

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JESSIE JAMES DAVIS

APPELLANT

VS.

NO. 2008-CP-0229-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. DAVIS'S MOTION FOR POST-CONVICTION RELIEF IS PROCEDURALLY BARRED.
- II. DAVIS IS NOT SERVING AN ILLEGAL SENTENCE.
- III. THE TRIAL COURT PROPERLY DISPOSED OF DAVIS'S CLAIM SUMMARILY AND WITHOUT AN EVIDENTIARY HEARING WHERE THE BASIS OF DAVIS'S CLAIM INVOLVED NOTHING MORE THAN A SCRIVENER'S ERROR.

STATEMENT OF FACTS

On December 6, 2001, Davis was indicted for kidnaping and attempted rape. On July 10, 2003, Davis pled guilty to attempted rape. C.P. 10. He was sentenced to ten years with 9 years and 265 days suspended and a mere 100 days to serve. C.P. 23. Davis subsequently violated the terms of probation and was ordered to serve the previously suspended 9 years and 265 days. C.P. 39. Davis filed a motion for post-conviction relief in the trial court on October 11, 2007. C.P. 9. The trial court summarily denied the petition.

SUMMARY OF ARGUMENT

Davis's motion for post-conviction relief is procedurally barred as it was filed more than three years after the entry of his guilty plea. Davis's claim that he is serving an illegal sentence would overcome the procedural bar, if the claim had merit. It does not. Davis's claim is based on a scrivener's error. He is not serving an illegal sentence for attempted rape, because that crime carries a maximum of ten years imprisonment, which is the sentence he received.

ARGUMENT

I. DAVIS'S MOTION FOR POST-CONVICTION RELIEF IS PROCEDURALLY BARRED.

Davis's motion for post-conviction relief is procedurally barred since it was filed more than three years after the entry of his guilty plea. Miss. Code Ann. 99-39-5(2). Davis claims that he is serving an illegal sentence. If true, that claim would overcome the applicable time bar. However, as explained in the following issue, Davis's illegal sentence claim is wholly without merit. As such, he has failed to overcome the procedural bar.

II. DAVIS IS NOT SERVING AN ILLEGAL SENTENCE.

Davis was indicted for attempted rape. The heading of the indictment read, "ATTEMPTED RAPE MCA § 97-1-7 and § 97-3-65(3)(a)." C.P. 10. The correct subsection for rape, however, is 97-3-65(4)(a). Subsection 3(a) actually prescribes the sentence for statutory rape where the defendant is between the ages of 18 and 21 and the victim is 14 or 15 years old. Miss. Code Ann. § 97-3-65(3)(a). The language in the indictment clearly put Davis on notice that he was indicted for attempted rape. C.P. 10. The indictment in pertinent part stated,

Jessie James Davis . . . did willfully, unlawfully, feloniously, forcibly against her will, attempt to have sexual intercourse with Betty Henry, a female person by forcibly removing her from her automobile, carrying her into his apartment, throwing her onto a couch, pulling her pants down and attempting to remove her underwear, pulling his own pants down, getting on top of her and telling her that he was "going to get his nuts," but the said Jesse James Davis failed in his attempt to rape the said Betty Henry because she fought, screamed and struggled against the said Jesse James Davis and broke free from him and ran out of the apartment to her car and got away

C.P. 10-11. The State articulated the same facts during the guilty plea hearing. C.P. 21.

The supreme court has stated, "when dealing with indictments, [] we employ a rule of substance over form." *Golden v. State*, 968 So.2d 378, 386 (¶28) (Miss. 2007). Here it is clear that Davis was indicted for and pled guilty to attempted rape. The apparent scrivener's error refers to the sentence for statutory rape where the defendant is between the ages of 18 and 21 and the victim is 14 or 15 years. Obviously Davis could not be indicted for the violation of a statute which contains only a sentence rather than a crime. It should be noted that the variety of rape which Davis attempted to commit was previously located in subsection (3)(a) prior to 2003, then moved to its current location under subsection (4)(a). See Miss. Code Ann. §97-3-65 (Rev. 2002). In any event, Davis was clearly on notice that he was indicted for attempted rape.

Attempted rape carries a maximum of ten years since rape is a capital offense. Miss. Code

Ann. §97-1-7. Davis was sentenced to ten years, so he cannot be serving an illegal sentence.

III. THE TRIAL COURT PROPERLY DISPOSED OF DAVIS'S CLAIM SUMMARILY AND WITHOUT AN EVIDENTIARY HEARING WHERE THE BASIS OF DAVIS'S CLAIM INVOLVED NOTHING MORE THAN A SCRIVENER'S ERROR.¹

Where a petitioner can prove no set of facts which would entitle him to the relief he seeks, the trial court may summarily dismiss the motion of post-conviction relief without an evidentiary hearing. *Davis v. State*, 973 So.2d 1040, 1044 (¶12) (Miss. Ct. App. 2008). Because the sole basis for Davis's claim that he was entitled to relief was based on a scrivener's error, there is no set of facts that would entitle him to relief. As such, the trial court properly denied the motion without an evidentiary hearing.

¹The State addresses Davis's second and third assignments of error as one, since they are the same issue simply reworded.


CONCLUSION

For the foregoing reasons, 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, La Donna C. Holland, 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 7th day of October, 2008.



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