IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM BRENT BOWEN — APPELLANT

VS. — NO. 2007-CA-1792

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

STATE RULES

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STATEMENT OF THE ISSUES

I. THE DEFENDANT IS PROCEDURALLY BARRED FROM ARGUING THAT HIS SENTENCE WAS INVALID AS HE DID NOT RAISE THE ISSUE AT THE TIME OF HIS SENTENCING; HOWEVER, NOTWITHSTANDING THE BAR, THE DEFENDANT'S SENTENCE WAS VALID AND PROPER.

II. THE DEFENDANT'S PLEA WAS KNOWINGLY AND VOLUNTARILY GIVEN.

STATEMENT OF THE FACTS

The Defendant, William Brent Bowen (hereinafter "Bowen") was indicted for uttering a "forged or counterfeit . . . bank check" in the amount of $250.00. (Record p. 18). On November 20, 2006, Bowen entered a guilty plea. (Exhibits "A" and "B"). At the conclusion of the plea hearing, Bowen was sentenced, without objection from his attorney, to serve ten years in the custody of the Mississippi Department of Corrections with the entire sentence suspended and five years probation. (Record p. 15).

Just days before his suspended sentence was revoked, Bowen filed a petition for post-conviction relief arguing, *inter alia*, that his "sentence exceeds the maximum authorized by law" and that his "guilty plea was made involuntarily." (Record p. 7). A hearing was held on the matter on May 14, 2007. (Transcript p. 1 -17). On July 24, 2007, Bowen filed a supplement to his petition for post-conviction relief referencing and attaching this Court's decision in *Tate v. State*, 961 So.2d 763 (Miss. Ct. App. 2007). On September 5, 2007, the trial court entered an order denying post-conviction relief holding in part as follows:

> The grand jury of Lowndes County indicted the Petitioner for the crime of felony uttering forgery. The State did not find that the case should be remanded to the Justice Court as a misdemeanor. Therefore, the Court properly sentenced the Petitioner for a felony offense. Furthermore, the Petitioner knew the minimum and maximum sentences for his offense and the actual sentence that he would be receiving as these were outlined in his sworn and notarized guilty plea petition.

(Record p. 33 - 34). Bowen appeals that decision.

SUMMARY OF THE ARGUMENT

Bowen is procedurally barred from arguing that his sentence was invalid as he did not raise the issue at his sentencing hearing. However, procedural bar notwithstanding, Bowen's sentence was valid and proper. Additionally, the record reflects that Bowen's guilty plea was knowingly and voluntarily given. Bowen pleaded guilty to a felony, was informed of the maximum and minimum penalties he faced under the felony portion of the statute, and was sentenced under the felony portion of the statute. However, if this Court finds that the trial judge should have advised Bowen of the misdemeanor penalties as well as the felony penalties, the trial judge's failure to do so should be deemed harmless error as Bowen did not establish by a preponderance of the evidence that the trial judge's failure to inform Bowen of the misdemeanor penalties affected his decision to plead guilty.

ARGUMENT

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)).

I. THE DEFENDANT IS PROCEDURALLY BARRED FROM ARGUING THAT HIS SENTENCE WAS INVALID AS HE DID NOT RAISE THE ISSUE AT THE TIME OF HIS SENTENCING; HOWEVER, NOTWITHSTANDING THE BAR, THE DEFENDANT'S SENTENCE WAS VALID AND PROPER.

Bowen argues that his "sentence to a term of ten years is invalid since the value involved in the crime was less than $500." (Appellant's Brief p. 7). However, Bowen is procedurally barred from raising this issue as he did not raise it at his sentencing hearing. *See Henley v. State,* 749 So.2d 246, 248 (Miss. Ct. App. 1999); *Collins v. State,* 822 So.2d 364, 366 (Miss. Ct. App. 2002); and *Payton v. State,* 845 So.2d 713, 717 (Miss. Ct. App. 2003).

