

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

296
NO. 2007-CP-00269-COA

COPY

ANTHONY ROBINSON

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APPELLANT

V.

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STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLANT

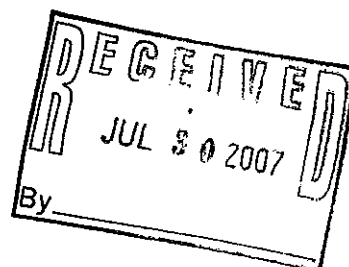
BY:

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ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF



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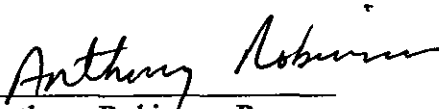
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Anthony Robinson, certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Anthony Robinson, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Michael R. Eubanks, Circuit Court Judge.
4. Honorable Clairborne McDonald, Assistant District Attorney.

Respectfully Submitted,

BY: 
Anthony Robinson, Pro se
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503 S. Main Street
Columbia, MS 39429

Appellant

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STATEMENT OF ISSUES

Appellant, Anthony Robinson has suffered a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where trial court advised petitioner any sentence he received, upon conviction for armed robbery, would be without parole. Such information was not correct where petitioner was not charged as a habitual offender and where law states only that first ten years are mandatory.

2.

Appellant was subjected to a denial of due process of law where the trial court failed to advise Robinson of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Petitioner Robinson was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct review.

3.

Appellant Robinson was denied due process of law where the indictment which charged petitioner with armed robbery, and which the state prosecuted the charge there under failed to set forth the Circuit Court judicial district of the state of Mississippi where the charge was originated or was alleged to have occurred. Such failure, as a matter of law, denied petitioner due process of

law in violation of the 5th and 14th Amendments of the United States constitution and constitutes plain error.

4.

Appellant Robinson Indictment failed to give him clear notice of the charge which he entered a plea of guilty, when the Indictment failed to include the name of Terrell Hopkins, who aided and abetted armed robbery, which violated Robinson's constitutional rights under the Sixth and Fourteenth Amendments.

5.

Appellant would assert that the trial court failed to consider the PCR motion under the provisions of Miss. Code Ann. §99-39-11 where trial court's order indicate it considered motion under another individual's case and where trial court failed to conduct an evidentiary hearing or assert that it had examined the claims together with all the files, records, transcripts and correspondence relating to the judgment under attack.

SUBSTANTIAL FACTS

Petitioner Robinson presents his post conviction motion upon the following facts which are within his personal knowledge.

1. Petitioner was indicted on May 21, 1998 for once count of armed robbery pursuant to §97-3-79.
2. Petitioner was represented by Honorable Morris Sweat. Attorney of Law of Columbia, Mississippi.
3. Petitioner's was never explained to that he will be eligible for earned time after serving 10 years of his sentence. Petitioner was told by his counsel and by the

court that the sentence which was rendered under the indictment would require that it be served mandatory.

4. Petitioner believed that if he entered a plea of guilty to the indictment the sentence imposed would not be a mandatory sentence and would be served with full benefit of earned time credit for good conduct.
5. That the trial court never advised that the sentence, or any portions thereof, would be served mandatory before Robinson decided to enter a plea of guilty, however, petitioner only had knowledge that he could be sentenced to life imprisonment if he had been found guilty by a jury.
6. That after researching my case due diligently, I was denied due process of law where the trial court failed to advise me that I could appeal my sentence, if I felt my sentence is illegal in according to law.
7. That after researching my case due diligently, I found out that my conviction and sentence is illegal due to the fact that the indictment and/or the court failed to give me notice of the Judicial District by which my crime was committed, which is a violation of my rights under the Mississippi and U. S. Constitution.

STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v State, 728 So.2d 565, 567 (Miss. 1999).

In the instant case, well-settled law dictates that the trial court's decision was clearly erroneous since the trial court failed to address the substantial and meritorious claims made in the petition.

SUMMARY OF ARGUMENT

Appellant Robinson convictions by pleas of guilty were invalid since such pleas were made without the trial court having recognized that the suspended sentence imposed upon Robinson, as a matter of statute, was an illegal sentence. Moreover, according to Robinson in-court admissions, he is not guilty of armed robbery and the Court v should not have sentenced Robinson's to prison for armed robbery when the admissions made constitute a far lesser crime.

