

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

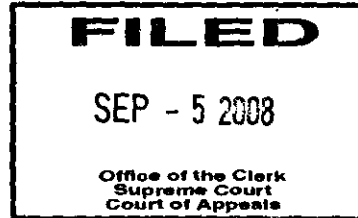
NO. 2008-CP-00856-COA

OTIS BANKS

APPELLANT

V.

STATE OF MISSISSIPPI



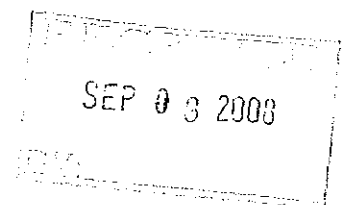
APPELLEE

BRIEF FOR APPELLANT

BY: Otis Banks
Otis Banks, Pro se

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF



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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Otis Banks, 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. Otis Banks, Appellant pro se.
2. Honorable Jim Hood, Attorney General.
3. Honorable, Frank Vollar, Circuit Court Judge.
4. Honorable Richard Smith, District Attorney.

Respectfully Submitted,

BY:

Otis Lee Banks, #L0698
CMCF
P. O. Box 88550
Pearl, MS 39208

Appellant

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NO. 2008-CP-00856-COA

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STATEMENT OF ISSUES

1.

Whether Banks was denied due process law and subjected to a fundamental constitutional violation where trial court imposed sentence for armed robbery offense and specified that such sentence was imposed pursuant to Miss. Code Ann. §47-7-3(d)(ii) and where such sentence should have been imposed pursuant to Miss. Code Ann. §47-7-3(d)(i) where the indictment charges Banks under Miss. Code Ann. §97-3-79 and not under Miss. Code Ann. §97-3-115 or any other statute related to carjacking. The imposition and sentencing for armed robbery under Miss. Code Ann. §47-7-3(d)(ii) therefore constitutes plain error and a fundamental constitutional violation when such error has the effect of shifting the sentence from the first ten years to be served with the ability to accumulate earned time to the complete sentence being served without the ability to accumulate earned time to the complete sentence being served without the ability to accumulate earned time.

2.

Whether trial court erred in its summary dismissal of the PCR Motion where claims presented here constitute fundamental plain error and should not be barred from review by procedural bar or successive bar.

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 Banks was charged by six (6) Count criminal indictment with one (1) count of armed robbery and five (5) counts of Kidnapping in the Circuit Court of Warren County, Mississippi and in Criminal Cause No. 100227-CR-V. .¹

STATEMENT OF FACTS

Appellant Banks presents his post conviction motion upon the following facts which are within his personal knowledge:

On October 16, 2001 during the October 2001 Term of the Grand Jury of Warren County, Mississippi, an indictment was filed against Otis Lee Banks charging one count of armed robbery and five counts of Kidnapping. The indictment was filed under Cause No. 01-0227-CR-V.

Otis Lee Banks was represented by Honorable James T. Prenley, Jr. in such cases and was convicted, by plea of guilty, on March 20, 2002.

¹ The prohibited acts provisions of Miss. Code Ann. §97-3-79 provides the following language:

2 Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to is person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

The trial court imposed a sentence total 30 years, 15 for armed robbery to run consecutive with 15 years on the 5 counts of Kidnapping. All sentences imposed under the kidnapping offenses were designated to run concurrent.

The Court referenced the no parole statute in regards to the armed robbery sentence, which was referenced to be under the provision of Miss. Code Ann. §47-7-3(d)(ii).

The indictment filed in this case was filed under Miss. Code Ann. §97-3-79 which apply to armed robbery or attempted armed robbery through the display of a firearm.

That the trial court did not make any reference to Miss. Code Ann. §47-7-3(d)(i) in it's order imposing the sentence even through Miss. Code Ann. §47-7-3(d)(i) comes before Miss. Code Ann. §47-7-3(d)(ii).

That the significance and difference between Miss. Code Ann. §47-7-3(d)(i) and Miss. Code Ann. §47-7-3(d)(ii) is that the first statute allows the possibility of parole consideration and earned time credits after the service of the first ten (10) years and the latter statute do not allow this but require the complete sentence to be totally mandatory.

