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IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

NO. ~~CP-01000-COA~~
2007-CP-1000-COA

CLARRIS TURNER — APPELLANT

V

STATE OF MISSISSIPPI — APPELLEE

FILED

MAR 10 2008

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

BRIEF FOR APPELLANT

BY: Clarris Turner

Clarris Turner, #K8143
Unit 29-I
Parchman, Ms 38738

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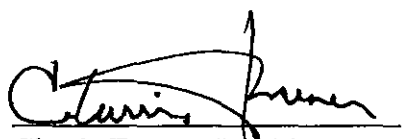
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Clarris Turner, certifies that the following listed persons have an interested 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. Clarris Turner, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable James Kitchens, Circuit Court Judge.
4. Honorable Charlie Hedgepeth, Assistant District Attorney.

Respectfully Submitted,

BY: 

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STATEMENT OF ISSUES

ISSUE ONE

Whether trial court erred in failing to grant PCR where record reveal that trial court never specified sentences to be served consecutive and where Turner actually entered plea of guilty upon understanding that he would be sentenced to concurrent sentences.

ISSUE TWO

Whether trial court erred and committed fundamental plain error in accepting plea of guilty to accessory to sales when the indictment charged only sales and the admissions made by Appellant did not prove sales.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi State Penitentiary at Parchman, in service of a 13 year prison term imposed by the trial court on two separate convictions and sentences. Appellant has been continuously confined since the date of sentencing.

STATEMENT OF CASE

Clarris Turner was sentenced by the Circuit Court of Lowndes County, Mississippi, on November 17, 2006, to a term of eight (8) years imprisonment, with five (5) years post release supervision.)R. 22-26). Such sentence was imposed by the court without any specific instructions as to how it should be served, concurrent or consecutive, with a sentence which Turner was currently serving. (R. 22-26) Petitioner's post conviction motion clearly states that it was agreed and understood by the plea that the 8 year sentence would be concurrent to the five year being served and would effectively give petitioner a new sentence totaling 8 years.

In regards to the post conviction motion, which is on appeal by this case, the trial court asserted that Ball v. State, 437 So.2d 423 states that where the court fail to specify the manner in which the sentence is to be served then the sentences are consecutive. Appellant would assert that this ruling should not apply where there has been a concession between petitioner and the state and where the plea of guilty is based upon such or was arrived at by such understanding. The trial court should have conducted an evidentiary hearing.

The trial court never found, as a fact, that Appellant was guilty of violating any condition of his post release supervision or that the state had actually proved any such violation.

STATEMENT OF FACTS

On May 1, 2006, an indictment was filed against Clarris Turner in Lowndes County Mississippi, charging that Turner committed the offense of sale of a cocaine.

Petitioner turner was represented Honorable Donna Smith in such case and was convicted on November 17, 2006. Sentence was imposed upon defendant on the same date.

Upon conviction of the charge, the trial court imposed a sentence of 8 years in the custody of the Mississippi Department of Corrections.

In imposing such sentence the trial court never specified whether such sentence was to be served concurrently or consecutively to five year sentence which was being served at that time. Additionally, the trial court accepted the plea of guilty to accessory without having amended the indictment.

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. Petitioner was told that this sentence would be 8 years.

Upon being sent to the Mississippi Department of Corrections, petitioner was told that where the court failed to say otherwise, the state automatically makes the sentence consecutive to apply a 13 year term.

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).

SUMMARY OF ARGUMENT

The trial court erred in finding that the claims in the PCR was without merit where court did not conduct as evidentiary hearing.

LEGAL ARGUMENT IN SUPPORT OF CLAIMS FOR RELIEF

A.

