IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLIFTON GATLIN — APPELLANT

VS. — NO. 2007-CA-1650

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLIFTON GATLIN **APPELLANT**

vs. **CAUSE No. 2007-CA-01650-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Madison County, Mississippi in which relief was denied on the Appellant's motion in post - conviction relief.

STATEMENT OF FACTS

On 7 November 2005, the Appellant filed a petition to enter a plea of guilty to the felony of statutory rape. (R. Vol. 1, pp. 5 - 13). While there is no transcript of the plea colloquy, the Circuit Court did entertain the Appellant's petition. The court accepted the Appellant's plea, convicted him of statutory rape, and sentenced the Appellant to a term of five years imprisonment. However, the court further ordered the Appellant into the regimented inmate discipline program and ordered that, upon successful completion of that program, that the remaining portion of the sentence be suspended, the Appellant to be released on supervised probation for a period of five years. (R. Vol. 1, pp. 14 - 20).

On 1 December 2006, the Appellant filed a motion in post - conviction relief. In this motion, the Appellant alleged that he was not eligible to be placed in the regimented inmate discipline program. He further alleged that he would not have entered a plea of guilty had he known that he was not so eligible. He alleged that he was then currently in the custody of the Madison County jail, awaiting transportation to the penitentiary. His prayer for relief was that his conviction be set aside. (R. Vol. 1, pp. 2 - 5). The Appellant was released by the Department of Corrections on 4 May 2007. (R. Vol. 1, pg. 21). The motion filed by the Appellant had not been brought forward for a hearing while he was in custody.

A hearing was held on the allegations of the motion in post - conviction relief on 20 August 2007. Preliminarily, the Circuit Court noted that the Appellant had filed his motion on 1 December 2006, that the Appellant was taken to the penitentiary on 5 December 2006, and that the Appellant successfully completed the regimented inmate discipline program and was released from the penitentiary on 4 May 2007. According to the court's calculations, the Appellant had been incarcerated for a period of six months and sixteen days. (R. Vol. 2, pg. 3).

The State conceded that the Appellant was not eligible for the regimented inmate discipline program. However, it argued that that fact was no good ground to set aside the conviction, however flawed the sentence might have been. The prosecutor then went on to say that he had offered the Appellant a reduction of one year in sentence, together with credit for time served in the program, as well as a reduction of some kind for the period of post - release supervision. This the Appellant rejected, apparently viewing the prosecutor's proposal as a kind of new plea or new plea offer. (R. Vol. 2, pp. 5 - 6).

The Circuit Court, noting that the Appellant had served time and been released, upheld the sentence originally imposed save for a modification concerning the term of supervised

probation. It found that the Appellant was not in custody; thus post - conviction relief was not available to him. (R. Vol. 2, pp. 7 -8).

STATEMENT OF ISSUES

1. WAS THE APPELLANT "IN CUSTODY," FOR PURPOSES OF THE UNIFORM POST - CONVICTION RELIEF ACT?

2. WAS THE APPELLANT'S GUILTY PLEA ENTERED INTO VOLUNTARILY AND INTELLIGENTLY?

SUMMARY OF ARGUMENT

1. THAT THE APPELLANT WAS NOT IN CUSTODY FOR PURPOSES OF THE UNIFORM POST - CONVICTION RELIEF ACT

2. THAT THE APPELLANT ESTABLISHED NO GROUND TO VACATE AND SET ASIDE HIS CONVICTION FOR STATUTORY RAPE

ARGUMENT

1. THAT THE APPELLANT WAS NOT IN CUSTODY FOR PURPOSES OF THE UNIFORM POST - CONVICTION RELIEF ACT

As pointed out above in our statement of facts, the Appellant was not in custody of the Department of Corrections at the time he brought his motion in post - conviction relief on for a hearing. As the Court is well aware, though, post - conviction relief is not available for those who are not in such custody. Miss. Code Ann. Section 99-39-5(1) (Rev. 2007). *Rice v. State*, 910 So.2d 1163, 1165 - 1166 (Miss. Ct. App. 2005).

However, the Appellant contends that the "in custody" requirement of the Uniform Post Conviction Relief Act is an elastic concept and may, in addition to actual imprisonment, include "mere power, legal or physical" to imprison an individual. He cites *Gates v. State*, 904 So.2d 216 (Miss. Ct. App. 2005) for the proposition that one may avail himself of post - conviction relief where he is under the "effects" of a conviction.

