IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEDRIC DEMOND MINOR — APPELLANT

VS. — NO. 2007-CP-0990-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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STATEMENT OF THE CASE

In this *pro se* appeal from a denial of post-conviction relief, De[d]ric Minor claims a twenty (20) year sentence imposed for the crime of aggravated assault was disproportionate to his offense and his status as a first offender.

Although within statutory limits, Minor, citing **Presley v. State**, 474 So.2d 612 (Miss. 1985), argues his sentence was unduly harsh, excessive, and disparate. He invites this court to vacate his sentence and remand his case to the trial court for re-sentencing. (Brief For Appellant at 6)

DE[D]RIC MINOR, a twenty-four year old African American male with an 11th grade education at the time of his plea of guilty to aggravated assault, appeals from the summary denial of his motion for post-conviction relief filed at some point in time in the Circuit Court of Madison County, William E. Chapman, III, presiding.

Regrettably, neither Minor's motion for post-conviction relief nor an order denying, summarily or otherwise, Minor's motion is a part of the official record which consists of a transcript

of the plea-qualification hearing and the clerk's papers. The latter contains a copy of Minor's petition to enter plea of guilty.

Despite the imperfect record, it seems clear to us that Minor's twenty (20) year sentence, which was within the limits prescribed by statute, was neither excessive nor disproportionate to the offense for which he plead guilty.

The plea transcript reflects quite clearly that Minor entered his guilty plea with full awareness the trial judge was going to accept the State's recommendation that Minor be sentenced to twenty (20) years for the crime of aggravated assault. (R. 16) Minor, the triggerman, shot another man in the abdomen during a drug deal gone sour. (R. 8) In exchange for his plea, a charge of murder, as an accessory before the fact, committed against a second individual was the target of a *nolle prosequi*. (R. 10)

In his appeal to this Court, Minor claims he received more than his just desserts because he was a first offender and had two children he needed to be with. (R. 18)

The truth of the matter is the sentence imposed, which was within statutory limits, was neither excessive nor disproportionate to an aggravated assault precipitated by a drug deal gone bad. This is especially true where, as here, Count 1, charging Minor as an accessory before the fact with killing a second man during the same altercation, was *nolle prossed* as part of the plea bargain agreement. (R. 10, 19)

STATEMENT OF FACTS

De[d]ric Minor is a twenty-four (24) year old father of two children. (R. 11) He has an 11th grade education and can both read and write. (C.P. at 16) According to the State's factual basis, Minor shot and injured a man during a dispute over the quantity of contraband and/or its purchase price. (R. 8) Minor acknowledged he had no disagreement with this factual basis. (R. 8)

On February 22, 2006, Minor, in open court and under the trustworthiness of the official oath (R. 2), entered a negotiated plea of guilty to aggravated assault. Minor's plea followed an indictment returned on September 7, 2005, charging him with murder (Count I) and aggravated assault (Count II), both of which took place during a drug deal that got out of hand. (R. 8) After taking his plea and ascertaining it was all knowing, intelligent, and voluntary, Judge Chapman sentenced Minor to serve twenty (20) years in the custody of the MDOC. (R. 18-19; C.P. at 24-26)

This did not sit well with Minor, a first offender, who laments that twenty (20) years to serve is much too harsh considering his status as a father and first offender, (Brief For Appellant at 4-5)

Although not included in the record, a post-plea motion for post-conviction relief was apparently filed by Minor at some point in time after the plea-qualification hearing. Minor, we surmise, assailed the duration of his sentence.

The trial court's order denying the motion is, likewise, not a matter of record. Both Minor's notice of appeal and designation of record, however, reflect the trial court denied post-conviction relief on March 14, 2007. (C.P. at 29-30) Minor's appellate brief, on the other hand, states that post-conviction relief was denied "on or about 2-13-07." (Brief For Appellant at 2)

SUMMARY OF THE ARGUMENT

Although the record is imperfect and this Court can deny relief for this reason alone, we invite the Court tp decide the proportionality issue on its merits with prejudice to Minor.

The circuit judge did not err in denying post-conviction relief because Minor's claim targeting the duration of his sentence, however sincere and well-meaning, was manifestly without merit. Miss. Code Ann. §99-39-11; **Garlotte v. State,** 530 So.2d 693 (Miss. 1988).