ARGUMENT

CLAIM 1.

Anthony Robinson was charged in a Criminal Indictment, with the offense of armed robbery. After being given notice of the indictment, Robinson went up before the Court on August 17, 1998, and he waived the arraignment and the 270 days speedy trial limitation, and Robinson trial was set to convene the next day on August 18, 1998. Roberson petitioned the court to enter a plea of guilty on August 25, 1999, and the said petition was filed with the Clerk on September 3, 1999. On or about September 15, 1999, the court accepted the plea and sentenced Petitioner to a term of 25 years imprisonment with 10 years suspended and 15 years to serve. The Circuit Court Judge did advised Robinson that his sentence would be without parole and the entire amount of time has to be served without parole. The Court also advised that "and you understand we don't do plea bargaining in this district." R-9 The court made it clear that Robinson will not be granted any earned time credit under the applicable earned time statutes Miss. Code Ann. §47-5-138.

Robinson's conviction was entered upon the plea of guilty to the Indictment count of Armed Robbery. Robinson would assert that such plea to information has no authority to deprive

Robinson of earned time accumulation which would permit Robinson to be released from the service of the first 10 years early. Robinson would assert that:

- a) The information failed to appraise Robinson that he was subject to a sentence which required that the first 10 years be served mandatory and he was, therefore, not appraised of the consequences of any such plea to the information, and
- b) Miss. Code Ann. §99-19-3 provides the following:

A person indicted for a criminal offense shall not be convicted thereof, unless by confession of his guilt in open court or by admitting the truth of the jury accepted and recorded in court. A person charged with an offense shall not be punished, therefore, unless legally convicted thereof in a court having jurisdiction of the cause and of the person.

This section clearly requires an indictment before any conviction may be legal. Article 3, Section 27, of the Constitution of the State of Mississippi was amended in November, 1978, to authorize proceedings against a defendant charged with a felony by information. . . . where a defendant is represented by counsel and by sworn statement waives indictment. Jefferson v. State, 556 So. 2d 1016 (Miss 1989). The failure of the indictment and the court to explain that he would be eligible for earned time calculations after serving ten (10) years should cause the sentence rendered to be without the effect of Miss. Code Ann. §47-5-139 (1) (e). Additionally, the conviction and sentence conflicts with Miss. Code Ann §97-3-79 which should prevent petitioner's excess punishment unless the conviction was by an indictment and/or legal information.

Robinson seeks an order from this court directing the respondents to allow him 15% earned time allowance on his sentence, pursuant to Miss. Code Ann. 47-5-138(5). He contends that he is entitled to a 15% earned time allowance for this entire twenty-year sentence. In the alternative, Robinson contends that he should be granted a 15% earned time allowance on any

amount of his sentence exceeding ten years. Robinson also requests that an order be issued directing that his sentence be re-computed to reflect a new tentative release date.

ANALYSIS

(A.). Contention that 15% Earned Time be Applied to Entire Sentence

Robinson would not contend here that he should be granted 15% carried time for everyday of his twenty-year sentence for Robbery, Use of Deadly Weapon. In Williams v. Puckett 624 So "2d 446 (Miss. 1993) the Mississippi Supreme Court held that an inmate is required to serve 10 years of a robbery or attempted robbery sentence, through display of a deadly weapon, before being eligible to accumulate earned time. Robinson cites Williams to this court, but contends that the July 1, 1995 amendments to *Miss. Code Ann. 47-5-138(5)* and *Miss. Code Ann. 47-7-3* has nullified its effect. However, after the July 1, 1991 amendments, the Mississippi Supreme Court relied on and corroborated during the Williams ruling in Wilson v. Puckett , 721 So. 2d 1110 (Miss. 1998). The Court cited the Williams ruling in determining that an earned time allowance will not be accumulated during service of any mandatory time without parole eligibility. Id. At 1112.

Robinson was sentenced to 20 years for the Robbery, Use of a Deadly Weapon. §47-1-3(d)(i) of the *Mississippi Code Annotated* dictates that those convicted of robbery or attempted robbery, through display of a deadly weapon, cannot be eligible for parole until they shall have served ten years of a sentence of more than ten years. Williams v. Puckett and its re-application in Wilson v. Puckett dictate that the portions of sentences that carry with than no possibility of parole, provide no opportunity for the accumulation of earned time. Therefore, Robinson is not entitled to earned time for the first ten years of his twenty-year sentence.

