed, thereby causing the sentence to be illegal and these Constitutional violations were used to enhance the Present sentence. By these means, that would make the Present sentence imposed illegal, because illegality was applied from the grand larceny charges. Appellant's evidence/exhibits support his claim.

illegal Probation / Violation thereof rendered a nullity, an illegal sentence imposed by the Judge abusing his authority and these violations used for enhancement Purpose.

Petitioner would assert to this Court that the illegal Sentence / Probation rendered in Cause numbers 21,023, 21,024 and 21,027 was used to enhance Petitioner's Subsequent and Current Sentence in Cause no. CR96-317, in the Circuit Court of Lee County, Miss., and therefore allows Petitioner standing to Challenge the legality of such Conviction and Sentence. Phillips v. State, 401 So. 2d 476 (Miss. 1982); Culberson v. State, 612 So. 2d 341, 342-47 (Miss. 1992); Quinn v. State, 739 So. 2d 419, 420 (Miss. App. 1999). The Federal Courts have rationalized that a Petitioner could attack a Prior Conviction used to enhance his Punishment because the Jurisdictional requirement of "in Custody" is satisfied by reading the Petition as a Challenge to the Current Conviction. Dilworth v. Johnson, 215 F.3d 497, 500 (5th Cir. 2000); Citing Malena v. Cook, 490 U.S. 488, 493-94, 109 S.Ct. 1923, 1926-27, 104 L.Ed. 2d 540 (1989). See also, Herbst v. Scott, 42 F.3d 902, 905 (5th Cir. 1995).

In Kennedy v. State, 626 So. 2d 103, 105 (Miss. 1993), the Court held that "Where it is clear from the record that the court" has exceeded its statutory authority in sentencing and a fundamental Constitutional right may be involved, such claims are exempt from Procedural bars". The Circuit Court overstepped its authority when it violated a Probation decree that was never factually implemented because Petitioner hadn't completed the restitution as ordered.

The law is that Petitioner is entitled to the relief sought, to have this case set aside and declared illegal where the Plea was Consummated upon an agreement that was not adhered to and the illegal Sentence was embraced by the Circuit Court

to participate in any RID Program. The Judge should have set a trial date since he didn't adhere to the Plea agreement.

Vittino v. State, 556 So.2d 1062 (Miss. 1999)

The trial Court acted unjustly and unfairly, thereby abusing his discretion by forcing the Petitioner to accept the RID. The Court coerced Petitioner by threats of giving him the maximum time allowed for grand larceny on each count, thereby persuading him to enter a Plea. It has been held in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971), that "when a guilty Plea rests in any significant degree on a Promise or agreement of the Prosecutor, so that it can be said to be part of the inducement or consideration, such Promise must be fulfilled. Id. at 262, 92 S.Ct. at 499 Citing Presley v. State, 792 So.2d 950; 2001 Miss. Lexis 1532 Miss.S.Ct. 2001).

The Petitioner avers that the 35 year sentence in Cause no. CR96-317, for the charge of armed robbery and enhancement pursuant to M.C.A. § 99-19-81 is an illegal sentence. The Court utilized illegal prior convictions for enhancement. The illegality of the prior convictions stems from the fact that the Petitioner never signed any Probation agreement, no Probation officer was appointed and the order dated the 19th day of October, 1992, supercedes the fabricated order dated the 23rd of October, 1992, revoking a Probation that Petitioner was never on. Pursuant to M.C.A. § 47-7-33, in pertinent part, "In placing any defendant on Probation, the Court or Judge shall direct that such defendant be under the supervision of the department of Corrections. No order exist placing Petitioner on supervised Probation of the dept. of Corr. No field officer was appointed as evident from the alleged order. (see exhibit J). Therefore, is no Probation to violate and Petitioner's Constitution."

Understand the terms and Conditions of Probation only then
Could it have been said that Petitioner violated Conditions of
his Probation. The Courts has held that "due Process requires
that the trial Judge at least orally inform the defendant of the
terms and Conditions upon which his suspended sentence is
Contingent before it may be Properly revoked for the violation
of those terms and Conditions. Morrissey v. Brewer, 408 U.S.
471, 33 L.Ed. 2d 484, 92 S.Ct. 2593 (1972); Citing Artis v.
State, 643 So. 2d 533; 1994 Miss. Lexis 468. The Courts reversed
in this case because they found that the Judge didn't follow
the Procedures set out in M.C.A. §§ 47-7-35; 47-7-37. For the
Same Stated reasons in Artis, Id., Petitioner sentence should
be deemed illegal and doesn't meet the Criteria for enhance-
ment.

