IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARRIS TURNER APPELLANT

VS. NO. 2007-CP-1000-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

In this *pro se* appeal from summary denial of post-conviction relief, Clarris Turner states that after entering, as a probationer, a plea of guilty in 2006 to the sale of cocaine he was sentenced to eight (8) years imprisonment. Turner complains the MDOC has construed this sentence to run consecutively, as opposed to concurrently, to the five (5) year sentence he had been serving for an earlier offense.

Turner claims his sentencing order is "ambiguous" and that his eight (8) year sentence should be construed to run concurrently, as opposed to consecutively, with the five (5) year sentence he had been serving prior to his release from custody as a probationer.

The circuit judge denied post-conviction relying on **Ball v. State,** 437 So.2d 423, 426 (Miss. 1983) which held, in part, that " . . . the absence of language affirmatively indicating that sentences will run concurrently means that the sentences will run consecutively."

We respectfully submit Judge Howard's findings of fact and conclusion of law were neither

clearly erroneous nor manifestly wrong.

CLARRIS TURNER, a twenty-three (23) year old African American male with a 12th grade education at the time of his plea of guilty to the sale of cocaine (R. 4), appeals from the summary denial of a pleading styled "Motion for Post-Conviction Relief to Clarify Sentence Status" filed on May 10, 2007, in the Circuit Court of Lowndes County, Lee J. Howard, Circuit Judge, presiding.

Both a copy of the "Petition to Enter a Guilty Plea" and a transcript of the plea qualification hearing are a part and parcel of the official record. (C.P. 4-10; R. 1-15)

In his appeal to this Court, Turner claims, *inter alia*, he should be serving his eight (8) year sentence concurrently, as opposed to consecutively, with his previously imposed five (5) year sentence. He invited the trial court, and invites this Court on appeal as well, to " . . . direct that the §99-19-21 sentence be defined as concurrent where it was petitioner's understanding of such at the time of plea and plea was made with this fact in mind." (C.P. at 17)

The truth of the matter is that Turner, as a probationer, was not entitled to a concurrent sentence. Contrary to Turner's claim otherwise, the trial judge had no discretion to order that Turner's eight (8) year sentence run concurrently with his five (5) year sentence. Rather, the imprisonment for the sale of cocaine had to commence at the termination of the imprisonment for Thomas's preceding conviction for motor vehicle theft. Miss.Code Ann. §99-19-21.

STATEMENT OF FACTS

Clarris Turner is a twenty-three (23) year old high school graduate who can both read and write. (R. 4)

On November 17, 2006, Turner, in open court and under the trustworthiness of the official oath (R. 3), entered a negotiated plea of guilty to the sale of cocaine taking place on March 8, 2004. Turner's voluntary plea of guilty followed an indictment returned on or about May 1, 2006. (C.P.

at 21) Turner entered his plea before James T. Kitchens, Circuit Judge.

According to Turner's admission made in open court under the trustworthiness of the official oath, he took the money from the confidential informant who was purchasing the cocaine. (R. 9) Turner thus acted as a go-between by facilitating the sale. The State's factual basis reflects the transaction was both video and audio taped. (R. 10-11)

Judge Kitchens, in the wake of Turner's negotiated plea and in accordance with the State's sentencing recommendation, sentenced Turner to serve eight (8) years imprisonment with five (5) years of post-release supervision. (R. 12)

On May 10, 2007, Turner, claiming his sentence was "ambiguous," filed a "Motion for Post-Conviction Relief to Clarify Sentence Status." (C.P. at 11-20) Turner asked the trial court to redefine his eight (8) year sentence as a sentence to be served concurrently with his five (5) year sentence previously imposed.

Judge Howard, relying on **Ball v. State,** *supra,* 437 So.2d 423, 427 (Miss. 1983), held that "the absence of language affirmatively indicating that sentences will run concurrently means that the sentences will run consecutively." (C.P. at 29; appellee's exhibit A, attached)

SUMMARY OF THE ARGUMENT

Turner's sentences, imposed at separate terms of court, must be construed to run consecutively. **Ball v. State,** *supra,* 437 So.2d 423, 427 (Miss. 1983); Miss.Code Ann. §99-19-21.

The circuit judge did not err in denying post-conviction relief sought in the form of a motion to clarify sentence because Turner's claim targeting the nature and duration of his sentence (consecutive versus concurrent), was manifestly without merit. Miss. Code Ann. §99-39-11; **Garlotte v. State,** 530 So.2d 693 (Miss. 1988).