Minor has failed to establish by a preponderance of the evidence he was entitled to any relief as a result of a disproportionate and/or disparate sentence. **Todd v. State,** 873 So.2d 1040 (Ct.App.

Miss. 2004).

The sentence imposed for aggravated assault is within the limits prescribed by statute, Miss.Code Ann. §97-3-7(2). Accordingly, it is neither disproportionate to the severity of the offense nor a product of an abuse of judicial discretion. **Williams v. State,** 757 So.2d 953 (Miss. 1999); **Smith v. State,** 569 So.2d 1203 (Miss. 1990).

ARGUMENT

It is elementary "[t]he burden is upon [Minor] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State,** 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge did not abuse his judicial discretion in finding that De[d]ric Minor failed to do so here.

Minor's "Petition to Enter Guilty Plea" is a matter of record at C.P. 16-23.

The guilty plea transcript is also a matter of record at R. 1-20.

Missing from the record, on the other hand, is a copy of Minor's motion for post-conviction relief filed in the trial court and the trial judge's subsequent order denying post-conviction relief.

"The burden is on the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1987). Ordinarily this Court will not rely upon facts supplied in the briefs alone. **Genry v. State,** *supra*, 735 So.2d 186, 200 (Miss. 1999); **Wortham v. State,** 219 So.2d 923, 926-27 (Miss. 1969)

The denial of Minor's motion for post-conviction relief could be affirmed on the basis of an imperfect record.

We invite this Court, however to reject the merits of Minor's claim targeting the duration of his sentence. Stated differently, we invite the Court to decide this case, with prejudice, on the basis

of the argument presented in Minor's *pro se* brief on the merits. To dismiss his appeal, without prejudice to Minor, on account of an imperfect record would, in our opinion, be a waste of time and judicial resources.

Minor argues that given his status as a father and first offender his twenty (20) year sentence is disproportionate to the circumstances of the offense and the character of the offender. We argue, on the other hand, his sentence, which is within the limits prescribed by statute, is not subject to appellate review.

The issue is controlled by the following language found in **Lee v. State,** 918 So.2d 87 (¶¶ 3-5) (Ct.App.Miss. 2006), where Lee, in the wake of her guilty plea, claimed she was denied due process of law by the imposition of a sentence that was "disparate, disproportionate, harsh and excessive in light of her first offender status." *Id.* 918 So.2d at 88-89.

> Lee claims that her sentence of twenty years for conspiracy with ten years suspended and ten years to serve and her sentence of ten years for attempted capital murder with ten years to serve is excessive considering her status as a first time offender.
>
> The trial court has complete discretion in sentencing and [such] is not subject to appellate review when that sentence is within the limits set by statute. *Allen v. State,* 826 So.2d 756 (¶18) (Miss.Ct.App. 2002). This Court will not disturb a sentence that is imposed as long as the sentence is within the terms set forth in the statute. *Id.*
>
> Lee was charged with violating Mississippi Code Annotated §97-1-1 (conspiracy) and §97-1-7 (attempt to commit offense). The permissible punishment for conspiracy to commit capital murder is twenty years and the punishment for attempted capital murder is ten years. We find the sentence imposed on Lee is within the limits of those provided by statute. This issue is without merit.

The permissible penalty for aggravated assault is found in Miss. Code Ann. §97-3-7(2) which states, *inter alia*, that a person convicted of aggravated assault " . . . shall be punished by

imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years."

Needless to say, the sentence imposed here was within the statutory guidelines authorized by Miss.Code Ann. §97-3-7(2) wherein the permissible punishment for aggravated assault is one (1) to twenty (20) years.

The type and duration of a sentence has always been a matter within the discretion of the trial judge. A sentence will not be reviewed if it is within the limits prescribed by statute. **Reynolds v. State,** 585 So.2d 753 (Miss. 1991); **Moore v. State,** 873 So.2d 129 (Ct.App.Miss. 2004).

After pleading guilty (R. 17), Minor was given an opportunity to say what he had to say, i.e., to present any additional facts relevant to sentence. (R. 17-18) Judge Chapman, who was fully aware of Minor's fatherhood and his status as a first offender (R. 11, 18), obviously recognized the seriousness of the offense and the drug-related altercation that precipitated the shooting.