The Court allege that the Petitioner violated the terms
of his Probation by . . . "Failing to successfully complete the
Program of the Greenwood/Leflore Co. restitution center by
abandoning the restitution center on the 28th day of October, 1992.
But exhibit 'D' show that the Petitioner was never legally on
Probation, rendering the Probation invalid and illegal. The Court
did advise the Petitioner that he would be given Probation,"
"not" what any of the terms and Conditions would be. The Court
also advised the Petitioner that it would be based on success-
ful Completion of the RID and restitution. But the Courts
violated the alleged Probation for a specific term "N", which
the Court can not prove by clear and Convencing evidence
that the Petitioner was Cognitive of the Conditions of the
alleged Probation that was never legally imposed. Artis, Supra.

III.

Prosecutions. Sixth amendment right to counsel in criminal proceedings applies to states through the Wyamond v. Gideon v. Wyamond right.

372 U.S. 335, 342 (1963). The courts would say that one doesn't have a right to counsel at a revocation hearing. But this proceeding / hearing was more of an adversarial renegotiations / repleading to the same charges. It has been acknowledged that "right to counsel attached at initiation of plea

negotiation. U.S. v. Gideon, 156 F.3d 376, 379 (2d Cir. 1981). It stands logically that petitioner had a right to renegotiation / repleading hearing. This denial of counsel violates due process clause of the Wyamond. The cumulative errors of the sentencing judge worked to make the sentence imposed illegal and the illegality of said sentence can not be used to enhance another sentence under 99-18-XL.

Gray v. State, 605 So. 2d 791, 792 (Miss. 1990), protects against multiple punishment for the same offense. Petitioner was subjected to multiple punishments. He was ordered to the RID, then restitution and probation, finding that the court illegally violated that probation. Petitioner was ordered to replead guilty in cause no. 3 01,004 and 01,007 and was sentence to serve a term of 9 (1/2) years on each charge can current. Even though petitioner plead guilty to the charges does not waive his double jeopardy claim. Menna v. New York, 423 U.S. 61, 60, 96 S.Ct. 241, 46 L.Ed. 2d 195 (1975)

Blackledge v. Perry, 417 U.S. 21, 30, 94 S.Ct. 2098, 110 L.Ed. 2d 608 (1974)

III.

Counsel objected at trial (T.T.) to the methods used to prove Rodney L. Jones was an habitual. No certified copies from M.A.C. nor clerk of court was submitted. No Pen-Pack, Verifying 12-1-1 or state Pen-Pack, Verifying 12-1-1

The law is explicit when it states that the Prosecution must Prove the Prior Offenses by competent evidence. Keyes v. State, 549 So.2d 949 (Miss. 1989). The Prosecutor didn't forego these Procedures and Counsel's objection reflect upon the record that it was never Competently Proven that this was Rodney L. Jones being referred to.

At the bifurcated hearing required under the recidivist Statutes, the State must Prove beyond a reasonable doubt that the defendant meets the requirements for sentencing as a habitual offender. Bandy v. State, 475 So.2d 486 (Miss. 1986). A reasonable doubt exist if the Prosecutor didn't Prove that it was actually the same individual being referred to.

is entitled to have his sentence vacated and set aside, or to have the case remanded for new trial or for resentencing without the habitual status being applied.

Respectfully Submitted,
M. Rodney L. Jones
Rodney L. Jones, Pro-Se

Certificate

I, Rodney L. Jones, do hereby certify that I have this the 10th day of Dec, 2007, mailed a true and correct copy of the above and foregoing Brief of Appellant to Hon. Thomas Gardner, III, Circuit Judge, P.O. Box 762, Tupelo, MS. 38802; Hon. Frank Russell, Circuit Judge, P.O. Box 762, Tupelo, MS. 38802; Hon. Jim Hood, Attorney General, P.O. Box 220, Jackson, MS. 39205 and Supreme Court Clerk Betty Sephton, P.O. Box 249, Jackson, MS. 39205, all by U.S. Mail, First Class Postage Pre-Paid.

M. Rodney L. Jones #79065
Rodney L. Jones, Pro-Se
D.O.C. # 79065
32 Alcatraz
Parchman, MS. 38738