Turner has failed to establish by a preponderance of the evidence he was entitled to any relief

as a result of an allegedly ambiguous sentence. **Todd v. State,** 873 So.2d 1040 (Ct.App. Miss. 2004).

ARGUMENT

Turner claims the trial judge should have conducted an evidentiary hearing. (Brief for Appellant at 4)

We disagree. Turner's claims were manifestly without merit.

It is elementary "[t]he burden is upon [Turner] 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 Turner failed to do so here.

"In reviewing a trial court's decision to deny a petition for post-conviction relief this Court will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous." **Kirksey v. State,** 728 So.2d 565, 567 (Miss. 1999), citing **State v. Tokman,** 564 So.2d 1339, 1341 (Miss. 1990).

However, if questions of law are raised, then the applicable standard of review is *de novo*. **Jackson v. State,** 965 So.2d 686 (Miss. 2007).

Turner's "Petition to Enter Guilty Plea" is a matter of record at C.P. 4-10.

The guilty plea transcript is also a matter of record at R. 1-15.

The issue presented is controlled by the following language found in **Ball v. State,** *supra*, 437 So.2d 423, 426 (Miss. 1983), where we find the following language:

> In pertinent part, our statute [§99-19-21]provides:
>
> > When a person is sentenced to imprisonment

> on two or more convictions, the imprisonment on the second, or each subsequent conviction, shall commence at the termination of the imprisonment for the preceding conviction, and the sentence ought to so specify. Provided, however, that when a person is convicted at the same term of a circuit or county court of more than one offense, the judge of such court may impose sentences on such convictions to run concurrently. Miss.Code Ann. §99-19-21 (1972).

Maycock [v. Reed, 328 So.2d 349 (Miss. 1976)] and Section 99-19-21 provide that the absence of language affirmatively indicating that sentences will run concurrently means that the sentences will run consecutively. 328 So.2d at 351. *See also* **Pickett v. Thomas**, 209 So.2d 192 (Miss. 1968).

A subsequent amendment to Miss.Code Ann. §99-19-21 completely shuts the door to Turner's claim that the trial judge had the discretion to run his eight (8) year sentence concurrently with his five (5) year sentence. The statute reads, in its amended form, as follows:

> (1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.
>
> (2) **When a person is sentenced to imprisonment for a felony committed while the person was on** parole, **probation,** earned-release supervision, post-release supervision or suspended sentence, **the imprisonment shall commence at the termination of the imprisonment for the preceding conviction. The term of imprisonment for a felony committed during** parole, **probation** earned release supervision, post-release supervision or suspended sentence **shall not run concurrently with any preceding term of imprisonment.** If the person is not imprisoned in a penitentiary for the preceding conviction, he shall be placed immediately in the custody of the department of corrections to serve the term of imprisonment for the felony committed while on parole, probation, earned-release supervision, p[ost-release supervision or suspended sentence. [emphasis supplied]

Turner, as a probationer (R. 8-9), was not entitled to a concurrent sentence; rather, "the

imprisonment [for the sale of cocaine] shall commence at the termination of the imprisonment for the preceding conviction," *viz.*, five (5) years for motor vehicle theft.

Turner also claims his plea was involuntary because ". . . it was agreed and understood by [his guilty] plea that the 8 year sentence would be concurrent to the five year [sentence] being served and would effectively give petitioner a new sentence totaling 8 years." (Brief for Appellant at 5) According to Turner, he entered his " . . . plea of guilty upon understanding that he would be sentenced to concurrent sentences." (Brief for Appellant at 3)

Turner asserts: "Defense counsel specifically advised petitioner, before entry of the plea, that any sentence received would be served concurrently and would mean that petitioner would be serving only the sentence imposed on the date of the plea [and] [p]etitioner was told that this sentence would be 8 years." (Brief for Appellant at 5)

This claim is totally and materially contradicted by the record. We quote the following colloquy from the plea-qualification hearing:

> Q. [BY THE COURT:] Have you talked to your lawyer about the facts surrounding this charge?
>
> A. [BY TURNER:] I asked could she run it concurrent with the time that I'm doing already.
>
> Q. She probably told you that I can't run time concurrent with something that you're already serving. I bet she explained that to you didn't she?
>
> A. Yes, sir.
>
> Q. Because I would have had to sentence you at the same time.
>
> * * * * * *
>
> BY THE COURT:

> Q. I can't go back in time and order something to be run concurrently with something you're already serving. I'm sure she explained that to you, right?
>
> A. Yeah.
>
> Q. All right. So, you've talked to your lawyer about the facts and the charge - - about what happened?
>
> A. Yeah. (R. 6-7) [emphasis ours].

