IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

WALTER CONLEE — APPELLANT

VS. — CAUSE NO. 2008-CP-00724-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

WALTER CONLEE, PRO SE

CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this appeal.

1. Honorable Jim Hood, Attorney General

   P.O. Box 68

   Jackson Ms. 39205

2. Honorable Marlin Miller, Assistant District Attorney

   P.O. Box 68

   Brandon, Ms. 39043

3. Honorable Sumac Richardson, Circuit Judge

   P.O Box 1599

   Brandon, Ms. 39043

4. Walter Conlee, Appallent

   399 C.O Brooks St.

   Carthage, Ms. 39051

TABLES OF CASES AND AUTHORITIES

Rules

Miss. Code Ann. 41-29-115 (1) (K)

Miss. Code Ann. 9-7-3

Miss. Code Ann. 41-29-139 (A) (B)

U.R.C.C.C. 8.04 (4) (B)

Miss. Code Ann. 41-29-139

Miss. Code Ann. 41-29-117

Rule 3.03 (2)

U.S. v. Broce 488 U.S. 563

Miss. Code Ann. 41-29-139 (1) (4)

Miss. Const. Art. 3 section 26

STATEMENT OF THE ISSUES

1. Was Appellant indicted by a legally convened Grand Jury?

2. Was Appellant's plea knowingly made due to a change in law from time of indictment to trial?

3. Was Appellant's plea knowingly when the ambiguous statute caused him to be sentenced to the greater sentence.

SUMMARY OF THE ARGUMENT

Appellant was indicted by the July term recalled December 19, 2002. At issue is whether the Grand Jury was a legally convened body. The court terms for Rankin County for December runs for 12 days. Unable to acquire the court minutes of the Grand Jury, Appellant states that the Grand Jury was dismissed prior to December 19, 2002.

Appellant was indicted in 2002. At the time of indictment the statute which Appellant was convicted under allowed a " earned time " credit towards the sentence. Appellant did not discover that he was not eligible for these credits until after he was serving his sentence.

The statute under which Appellant was indicted and sentenced is ambiguous in that the drugs Appellant was charged with are a Schedule 3 drug.

ARGUMENT I

Appellant was indicted by the July term Grand Jury, recalled December 19, 2002. (Exhibit A). The affidavit of the Grand Jury (Exhibit B) signed the affidavit Jan. 13, 2003. The judiciary calendar lists the term of court for Rankin County ending Dec. 17, 2003. The calendar also lists the Jan. term as starting the 1st Monday.

In the case at bar the Judge stated that the Grand Jury terms started in Jan. and July each year. (Evidentiary hearing page 6, line 11-12.) Exhibit A states the grand jury was recalled Dec. 19, 2002. The affidavit of the Grand Jury foreman was signed Jan. 13, 2003.

If the Grand Jury was legally convened the affidavit of the Grand Jury foreman voided the indictment as it was signed after the July term, recalled Dec. 19, 2002 had been adjourned. The state offered no proof other than the Judge explaining the difference between court terms and Grand Jury terms.

Mississippi Constitution section 264 requires that a list from which grand jury and petit jurors be drawn at each term of court.

> The grand jury is a part of a term of the court
> which is a part of the machinery of the court
> under the control to a certain extent of the judge
> of that court. Walton v. State 112 So2d 790.

Mississippi code ann. 9-7-3 states that the terms for each multi county circuit court district is to be entered annually. The court offered no proof as to whether there was a grand jury convened on Dec. 19, 2002. Nor did the court offer any proof that the term was extended to Jan. 13, 2002 when the grand jury foreman signed the affidavit. See Gray v. State 819 So2d 542.

ARGUMENT II

Appellant was charged in 2002 for the delivery of a controlled substance. At the time of arrest indictment the charge allowed an inmate to "earned time". This may be an administrative charge, but it caused appellant to plead unknowingly to a misleading sentence. Inmates convicted of drug offenses prior to 2004 were allowed 30 days per month "earned time".

Appellant relied on this "earned time" in his decision to plead guilty.

> Mistaken advice of counsel may in some cases
> vitiate a guilty plea. Baker v. State 358 So2d 401,
> also Tiller v. State 440 So2d 1001.

