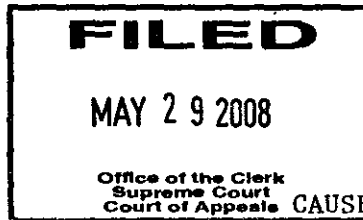


IN THE SUPREME COURT OF APPEALS, FOR THE STATE OF MISSISSIPPI

LIONELL JAVON DYSON

VS.

STATE OF MISSISSIPPI



CAUSE NO.

APPELLANT

2008-CP-379
~~2008-0077~~

RESPONDENTS

COPY

APPELLANT BRIEF FOR DENIAL OF POST-CONVICTION COLLATERAL RELIEF, PURSUANT §99-39-5 (1)(g)(h)

LIONELL J. DYSON #103456

DCF/D

3800 COUNTY Rd. 540

GREENWOOD, MISSISSIPPI 38930

IN THE SUPREME COURT OF APPEALS, FOR THE STATE OF MISSISSIPPI

LIONELL J. DYSON

APPELLANT

VS.

CAUSE NO. - 2008-0099

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

- 1) STATE OF MISSISSIPPI ----- JAMES M. HOOD (3rd.)
- 2) PRO-SE APPELLANT ----- LIONELL J. DYSON #103456

THIS the 29th DAY OF May 2008

BY:

Lionell J. Dyson

LIONELL J. DYSON #103456

DCF/ D

3800 COUNTY Rd. 540

GREENWOOD, MISSISSIPPI 38930

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STATUTES

§ 97-3-53; § 97-3-79; § 97-3-117 (2) § 99-7-21 3; 4, ~~5, 6, 7, 8~~
 Miss. Code Ann. § 99-39-21; § Miss. Code Ann. § 99-39-21 8; 10

OTHER AUTHORITIES

5th Amendment of U.S. Const. 3; 4; 5; 6; 7; 8
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 W.R.C.P. Rule 7.09, § 8.04, § 11.03 5, 6, 11

- 1.) Whether Dyson was exposed to double jeopardy?
- 2.) Whether Dyson was denied his right to a Fast and Speedy Trial?
- 3.) Whether Dyson ex-post-facto law rights were violated?
- 4.) Whether Dyson received ineffective assistance of counsel?
- 5.) Whether Dyson plea was voluntary and intelligently entered?

That in January 2003 term of "Pearl River Circuit Court Dusen was indicted by the Grand Jury on the charges of armed carjacking, armed robbery, attempted armed robbery and kidnapping in violation of Miss. Code Ann. Section § 97-3-17 (2), § 99-3-53, and § 97-3-79 in which alleged crimes occurred on or about the 26th day of November 2002.

The Trial Court on its own motion file to reduce the armed carjacking to regular carjacking.

The Petitioner entered a plea to count (4) four of

the multiple count indictment, which was armed robbery by the exhibition of a firearm, to serve twenty (20) years in the Miss. Dept. of Corrections to be run consecutive to count one (1) and ten (10) years of count four (4) to be suspended, count one (1) was the armed carjacking that was reduced to regular carjacking. The sentence was imposed on the 23rd day of April 2004.

Dusen's indictment reads January 2003 term, however no date appears where the term of the Grand Jury sign nor District Attorney, the clerk filed and recorded June 27th 2003, placed original seal date is 27th of no certain month of 2004.

The Fifth amendment right "A person has a right that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment Right of an accused in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

It is ex-post-facto, the effect, not the form, of the law which determines whether it is ex-post-facto, see U.S.C.A. Const. Art. I, § 10, cl. I. Even when the sentence is of issue, a law may be retrospective for ex-post-facto purpose not only if it alters the length of the sentence, but also if

if changes the manner sentence from discretionary to mandatory, critical question for ex-post-facto purpose is whether the new statutory provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence. Commission of the offense is time crime committed.

statute may violate ex-post-facto clause even if it alters punitive conditions outside sentence or where it substantially alters consequences attached to crime already completed and therefore changes quantum of punishment.

U.S. Ct. Const. Art. I, § 10 cl. 1.

When the trial court after, the armed carrying to carrying, this was to appellant's disadvantage. However, Dyson had already been exposed to double jeopardy when he was indicted, U.S. v. Hall, 2 Wash. C.C. 306.

Fifth Amendment of U.S. Const. nor shall any person be subject for the same offense to be put in jeopardy of "life or limb" protection was applied to the states via the 14th Amendment in McNeal vs. Howell, 481 F.2d 1143, 1149 (5th Cir. 1973); Watts v. State, 492 So. 2d 1281 (Miss., 1986).

When the formal defect is curable by amendment, the failure to demand for the indictment in accordance with our statute, will waive the issue from consideration.

