

IN THE MISSISSIPPI SUPREME COURT /
MISSISSIPPI COURT OF APPEALS

COPY

JIMMY LEE LONG

PETITIONER/APPELLANT

Vs.

APPEAL No.

2007-~~LS~~-00582-COA

FILED

STATE OF MISSISSIPPI

JUL 25 2007

RESPONDENT/APPELLEE

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

#####

BREIF OF THE APPELLANT

#####

MS. BETTY W. SEPHTON, CLERK
OFFICE OF THE CLERK
MISSISSIPPI SUPREME COURT /
MISSISSIPPI COURT OF APPEALS
POST OFFICE BOX 249
JACKSON ,Ms. 39205-0249

Dear Clerk ,

Please find here is the Breif of the Appellant in the aboved styled and numbered case for filing . The certificate of interested persons is included. Your usual attention in this matter is well appreciated .

Thank you for your time and consideration in this matter.

Cc.


RESPECTFULLY SUBMITTED

Appellant

HON. JIM HOOD, THE ATTORNEY
GENERAL FOR THE STATE OF MISSISSIPPI

HONORABLE SHARON AYCOCK, Judge
Circuit Ct. of LEE , County, Ms.

HON. DENNIS H. FARRIS, Asst. D.A.
Circuit Ct. of LEE , County, Ms.


Jimmy Lee Long
CMCF-III/3, Unit A-1
Post Office Box 88550
Pearl ,Ms. 39288-88550

Enclosures:

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Total No of Pages

16

CERTIFICATE OF INTERESTED PERSONS

The follow is a list of interested persons in order to determine possible disqualification or recusals. These persons have a vested interest in the outcome of the forgoing proceedings.

1. Jim Hood, The Mississippi Attorney General .
2. Ms.Sharion Aycock, The Judge For the Circuit Court of Lee County, Mississippi
3. Hon. Hon.Dennis H. Farris, The Assistant district attorney For the Circuit Court of Lee County, Mississippi
4. Hon.William C. Stennett , Shelton and Associates, Attorney for the defendant
5. Jimmy Lee Long, Petitioner /Appellant , MDOC [REDACTED]

Jimmy Lee Long ,Appellant

vs.

State of Mississippi

Appeal No. 2007-75-00582-COA

CLAIM FOR RELIEF

I.

THAT MISSISSIPPI CODE ANNOTED §47-7-34 does not apply retroactively to cases charged, indicted, before the Court's pronouncement of JOHNSON V. STATE, 925 So.2d 86 (Miss.2006) .

II.

THAT MISSISSIPPI CODE ANNOTED §47-7-33 does not apply prospectively to cases charged, indicted, before the Court's Pronouncement of JOHNSON, Supra, according to GOSS V. STATE, 721 So.2d 144 (Miss. 1998) as precedence according to MISSISSIPPI CODE ANNOTED §47-7-33 .

III.

THAT MISSISSIPPI CODE ANNOTED §47-7-34 cannot...be predicated on an illegal sentence which amounts to life in the absense of a jury recommendation .

These questions are not intended to harass the parties or cause unnecessary delay, cost, or harassment. Petitioner presents these questions in the interest of Justice .

RESPECTFULLY SUBMITTED
Appellant



Jimmy Lee Long

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STATEMENT OF THE CASE

On February 22, 2007, Petitioner Jimmy Lee Long Filed a Motion For Post Conviction Collateral Relief in the Circuit Court of Lee County, Mississippi. Respondents are The State of Mississippi in (CV07-025 (A)L) Original Causes CR05-396(A)L / CR05-515(A)L .
C.P. at 2 .

Petitioner Lee had been Convicted by Plea Agreement on the Charges of [Possession of Cocaine/Possession With Intent] in violation of M.C.A. §41-29-149 , and accordingly entered said plea before the Hon. Sharion Aycock to ["serve a term of 8 years in the Custody of the Mississippi Department of Corrections. Entry of Judement of conviction and sentence was imposed on the 7 day of March , 2007."] C.P. at 2 ; at 14-15 , Trial Trans 15/16 [C.P. at 18]

The court after informing Long that there was a factual basis for the exceptance of his plea defered Jimmy Lee Long's Sentencing in said cause until the Next Court term (Trial Trans at 24)[C.P. at ,19-20]. See, 30th day August 2005 .

