

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2008-CP-0917-COA

FILED

BENNIE LACY

APPELLANT

VS.

OCT 01 2008

STATE OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE

MOTION TO STRIKE APPELLEE BRIEF

OF IN THE ALTERNATIVE

REPLY BRIEF OF THE APPELLANT

RESPECTFULLY SUBMITTED,


BENNIE LACY, #38390

DELTA CORRECTIONAL FACILITY

3800 COUNTY ROAD 540

GREENWOOD, MS 38930

MOTION# 2008 2850

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STATEMENT OF THE FACTS

Appellant, Bennie Lacy, was adjudicated as an habitual offender in the Circuit Court of Wanye County, Mississippi on April 12th 1991. Upon obtaining records of the prior convictions that the State had used in the enhancement proceedings, Appellant became aware that the conviction from the 1984 for a sale of a quantity of phentermine, a schedule IV controlled substance, being cause No. 7754, (see Exhibit "D"), had been obtained through deception, and that he had not been indicted by a grand jury for that particular offense.

Becoming knowledgeable to the illegal 1984 conviction, Lacy did file his Motion To Vacate Illegal Sentence Enhancement as an Habitual Offender pursuant to **Mississippi Code Ann. Section 99-39-5(1)(i) (Rev. 2000)**. The Circuit Court of Wanye County, Mississippi denied the motion.

SUMMARY OF THE ARGUMENT

Appellant's case was assigned to the Court of Appeals of the State of Mississippi on June 3, 2008. This assignment of the Appellant's case was in conformity with **Rule 16, of the Mississippi Rule Of Appellate Procedure**, and pursuant to **Rule 32(b)**, after the assignment to the Court of Appeals all pleadings must be captioned with the name of that Court. (see Exhibit "A")

The Appellee has attempted to circumvent that Rule, by captioning their motions and brief to the Mississippi Supreme Court. It does appear that the Appellee is attempting by subterfuge to have this case ruled upon by the Mississippi Supreme Court. This is in direct conflict with **Rule 16(d), Mississippi Rule Appellate Procedure**.

Appellant moves this Court to either sanction the Appellee or Strike The Motion To Dismiss Appeal Or In The Alternative, Brief For Appellee filed by the Appellee as improperly filed in the wrong court.

If the Court allows Appellee's present motion to dismiss to be considered by this Court, Appellant asserts that it presents an incorrect statement of the law and the facts of the case of Appellant.

In the case sub judice, Appellant is attacking a prior uncounseled and unconstitutional conviction that had been used to enhance his current sentence under **Mississippi Code Ann. Section 99-19-81 (Amended 1976)**. This prior illegal conviction sentence was obtained through duplicity of the State, and there is evidence that Appellant had not been properly charged by indictment as guaranteed by **Article 3, Section 27 of the Mississippi Constitution**. Because of this fact,

jurisdiction did lie in the Circuit Court of Wayne County, Mississippi pursuant to **Mississippi Code Ann. Section 99-39-5(1)(i) (Rev.2000)**.

Also, because Appellant is attacking the 1984 conviction in Cause No.7754 as being in violation of the **Sixth Amendment right to counsel**, he was not required to seek leave from the Mississippi Supreme Court pursuant to **Mississippi Code Ann. Section 99-39-27 (Rev.2000)**, as, that conviction had never been taken on appeal to any court. It was when this prior uncounseled and unconstitutional conviction was used in the the enhancement of his conviction in 1991 in Cause No.8343, did the prior conviction with its unconstitutional impact make the habitual portion of his current conviction and sentence illegal.

It has long been held in the Courts of Mississippi, that, errors affecting fundamental constitutional rights are exempt from procedural bars that would otherwise preclude review. Appellant's claim that he had never been indicted by a grand jury in Cause No.7754, and the fact that there was never a plea hearing held pursuant to **Rule 3.03 Mississippi Rules of Criminal Court Practice, (now Rule 8.04, Uniform Circuit and County Court Rules)**, there was never a waiver of rights and a valid guilty plea. So that, any sentence imposed in Cause No.7754 is an illegal sentence and subject to collateral attack.

The Appellee's motion to dismiss must fail, as the facts that are set forth by the Appellees are not pertinent to the case of the Appellant which are now before the Court. This Court should not grant Appellee's Motion to Dismiss.

ARGUMENT

A. MOTION TO DISMISS

The assertions in the Appellee's Motion to Dismiss that the Court should dismiss the appeal on the grounds that leave was not granted by the Supreme Court to file post-conviction motion into the trial court, is not supported by the record. Issues not supported by the record should not be addressed by this Court. see **PULPHUS V. STATE**, 782 So.2nd 1220, 1224 (Miss.2001).

Also a post-conviction relief proceeding is first to be filed in Supreme Court only where matter is presented originally to trial court and thereafter appealed to the Supreme Court. see, **MARTIN V. STATE**, 556 So.2nd 357 (Miss.1990). In the case sub judice, Appellant is attacking a prior unconstitutionally obtained conviction that was used to enhance his current sentence. This being the case, the Circuit Court of Wayne County, Mississippi had jurisdiction to entertain the claim. see, **HERBST V. SCOTT**, 42 F.3d 902, 905 (5th Cir.1995).

The Motion To Dismiss is groundless and was filed into the wrong court. It would appear that the Appellees are attempting to usurp the authority of this Court by filing their briefs and pleadings in the Mississippi Supreme Court. This attempt is contrary to **Mississippi Rules Of Appellate Procedure, 16(d)**. Because of this, this Court should strike Appellee's motion and brief.