This is not the issue at hand, Dyson was exposed to double jeopardy in his indictment, multiple indictments for same offense arm carrying and armed robbery, the state had to choose one of the two crimes.

Gray v. State, 728 So. 2d 36, 70 (Miss., 1998)

Bradley v. State, 662 So. 2d 1051 (Miss., 1995) (99-7-21)

Rule 709 amendments of indictment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised. Amendments can be made to form but not to substance, but however amendments can not correct a constitutional violation "Double jeopardy". Amending an Indictment from armed carrying to carrying, lies to the substance, and only the Grand Jury could make such amendment to Dwyer indictment purported to charge defendant as a armed carjacker, then a armed robbery, was deficient, under Miss. Const. Art. 3, Sec. 2, R. 11-03, as the indictment did not fully acquaint defendant with the nature of the accusation. *Price v. State*, 844 So. 2d 510 (MCA-2003)

Whether Dwyer's indictment was fabricated? Evidence shows such allegation could be true, no date appears where the foreman of the Grand Jury sign nor District Attorney, the clerk filed same 27th 2003, original seal date is in 2004 2 day.

Dwyer entered a plea to an illegal sentence cause he was exposed to Double jeopardy in sentencing. If a plea is improper induced, which it was because it was an illegal sentence, which originally from Dwyer's indictment of armed carrying, violated his 5th amendment constitutional rights.

If counsel allow his client to plead to a illegal sentence, he has rendered ineffective assistance of counsel

Dyson sentences is illegal, legislature did not abrogate a defense to allow an amendment to correct a procedural default and constitutional violation, Dyson is exposed to double

jeopardy, the law is when a court empowers, jeopardy is attaching. Therefore when the Grand Jury indicted Dyson, he was exposed to jeopardy at that point until now, because the Trial court did not take the indictment back to the Grand Jury that rendered it, instead the trial court attempted to correct the deficiency, amending Dyson's indictment, withdrawing armed from carrying. Still lies multiple indictments for same offense, armed carrying eliminated the armed robbery and attempt to arm robbery.

In Haines v. State, 46 W.2d 93, 115 A.W.2d 125 (1970) the court held the trial court had an inherent power to reduce a sentence, but to permit such discretion provided only application therefor was made within one (1) year following judgment.

A court does have inherent power to correct judgments obtained through fraud, accidents or mistake, which is reversible through a writ of error coram nobis. See McNeely v. Blair, 255 So.2d 933, 935 (Miss. 1971); City of Starkville v. Thompson, 243 So.2d 54, 55 (Miss. 1971); Cory v. Buckeloff, 98 Miss. 98, 54 So. 84 (1971).

Pursuant Uniform Rule of Court and County Court Practice Rule 8.04 "A plea must be freely, proper indictment, not deception, free from schemes, Dyson plea was a scheme to overcome the double jeopardy indictment by the state and when they amended the indictment

ISSUE # 1 : Whether Dyson was exposed to Double jeopardy?

Dyson was indicted by Pearl River County Circuit Court's January 2003 term of court for armed robbery and armed robbery, when the panel, Grand Jury empaneled and rendered a true bill for both offenses, separately attached, subject the court to squash the indictment cause of double jeopardy attaching. ~~Edmond v. State, 2004~~ 906 So. 2d 798

Fifth amendment right no person shall be prosecuted twice for same offense, nor shall any person be subject for the same offense, to be twice put in jeopardy of "life or limb", multiple punishments (see, ~~McNeal v. Holwell~~, 481 F. 2d 1145, 1149 (5th Cir. 1973), ~~Harley v. State~~, 460 So. 2d 1194 (Miss. 1984), ~~Blockburger v. U.S.~~ 384 U.S. 299 (1966))

Dwyer crime allegedly occurred November 20th 2002, and he was indicted January 2003. Dwyer was sentenced April 23rd 2004, falling of time, approximately 415 Days Dwyer awaited Trial. Violation of Dwyer 5th Amendment right, see McGhee v. State, 657 So. 2d 799 (Miss. 1995); Dwyer v. State

The Trial Court was far beyond the 270 day rule to take Dwyer to trial. Miss. Code Ann. § 99-39-21 states that claims are waived, except upon showing of cause for the default and actual prejudice. This exception is extremely narrow and requires establishing a "colorable claim of factual innocence."