Procedural bar notwithstanding, Bowen's sentence is valid and proper. It is well-established Mississippi law that "as a general rule, a sentence imposed will not be disturbed on appeal as long as it does not exceed the maximum term allowed by statute." *Payton v. State,* 845 So.2d 713, 717 -718 (Miss. Ct. App. 2003) (citing *Corley v. State*, 536 So.2d 1314, 1319 (Miss.1988)). Bowen pleaded guilty to uttering a forgery pursuant to Miss. Code Ann. §97-21-59 which states that those persons convicted under the statutes "shall suffer the punishment herein provided for forgery." Miss. Code Ann. §97-21-33 sets forth the penalty for forgery as follows:

> Persons convicted of forgery shall be punished by imprisonment in the Penitentiary for a term of not less than two (2) years nor more than ten (10) years, or by a fine of not more than Ten Thousand Dollars ($10,000.00), or both; provided, however, that when the amount of value involved is less than Five Hundred Dollars ($500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars ($1,000.00) or both, within the discretion of the court.

Bowen, like the defendant in *Tate v. State*, argues that "because the amount of the check uttered totaled less that $500, [he] was entitled to a misdemeanor sentence." 961 So.2d 763, 766-67 (Miss. Ct. App. 2007). However, this Court held, in *Tate*, that "[t]he statute clearly states that the imposition of the sentence is left to the discretion of the trial court." *Id.* at 767. Additionally, the Court noted that "[g]iven the second indictment, which was retired to the file, and the trial court's knowledge of a similar charge in Lowndes County for which Tate owed restitution, this Court holds that the trial court acted properly and within its discretion in imposing a felony sentence." *Id.* Like the trial judge in *Tate*, the judge in the case at hand was also aware of an extensive list of misdemeanors for which Bowen had been charged as well as his admission that he had a cocaine addiction. (Transcript of Guilty Plea Hearing - Exhibit "B" pp. 9 - 16 and Transcript of Hearing on Motion for Post Conviction Relief p. 10). Furthermore, Bowen's sentence was within the statutory guidelines. Thus, the trial court acted within its discretion in its sentencing of Bowen. *See also Davis v. State,* 758 So.2d 463, 467 (Miss. Ct. App. 2000) and *Davis v. State,* 975 So.2d 905, 907(Miss. Ct. App. 2008).

II. THE DEFENDANT'S PLEA WAS KNOWINGLY AND VOLUNTARILY GIVEN.

Bowen also argues that his "guilty plea was not knowing and voluntary since he was incorrectly advised of the minimum sentence prior to his plea." (Appellant's Brief p. 11). The question of whether a plea was voluntarily and knowingly made is a question of fact. *Davis v. State,* 758 So.2d 463, 466 (Miss. Ct. App. 2000). The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to relief. *Id.* (citing *McClendon v. State*, 539 So.2d 1375, 1377 (Miss.1989)). A trial judge's findings at a preliminary hearing "are treated as findings of fact made by a trial judge sitting without a jury as in any other context" and "[a]s long as the trial judge applied the correct legal standards, his decision will not be reversed on appeal unless it is

manifestly in error, or is contrary to the overwhelming weight of the evidence." *Payton v. State,* 845 So.2d 713, 716 (Miss. Ct. App. 2003) (quoting *Foster v. State*, 639 So.2d 1263, 1281 (Miss.1994).

In order for a guilty plea to be deemed voluntary, the defendant must be advised of the nature of the charges against him and understand the consequences of entering a guilty plea, including the minimum and maximum penalties he faces. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992); URCCC 8.04(A)(4)(b)). Bowen was informed of the maximum and minimum penalties he faced if sentenced under the felony portion of the statute. (Exhibits "A" and "B"). As the trial judge noted in his order denying post-conviction relief, Bowen was indicted for felony uttering forgery and he knew "the actual sentence that he would be receiving as these were outlined in his sworn and notarized guilty plea petition." (Record p. 33 - 34). The section of the guilty plea petition to which the trial court refers reads as follows:

> 8. I know that if I plead "GUILTY" to this charge, the possible sentence is:
> the minimum sentence is: *2 years no fine*
> the maximum sentence is: *10 years $10,000.00 fine*
>
> I know also that the sentence is up to the Court . . . . the District Attorney shall make no recommendations to the Court concerning my sentence except as follows:
> *10 years MDOC - 5 years suspended - 5 years probation*
> *fine up to court*

(Exhibit "A") (*sections in italics were hand written*). Bowen pleaded guilty to a felony and was sentenced under the felony portion of the statute. *See Ward v. State*, 879 So.2d 452, 456 (Miss. Ct. App. 2003).

