IN THE COURT OF APPEALS

OF THE STATE OF MISSISSIPPI

Walter Conlee — Appelant

vs

State of Mississippi — Appellee

NO 2008-CP-0724-COA

Rebuttal for Appellant

Walter Conlee, Pro Se

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Certificate of Service

I, Walter Conlee, have this day, mailed a true and correct copy of the foregoing, via first class prepaid postage, a copy to the following

Supreme Court Clerk (COA)

P O Box 249

Jackson, MS 39205

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Michael Guest

P O Box 68

Brandon, MS 39043

This the 4th day of Sept. 2008.

Argument I

Was the Grand Jury Legally Convened

Appellant may have confused the court terms with the grand jury terms. But the grand jury foreman's signature on Jan 13, 2003 is not confused. While Miss. Code Ann. 13-5-39 may give the grand jury the power to indict in term time on vacation, once the order is entered into the minutes, the term has ended. See Walton v State 112 So 790.

In the case at bar, the circuit judge page 7, line 18-25 stated that the grand jury for Rankin County is impaneled in January and July of each year. (Miss. Code 9-7-3) Thus, by the circuit court clerk recording the dates of court's adjournment in December 2002 and the convening of the January 2003 term would show that the June 2002 term, recalled December 2002 had ended and therefore the grand jury foreman's signature on Jan. 13, 2003 was void as a subsequent term of court had begun.

Had Appellant been allowed discovery in the post conviction, these records would have shown this.

Appellant in the pro se case at bar does raise subject matter jurisdiction. See Box v State 241 So2d 158. It is indictment by a legally convened grand jury that gives the court subject matter and personal jurisdiction.

URCCCP 7.06 (Effective May 1, 1999) lists 7 things an indictment "Shall" include. Number (6) is the grand jury foreman's signature. By signing it on Jan. 13, 2003 after the grand jury was adjourned rendered the indictment as void.

> We have found no authority which has upheld the validity of an indictment returned by a grand jury whose life had terminated

under the clear language of the governing rule. United States v

Fein 504 F2d 1170

Appellant's claim under Box v State, supra, does allege a jurisdictional defect. The grand jury foreman's signature is required under URCCCP 7.06 and under Miss. Constitution Ant. 3 sec 27, in Miss. places upon the grand jury and the grand jury alone the authority to indict. Kelly v State 36 So2d 925.

Thus we now must look to the plea to see what Appellant waived. First, the circuit court did not prove that the plea was valid. The District Attorney stated that a valid plea waives certain things. Jurisdiction is not waiveable by consent or plea.

> Accused cannot waive objections to avoid indictment. Newcomb v
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> State 37 Miss. 383. The jurisdiction of the offense is gone,
>
> because the case was not properly presented by indictment. Ex
>
> parte Bain 121 US 1.

The Supreme Court is the ultimate expositor of the law of this state. UHS-Qualicare, Inc. V Gulf Coast Community Hospital 525 So2d 746. The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this court. Tucker v Hinds County 558 So2d 869.

> Failure to demur or otherwise object to the validity of the
>
> indictment does not constitute a waiver or invoke considerations of
>
> estoppel. White v State 851 So2d 400.

Argument II

The Plea Was Not Knowing Nor Voluntary

Appellant requested "Discovery" of the plea transcript and plea petition in order to "prove" his allegations. Even the District Attorney page 13, line 8-12, line 21-29 admitted that counsel for Appellant may not have informed Appellant of the time that Appellant would receive.

For a plea to be knowingly made, a defendant must be advised as to what part of his sentence is mandatory. Vittitoe v State 556 So2d 1062.

Appellant relies on the "no transcript or any other documentation" to support his claim. Appellant sought "Discovery" of such documentation prior to the evidentiary hearing. (The Court did not rule on the motion.) In Marshall v State 680 So2d 794, the court stated in Judge Bank's concurring opinion

> the rule is that affidavits from others must be acquired only when
>
> events are not within the inmates personal knowledge.

In White v State 751 So2d 481, Judge Southwick, concurring stated the affidavit of White should have been weighed.

Appellant did and does allege that he was not informed of the "earned time" change from time of indictment to plea. In post conviction as well as the evidentiary hearing appellant stated that had he been informed of the change in statute and administrative application that he would not receive "earned time," he would not have pled guilty.

In White v State, supra, White was not advised until he was sentenced that his sentence required him to serve the entire sentence. Appellant in the case at bar, like White, would not have pled guilty.

> Defendant who enters plea of guilty to charge of armed robbery pursuant to plea bargain agreement in reliance upon erroneous advice of attorney that defendant will be eligible for earned good time... Is entitled to vacation of plea... When Mississippi Department of Corrections changes administrative policy. Coleman v State 483 So2d 680.

Had Appellant advanced his trial in 2002, he would not have been subject to the change in statute, Miss. Code Ann. 41-29-139 or the administrative change. The Court and now the State has attacked the Ex Post Facto as a vested "property right."

> When a court engages in Ex post facto analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory charge touches any vestal rights. State v Curtis 363 So2d 1375.

Appellee fails to acknowledge that it is the effect, not the form, that determines whether it is ex post facto. Weaver v Graham 450 US 24.