Rule 11.02 of the Uniform Circuit and County Court Rules, cited by Minor, states, *inter alia*, that " . . . where the court has discretion as to the sentence to be imposed, the court *may* direct that a presentence investigation and report be made." [emphasis ours] This language is permissive and not mandatory.

Judge Chapman's sentencing order, we note, reflects, *inter alia*, " . . . that the Defendant's application to waive deferment of sentence and pre-sentence report and to proceed with sentencing instanter is granted . . ." (C.P. at 25)

Given all this, a twenty (20) year sentence is neither disproportionate nor an abuse of judicial discretion. **Williams v. State,** 757 So.2d 953 (Miss. 1999); **Smith v. State,** 569 So.2d 1203 (Miss. 1990).

Although Minor, relying upon **Presley v. State,** *supra,* suggests there is a disparity between

his sentence and the sentence given others similarly situated, there is nothing in the record to reflect the duration of the sentences imposed upon other defendants whether first offenders or otherwise.

The facts in the case *sub judice* are quite distinguishable from those found in **Presley v. State,** 474 So.2d 612 (Miss. 1985), where Presley, an habitual offender, went to a Kroger Store and attempted to place two packages of ribeye steaks in his trousers and underneath his shirt. When approached by a store employee, Presley pulled out a pocketknife, opened the blade, put the knife in his palm and walked out of the store.

Presley's conviction for armed robbery was affirmed, but his sentence of life imprisonment without parole was vacated and his case remanded to the trial court for re-sentencing. In a specially concurring opinion Justice Robertson opined: "I think it fair to say that the only thing that will ever cause us to deviate from [the rule of sentencing discretion] is the imposition by trial judges of sentences as shockingly excessive as that we have here, " . . . forty (40) years without parole for what in essence is a petty criminal's stealing a steak." 474 So.2d at 621.

We reiterate.

The sentence imposed, although the maximum authorized by law, was within statutory limits and did not constitute an abuse of judicial discretion. **Hart v. State,** 639 So.2d 1313 (Miss. 1994); **Stromas v. State,** 618 So.2d 116 (Miss. 1993); **Moore v. State,** 873 So.2d 129 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 872 So.2d 96 (Ct.App.Miss. 2004); **Miller v. State,** 870 So.2d 667 (Ct.App.Miss. 2004) [Appellate court reviews a denial of post-conviction relief under an abuse of discretion standard]; **Miles v. State,** 864 So.2d 963, 968 (Ct.App.Miss. 2003), reh denied ["Sentencing is within the complete discretion of the trial court and [is] not subject to appellate review if it is within the limits prescribed by statute."]

In short, Minor has failed to demonstrate by a preponderance of the evidence his sentence

was excessive or disproportionate to the circumstances of the offense charged or the character of the offender. *See* **Falconer v. State,** 832 So.2d 622, 623 (Ct.App.Miss. 2002) [Petitioner, a first offender, failed to demonstrate any unconstitutional dimension to his sentence, as it was within the limits of the statutory sentencing scheme.]

CONCLUSION

Miss.Code Ann. § 99-39-11 (Supp. 1998) reads, in its pertinent parts, as follows:

* * * * * *

> (2) *If 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, *the judge may make an order* for its dismissal and *cause the prisoner to be notified.*

* * * * * *

Apparently, it did, he did, and he was. **Garlotte v. State,** *supra,* 530 So.2d 693 (Miss. 1988)["This case presents an excellent example of the appropriate use of the summary disposition provision of §99-39-11(2)]; **Falconer v. State,** 832 So.2d 622 (Ct.App.Miss. 2002) ["(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without merit."].

Summary denial was proper because Minor's post-conviction claim targeting the duration of his sentence was manifestly without merit. No further fact-finding was required, and relief was properly denied without the benefit of an evidentiary hearing focusing upon additional facts in extenuation and mitigation of sentence.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the sentence imposed following Minor's voluntary plea of guilty. Accordingly, the judgment entered in the lower court summarily denying De[d]ric

Minor's motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Billy L. Gore, 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 William E. Chapman, III
Circuit Court Judge
Post Office Box 1626
Canton, MS 39046

Honorable Michael Guest
District Attorney
Post Office Box 121
Canton, MS 39046

Dedric Demond Minor, #118817
S.M.C.I. #2
Post Office Box 1419
Leakesville, MS 39451

This the 21ST day of March, 2008.

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680