Robinson should be granted 15 % earned time for the non-mandatory portion of his, sentence.

The Mississippi Code states, "for any sentence imposed after June 30, 1995, an inmate may receive an earned time allowance of four and one-half (4 1/2) days for each thirty (30) days served if the department determines that the inmate has complied with the good conduct and performance requirements of the earned time allowance program." Miss Code Ann. 47-5-138 Section 47-5-139 of the *Mississippi Code Annotated* addresses the possible ineligibility of an inmate, like Robinson, who has been convicted of robbery with a deadly weapon, of receiving earned time allowances. The statute states that "an inmate shall not be eligible for the earned time allowance if: the inmate has not served the mandatory time required by parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon." Miss Code Ann. 47-7-3 139 (1)(e). The mandatory time required for parole eligibility for Robinson's crime is 10 years. *Miss. Code Ann. 47-7-3 (d)(i)*. Barring the mandatory parole eligibility requirements of armed robbery sentencing discussed supra, Robinson is not amenable to any other prohibitions of earned time accumulation listed in Section 47-5-139 of the *Mississippi Code Annotated*. *He may* begin accumulating earned time after the mandatory ten year sentence has been served.

This court should carefully examine Anthony Robinson's Petition for post conviction relief based upon this illegal sentence, should find that Robinson is not entitled to have his earned time accumulated throughout his sentence but should find that Robinson is entitled to accumulate 15% earned time on any amount of his sentence exceeding 10 years.

CLAIM 2.

After the Guilty Plea Colloquy Proceeding of September 11, 1999, and filed with the Clerk of Court on September 15, 1999, the Court continued by executing the Sentence of Robinson. The

Court sentenced Robbery to serve a term of twenty-five year in the custody of the Mississippi State Department of Corrections, to pay a restitution of \$500.00, and suspended ten years, requiring Robinson to serve fifteen years of that sentence without the eligibility of parole. TR 23

The Court concluded his sentencing as following:

“Now, if you do everything your’re suppose to do, then I’m going to authorize the Mississippi Department of Corrections to suspend the remaining ten years and place you on postrelease supervision for ten years, which is going to be under very strict terms and conditions that during that ten-year period if you violate any term or condition, they revoke you and you’re going to end up serving the whole twent-five years.” TR 23-24 The Court failed to add that Robinson had the right to appeal his sentence to the Appeal Court if he was not satisfied with the court sentencing.

CLAIM 3.

Robinson is alleging under Claim 3 that he was denied due process of law where the indictment which charged him with armed robbery, and which the State prosecuted him for, failed to state the judicial district wherein the crime had been committed, and the judicial district was not ascertained by law any part of the record, in order to clearly inform Robinson of the nature and caused of the his accusation. By the failure to do so, violated constitutional rights under the Sixth Amendment, denied him due process of law and equal protection of the law as guaranteed him under the Fourteenth Amendment of the United States Constitution and under the Mississippi Constitution.

Even the Rule 7.06 of the Uniform Circuit Court Rules of the State of Mississippi is given to make sure that the accused rights will not be violated during the grand jury indictment, which state as following;

RULE 7.06 INDICTMENTS

“The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment **shall also include the following:** 1. The name of the accused; 2. The date on which the indictment was filed in court; 3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi; 4. The county **and judicial district in which the indictment is brought;** 5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient; 6. The signature of the foreman of the grand jury issuing it; and 7. The words "against the peace and dignity of the state." The court on motion of the defendant may strike from the indictment any surplusage, including unnecessary allegations or aliases. (Amended effective August 26, 1999.) [Emphasis added]

Further, the Sixth Amendment states the following:

Amendment VI. Rights of the accused.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. [Emphis added]

Robinson requests the court to review this error as plain error and in the final analysis find that Roinson’s indictment is illegal, and remand the case with instructions to release Robinson from his illegal imprisonment.

CLAIM 4.

