

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01072-COA

COPY

ERIC BERRY

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

FILED

MAY 12 2008

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COURT OF APPEALS

BRIEF FOR APPELLANT

BY:

Eric Berry
Eric Berry, Pro se

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Eric Berry, certifies that the following listed persons have an interest 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. Eric Berry, Appellant pro se.
2. Honorable Jim Hood, Attorney General.
3. Honorable Bob Helfrich, Circuit Court Judge.
4. Honorable John Mark Weathers, District Attorney.

Respectfully Submitted,

BY: 
Eric Berry 
SCCF
1429 Industrial Pk Rd
Wiggins, MS 39577

Appellant

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STATEMENT OF ISSUES

Appellant, Eric Berry has suffered a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where he has been sentenced to mandatory sentence without benefit of earned time, without having been indicted for such mandatory offense as required by law and where no firearm or deadly weapon was introduced in court to substantiate armed robbery under Miss Code. Ann. §93-3-79 and Miss. Code. Ann. §47-5-139 (1) (e).

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at the Stone County Regional Correctional Facility, in service of a prison term imposed as a result of the conviction which is the subject of this action. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition by the trial court.

STATEMENT OF CASE

Appellant Berry was charged by a single count criminal information, filed in the Circuit Court of Forrest County, Mississippi, with the offense of armed robbery.

FACTS

1. Appellant executed a waiver of indictment on July 31, 2003, in Cause No. 03-290-CP. Such waiver charged appellant with armed robbery but never set forth any statutory code identification Cause No. 03-290-CP.
2. Appellant was represented by Honorable Tracy Klein of Hattiesburg, Mississippi.
3. Appellant's attorney never instructed Appellant that the sentence which was rendered under the indictment would require that it be served mandatory.
4. Appellant believed that if he waived a formal indictment and proceeded to plead guilty that the sentence imposed would not be a mandatory sentence and would be served with full benefit of earned time credit for good conduct.
5. That the trial court never advised that the sentence, or any portions thereof, would be served mandatory.
6. That I was of the belief that my waiver of the indictment process would constitute a waiver by the state to seek or impose a mandatory sentence since such a sentence would require a formal indictment by the grand jury.

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).

In the instant case, well-settled law dictates that the trial court's decision was clearly erroneous since the trial court failed to address the substantial and meritorious claims made in the petition.

SUMMARY OF ARGUMENT

Appellant Berry's conviction by pleas of guilty were invalid since such plea were made on information and not on an indictment with the full force and effect of the law. Any sentence

rendered upon Appellant, under the plea on information, should not be mandatory as it would be had an indictment attached and the state had sought to allow a grand jury to pass on the validity of the probability of the evidence to secure an indictment. Information should not enjoy the same force and effect of the law as an indictment.

ARGUMENT

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Eric S. Berry was charged by criminal information, with the offense of armed robbery. The prosecution elected to allow Berry to waive a formal indictment and to proceed to plead guilty under the information. The court accepted the plea and sentenced Appellant to a term of 25 years imprisonment with 15 years suspended and 10 years to serve. The Circuit Court Judge never indicated nor advised that the sentence or any portion thereof, was to be served without the possibility of earned time under the applicable earned time statutes under Miss. Code Ann. §47-5-138.

Berry's conviction was entered upon the plea of guilty to information. Berry would assert that such plea to information has no authority to deprive Berry of earned time accumulation which would permit Berry to be released from the service of the first 10 years early. Berry would assert that:

- a) the information failed to appraise Berry that he was subject to a sentence which required that the first 10 years be served mandatory and he was, therefore, not appraised of the consequences of any such plea to the information, and
- b) Miss. Code Ann. §99-19-3 provides the following:

A person indicted for a criminal offense shall not be convicted thereof, unless by confession of his guilt in open court or by admitting the truth of the jury accepted and recorded in court. A person charged with an offense shall not be punished, therefore, unless legally convicted thereof in a court having jurisdiction of the cause and of the person.

This section clearly requires an indictment before any conviction may be legal. Article 3, Section 27, of the Constitution of the State of Mississippi was amended in November, 1978, to authorize proceedings against a defendant charged with a felony by information. . . . where a defendant is represented by counsel and by sworn statement waives indictment. Jefferson v. State, 556 So. 2d 1016 (Miss 1989). The information filed against Berry in this case provides no notice that the charge of armed robbery, upon conviction subjects the defendant to a term of imprisonment without any possibility for earned time nor parole. Moreover, the indictment fails to provide or identify the statute in which it is sought under. Appellant should have been entitled to notice of this critical information before a plea of guilty to such offense. The failures of the indictment in this regard should cause the sentence rendered to be without the effect of Miss. Code Ann. §97-3-79 and Miss. Code Ann. §47-5-139 (1) (e). Additionally, the conviction and sentence conflicts with Miss. Code Ann §99-19-3 which should prevent Appellant's punishment unless the conviction was by an indictment and legal.

CONCLUSION

Appellant Berry respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction, and sentence imposed as well as the action taken by the trial court in regards to the post conviction relief motion. The trial court erred in failing to conduct an evidentiary hearing and in failing to grant relief in this case. This case should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted,

BY:

Eric Berry

Eric Berry

SCCF

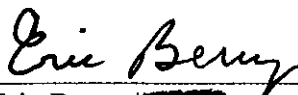

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CERTIFICATE OF SERVICE

This is to certify that I, Eric Berry, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205; Honorable Bob Helfrich, Circuit Court Judge, P. O. Box 309, Hattiesburg, MS 39043; Honorable John Mark Weathers, District Attorney, P. O. Box 166, Hattiesburg, MS.

This, the 12, day of May, 2008


Eric Berry 
SCCF
1429 Industrial Pk Rd
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