Petitioner was retruned to open Court in the aboved mentioned styled and numbered cause on March 07 2006 over six (6) Months later, C.P. at 22 (Sentencing Order) and sentenced to serve a term of eight (8) years in the Custody of the Mississippi Department of Corrections.....C.P. at 23.....the Defendant informed the court that he was sixty-four (64) that he was not employed, had not been employed since the 90's...at C.P. at 26 [Trial Trans at 12-13.... and could not read or write . Jimmy Lee Long was sentenced to [" eight (8) years in the Mississippi Department of Corrections. That's going to be followed by tweleve (12) years post-release Supervision

Five of those will be Supervised . I'm going to require that you pay five-thousand dollars (\$5,000) fine;however,I'm going to suspend three-thousand (3,000) of the five thousand (\$5,000) fine provided that you comply with all the terms and conditions of you sentencing order and that you have no violations,further violations of any type".] C.P. 37 at [Trial Trans at pg. 55-56] .

The trial court entered an ORDER (C.P. at 41) MARCH 8th,2007, Dismissing Petitioner Request For Post Conviction Relief pursuant to Miss.Code Ann § 99-39-11 (2000).

The Trial Court Specifically Cites MCA §47-7-34 as it's legal conclusion for denial .

The Petitioner filed a NOTICE OF APPEAL/DESIGNATION OF THE RECORD, and an APPLICATION TO PROCEED IN FORMA PAUPERIS (C.P. at 44) in the CIRCUIT COURT OF LEE COUNTY,MISSISSIPPI (April 9,2007). The Pro se Petitioner has submitted CERTIFICATE OF COMPLIANCE .

STATEMENT OF THE FACTS

Petitioner Jimmy Lee Long, sixty-four years of age, unable to read or write was offered the wrong information by his attorney of record as to the Maximum and Minimum sentence that he could receive, punishable by law. (C.P. at 18 [Tr. Trs. at 16]) This incorrect Statement of Law to his Client(s) may have initially induced defendants to proceed with plea negotiations, however, in the absense of additional information, the court here would be at a lost of facts sufficent to determination of any claim for relief based on such argument.

Petitioner Jimmy Lee Long, sixty-four (64) years of age was sentenced however to a term of [eight] (8) years, with twelve (12) years of post release supervision. Five of those years will be supervised . The Court has ordered that Mississippi Code Annotated Sec. §47-7-33 does not apply . The Circuit Court Specifically Cites the case of Johnson v. State, 925 So.2d 86 (Miss.2006) . However, as correctly applied, Petitioner Cited Goss v. State, 721 So.2d 144 Miss. 1998) As the Presedence at the time he was charged in the aboved styled and number case . He had been informed that he could only use those cases that were in effect at the time he was charged with those crimeswith which he was charged, indicted, convicted , unless the new cases had been considered by the Mississippi Supreme Court/Mississippi Court of appeals as "Retroactive to Collateral Reveiw" . Respectfully Johnson, Supra was not the holding when the Petitioner Jimmy Lee Long was charged and indicted in this case.

Petitioner , submits that the sentence described here does exceed the life expectancy of the Petitioner Jimmy Lee Long, as a fact . That Claims of Illegal Sentences are not Procedurally Barred.

The Petitioner may have had to receive a sentence slightly less than the eight (8) years to serve, twelve (12) on post release Supervision, (5) on actual Probation . Because the Sentence may be excessive, as compared to the age of the petitioner, then the application by the trial court of MCA §47-7-34 , as applied to him may in-it-self, be totally without merit. In order to apply the Statue (By challenging the legality thereof) the sentence it-self might have ... to be within the confines of the Law . There are several cases which demonstrate that a sentencing judge does not have the authority to impose a life sentence without the consent of the jury, meaning in absense of a "Jury" reccomendation .

