

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEFFREY EARL EVANS

APPELLANT

VS.

FILED

NO. 2007-CP-0295

NOV 26 2007

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEFFREY EARL EVANS

APPELLANT

vs.

CAUSE No. 2007-CP-00295

THE STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

The prisoner was indicted for having stolen a pick up truck belong to the Fulton Grain Company. Inasmuch as the prisoner had been previously convicted of other felonies, he was further noticed of the State's intention to have him sentenced as an habitual offender upon conviction of the theft. (R. Vol. 1, pp. 17 - 18).

On 9 September 2004 the prisoner entered a plea of guilty to the theft of the truck. He also admitted that he had been convicted of the felonies set out in the indictment upon which the State intended to rely to support sentencing as an habitual offender. (R. Vol. 1, pp. 23 - 36)

The prisoner then filed, on 8 September 2006, a motion in post - conviction relief. In this motion, he alleged that his sentence was not authorized by law. The basis for this claim was that

there were no certified copies of the judgments of conviction in support of the allegations of the indictment as they pertained to the prisoner's status as an habitual offender. (R. Vol. 1, pp. 3 - 8). Relief on this motion was denied by the Circuit Court, without an evidentiary hearing, on 30 January 2007. The prisoner filed his notice of appeal on 16 February 2007. (R. Vol. 1, pp. 37 - 38).

STATEMENT OF ISSUES

DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

The State of Mississippi did not seek to admit certified copies of the records of the prisoner's prior convictions in the course of the plea colloquy. It did not do so because the prisoner admitted the existence of the prior convictions, as alleged in the indictment, under oath. (R. Vol. 1, pp. 26; 30 - 31).

It is well established that an accused's in - court admissions as to the existence of prior felony convictions are a sufficient basis for sentencing under the habitual offender statutes. *Sanders v. State*, 786 So.2d 1078, 1082 and cases cited therein (Miss. Ct. App. 2001). The Appellant, by admitting the existence of the prior convictions, waived the burden on the State to prove his status as an habitual offender, just as he waived the State's burden to establish the elements of the principal charge of the indictment. The Circuit Court did not rely upon "false

documents,” as claimed by the prisoner; it relied on the prisoner’s admissions. These admissions are not set to be false.

The indictment was not defective. It properly alleged the principal charge as well as the two prior convictions upon which the State intended to seek sentencing under Miss. Code Ann. Section 99-19-81.

The prisoner appears to claim that there were no records in the Circuit Court clerk’s office to support the allegations of the prior felonies as those allegations pertained to the dates of the convictions. (Brief for the prisoner at 6).

First of all, assuming for argument that the prisoner is correct – that is, that the convictions did not occur on the dates alleged in the indictment –, this complaint is waived because he stated under oath that he had been convicted of the felonies. Beyond this, any mistake in the indictment concerning the dates of the prior convictions would not be a jurisdictional defect. Indictments may be amended on motion of the prosecution to amend errors regarding prior convictions, or even to add a charge of habitual offender status. URCCC 7.09 Because indictments may be amended for such purposes on motion by the prosecution, any error in the allegations concerning the prior convictions cannot be jurisdictional defects.

Secondly, the prisoner’s motion in the Circuit Court did not include any kind of affidavit by the circuit clerk to the effect that there were no judgment of conviction in his office concerning the prior convictions alleged in the indictment. The prisoner points to a hand - written notation on a letter the prisoner sent to a Miss Gates to the effect that this Miss Gates did not find any sentence ordered on 29 July 2002. (R. Vol. 1, pg. 12). One simply has no idea if this Miss Gates wrote this. This said - to - be statement by Miss Gates is entirely insufficient to require an evidentiary hearing on the prisoner’s claim, a claim which, essentially, appears to be

that at least one conviction does not exist.

It should also be noted that the letter onto which Miss Gates supposedly responded asked only whether her files showed a sentencing order on 29 July 2002. The clerk's office may not have filed a sentencing order on that date. That, though, would not mean that the prisoner was not sentenced on that day.

It is quite common for a Circuit Court to reduce its orders made from the bench to writing at a later time. It is not uncommon to see a difference between the date a judge signed a written order and the date the order was filed. One example of this would be the dates on the Order denying relief on the post - conviction motion in the case at bar. (R. Vol. 1, pg. 37). The prisoner may well have been sentenced on the date indicated in the indictment, yet the written orders concerning such sentencing might well not have been filed to some time thereafter. The prisoner's request was for a sentencing order or judgment for 29 July 2002. Yet, what he should have requested was the sentencing order in the cause number, without specifying a particular date. The clerk's office might well have failed to find an order filed on that date, but might have found an order filed on a different date memorializing an action taken by the Circuit Court on 29 July 2002. Its records would be keyed to the date of filing.

In any event, this cryptic comment said to have been written by Miss Gates, if indeed it was written by her was, as we have said, entirely insufficient to require an evidentiary hearing. The prisoner provided nothing in his filing which would qualify as a statement by the circuit clerk's office to the effect that there was no record of his having been sentenced on the day alleged in the indictment.

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where " . . . it plainly appears from the face of the motion, any annexed

exhibits and the prior proceedings in the case that the movant is not entitled to any relief.” Miss. Code Ann. Section 99-39-11(2) (Rev. 2007). This Court will not disturb a Circuit Court’s decision to deny relief absent a showing that the decision was clearly erroneous. *Epps v. State*, 926 So.2d 242 (Miss. Ct. App. 2005). Here, the prisoner has wholly failed to show error, much less clear error, in the decision by the Circuit Court to deny him post - conviction relief. This Court should affirm the Circuit Court’s action in this regard.

CONCLUSION

The Order of the Circuit Court denying relief in post - conviction relief should be affirmed.

The simple fact is that the prisoner admitted under oath the existence of these prior convictions. This admission was itself sufficient to permit an habitual offender sentence to be imposed. The prisoner may not now be heard to claim that his sentence was not supported by evidence. He provided the evidence and waived the State’s burden to prove the allegations of the habitual sentence portion of the indictment.

Respectfully submitted,

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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:

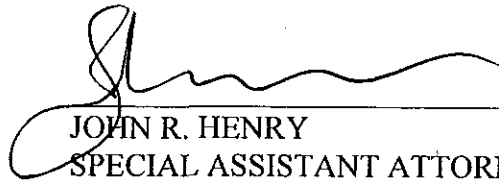
Honorable Thomas J. Gardner, III
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This the 26th day of November, 2007.



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