ARGUMENT

i) The Illegal Sentence under Miss. Code Ann. §47-7-3(d)(ii)

The manner and statute in which the Court imposed the sentence for armed robbery under has the effect of making Banks sentence mandatory since Miss. Code Ann. §47-7-3(d)(ii)²

² (1) Every prisoner who has been convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi Department of Corrections for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the department, and who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole as hereinafter provided, except that:

(d)(ii) No person shall be eligible for parole who shall, on or after October 1, 1994, be convicted of robbery, attempted robbery or carjacking as provided in Section et seq., through the display of a firearm or drive-by shooting

actually deprives the parole board of the jurisdiction to consider or release a defendant on parole. Further, if a defendant is not eligible for parole then he cannot be eligible for earned time accumulation. Cooper v. State, 439 So.2d 1277 (Miss. 1983). Appellant Banks would assert to this Court that the sentence for armed robbery in this instance should have been imposed under the provisions of Miss. Code Ann. §47-7-3(d)(i) which provides that:

(d)(i) No person shall be eligible for parole who shall, on or after January 1, 1977, be convicted of robbery or attempted robbery through the display of a firearm until he shall have served ten (10) years if sentenced to a term or terms of more than ten (10) years or if sentenced for the term of the natural life of such person. If such person is sentenced to a term or terms of ten (10) years or less, then such person shall not be eligible for parole. The provisions of this paragraph (d) shall also apply to any person who shall commit robbery or attempted robbery on or after July 1, 1982, through the display of a deadly weapon. This subparagraph (d)(i) shall not apply to persons convicted after September 30, 1994;

The trial court erred, by reason of it's summarily dismissal, in failing to find that Appellant's sentence did not constitute an illegal sentence which violates the 5th and 14th Amendments to the United States Constitution where the Court exceeded it's sentencing authority when the Court imposed a sentence of 15 years to serve under the mandatory no parole statute where the sentence should have been imposed under the 10 year mandatory provisions contained under Miss. Code Ann. §47-7-3(d)(i). The indictment clearly demonstrates that the indictment was returned under Miss. Code Ann. §97-3-79 which should require that the sentence be imposed under the parole provisions of Miss. Code Ann. §47-7-3(d)(i). The law is clear that where there are two statutes which apply then the statute which apply the most lenient punishment should apply.

as provided in Section . The provisions of this subparagraph (d)(ii) shall also apply to any person who shall commit robbery, attempted robbery, carjacking or a drive-by shooting on or after October 1, 1994, through the display of a deadly weapon;

A general principle is well established that when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment shall be applied. In *Grillis v. State*, , (1944), this Court, through Justice Griffith, stated:

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 of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. See cases cited 24 C.J.S., Criminal Law § 1979, p. 1193 under Note 75. And under the attempt statute Section 793, Code 1930, Section 2017, Code 1942, no greater punishment may be administered than that prescribed for the actual commission of the offense attempted.

There certainly is substantial doubt as to which of the above quoted sections is applicable. Under Section it is required to prove that the accused escaped from the Department of Corrections (penitentiary) or escaped from "custody" before confinement. While not clear, this custody seems to imply that it refers to the Department of Corrections. This implication is strengthened by the provisions of Section , which is confined to escape from a "jail."

Bourdeaux v. State, 412 So.2d 241, 243 (Miss. 1982).

Most recently in Pollard v. State, ____ So.2d ____ (Miss. App. 2006), the Court held

that:

The Mississippi Supreme Court has held that "when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment shall be applied." *Bourdeaux v. State*, 421 So.2d 241, 243, (Miss. 1982); see also *Grillis v. State*, 196 Miss. 576, 586, 17 So.2d 525, 527 (1944). Pollard argues that, because there is a substantial doubt as to which statute applies to his conduct, he should be subjected to the lesser punishment set forth in section 97-17-81.

In the instant case the law is clear that the trial court should have made reference to Miss. Code Ann. §47-7-3(d)(i) when Banks was sentence. However, the Court skipped over this statute and made reference to (Miss. Code Ann. §47-7-3(d)(ii). While there is a question which could arguably show that both or either statute could have been referenced in the armed robbery

conviction, there is Mississippi which would support that point that the statute which applied the lesser punishment should have been applied. Miss. Code Ann. §47-7-3(d)(i) Jenkins v. State, ____ So.2d ____ (Miss. 2002) (No. 2002-CT-00394-SCT; Miss. 10-14-2004)

Otis Lee Banks has been subjected to a denial of due process in his sentencing and this Court should grant the relief requested in this case and enter a correction of the sentence by making the sentencing order reference that Banks sentence is to be applied under Mississippi Code Ann. §47-7-3(d)(i) as the applicable statute to determine the eligibility of parole and earned time credits to such sentence.

2.

SUMMARILY DISMISSAL

The trial court erred in summarily dismissing the claims without an evidentiary hearing or requiring the state to file an answer.

The Trial Court's finding that the Petition should be summarily dismissed constitutes an abuse of discretion and should be reversed by this Honorable Court for an evidentiary hearing on the merits. Under the law where there is a question of fact the trial court should conduct an evidentiary hearing. This Court should therefore FIND THE TRIAL COURT'S RULING TO BE VOID and remand this case to the trial court for evidentiary hearing on the merits.