The Mississippi Supreme Court has long recognized that the courts of the State of Mississippi are open to those incarcerated at Mississippi Correctional facilities and Institutions raising questions regarding the voluntariness to their pleas of guilty to criminal offenses or the duration of confinement. Hill v. State, 388 So.2d 143, 146 (Miss. 1980); Watts v. Lucas, 394 So.2d 903 (Miss. 1981); Ball v. State, 437 So.2d 423, 425 (Miss. 1983); Tiller v. State, 440 So.2d 1001, 1004-05 (Miss. 1983).

B.

Clarris Turner was represented in the Circuit Court of Lowndes County by Honorable Donna L. Smith., who negotiated a plea of guilty to the charge of sale of cocaine to secure a sentence consisting of 8 years, with 5 years of post release supervision.

At the time of plea and sentencing in this case, petitioner was serving a sentence of 5 years for the nonviolent offense of vehicle theft.

ARGUMENT

I.

PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW WHERE HE WAS SENTENCED TO AN EIGHT YEAR TERM, PURSUANT TO PLEA OF GUILTY, AND WHERE SENTENCE HAS BEEN CONSTRUED TO BE CONSECUTIVE TO OTHER SENTENCE WITHOUT INSTRUCTIONS BY SENTENCING ORDER.

Petitioner was sentenced, by plea agreement, to a term of 8 years for the offense of sale of cocaine. At the time of such plea, petitioner was serving a 5 year sentence for the offense of auto theft. While the plea entailed that such sentences could be concurrent, the sentencing order failed to specify such information and said sentence has been construed to be consecutive to amount to a term of 13 years. Petitioner would assert here that the statute is clear that the trial judge had the discretion to order the sentences to be concurrent or consecutive. Where the court failed to specify either, the sentences should be deemed concurrent and petitioner should be serving a sentence of 8 years rather than the 13 year sentence which petitioner is currently serving. Miss. Code Ann. §99-19-21 (1). At most, the final 8 year sentence should have been deemed to start at that time and not be placed in the lay away until the initial sentence was served.

The statute is very clear on the issue of concurrent sentences. Miss Code Ann §99-19-21 provides:

> **§99-19-21. Sentence; prison terms to run consecutively or concurrently in discretion of court; sentence for felony committed while on parole, probation, earned-release or post-release supervision, or suspended. sentence.**
>
> (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.

In Heafner v. State, 947 So.2d 354 Miss. App. 2007) (No. 2005-CA-01792), the court explored such statute in its entirety. This case pointed out "that with concurrent sentences, each prison term runs simultaneously and the prisoner is entitled to discharge at the expiration of the longest term".

The Mississippi Supreme Court has held that an order of a trial court imposing a sentence is controlling. Anderson v. State, 288 So.d 852, 855 (Miss. 1974). However, any ambiguity in an order must be resolved in favor of the accused. At the time which petitioner was sentenced the law did not require that the sentences be consecutive where there was a failure to specify by the court. In the absence of such requirement the sentences should be concurrent.

In Tate v. State, 455 So. 2d 1312, 1313 (Miss. 1984), the court considered an issue similar to the issue here and which regarded a judgment from the same court. In that case, the court determined that while the court failed to specify the manner in which the sentences were to be served, the law at that time required that such sentences be consecutive where the court failed to specify. Moreover, the law also would not allow sentences imposed at different terms of court to be concurrent. Glover v. State, 419 So. 2d 588 (Miss 1982). At the time of Tate, the sentencing judge sitting at a subsequent term of court had no authority to provide that the sentences run concurrently with the sentence imposed in an earlier case. 419 So.2d at 589.

In Watts v. Lucas, 394 So. 2d 903 (Miss. 1981) the court found that where two or more sentences imposed at the same term of court failed to specify whether they were to be served concurrent or consecutive then such sentences were to be served concurrent. Also see Anderson v. State, 288 So.2d 852 (Miss. 1974). The ambiguity should be resolved in favor of the accused. The trial Court, in denying relief, relied upon the decision rendered in Ball v. State, 437 So.2d 423 (Miss. 1983). The Ball decision, which was relied upon by the trial court, specifically provide that:

> *Orders imposing sentences to be served consecutively should provide for commencement at the termination of the imprisonment for the proceeding conviction.* A provision in a sentence order to this effect would do much to clarify the manner in which it is to be served and avoid post-conviction petitions such as this.