The facts in *Gates* were that that prisoner, having been sentenced as an habitual offender on the felonies of murder and aggravated assault, sought post - conviction relief as to one of the felonies relied upon by the State for sentence enhancement, alleging that the sentence imposed on that predicate felony had been illegally imposed. However, at the time of his filing, he was not in custody under that allegedly illegal sentence.

In disposing of the claim, it is true that the Court stated that ". . . post -conviction relief procedures, for setting aside a conviction, are only available while the prisoner is under the effect of the conviction he seeks to set aside." *Gates, supra*, at 218. However, given the balance of what the Court said, and given the facts of the case, we do not think the Court intended to expand the meaning of the "in custody" requirement of the Post - Conviction Relief Act. In *Gates*, the prisoner there was certainly under the "effect" of the prior felony, yet this was insufficient to meet the "in custody" requirement. Because the prisoner was not in custody on account of the sentence imposed for the prior felony, the Court found that he could not invoke post - conviction relief with respect to that prior felony. The Court reiterated that an individual must be "in custody" in order to invoke post - conviction relief.

The curious use of the word "effect" in this context appears to have arisen in *Weaver v. State*, 852 So.2d 82, 85 (Miss. Ct. App. 2005). Yet, upon examination of the opinion in that decision, the Court will find that Judge Southwick provided no citation to authority for the use of the word; nor did he explain what his meaning was, if not simply actual custody. The statutes do not refer to "effect"; nor do the opinions of the Mississippi Supreme Court.

This Court's opinions on the subject make it exceedingly clear that "in custody" means current incarceration for a crime for which the prisoner was convicted by a Mississippi court. *Shaw v. State*, 803 So.2d 1282, 1284 (Miss. Ct. App. 2002). *See also Rice v. State, supra.* Even

in those cases which use the "effect" language, the determination of whether the movant in post - conviction relief was or was not in custody was the dispositive issue. We have found no case, the Appellant cites no case, in which actual incarceration was not an essential and indispensable predicate for post - conviction relief actions.

We submit, then, that the Appellant has placed much more significance upon Judge Southwick's curious and unsupported use of the word "effect" than the word deserves. Notwithstanding the use of that word, "in custody" meant and continues to mean actual incarceration. This is consistent with the legislative intention behind the Uniform Post - Conviction Relief Act. Under Miss. Code Ann. Section 99-39-5(1)(g) (Rev. 2007), those who have had their probation, parole or conditional release unlawfully revoked may avail themselves of post - conviction relief, yet nowhere in that statute, or anywhere else for that matter, is post - conviction relief said to be available to one who claims to have been unlawfully granted early release, which is what the Appellant is attempting to claim. Nowhere in the statutes is there authority which would permit one on parole or some other kind of early release, properly or not, to avail himself of post - conviction relief. Actual incarceration is the requirement.

Whether federal habeas corpus actions have a different understanding on the point is neither here nor there. It is clear that under the law of this State, for purposes of the Uniform Post - Conviction Relief Act, actual custody is necessary. Likewise, it is neither here nor there how Black's Law Dictionary defines "custody." In any event, neither federal habeas nor Black's Law Dictionary are binding authority in this Court.

The First Assignment of Error is without merit.

2. THAT THE APPELLANT ESTABLISHED NO GROUND TO VACATE AND SET ASIDE HIS CONVICTION FOR STATUTORY RAPE

In his Second Assignment of Error, the Appellant asserts that the Circuit Court erred in refusing to set aside his conviction. It is alleged that the State incorrectly represented to the Appellant in the course of plea negotiations that the Appellant would be eligible for the regimented inmate discipline program. The Appellant further claims that he would not have entered a plea of guilty had he known that he was not eligible for that program. Instead, he says, he would opted for a jury trial.

The State recommended the regimented inmate program, and that is what the Appellant got. The Appellant was then released on post - release supervision. Perhaps the Appellant was not permitted by law to have the benefit of the program, but benefit from it he did. In any event, the claim that the Appellant would not have entered a plea of guilty had he known that he was not eligible is simply a self-serving position, and a highly amusing one as well. We do not think the Appellant can possibly be taken seriously to say that had he known that he was not eligible for the program he would have accepted the risk of trial, the likelihood of conviction, and a certain term of imprisonment.