Appellant relied on erroneous information when making his plea. In the (evidentiary hearing) page 13, line 4-29, the state could only state that they could "only assume" (line 10) that appellant had been informed of the maximum sentence to serve. The state did say the appellant would have to put forth proof that he was not fully informed. This is, was the purpose of the evidentiary hearing. To bring facts not known at the time to light.

Appellant was not informed as to the statutory service of sentence.

> The law is clear that before accepting a plea of guilty,
> the trial court must undertake to assure itself
> that the defendant understands the relevant
> consequences of pleading rather than submitting
> to trial. King v. state 788 So2d 868.

The Mississippi Supreme Court has held that ...

> as a part of understanding the possible sentence faced by the defendant, he must be informed as to what portion of any anticipated sentence is mandatory, such that the prisoner would be ineligible for parole or other potential early release during the period. Washington v. State 620 So2d 966 see also Hall v. State 800 So2d 1202.

While the state raises the issue that the appellants attorney should have informed him, it also stated (evidentiary hearing, page 13 line 19-24) it appears his attorney of someone represented him did not inform him.

> Such allegations, if true, indicates that defendants were not fully aware of the implications of their plea nor consequences of a trial by jury. Baker v. State 358 So2d 401.

Boykin v. Alabama 395 US 238 States that where the plea is involuntary, the judgment is subject to collateral attack. To be voluntary a plea must inform the defendant.

> The one person in the world whose judgment, and advice, skill and experience, loyalty, and integrity that defendant must be able to rely is his lawyer. Sanders v. State 440 So2d 278.

Counsel in the case at bar was appointed in 2002. So this is not a case of lack of time to prepare. This is a case of not being informed of a statutory and administrative change. The statute change came about under Miss. Code ann. 47-7-3 (g) See Hudson v. State (Miss ct app. Nov 15, 2005).

> Statutory amendment that required that 85 % of sentence be served and that eliminated opportunities for parole that had previously existed was an ex post facto law as applied to defendants who had been charged with crimes before effective date of statute and whose changes were not disposed of until after effective date.
>
> Puckett v. Ables 684 So2d 671.

The case at bar as in Cooper v. State 737 So2d 1042 both Cooper and the appellant faced the same issue. A change in law. Cooper's was "truth in sentencing" and appellants was a change in the administration of "earned time" credits. Unlike Cooper, who was sentenced to an illegal suspended sentence, appellant in the case at bar was sentenced to the maximum sentence. (see 41-29-139) (a) (b).

> We are neither required to apply, nor prohibited from applying a decision retrospectively.
>
> Linkletter v. Walker 381 US618. Also Lacy v. State 468 So2d 63.

Earned time reduces the length of sentence and as such results in an earlier release date. Informed evaluation of potential defenses to criminal charges and meaningful discussion with ones client of the realities of his case are the cornerstones of effective

assistance of counsel. State of Miss. V. Tokman 564 So2d 1339.

The state in the evidentiary hearing brought up in effective counsel, (page 13, line 19-29). Appellant would not have plead guilty had he been informed that the sentence would be mandatory. Appellant received the maximum sentence on a plea as if he would had he went to trial.

The state (page 13, line 28-29) waved any defense as to ineffective counsel in that they stated "they could not address the issue without more information". What more did they need? See Daniels v. Maggio 669 F2d 1075.

To address the ineffective counsel issue, appellant would state that had counsel informed him of the statutory, mandatory service of the sentence he would not have plead guilty. Under Strickland v. Washington466 US 668. A defendant must meet a two prong test. The first prong of Strickland v. Washington was met and made by the state (evidentiary hearing page 13, lines 21-29) "fell below an objective standard of reasonableness". The second prong, prejudice is met by the "earned time" as applied to his sentence and the service of a sentence he was not fully and knowingly informed of.

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> As part of its voluntaries inquiry, the court must
> determine whether the accused understands
> the minimum and maximum sentences for the
> charge. URCCC8.04 (4)(b).

ARGUMENT III

Appellant was indicted for transfer of a controlled substance, Miss. Code Ann. 41-29-139. The indictment listed that it was a schedule II drug. Miss. Code Ann. 41-29417 lists dihydrocodeinone (Lortab) as a schedule III. There were no drugs found, recovered nor tested.

The ambiguous application of the statutes and as applied to appellant has resulted in a sentence that carries a greater punishment than he should have received. See Clubb v. State 672 So2d 1201.