Last, Petitioner sentence may be in the absense of jurisdiction wholly .

Petitioner, was ushered into court to plea guilty on SEPTEMBER 28,2005 andplead Guilty, the record demonstrates that he, Jimmy Lee long did indeed, pleadGuilty. However, on advise of counsel for the defendant; the Trial Court may have erroneously sentenced the Defendant/Petitioner Jimmy Lee Long to a term under §47-7-34 , in the absense of jurisdiction(C.P. 19)[Tr. Trans at at pg. 24]

See:

"In the case of 05-396,Mr.Long, the Court finds and determines that there does exist a factual basis for the entry of the plea and, further,Mr.Long, that you have knowingly, understandingly,freely, and voluntarily entered your plea, and the plea is excepted.

At the request of your counsel, I'm going to defere sentencing untill next term of Lee County Term, Which will be sometime in November ".

Because a sentencing Judge may not have the Authority to alter or amend a sentence outside of the term of court the sentence is given. Does the Legal parameterinclude sentences that should have been given that are not given in the proper term of court deprive

the court of jurisdiction to sentence petitioner . Petitioner here would suggest without clear authority that once he plead guilty that sentence may have been announced in the same term of court as the guilty plea.

For the Above reason it was error for the Trial Judge to have utilized Mississippi Code Annotated §47-7-34 to deny to the petitioner relief. The Validty of 47-7-34 in the absense of a legal sentence cannot be cause to uphold a sentence whichs violates the Law.

I.

THAT MISSISSIPPI CODE ANNOTED §47-7-34 does not apply retroactively to cases charged, indicted, before the Court's pronouncement of JOHNSON V. STATE, 925 So.2d 86 (Miss.2006) .

The record demonstrates that Long was charged in 2005, clearly Johnson v. State, 925 So.2d 86 (Miss.2006) was not the Clearly Established Legal Precedence of the Court, as Promulgated by the MCA §47-7-34 Statue . The Circuit Court's of Mississippi may have had less freedom deviating from the Precedence Goss, Infra, .

The Johnson Case may have clarified the MCA §47-7-34 holding after the petitioner had been charged, and indicted. Because the Statue MCA §47-7-34 involves decisions that are contrary to, or an unreasonable application of exsisting Mississippi Law as determined by the Supreme Court of Mississippi, a Common Law "Non retroactivity bar" similar to the Federal case of Teague v. Lane, 489 U.S. 288, 305-307 should apply likewise in legal application to bar the Court from using "New Rules of Law" that were not in place when the Petitioner was charged with the case . The state should not be allow acess to legal developements after a certain date, and especially when the New Rule was not in effect at the time when the Defendant was charged with the crimes on accurances the new rules seek to alter to the injury of the defendant the right to be free from an illegal sentence is found to be fundamental. See ,

"However, [e]rrors effecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit there consideration" Lockett v. State, 582 So.2d 428, 430 (Miss.1991) .

This case vefore the court may also be limited to just Lee, as in-it-self extrodinary. The Trial Court imposed upon Long the

new MCA 47-7-34 statute may have been [ambiguous] because there was no clearly established precedential expression by the court to have prevented the trial court from interpreting the 47-7-33 holding; See,

" When it appears to the satisfaction of any Circuit Court or County Court or in the State of Mississippi, having original jurisdiction over criminal actions to judge thereof, that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, such court, in term time, or in vacation, shall have the power after conviction or plea of guilty, except in a case where a death sentence or life imprisonment is the maximum penalty which may be imposed or where the defendant has been convicted of a felony on a previous occasion in any court in the United States and of any State and territories thereof, to suspend the imposition or execution of sentence, and place the defendant on probation as herein provided ".....