B. REPLY BRIEF ON THE MERITS

The claims that the Appellant has raised this appeal from the denial of his post-conviction motion are questions that deal with fundamental rights, and are excepted from procedural bars which would otherwise prohibit their consideration. see, LUCKETT V. STATE, 582 So.2nd 428 (Miss. 1991); also, MOSS V. STATE, 752 So.2nd 427, 430 (Miss. Ct. App. 1999).

Though Appellant has sought leave from the Supreme Court previously to file for post-conviction relief, the issue of the fabricated indictment in the prior conviction, raises the question of whether it was returned by the grand jury. The lower court should have ruled on the merits of this claim even if the motion was successive or time barred. see, GRAY V. STATE, 819 So.2nd 542 (Miss. Ct. App. 2002).

If the claims raised on this appeal would have been ruled on by the lower court on the merits, it would have been found that the correction of an illegal sentence is a fundamental right and can not be restricted by the successive motion or statute of limitations rules of the **Uniform Post-Conviction Collateral Relief Statutes**. see, SNEED V. STATE, 722 So.2nd 1255, 1257 (Miss. 1998). So, the lower court erred and abused its discretion in the dismissal of Appellant's post-conviction motion as time barred.

Appellant filed this appeal pursuant to **Mississippi Code Ann. Section 99-39-25 (Rev. 2000)**, which allows appeals to the Supreme Court from denials of post-conviction motions in the circuit court. This appeal has been assigned to this Court pursuant to **Rule**, and jurisdiction lies in this court.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Appellant respectfully request that this Honorable Court to strike the Appellee's Motion to Dismiss as filed into the wrong court. Appellant also moves this Court to reverse the lower court's denial of his post-conviction motion and grant the relief as requested by the Appellant on this Appeal.

RESPECTFULLY SUBMITTED, this the ___ day of September, 2008.

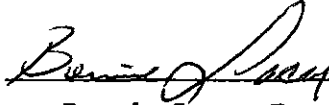
Bennie Lacy, #38390
Delta Correctional Facility
3800 county road 540
Greenwood, Ms. 38930

CERTIFICATE OF SERVICE

This is to certify,that I,Bennie Lacy,Appellant,have caused to be delivered this day,via United States Postal Service,postage prepaid,a true and correct copy of the forgoing **MOTION TO STRIKE APPELLEE BRIEF OR IN THE ALTERNATIVE, REPLY BRIEF OF THE APPELLANT** to the below listed person:

Honorable Stephanie Wood
Special Assistant Attorney General
P.O.Box 220
Jackson, Ms. 39205-0220

This the 29 day of September,2008.


Bennie Lacy, Pro Se

INDICTMENT

Exhibit

THE STATE OF MISSISSIPPI, }

CIRCUIT COURT

D

WAYNE County }

JANUARY Term A. D., 1984

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men and women of Wayne County, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi upon their oaths present:

That ADAM LACEY

BANDIGO LACEY aka Benda aka Benny E. Lacey

in said County, on the 22nd day of February, A. D., 1984
did wilfully, unlawfully, and feloniously sell a quantity of phentermine, a Schedule IV Controlled Substance, to Charlie McVey in consideration of the sum of seventy five dollars (\$75.00) in good and lawful currency of the United States of America

I CERTIFY THAT THIS IS A TRUE AND
CORRECT COPY OF THE ORIGINAL

ROSE M. BINGHAM, Circuit Clerk

By [Signature] D.C.

in violation of Mississippi Code Annotated Section 41-29-139 (1972), and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A TRUE BILL:

Charles W. Wright, Jr.
CHARLES W. WRIGHT, JR., District Attorney.

James David Humphrey
Foreman Grand Jury.

AFFIDAVIT

Comes now James David Humphrey Foreman of the January, 1984

Wayne County Grand Jury, and makes oath that this indictment presented to this Court was concurred in by twelve (12) or more members of the Grand Jury and that at least fifteen (15) were present during all deliberations.

James David Humphrey
FOREMAN GRAND JURY

Sworn to and subscribed before me this 10th day of January, 1984

Margie G. Mosley
CIRCUIT CLERK

WITNESSES' NAMES

Charlie McVey
Mike Tyson
Joe Taylor
Jim Miles

NO. 7754

Filed this the 10th day of January, 1984

Margie G. Mosley Clerk

By _____, D. C.

INDICTMENT SALE SCHEDULE IV CONTROLLED SUBSTANCE

DATE: SEPTEMBER , 2008

BENNIE LACY, #38390
DELTA CORRECTIONAL FACILITY
3800 COUNTY ROAD 540
GREENWOOD, MS 38930

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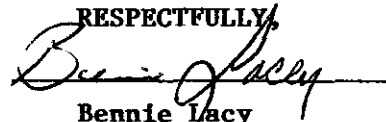
RE: BENNIE LACY V. STATE OF MISSISSIPPI
NO. 2008-CP-0917-COA

Mrs. Sephton,

Please find enclosed the original and three copies of my **MOTION TO STRIKE APPELLE BRIEF OR IN THE ALTERNATIVE, REPLY BRIEF OF THE APPELLANT** to be filed into the Court. Please file the same. By cover of this letter I have also delivered a copy of the same to the Honorable Stephanie B. Wood, Special Assistant Attorney General, for Appelle.

Thank you for your time and consideration in this matter.

RESPECTFULLY,


Bennie Lacy