However, if this Court finds that the trial judge should have advised Bowen of the misdemeanor penalties as well as the felony penalties, the State submits that the trial judge's failure to do so was harmless error. The failure of a judge to inform the defendant of the mandatory

sentencing requirements does not automatically create an invalid plea. *Burnett v. State*, 831 So.2d 1216, 1219 (Miss. Ct. App. 2002). Mississippi has established a "'harmless error' rule which provides that as long as 'the failure to advise a defendant concerning a mandatory sentence or fine requirement did not play a role in the decision of the accused to plead then the failure is not fatal to the sentence.'" *Id.* (quoting *Sykes v. State*, 624 So.2d 500, 503 (Miss. 1993)) (*emphasis added*). Bowen was not advised of the minimum and maximum sentences he faced if he were to be sentenced under the misdemeanor portion of the statute. However, as the trial court noted in its order denying post conviction relief, Bowen was aware of his potential sentence before he pleaded guilty as the sentence he was received was the one recommended by the State as reflected in the guilty plea petition. Thus, it is very unlikely that knowledge of the maximum and minimum misdemeanor sentences would have affected Bowen's decision to plead guilty.

In fact, Bowen only broadly asserts in his brief that "a defendant would be less induced to plead guilty where the recommendation is further from the minimum sentence" and that "he was not able to appreciate the disparity between the State's recommendation (ten years) and the minimum sentence (zero to six months in jail)." (Appellant's Brief p. 14). Bowen has "the burden of proving that a guilty plea was made involuntarily" and he has to prove it "by a preponderance of the evidence." *Burnett*, 831 So.2d 1216, 1219 (Miss. Ct. App. 2002) (citing *Stevenson v. State*, 798 So.2d 599 (Miss. Ct. App. 2001)). Certainly, Bowen's broad assertions certainly do not prove by a preponderance of the evidence that this information would have affected his decision to plead guilty. More likely affecting his decision to plead guilty was the fact that the recommended sentence was a ten year-suspended sentence with five years probation. Had his suspended sentence not been revoked, Bowen would have served absolutely no time in jail for this charge.

Bowen cites to *Bronson v. State*, 786 So.2d 1083 (Miss. Ct. App. 2001) to support his

argument that the trial court's failure to advise of him of the misdemeanor sentences could not be harmless error. (Appellant's Brief p. 13). However, *Bronson* is easily distinguished from Bowen's situation just as it was distinguished in *Burnett v. State*, 831 So.2d 1216 (Miss. Ct. App. 2002). The defendant in *Burnett* argued that the trial judge "failed to inform him of the correct minimum sentence which could be imposed for robbery." *Id.* at 1219. Burnett like Bowen received the "same sentence for the [charge] as the prosecutor requested" unlike the defendant in *Bronson* whose "expectations of a lighter sentence based on the misinformation was the motivating factor for his pleas." *Id.* at 1220. Bowen, not unlike the defendant in *Burnett*, did not even affirmatively assert that the "misinformation was the motivating factor for [his] plea." *Id.* at 1220.

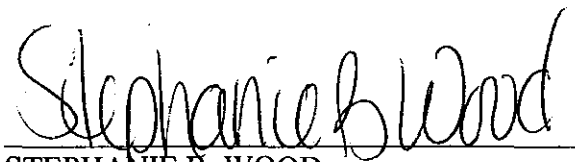
Accordingly, the trial judge properly denied Bowen's petition for post-conviction relief. Bowen pleaded guilty to a felony, was informed of the maximum and minimum penalties he faced under the felony portion of the statute, and was sentenced under the felony portion of the statute. However, if this Court finds that the trial judge should have advised Bowen of the misdemeanor penalties as well as the felony penalties, the trial judge's failure to do so should be deemed harmless error as Bowen did not establish by a preponderance of the evidence that the trial judge's failure to inform Bowen of the misdemeanor penalties affected his decision to plead guilty.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief as the Defendant's plea was knowingly and voluntarily given and as the sentence was valid and proper.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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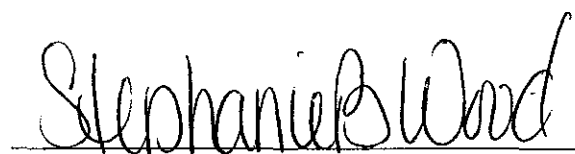
This the 30th day of May, 2008.



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