The trial court should have actually conducted an evidentiary hearing without any entry of a ruling regarding the motion. The claims contained in the motion are well pleaded and concise. Appellant was entitled to develop additional facts, during a hearing, to support his motion. This Court is, once again, confronted with factual problems in this case which could have been fully and finally resolved in the trial court by an evidentiary hearing or, possibly, by development of fact and expansion of the record in conformance with Miss. Code Ann. §99-39-17 (Supp. 1992).

For instance, the petition filed in the trial court asserts under the first claim that the pleas of guilty and convictions amount to double jeopardy. While the petition clearly states this, the trial court never indicated that it had examined the guilty plea transcript when the law clearly requires such. Moreover, even though the designation of record on appeal designates the plea transcript to be included in the record, it is not filed among the documents forwarded to this court as the record on appeal. The Supreme Court has held that when such a claim is advanced by a petition for post-conviction relief, it must be refuted with a record of the actual plea transcript. ***"While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal."*** Wilson v. State, 577 So.2d 394 (Miss. 1991). In the instant case, the trial court never conducted an evidentiary hearing or examined the plea transcript for evidence to dispute the claim. This court cannot do so because the transcript is not a part of the record. The trial court failed to follow the mandatory requirements of the post conviction procedure Act when it failed to examine the transcript. This act sets out the following requirements:

§ 99-39-11. Judicial examination of original motion; dismissal; filing answer.

- (1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to who it is assigned.
- (2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.
- (3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(5) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

In the instant case now before the bar of this Court, the trial court never indicated that it had examined the record of the pleas and the law require that an evidentiary hearing be conducted in such an instance. During the plea hearing, and according to law, Banks should have been advised that his pleas of guilty waive double jeopardy. There is no evidence that Banks was so advised. Additionally, Banks should have been told the consequences of his pleas of guilty. If the record does not disclose that Banks was told these things, and clearly the limited part of the record which has been included here does not, Banks was entitled to an evidentiary hearing because if these things were not told to him, then his claims have merit. *Moreover, Banks sentence, as pointed out above, is an illegal sentence. "If defendant's guilty pleas were involuntary, then not only defendant's sentences, but also his or her guilty pleas, must be vacated, even though defendant only sought to vacate sentences and did not specifically seek to vacate pleas."* Courtney v. State, 704 So.2d 1352 (Ct. App. 1997).

The Supreme of Mississippi has previously held that it is committed to the principle that a post-conviction collateral relief petition, which meets basic requirements, is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Horton v. State, 584 So.2d 764, 768 (Miss. 1991); Wilson v. State, 577 So.2d 394, 397 (Miss. 1991); Myers v. State, 583 So.2d 174, 178 (Miss. 1991); Miller v. State,

578 So.2d 617 (Miss. 1991); Wright v. State, 577 So.2d 387 (Miss. 1991); Billiot v. State, 515 So.2d 1284 (Miss. 1987).

In tandem, with the allegations in the post-conviction relief motion being supported by the record, Appellant was entitled to an “in court opportunity to prove his claims.” Neal v. State, 525 So.2d 1279, 1281 (Miss. 1987).

The trial court’s decision not to grant an evidentiary hearing here forced another needless appeal upon an already overloaded and overtaxed appellate court. The trial court should have, at a minimum, granted an evidentiary hearing on the claims contained in the post-conviction relief motion. Relief beyond that point would have depended upon the developments at the evidentiary hearing. Neal v. State, 525 So.2d 1279, 1280-81 (Miss. 1987); Sanders v. State, 440 So.2d 278, 286 (Miss. 1983); Baker v. State, 358 So.2d 401 (Miss. 1978). This point is especially clear where there was no record transcript of the plea made or consulted in considering the post-conviction motion. Appellant made a substantial showing of the denial of his constitutional rights under states law., as demonstrated by the record, that the trial court accepted pleas under the face of double jeopardy and failed to enter separate judgments and verdicts on each charge if, in fact, the proceedings was a multiple count indictment proceeding. Appellant Banks would ask this Court to vacate the ruling of the trial court and remand this case to the trial court for an evidentiary hearing.

CONCLUSION

Appellant Banks 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: Otis Banks

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CERTIFICATE OF SERVICE

This is to certify that I, Otis Banks, 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 Frank Vollor, Circuit Court Judge, P. O. Box 351, Vicksburg, MS 39181; Honorable Richard Smith, District Attorney, P. O. Box 648, Vicksburg, MS 39181.

This, the 5, day of September 2008.

Otis Banks
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