Ball v. State, 437 So.2d 423, 426 (Miss. 1983).

Thus, the Court did not find in Ball that as a blanket rule that the absence of language affirmatively indicating the sentences will run concurrently means the sentences will run consecutively. Instead, the Court held that *Orders imposing sentences to be served consecutively should provide for commencement at the termination of the imprisonment for the proceeding conviction.*

In the instant case the trial court had discussed with Appellant the issue of consecutive and concurrent sentences during the plea colloquy. Appellant had state to the Court that this discussion had came up when he had conferred with his attorney.

> Q. Have you talked to your lawyer about the facts surrounding this charge?

A. I asked could she run it concurrent with the time that I'm doing already.

Q. I'm sorry. I didn't hear you.

A. I said I asked her 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: Well, that and was this a revocation or was this a --okay. He's not serving on a revocation. Okay.

BY THE COURT:

Q. I can't go back in time and order something to be run currently 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 happened?

A. Yes, sir.

Q. She's talked to you about what the State's proof would have to be before a jury could find you guilty; is that right?

A. Yes, sir.

Q. Did you talk to your lawyer about an defenses to the charge that you might have had?

A. Yes, sir.

Q. Now, are you satisfied with the gelp that she's given you?

A. Yeah. I had asked her could she give me a lower time than the time that she asked.

Q. You wish the plea bargain was lower than what it is I guess you're saying?

A. Yes, sir.

Q. Well, it sounds like -- other than you wish you got somebody that was going to recommend lower time, are you happy with what she's -- the work she's done for you?

A. Yes, sir. (R. 6-8)

Surely, since this issue had been discussed then the trial Court would have known to specify the nature and manner in which the sentences were to run when the sentence was imposed. The trial Court did not specify but simply rely upon the position that Ball v. State, supra, renders the claim to be without merit. It should not be ignored that the issue of concurrent sentences had been discussed during the plea negotiations. The attorney never actually revealed what she had advised Appellant in the nature of concurrent and consecutive sentences. The Court asked Turner a question as to what the attorney had told him and received a simple "Yes, sir." (R. 2) The record also

demonstrates that the trial judge was under the belief that Appellant was not serving a sentence in which he had been subjected to a revocation.

BY MS. SMITH: I also told him I couldn't run anything.

That you had to Judge.

BY THE COURT: Well, that and was this a revocation or

was this a -- okay. He's not serving on a revocation. Okay. (R. 7)

Thus, the Court was under the belief that Appellant was not serving a sentence regarding revocation proceedings. This belief, according to the record, was a factor in the decision and belief that the Court stated it could not impose the sentence concurrent. However, the fact is that Appellant was serving a sentence which was the result of a probation revocation.

A. I had came back here in 2004 for violating probation for this charge. And they -- I had went to a preliminary hearing on it and seen the video and everything. And the Judge had told me that they were going to violate my probation for the sale of cocaine. So, two years later, they indicted me on it.

BY THE COURT: You're right. It happened in March of

2004. And you were indicted in the May term of 2006.

BY THE DEFENDANT: It's been over two years.

BY MS. SMITH: Was served in the August term.

BY THE COURT: Uh-huh.

BY MS. SMITH: And indicted or actually, I don't remember,

something happened in November.

BY THE DEFENDANT: They re-wrote my probation November 18th of 2004.

BY MS. SMITH: That's what I was going to say, Your Honor. He was serving time on taking of a motor vehicle.

BY THE COURT: Who was that, Judge Howard that revoked you on it?

BY THE DEFENDANT: I believe so. (R. 8)

II.

