

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIMMY LEE LONG

COPY APPELLANT

VS.

FILED
AUG 22 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0582

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

STATE CASES

<i>Crowell v. State</i> , 801 So.2d 747, 749 (Miss. Ct. App. 2000)	2
<i>Green v. State</i> , 762 So.2d 810, 813 (Miss. Ct. App. 2000)	4
<i>Johnson v. State</i> , 925 So.2d 86, 102 (Miss. 2006)	4
<i>Miller v. State</i> , 875 So.2d 194, 199 (Miss. 2004)	3
<i>Thomas v. State</i> , 861 So.2d 371, 375 (Miss. Ct. App. 2003)	4
<i>Welch v. State</i> , 958 So.2d 1288, 1292 (Miss. Ct. App. 2007)	4

STATE STATUTES

Miss. Code Ann. §47-7-33	2, 3
Miss. Code Ann. §47-7-34	2-4

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STATEMENT OF ISSUES

The Defendant raises three issues on appeal. For simplification purposes, the State of Mississippi combined these issues as follows:

- I. THE TRIAL COURT PROPERLY DISMISSED DEFENDANT'S MOTION FOR POST-CONVICTION COLLATERAL RELIEF AS HIS SENTENCE WAS NOT ILLEGAL.

STATEMENT OF FACTS

The Defendant, Jimmy Lee Long [hereinafter "Long"], was indicted for "wilfully, unlawfully, and feloniously hav[ing] in his possession a quantity of cocaine, a schedule II controlled substance, said quantity being greater than 10 grams, with intent to sell, transfer, or distribute, in violation of the Uniform Controlled Substance Act of the State of Mississippi." (Record p. 12). On August 30, 2005, Long, a convicted felon, knowingly, voluntarily, and intelligently pled guilty to the charge. (See generally Record p. 16 - 39). A sentencing order was entered on March 7, 2006 which states in pertinent part as follows:

IT IS THEREFORE ORDERED AND ADJUDGED by the Court that the Defendant be and he/she is hereby sentenced to serve a term of EIGHT (8) years in the custody

of the Mississippi Department of Correction at a facility to be designated by said department followed by TWELVE (12) years of Post Release Supervision and the Defendant shall be placed on SUPERVISED probation for the first FIVE (5) years of said sentence by the Mississippi Department of Corrections pursuant to Mississippi Code Section 47-7-34, and the post release is based on the following conditions. . . .

(Record p. 14).

On February 22, 2007, Long filed a Motion for Post-Conviction Collateral Relief alleging that “the trial court erred in partially suspending his sentence and sentencing him to a probationary period in violation of Miss. Code Ann. §47-7-33.” (Record p. 3). The trial court dismissed Long’s Motion and he appeals.

SUMMARY OF ARGUMENT

The trial court properly dismissed Long’s Motion for Post-Conviction Collateral Relief as Long’s sentence was not illegal and fell within the parameters of Mississippi Code Annotated §47-7-34.

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)).

Long’s three issues basically argue that his sentence was illegal. (See generally Appellant’s Brief). He first argues that his sentence was illegal under Mississippi Code Annotated §47-7-33 as he was a convicted felon. However, as clearly set forth in his sentencing order, he was sentenced in accordance with Mississippi Code Annotated §47-7-34 which states as follows:

(1) When a court imposes a sentence upon a conviction for any felony committed after June 30, 1995, the court, in addition to any other punishment imposed if the other punishment includes a term of incarceration in a state or local correctional facility, may impose a term of post-release supervision. However, the total number of years of incarceration plus the total number of years of post-release supervision

shall not exceed the maximum sentence authorized to be imposed by law for the felony committed. The defendant shall be placed under post-release supervision upon release from the term of incarceration. The period of supervision shall be established by the court.

(2) The period of post-release supervision shall be conducted in the same manner as a like period of supervised probation, including a requirement that the defendant shall abide by any terms and conditions as the court may establish. Failure to successfully abide by the terms and conditions shall be grounds to terminate the period of post-release supervision and to recommit the defendant to the correctional facility from which he was previously released. Procedures for termination and recommitment shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence.

(3) Post-release supervision programs shall be operated through the probation and parole unit of the Division of Community Corrections of the department. The maximum amount of time that the Mississippi Department of Corrections may supervise an offender on the post-release supervision program is five (5) years.

In *Miller v. State*, the Mississippi Supreme Court noted the difference between sentencing under §47-7-33 and §47-7-34:

Supervised probation and post-release supervision are totally different statutory creatures. Miss. Code Ann. §47-7-33 provides for supervised probation, while Miss. Code Ann. §47-7-34 provides for post-release supervision. At least two major differences in these two statutes are (1) supervised probation may not be imposed on a convicted felon while post-release supervision may be imposed on a convicted felon; and (2) supervised probation is limited to five years while post-release supervision is not. . . . While [§47-7-34] unquestionably limits to five years the period of time that the MDOC may supervise an offender who is on post-release supervision, the clear language of the statute does not limit the total number of years of post-release supervision to five years.

875 So.2d 194, 199 (Miss. 2004).

Long's sentence clearly falls within the requirements of §47-7-34 in that (1) the felony was committed after June 30, 1995; (2) the court imposed incarceration of 8 years; (3) the total number of years of incarceration plus the total number of years of post-release supervision do not exceed the maximum sentence authorized by law for the felony committed; (4) the amount of time that Long will be under supervised post-relief supervision is only five years; and (5) the remainder of Long's post-release supervision will be "unsupervised" i.e. where the court, not the Mississippi Department

of Corrections, will supervise Long. *See Johnson v. State*, 925 So.2d 86, 102 (Miss. 2006) (quoting *Boddie v. State*, 875 So.2d 180, 182 (Miss. 2004)). As such, Long's sentence was not illegal. Furthermore, even if his sentence was illegal, "a convicted felon may not quietly enjoy the benefits of an illegally lenient sentence, and later attack the sentence when suddenly it is in his interest to do so." *Thomas v. State*, 861 So.2d 371, 375 (Miss. Ct. App. 2003) (quoting *Pruitt v. State*, 846 So.2d 271 (Miss. Ct. App. 2002)).

Long also argues that his sentence is illegal in that it "amount to life in the absence of a jury recommendation." (Appellant's Brief p. 14). However, Long is procedurally barred from raising this issue as he did not raise it in his Motion for Post-Conviction Collateral Relief. *Welch v. State*, 958 So.2d 1288, 1292 (Miss. Ct. App. 2007). Moreover, "[a]s a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal." *Green v. State*, 762 So.2d 810, 813 (Miss. Ct. App. 2000) (citing *Wallace v. State*, 607 So.2d 1184, 1188 (Miss.1992)).

Accordingly, Long's sentence is legal and within the parameters of Mississippi Code Annotated §47-7-34. Therefore, the trial court properly dismissed his Motion for Post-Conviction Collateral Relief.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the trial court's dismissal of Long's Motion for Post-Conviction Collateral Relief as Long's sentence is not illegal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

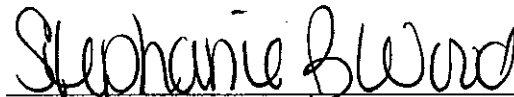
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 22nd day of August, 2007.



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