In **Richardson v. State,** 769 So.2d 230, 235-36 (Ct.App.Miss. 2000), the Court of Appeals, citing **Roland v. State,** 666 So.2d 747, 751 (Miss. 1995),

> " . . . concluded that an evidentiary hearing is not necessary if the record of the plea hearing reflects that the defendant was advised of the rights which he now claims he was not aware. *Id.* When the record of the plea hearing belies the defendant's claims, an evidentiary hearing is not required. If the defendant's claims are totally contradicted by the record, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). In *Mowdy v. State*, 638 So.2d 738, 743 (Miss. 1994), the court stated: "Where the petitioner's version is belied by previous sworn testimony, for example, as to render his affidavit a sham we will allow summary judgment to stand.*** "

See also **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996) ["There is a great deal of emphasis placed on testimony by a defendant in front of the judge when entering a plea of guilty."]; **Hull v. State,** 933 So.2d 315 (Ct.App.Miss. 2006) ["A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilty."]; **Dawkins v. State,** 919 So.2d 92 (Ct.App.Miss. 2005).

"Solemn declarations in open court carry a strong presumption of verity." **Richardson v. State,** *supra*, 769 So.2d at 234. *See also* **Brown v. State,** 926 So.2d 229 (Ct.App.Miss. 2005), reh denied, cert denied.

Same here.

Finally, Turner argues he was indicted for sale but actually entered a plea of guilty to being an accessory, an unindicted offense. Turner testified he

> " . . . ain't seen no drugs or nothing. They asked Eric Lewis to bring the drugs in and I ain't never seen the drugs." (R. 9)

No matter.

Turner informed Judge Kitchens he was present during the sale and took the money from the informant. (R. 9) Thus, Turner was properly indicted as a principal, and he voluntarily entered a plea of guilty to the sale of cocaine.

In short, Turner has failed to demonstrate by a preponderance of the evidence his sentence was "ambiguous" and that he was entitled to an evidentiary hearing or to any other form of relief. *Cf.* **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

Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Hebert v. State,** 864 So.2d 1041, 1045 (Ct.App.Miss. 2004). *See also* **Rowland v. Britt,** 867 So.2d 260, 262 (Ct.App.Miss. 2003) ["(T)he trial court is not required to grant an evidentiary hearing on every petition it entertains."]

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 Turner's post-conviction claim targeting the nature and 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.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation/redefinition of the sentence imposed following Turner's voluntary plea of guilty. Accordingly, the judgment entered in the lower court summarily denying Clarris Turner's motion for clarification of sentence should be forthwith affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI
MAY TERM, 2007

CLARRIS TURNER — PETITIONER

VS. — CAUSE NO. 2005-0184-CV1

STATE OF MISSISSIPPI — RESPONDENT

FILED
MAY 18 2007
Michala J. Ables
Circuit Clerk

ORDER

Came on to be heard this day the above styled and numbered post conviction matter; and the Court, after having reviewed the record of proceedings in the trial court, the sentencing order, and the pleadings contained within the Petitioner's post-conviction civil file; the Court finds as follows.

The Petitioner filed a Motion to Clarify Sentence stating that his sentence was ambiguous in Lowndes County Criminal Case Number 2006-0310-CR1 because the sentencing order did not state whether his new sentence was to run concurrent or consecutive with the sentence that he was currently serving. The Court finds that this issue has no merit pursuant to *Ball v. State of Mississippi, 437 So. 2d 423*, which states in pertinent part that "the absence of language affirmatively indicating that sentences will run concurrently means that the sentences will run consecutively."

IT IS THEREFORE ORDERED, that this petition be, and the same is hereby dismissed without the necessity of a hearing. Further, the Circuit Clerk is directed to send a copy of this Order to all parties.

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SO ORDERED, this the 18th day of May, 2007.

EXHIBIT
A

CIRCUIT JUDGE

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:

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This the 22nd day of April, 2008.

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