Dwyer v. Whitley, 505 U.S. 333, 339, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)

Dwyer is innocent of the charges, however he can prove that the court violated his 5th Amendment right, sentenced him for the same offense twice, which can not be fine barred. Meyers vs. New York, 423 U.S. 61, 62 A2, 2, 46 L. Ed. 2d 195, 96 S. Ct. 241 (1975)

The Supreme Court, Justice Marshall, held that

- 1) For a criminal or penal law to be ex-post-facto, it must be retrospective and it must disadvantage the offender affected by it (2) the effect, not the form of law, determines whether to ex post facto

- (3) fact that statute reducing good time credits was enacted in conjunction with other statutes providing additional bases for credits against sentence did not save it from an ex-post-facto challenge; and

- (4) as applied to prisoner whose crime was committed before its effective date, the statute reducing the amount of good time credit violated the ex-post-facto clause.

Here before the court, is not good time, but

Dyson was indicted for arm carrying and armed robbery, the trial court on its own motion amended

the underlying offense, to obtain two (2) convictions, this lengthen sentence(s), Dyson was given two separate sentences, this amendment was to Dyson's disadvantage, and exposed Dyson to ex-post-facto violations.

For an ineffective assistance of counsel claim, the defendant must prove his attorney's performance was defective and the deficiency deprived the defendant of a fair trial. Edwards v. State, 797 So. 2d 1049 (Miss. 2001). If Dixon had effective counsel he would not have allowed him to plea to an illegal sentence, plea to two separate offenses for one single offense.

Ineffective assistance of appellant and trial counsel must also show in the record, counsel performance was defective and the deficiency deprived the defendant of a fair trial. Dixon counsel fail to file for one of the two offenses to be squash cause of jeopardy attach- ing, so as to performance was deficient and prejudiced his defense. Perkins v. State, 487 So. 2d 791 (Miss. 1986) Counsel fail to file for fast + speedy trial. Deficiency and any prejudicial effect are assessed by looking at the totality of the circumstances. Conner v. State, 525 So. 2d 776, 780 (Miss. 1988); Nicolaou v. State, 612 So. 2d 1080, 1086 (Miss. 1992)

The application of the procedural bar of Miss. Code § 99-39-2⁽¹⁾ would be inappropriate to a defendant who had no earlier meaning opportunity to present issue of denial of effective assistance of counsel. Moody v. State, 644 So. 2d 451, 453 (Miss. 1994)

In doing so the reviewing court should "look to the totality of the circumstances in determining whether a defendant was deprived of effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 50 L. Ed. 2d 674, 104 S. Ct. 2052 (1990)

Whether Dyson's plea was voluntarily and intelligently entered? Pursuant Uniform Rules of Circuit and County Court Practice Rule 8.01 "Entry of guilty pleas" before the trial court may accept a plea, must be voluntarily and intelligently made and that there is a factual basis for the plea.

A plea of guilty is not voluntarily, if inducements by fear, violence, deception or improper inducements.

A showing that the plea of guilty was voluntarily and intelligently inducement, further was a scheme when the state amended the indictment with drawing armed from the carrying offense.

Dyson was indicted for four (4) crimes and 3 of the four (4) was one single offense - crime, the armed carrying, armed robbery, and attempt to arm robbery were all one (1) crime. Therefore Dyson's plea was introduced illegal or improper inducements.

Dyson co-defendant was the only witness made a statement as to his actions of the accused robbery that he was supposed to have voluntarily took part in, Dyson is actual innocent, he knew of any of the plan, nor took any voluntary acts as part of scheme. Hillard v. State, 2007, 2007 WL 446939 (criminal law) 1168 (2), Hillard, at 2007 Criminal Law 663, 60 & 2244 (1) (c)

The date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

Dyson is entitled to have this conviction reversed and ordered discharge of petitioner-appellant, because of said constitutional violations:

- 1) Double Jeopardy
- 2) denial of a Fast and Speedy Trial
- 3) ex-post-facto law violations
- 4) Received ineffective assistance of counsel
- 5) Plea was not voluntarily and intelligently entered.

OR Alternative and relief that this honorable court will grant under these circumstances, that would be proper and just.

This the 29th Day of May 2008

Respectfully Submitted

BY: Donald J. Dyson

Kienell Jaron Dyson #103456
DCF

3800 County Rd. 540
Greenwood, Ms. 38930

CERTIFICATE OF SERVICE

This is to certify that I, the undersigned, have this day and date mailed, via United States Mail, postage pre-paid, a true and correct copy of the foregoing and attached instruments to the following:

MRS. BETTY W. SEPHTON/CLERK

MISS. SUPREME COURT OF APPEALS

P. O. BOX 249

JACKSON, MISSISSIPPI 39205

HON. JAMES M. HOOD (3rd.)

ATTORNEY GENERAL'S OFFICE

P. O. BOX 220

JACKSON, MISSISSIPPI 39205

This the 29th day of May, 2008

Lionell J. Dyson
PETITIONER/ LIONELL J. DYSON
MDOC# 103456

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