

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GAIL LEE BURRIS

APPELLANT

VS.

NO. 2008-CP-1255

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GAIL LEE BURRIS

APPELLANT

vs.

CAUSE No. 2008-CP-01255-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Lawrence County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner was indicted for having sold or transferred .8 grams of cocaine within 1500 feet of a school. (R. Vol. 1, pg. 27). In due course, the prisoner filed a "Petition to Enter Plea of Guilty" to a charge of possession of .8 grams of cocaine. He stated that he was aware that the minimum term of imprisonment for this offense was four years and that the maximum was sixteen years and a fine of \$100,000.00. He also indicated that he had been previously convicted of altering a vehicle identification number and possession of a firearm by a convicted felon.

The prisoner's plea came on for a hearing. In the course of the hearing, the prisoner

acknowledged that the State intended to reduce the charge against him to possession cocaine .8 grams or greater but as a second and subsequent offender and not as an habitual offender. (R. Vol. Pg. 49). He further understood that he could be sentenced to a term of sixty years imprisonment without possibility of early release, if he were sentenced as an habitual offender. On the other hand, if the State moved to strike the habitual offender portion of the indictment and proceed against the prisoner as a second and subsequent offender, the maximum term of imprisonment would be sixteen years, the minimum four years. (R. Vol. 1, pg. 54).

The State moved to amend the indictment against the prisoner. It sought to amend the indictment so as to allege possession of .8 grams of cocaine, rather than sale, and to have the prisoner sentenced as a second or subsequent offender. Relief upon this motion was granted. (R. Vol. 1, pp. 60 - 61). The plea was accepted, and the prisoner was convicted and sentenced, *inter alia*, to a term of sixteen years imprisonment, twelve to serve and four for which execution was to be suspended, the prisoner to be on post - conviction release.

Two years later, the prisoner filed a motion in post - conviction relief, alleging that his attorney was ineffective for having permitted the prisoner to agree to a sentence enhancement where one of the prior convictions was a misdemeanor. He also alleged that his sentence was excessive because one of the prior convictions was a misdemeanor. The third ground alleged was that the Circuit Court failed to inform the prisoner that he could appeal his sentence. The prisoner admitted, in his motion for post - conviction relief, that he had been previously convicted of possession of less than a gram of cocaine. (R. Vol. 1, pp. 4, fn.1 - 5).

The Circuit Court denied relief on this motion, without an evidentiary hearing. The court noted that the prisoner had been convicted of possession of less than one gram of cocaine on 14 December 2005. It found that Miss. Code Ann. Section 41-29-147 applies to second or

subsequent offenses of the Uniform Controlled Substances Act regardless of whether the first offense was a misdemeanor or felony. It further found that the sentence imposed was not excessive and that there was no obligation to inform the prisoner of any putative right to appeal a sentence imposed in consequence of a guilty plea. (R. Vol. 1, pp. 73 - 79).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

The primary claim raised by the prisoner was that a misdemeanor offense under the Uniform Controlled Substances Act may not be used to enhance sentencing for a second or subsequent offense under that act under Miss. Code Ann. Section 41-29-147 (Rev. 2005). His claim of ineffective assistance of counsel turns on this claim. The third claim was that the Circuit Court failed to advise the prisoner that he could appeal his sentence.

A circuit court may summarily dismiss a PCR “[i]f 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.” Miss.Code Ann. § 99-39-11(2). On appeal, this Court will affirm the summary dismissal of a PCR if the petitioner has failed to demonstrate “a claim procedurally alive substantially showing [the] denial of a state or federal right....” *Young v. State*, 731 So.2d 1120, 1122 (¶ 9) (Miss.1999) (quoting *Myers v. State*, 583 So.2d 174, 176 (Miss.1991)). *Flowers v.*

State, 978 So.2d 1271 (Miss. Ct. App. 2008).

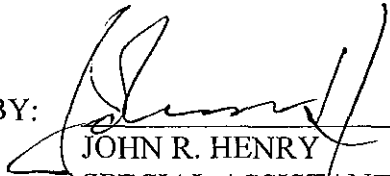

The Circuit Court entered a detailed finding of fact and conclusion of law concerning the issues raised by the prisoner in the Circuit Court. (R. Vol. 1, pp. 73 - 79). In that Order, the court concluded that nothing in Section 41-29-147 restricted its operation to prior convictions felonious in nature. It further found that there was no requirement to advise one entering a plea of guilty of the former right to appeal from a sentence imposed in consequence of a guilty plea. We adopt the Circuit Court's reasoning and conclusion here as our response as to all issues raised by the prisoner, it being our view that the Circuit Court thoroughly and correctly analyzed the issues and reached the correct conclusions. We do not believe that we could improve in any way the Circuit Court's analysis.

CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

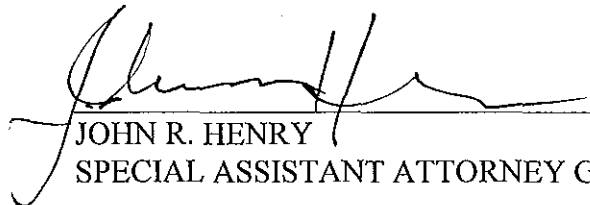
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 20th day of April, 2009.


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