ADDITIONALLY, THE PLEA OF GUILTY IS VOID WHERE SUCH PLEA WAS ENTERED TO ACCESSORY WHERE PETITIONER WAS INDICTED FOR SALES AND THERE WAS NO AMENDMENT TO THE INDICTMENT MADE. THE TRIAL COMMITTED FUNDAMENTAL PLAIN ERROR.

Appellant appeared to be reluctant to enter the plea of guilty when the court questioned him on the subject of what he was pleading to.

Q. Okay. But are you pleading guilty to it because you're guilty of it?

A. I ain't seen no drugs or nothing. They asked Eric Lewis to bring the drugs in and I ain't never seen the drugs.

BY MS. SMITH: The Court's indulgence, Your Honor.

BY THE COURT: Sure.

(WHEREUPON, MS. SMITH CONFERS WITH HER CLIENT OFF THE RECORD.) (. 8-9)

There is serious question as to whether the plea of guilty was voluntary by the statement which Appellant made. Defense counsel subsequently talked to Appellant, off

the record, and persuaded Appellant to lie to the Court. The record demonstrates that when the "off the record" discussion was over Appellant stated to the Court:

BY THE DEFENDANT: I plead guilty.

BY MS. SMITH: Did you sell cocaine is the question or did you take money for the sale of cocaine?

BY THE DEFENDANT: I took the money from an informant.

BY THE COURT:

Q. Okay. And brought back cocaine from somebody else?

A. Sir?

Q. Brought back--

BY MS. SMITH: Two people.

BY THE COURT: Okay. It was, like, an accessory to a sale?

BY MS. SMITH: Yes.

BY THE COURT:

Q. Do you want to plead guilty to this charge?

A. Yes, sir. (R. 9-10)

According to the record, the Court accepted a plea of guilty to accessory to a sale. That charge was not a part of the indictment. The record affirmatively demonstrates that there was a plain error committed in this instance. This Court should hear a plain error no matter where or when it is raised.

> Mississippi Rule of Appellate Procedure 28(a)(3) ordinarily restricts our review to those issues raised by the parties on appeal. However, Rule 28(a)(3) provides that "the court may, at its option, notice a plain error not identified or

> distinctly specified." In addition, Mississippi Rule of Evidence 103(d) permits review of "plain errors affecting substantial rights although they were not brought to the attention of the court." "According to the Mississippi Supreme Court, the reviewing court may address issues as plain error `when the trial court has impacted upon a fundamental right of the defendant.'" Moore v. State, 755 So.2d 1276, 1279(¶ 9) (Miss.Ct.App. 2000) (quoting Berry v. State,728 So.2d 568, 571 (¶ 6) (Miss. 1999)). "The right to be free from an illegal sentence has been found to be fundamental." Davis v. State, 933 So.2d 1014, 1022 (¶ 32) (Miss.Ct.App. 2006) (quoting Ethridge v. State, 800 So.2d 1221 (¶ 7) (Miss.Ct.App. 2001)).

Appellant would assert to this Court that the trial Court confirmed that Appellant was not pleading guilty to a sales of cocaine. There was no admission to that charge. The trial court termed the admission as being an accessory but continued to accept the plea. This Court should hear this fundamental error and should reverse and render the charge.

CONCLUSION

Appellant Clarris Turner respectfully submits that based on the authorities cited herein, and in support of his brief, that this Court should reverse and remand this case to the trial court for additional proceedings. In the alternative, this Court should reverse and render the conviction and sentence on the basis of fundamental constitutional plain error committed by the trial court.

Respectfully submitted,

By: 

Clarris Turner, #K8143
Unit 29-I
Parchman, Ms 38738

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant have been served, by United States Postal service, upon: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205; Honorable James T. Kitchens, Circuit Court Judge, P. O. 1387, Columbus, MS 39703; Honorable Forrest Allgood, District Attorney, P. O. Box 1044, Columbus, MS 39703.

This, the 10 day of March, 2008.

Clarris Turner, #K8143
Unit 29-I
Parchman, Ms 38738