The error in permitting the Appellant to serve a short time in the regimented inmate program was one that was entirely of benefit to him. As such, the law is clear that he may not be heard to complain of it. *Brooks v. State,* 919 So.2d 179 (Miss. Ct. App. 2005); Graves *v. State*, 822 So.2d 1089 (Miss. Ct. App. 2002).

The Appellant expends much of his argument in an attempt to show that his plea of guilty was involuntary because he did not know that he was not eligible for the regimented inmate program. For that reason, says he, his conviction should be set aside. This, to us, is a highly

illogical argument. What the Appellant is trying to tell this Court is that, even though he received the benefit of the plea bargain, one that he does not say he did not voluntarily enter into at the time, somehow or another his plea became involuntary when he later discovered that he should not have been permitted the advantage of the program. Regardless of whether the Appellant was eligible for the regimented inmate discipline program, he clearly agreed to it. (R. Vol. 1, pp. 5 - 13). His agreement was voluntary and intelligent, notwithstanding that he was not eligible for the program. The fact that he was not eligible does not mean that his agreement was not voluntary.

The Appellant claims that his agreement was not intelligent because of the erroneous understanding concerning his eligibility for the program. Again, while it may have been that the Appellant was not eligible, this does not mean that his decision to plead guilty, based at least in part on what the State intended to recommend, was not unintelligently made. The Appellant got a very nice deal, and he got the benefit of a deal he should not have been given. It sounds like an intelligent choice to us. The promises made by the State were each and all fulfilled.

This Court has held that a plea of guilty is voluntary and intelligent where the defendant knows of the elements of the charge against him, understands the charge's relation to him, what effects the plea will have and what sentence the plea may bring. *Sweat v. State*, 910 So.2d 12, 17 (Miss. Ct. App. 2004). The Appellant does not assert here that one or more of these considerations were lacking in his plea. The record demonstrates that he was aware of these things. (R. Vol. 1, pp. 6 - 13). Consequently, there is no basis to set aside his conviction. While it is true that the Appellant should not have been put into the regimented inmate discipline program, this error, far from prejudicing him, was of great benefit to him. He cannot complain of a beneficial error. *Chancellor v. State*, 809 So.2d 700, 702 (Miss. Ct. App. 2001).

The Appellant claims that the State breached the plea agreement. It did not. It made the recommendation as to sentence that it agreed to make. The Circuit Court accepted that recommendation.

The Appellant claims that the Circuit Court found as a fact that the Appellant would not have accepted the plea offer by the State had he known that he was not eligible for the regimated inmate discipline program. This is not correct. While the Circuit Court noted that that was the Appellant's claim (R. Vol. 2, pg. 7), it did not find that as a fact.

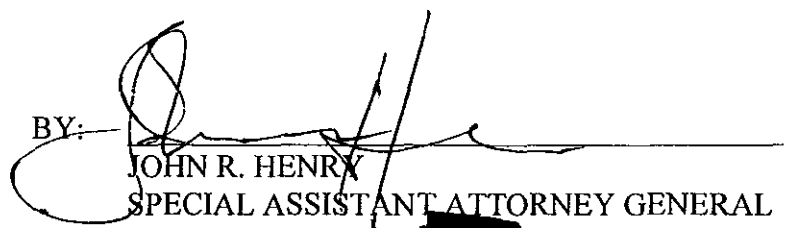
The Second Assignment of Error is without merit.

CONCLUSION

The Order of the Circuit Court denying relief on the Appellant's motion in post - conviction relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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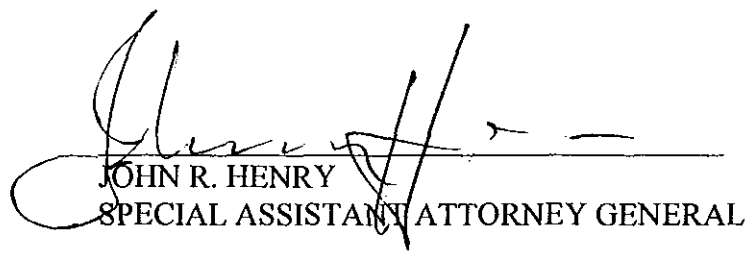
This the 9th day of June, 2008.



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