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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ERIC BERRY

FILED

APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS.

NO. 2007-CP-1072

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT DID NOT ERR IN SENTENCING BERRY TO SERVE THE MANDATORY SENTENCE WITHOUT BENEFIT OF EARNED TIME.
- II. BERRY WAIVED THE INDICTMENT PHASE OF HIS SENTENCING BY ENTERING A VALID GUILTY PLEA.

STATEMENT OF THE FACTS

On or about July 31, 2003, Eric Berry pled guilty to armed robbery on criminal information. The Trial Court conducted a hearing and accepted his plea. He was sentenced to a term of twenty-five (25) years in the custody of the Mississippi Department of Corrections with 15 years suspended. The Trial Court entered it's Judgment of Conviction and Sentence on or about August 4, 2003. On or about September 26, 2006, Berry filed a motion seeking post conviction relief which was denied by the Circuit Court of Forrest County on June 4, 2007. The instant appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Eric Berry post-conviction relief. Berry asserts several errors by the trial court below in regards to his sentencing.

Berry asserts error where he was sentenced to serve his mandatory sentence without benefit of earned time. This assignment of error is without merit because information as to the sentencing phase of the offense is not an essential element of the offense.

Berry asserts a constitutional violations because he was not indicted for his offense. However, Berry's valid guilty plea effectively waived any necessity for a formal indictment.

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. **Smith v. State**, 806 So.2d 1148, 1150 (¶ 3) (Miss. Ct. App. 2002).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN SENTENCING BERRY TO SERVE THE MANDATORY SENTENCE WITHOUT BENEFIT OF EARNED TIME.

Berry asserts that he was not informed that the first ten years he was to serve would be mandatory. He argues that because there was no indictment that his conviction was illegal and thus, he should not be bound to serve the mandatory ten years of his sentence. However, when Berry pled guilty, he effectively waived his right to a formal indictment. Berry even concedes this in his own Appellate Brief. (Appellant's Brief at 5).

This issue is without merit. The Mississippi Court of Appeals has agreed in a similar assertion of error, opining:

By pleading guilty plea to armed robbery, defendant waived argument that indictment was flawed because no parole provision was included; the only indictment deficiencies that survived waiver by a guilty plea were essential elements of the crime or lack of jurisdiction, and parole eligibility was not an essential element of armed robbery and had no effect on jurisdiction. **Richardson v. State**, 769 So.2d 230 (Miss. Ct. App. 2000).

Richardson found that an issue in regards to the sentencing for the offense in question was not an essential element of armed robbery. **Id.** In the case at bar, Berry has pled guilty to armed robbery and essentially asserts a similar indictment defect in regards to his earned time. As the honorable Court in **Richardson** reasoned, so should this court find the missing information regarding the mandatory time served not an essential element of armed robbery.

[A]n entry of knowing and voluntary guilty plea waives all defects or insufficiencies in indictment except failure of indictment to charge criminal offense or essential element of criminal offense and subject matter jurisdiction. **Jefferson v. State**, 556 So.2d 1016 (Miss. 1989). Where there are no arguments of a jurisdictional defect, and the essential elements of the criminal offense of armed robbery are present, we find no basis for relief.

The lower court correctly dismissed of Berry's assertion that he should have been eligible for earned time. Berry was not entitled to earned time at all pursuant to Miss Code Ann. § 47-7-3(1)(d)(ii). (C.P. 32). Furthermore, § § 47-5-138.1(2)(d) (Rev. 2004) and 47-5-139(1)(e)(Rev. 2004) state that trusty time and earned time, respectively, are not available to those persons convicted of armed robbery who have not "served the mandatory time for parole eligibility." (C.P. 32).

Also, the Mississippi Court of Appeals has held that:

"[a]n inmate shall not be eligible for the earned time allowance if: The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon." Therefore, because [defendant] must serve his entire sentence, his argument that he is entitled to

earned time lacks merit... [T]he MDOC correctly points out that “since an offender serving a sentence for an armed robbery committed on or after October 1, 1994 can never serve the mandatory time required for parole eligibility, he is not eligible to accrue earned time credits.” **Sykes v. Epps**, 963 So.2d 31 (Miss. Ct. App. 2007).

Hence, the State prays that this reviewing court, in accordance with the lower court and applicable case law, deny Berry any relief in regards to these issues.

II. BERRY WAIVED THE INDICTMENT PHASE OF HIS SENTENCING BY ENTERING A VALID GUILTY PLEA.

On July 31, 2003, Eric Berry pled guilty to armed robbery. (C.P. 19). Berry entered this plea after the court’s:

advising the defendant of the legal and constitutional rights applicable in the premises and satisfied that the defendant understood those legal and constitutional rights, and further being satisfied that the defendant knowingly, freely, voluntarily and intelligently entered a plea of guilty herein, with full understanding of the nature of the crime. (C.P. 19).

A guilty plea is valid only if it is entered into “voluntarily, knowingly, and intelligently, ‘with sufficient awareness of the relevant circumstances and likely consequences.’ ” **McNeal v. State**, 951 So.2d 615 (¶6) (Miss. Ct. App. 2007) (quoting **Brady v. United States**, 397 U.S. 742, 748 (1970)). A valid guilty plea admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment or information against a defendant. **Reeder v. State**, 783 So.2d 711 (Miss. 2001).

It is well known that before a guilty plea can be accepted, the judge is to inform the defendant of his rights as a means of ensuring this plea is given with full knowledge of the offense and the ramifications of entering this plea. “By entering guilty plea following plea colloquy in which he confirmed to the circuit court that he understood the charges against him and was in fact guilty of them, defendant waived any defect to the indictment.” **Von Brock v.**

State, 794 So.2d 279 (Miss. Ct. App. 2001). Due to the absence of the plea hearing from the record, the State will assume that a valid guilty plea was given and accepted in the lower court.¹ Based on this assumption in accordance with applicable case law, Berry has waived his right to challenge any defect to his indictment.

Berry also alludes to the State having not produced the deadly firearm used in the armed robbery to substantiate his conviction. However, it is well recognized that a guilty plea relieves the State's burden to produce evidence. *See Steele v. State*, 845 So.2d 758 (Miss. Ct. App. 2003) (explaining that defendant, by pleading guilty... waived his right to post-conviction review of the sufficiency of the evidence).

[Defendant] is not entitled to relief since he waived his right to challenge the State's evidence by entering a valid guilty plea. **Thornhill v. State**, 919 So.2d 238 (Miss. Ct. App. 2005) (quoting **Young v. State**, 797 So.2d 239, 246 (Miss. Ct. App. 2001)). A plea of guilty waives any evidentiary issue. **Jefferson v. State**, 855 So.2d 1012 (Miss. Ct. App. 2003). Accordingly, this argument is also without merit.

¹Berry does not dispute having entered a valid guilty plea.

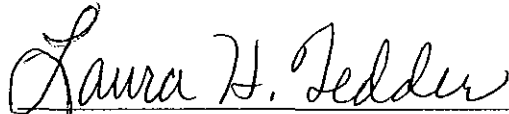
CONCLUSION

As supported by the aforementioned facts and authority, Eric Berry's claims for relief are without merit. Accordingly, the State asks this honorable Court to affirm the trial court's denial of post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

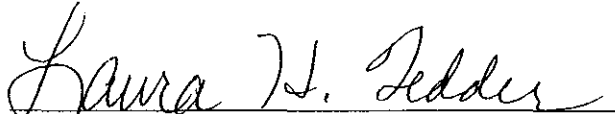
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of August, 2008.


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