> The constitution deals with substance not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form however disguised. Cummings v Missouri 4 Wall. 277

For defendants who committed their crime before 2005 and the enactment of Miss. Code Ann. 45-5-139 and SOP 15-02-01 substantially alters the consequences and changes the "quantum of punishment." Dobbert v Florida 432 US 282.

> A prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. Wolff v McDonnell 418 US 539.

Appellee states that the Ex Post Facto claim fails because it applies only to sentencing and penal statutes. It was a sentencing and penal law (statute) that the legislature enacted, passed to the courts that caused Appellant not to be informed of. Page 13, line 20-29 even the District Attorney admits that Appellant was not informed.

Appellee states that Appellant did not allege erroneous advice from counsel. Unaware means ignorant, not informed. One of the requirements of URCCCP 8.04, also Washington v State 620 So2d 966. Mistaken advice of counsel may also vitiate a guilty plea. Myers v State 583 So2d 174.

While Appellee states that Appellant did not state that counsel gave erroneous advice, this was the whole of Appellant's post conviction. Appellant even stated that he was new to the law, page 4, line 13-18. It can also be said that Appellant was pro se, without the plea transcripts.

> We have the discretion to address the substance of what appears to be petitioner's complaint even if inartfully drafted. McCaleb v State 743 So2d 409.

Appellee states that Appellant's affidavit is without merit under Coleman v State 772

So2d 1101. Miss. Code Ann. 99-39-9 requires an affidavit based on personal knowledge. Appellee wants more. In Marshall v State 680 So2d 794, Judge Banks' concurring opinion stated

> that the rule is that affidavits from others must be acquired only when events are not within the inmate's personal knowledge. Id at 795. Also White v State 751 So2d 481.

Argument III

Was the Plea Valid

Appellee would have the court to rely on the plea being valid. At no time, in no place did the lower court attack or prove that the plea was valid. Like the Appellee, they alleged the plea was valid.

Appellant tried to obtain the plea transcripts, attempted to get the "file that was in storage" (Evidentiary hearing page 10, line 26-27).

> What was said during the plea colloquy regarding voluntariness is not binding and an attack on the accuracy of what was said is permitted. Baker v State 358 So2d 401.

Appellant did attempt to distinguish between the two statutes. Under Miss. Code Ann. 41-29-115, hydrocodone is a Schedule II drug. But under 41-29-117, a compound drug, such as Lortab, is a Schedule III drug.

This difference, ambiguous difference, cause Appellant to plead to a charge that carried a higher penalty than he should have been subjected to. Had the drug classification been under Schedule III, he would have been able to receive not only a lesser sentence (Miss. Code Ann. 41-29-139) but also been eligible for the "earned time" credits he has been denied.

Again, Appellee states that a valid plea waives the right to challenge the evidence against him. Was the plea valid? Was there a basis for the plea? Appellee states it was not addressed in the post conviction petition. But it was, the lower court chose not to address the issue because there were no drugs, no evidence, and no lab report in the file to prove. Thus, the State waived the issue by not addressing it.

Error for the circuit court to raise issue sua sponte when not raised by government Trest v Cain 522 US 87. Also see Gary v Netherland 518 US 152.

Procedural default is normally a "defense" that the State is "obligated" to raise and "preserve" if it is not to "lose" the right to assert the defense thereafter.

Appellant sought to obtain the plea transcripts. This default does not lie with Appellant. The law states that a factual basis is essential part of the constitutionally valid and enforceable decision to plead guilty. Austin v State 734 So2d 234.

The burden of proof never shifts from the State in a criminal case. Brown v State 556 So2d 338.

The State relies on the plea being valid. To meet the constitutionality of a valid plea, the defendant must knowingly waive the rights in question. The files in storage, which should have been brought out, see "Motion for Discovery", would have shown that Appellant did not waive the burden of proof as he was never asked nor did the State offer any proof of a transfer.

In United States v Huff 512 F2d 66 (5th Cir 1975) found that

the chemical name without the "3,4" was not a statutorily controlled substance. See Copeland v State 423 So2d 1333.

In the case at bar, Miss. Code 41-29-115 lists Hydrocodone as a Schedule II drug. The penalty under 41-29-139 (b)(1) being 30 years. Miss. Code 41-29-117 (3) lists dihydrocodeinone (also known as hydrocodone) as a Schedule III and under Miss. Code Ann. 41-29-139 (4) the

penalty being 20 years.

Appellant did not waive the element of indictment, did not waive the evidence against him. He was not informed (Evidentiary Hearing page 13, line 20-29). See Martin v State 732 So2d 847.

> Quantity standing alone might be insufficient to demonstrate an intent to distribute beyond a reasonable doubt. Edwards v State 615 So2d 590.

In Conclusion

Appellant would pray this court will take his inartfully drafted petition and call on the lower court to produce the records that Appellant can not obtain so that the case can progress to a hearing on the issues presented.

That the grand jury had ended when the foreman signed the affidavit. That the change in statute law as well as administrative application violated Appellant's ex post facto rights, and that under the statutes 41-29-115 - 41-29-117 Miss. Code Ann. That Appellant should have been sentenced under the lesser, as the court did not offer any factual proof of the substance or transfer.

Wherefore premiss considered, Appellant prays this court will merit his pro se petition and reverse the lower court's ruling. To remanded for sentencing under the lesser statute.

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