Petitioner Robinson is alleging that his Indictment failed to give clear notice of the charge which entered a plea of guilty, that when the indictment failed to include the name of Terrell Hopkins, a defendant who aided and abetted the armed robbery, violated Robsinon’s constitutional rights under the Sixth and Fourteenth Amendment.

§ 99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury.

(1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant. (2) The provisions of subsection (1) of this section shall not apply to indictments returned by a state grand jury. The venue of trials for indictments returned by a state grand jury shall be as provided by the State Grand Jury Act. This subsection shall stand repealed from and after July 1, 2011.

Robinson contends that First the Court failed show or state the Judicial District the Crime of Armed Robbery was committed in. Next, the record shows one Terrell Hopkins aided and abetted Robinson in the Armed Robbery, however, Robinson was the one that possessed the firearm and he admitted that he did discharge the firearm in order to put the victim in fear.

The Guilty Plea Colloquy Proceeding and/or the Sentencing Transcript indicates the following;

Q. In other words, was you using the gun to tell them to get the money?

A. Yes Sir.

Q. And you were pointing the gun at them?

A. Yes sir.

Q. All right. Well, did they, in fact, get the money?

A. Yes, sir.

Q. And did they give it to you?

A. No. They gave it to Terrell Hopkins.

Q. Who is that?

A. Fellow that was with me.

Q. All right. So there was another person with you?

A. Yes sir.

Q. Did he have a gun, too?

No, sir.

Q. And so you were pointing the gun at them and told them give y'all some money and they got \$400, what, was it in the cash register?

A. No, sir. He got the money.

Q. Oh, he got the money out of the cash register?

A. Yes, sir. See TR at p. 15-16

The Judge appeared surprised at learning that there was another defendant that aided and abetted the armed robbery and that defendant was not charged in the indictment. He tried to cover up by asking Robinson, was he the one that had the firearm. Even though that Hopkin did not have a firearm, he is the one that got the money out of the cash register, while Robinson held the gun on the victim.

The Prosecutors did not reveal this information in the indictment nor was it revealed to the court before Robinson entered a plea of guilty. Robinson clearly entered a plea to information that was not included in the indictment, making Robinson's plea as well as the sentence illegal. Robinson's. The Court must review this error as clear error of the court and consider the indictment, conviction and Sentence of Robinson illegal. The case conviction and sentence must be vacated and ordering that Robinson be released from illegal custody.

CLAIM 5.

THE TRIAL COURT ERRED WHERE IT NEVER CONSIDERED MOTION

The trial court's order clearly reflects that it considered the Jamie Christie's motion. (R. 63) The law is clear that the trial court is required to review the original motion together with all files, records, transcripts and correspondence relating to the judgment under attack. The statute requires this as being mandatory. Miss. Code Ann. § 99-39-11(1). Here the trial court clearly did not follow such requirement since the order itself states that the court heard and considered Jamie Christie's motion sua sponte. The court never stated it considered Appellant's motion. Moreover, the court applied the time bar in this case to claims which clearly falls outside the time bar. Appellant's claims go to the question of the imposition of the sentence and the terms of it's application. This could not have been found until the time required under the law was served and credits not applied as required by law. This would fall under the guise of newly discovered evidence.

The Circuit Court applied a summary dismissal to the PCR Motion. Jefferson v. State, ____ So.2d ____ (Miss. App. 2007). The dismissal applied by the court was clearly outside the procedure outline and set forth in Young v. State, 731 So.2d 1120, 1122 (Miss. 1999).

CONCLUSION

Appellant Robinson respectfully submits that based on the authorities cited herein and in support of hid brief, that this Court should vacate the guilty plea convictions and sentences imposed as well as the action taken by the trial court in regards to the post conviction relief motion. The trial court erred in failing to conduct an evidentiary hearing and in failing to grant relief in this case. This case should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted,

BY: Anthony Robinson
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CERTIFICATE OF SERVICE

This is to certify that I, Anthony Robinson, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, 5th Floor of Gartin Justice Building, Jackson, MS 39205; Honorable Michael R. Eubanks, Circuit Court Judge, P. O. Box 488, Purvis, MS 39475; Honorable Kathy D. Sones, Assistant District Attorney, 500 Courthouse Square, Suite 3, Columbia, MS 39429.

This, the 25, day of July, 2007

Anthony Robinson
Anthony Robinson #R9843
MCCF
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