This can be a "first breath" by this court as to ambiguous statute. The drug Lortab is a compound drug with less than 15 mg per dose and considered Schedule III drugs. (Wikipedia the free encyclopedia) also see

www.deadiversion.usdoj.gov/schedules/listby_sched/sched3.htm .

The states response is that appellant plead guilty and his plea admitted all elements of the crime charged (evidentiary hearing page 10, line 3-4). While a valid plea (knowingly, voluntarily, and nature) is not subject to attack, a plea that contained unexplained elements, not knowingly, voluntary, or informed is subject to attack.

In the case at bar, appellant states that under the ambiguous statute the court did not have jurisdiction to sentence appellant to a term of 30 years in lieu of 20 years.

> Advice received by the defendant from his attorney
> and relied upon by him in tendering his plea is a
> major area of factual inquiry. Chavez v. Wilson 417 F2d 584.

In the case at bar appellant states that there were no drugs recovered, no drugs transferred. What is the bottom line? There was no factual basis for the plea. Rule 3.03(2)

in relevant part provides

> Before the trial court may accept a plea of guilty,
> the court must determine... that there is a factual
> basis for the plea.

We take this rule seriously. (Brown v. State 533 S02d 1118.) While an admission of guilt is not a constituional requisite of a forcible plea. Knowingly and voluntarily action by the accused is, and as well as independent evidentiary suggestion of guilt. Reynolds v. State 521 S02d 914.

Can the court say with confidence that the prosecution could prove the accused guilty of the crime charged?

> that the defendants conduct was within
> the ambit of that defined as criminal
> US v. Broce 488 US 563.

Appellant in his Post Conviction (page 10) stated that "the indictment did not list the weight, amount or dosage amount."Had the indictment listed the milligram dosage it would have fallen under 41-29-139 (1) (4) A schedule III drug.

> We require independent proof of "corpus delict"
> to avoid convicting a person solely out of his
> own mouth. Gentry v. State 416 So2d 650.

In the case at bar as in Bullock v. state 447 So2d 1284, the state has little to no evidence other than the confession of the appellant.

No drugs recovered, tested or independent evidence other than appellant's confession does not warrant a sentence of 30 years. The ambiguous statute entitles him to a lesser

sentence. (Fairchild v. State 459 So2d 793).

> The case, then is one for the application of the rule that when the facts which constitute a criminal offense may fall under either of two statutes or when there is substantial doubt as to which one of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment.
>
> Grillis v. State 17 So2d 525.

While Finn v. State 2007 Miss. App. Lexis 451 was reversed and rendered and then overruled by the State Supreme Court, it dealt with weight in dosage units. In the case at bar the issue is the schedule of the drug. More so the chemical make up. Miss. Code Ann. 41-29-115 (1) (x) lists hydrocodone as a schedule II drug. Miss. Code Ann. 41-29-117 (E)(3) lists dihydrocodeinone as a schedule III which carries a lesser sentence. Appellant did not have hydrocodone; he had dihydrocodeinone (Lortab). The state has no evidence of what appellant had.

> The state must prove that the amount possessed exceeds a personal consumption amount. Bryant v. State 427 So2d 131.

The state used two arguments to dismiss appellants argument on the drug charge. One they did not have to prove amount.

> The burden of proof never shifts from the

> state in a criminal case. The state not
> only must also prove all the elements
> of the crime, but it must also prove the
> accused connection with the same.
> Mcveay v. state 355 So2d 1389.

In the case at bar the burden shifted to appellant, either by counsel not holding the state to its burden (Myers v. State 583 So2d 174) or by false evidence (Rhone v. State 254 So2d 750).

A defendant must be informed of the elements before a plea is considered to be voluntary. (Wilson v. State 577 So2d 394) also Miss. Constitution art. 3 section 26.

The defect of the ambiguous statute is of a jurisdictional defect as to the sentence of appellant.

IN CONCLUSION

The indictment, affidavit of jury foreman were not of a legally convened grand jury.

By not applying the statute at the time of the crime caused appellant to serve a greater sentence.

The ambiguous statute caused appellant to be sentenced for a crime he did not commit.

The lack of proof by the state cannot be waived by appellant. As it goes to the jurisdiction of the court.

Wherefore premiss considered, appellant prays this honorable court will grant him any and all relief he is entitled to under law.

Walter Conlee