" In ROBINSON, *Infra*, we held the trial court suspended the defendant's sentence in violation of §47-7-33 due to the defendant's prior felony conviction. ROBINSON, 585 So.2d at 759. The uncertainty in the instant case stems from the fact that only part of GOSS's sentence was suspended by the lower court rather than as the prior sentencing in ROBINSON. We find that the wording of the Statute not only restricts their ability to wholly or partially suspend the sentence of a previous convicted felon. Therefore the lower court erred in sentencing Goss a convicted felon to serve seven years in the State penitentiary followed by a conditional three year suspended sentence, Goss is not entitled to a suspended sentence in light of his prior conviction". See, *Ms.S.ct. Citing Goss, Supra; See also Cooper V. State*, 737 So.2d 1042, *Goss V. State*, 721 So.2d 144 *Cites, Robinson v. State*, 585 So.2d 757 .

Because there was ambiguous statutory interpretation as we have seen , and the two statutes do not convey a language to determine a clear and definite meaning at the time Jimmy Lee Long was sentenced because there was no statutory interpretation by this court, the public policy was thus unclear, and this court should have provided a remedy limited to to the injured party. The Court had clearly not opined the legislative intent of 47-7-34 at the time of Long's conviction .

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II.

THAT MISSISSIPPI CODE ANNOTED §47-7-33 does apply prospectively to cases charged, indicted, before the Court's pronouncement of JOHNSON, Supra, according to GOSS V. STATE, 721 So.2d 144 (Miss. 1998) as Precedence according to MISSISSIPPI CODE ANNOTED §47-7-33 ?

An enactment §47-7-33 of the legislature is by definition to express the public policy of the [the State] See, Boardman V. United Services Auto Ass'n, 470 So.2d 1024, 1030 (1985). Because we have two statutes MCA §47-7-33 which expresses that previously convicted felons cannot receive suspended sentences, and or probation..... supported by a long line of case interpretation by this court ; and now we have MCA §47-7-34 which expresses by and or through the recent case of JOHNSON, Supra, See:

"[F]or purposes of clarity, consistancy and cohesion, we hold today that HN11 the circuit and county courts of this state have power to suspend, in whole or in part, a convicted felon's sentence under Miss. Code Ann Section, 47-7-33 inasmuch as [**48] this Court and the legislature have empowered them to do so under Miss. Code Ann. Section, and to the extent that the practice has been historically ingrained in our criminal court's sentencing practice. In this way, the appellate courts of this state should liberally read the Probation Act, as Codified in 1956, along with the Post-release Supervision Program, as Codified in 1995, with an eye on intentions of the trial courts, recognizing the trial court's ability to monitor or supervise prior convicted felons beyond the five-year maximum period statutorily assigned to the MDOC."

925 So.3d at 47-48 .

The Petitioner must challenge the constitutionality, not only of the Statute but of the Court's ruling it-self . Mississippi Supreme court has opined "[where the language used by the legislature is] plain and unambiguous and convey a clear and definite meaning there is no occas[ion] to resort to the Rules of Statutory interpretation"... See, Mississippi Power Company V. Jones, 396 So.2d 1381, 1388 (Miss. 1979) . Here the Court is instructing a "LIBERAL" reading of the "PROBATION ACT" to carry out "CONSERVATIVE POLICIES".

CERTIFICATE OF SERVICE

I Jimmy Lee Long, [REDACTED], Mississippi Prisoner, do certify, that I have this day forwarded to the following interested persons, true and corrected copies of the "BRIEF OF APPELLANT in the Mississippi Supreme Court/Mississippi Court of Appeals, U.S. Prepaid Postage...on the following Date:

1. Hon. Jim Hood , The Mississippi Attorney General, Post Office Box 220 , Jackson, Mississippi 39205-0220 .
2. Hon. Dennis H. Farris, Assistance District Attorney, Post office Box 7237 , Tupelo, Mississippi 38802 .
3. Hon. William C. Sennett , Shelton & Associates , Post Office Box 1362 , Tupelo, Mississippi . 38802 .
4. Honorable Sharion Aycock , Judge The Circuit Court of Lee County, Mississippi, Post Office Box 762 , Tupelo, Ms. 38802-0762 .

Executed by me this 25 day of July, 2007

RESPECTFULLY SUBMITTED
Appellant

Cc
FLIP
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