

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRIDGIT L. WILLIAMS

APPELLANT

VS.

NO. 2008-KA-0227

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. Williams' appeal is untimely pursuant to the Mississippi Rules of Appellate Procedure thus depriving the Mississippi Court of Appeals of jurisdiction over the matter and the State therefore reasserts its Motion to Dismiss.
- II. Williams was correctly sentenced as an habitual offender and her sentence does not violate her Eight Amendment rights.

STATEMENT OF THE CASE

Appellant Bridgit Williams, is attempting to appeal from order of conviction and sentencing of the Circuit Court of Madison County entered on or about February 3, 2005. In the Final Judgment of Conviction, the Circuit Court adjudged Williams guilty of felony shoplifting. (C.P. 50) In the Order of Sentence, the Circuit Court having found and adjudicated Williams to be an habitual offender, sentenced Williams to a term of ten (10) years in the custody of the Mississippi Department of Corrections without the possibility of probation or parole and assessed

a fine of ten thousand dollars (\$10,000) plus costs. On or about February 10, 2005, Williams filed a Motion for New Trial. The Motion was never set for hearing and no Order overruling or granting the motion was ever entered by the trial court. On or about February 23, Williams filed a Motion for Trial Transcript. On April 16, 2007, the trial court entered its Order requiring the court reporter to produce a transcript no later than April 30, 2007. On June 18, 2007, Williams filed an amended Motion for New Trial. On or about August 2, 2007, the trial court denied Williams' Amended Motion for New Trial. On or about, January 29, 2008, some 6 months later, Williams filed a Notice of Appeal from the Final Order entered on February 3, 2005. The State of Mississippi filed a Motion to Dismiss the Appeal in the Mississippi Court of Appeals. The Court of Appeals denied the Motion stating in it's Order that the Court had previously issued an order to allow the briefing to go forward. The State was unaware of the previous Order and now files its Brief in this matter.

STATEMENT OF THE FACTS

Steven Ray Wilson, Loss Prevention Officer for Dillards Department Store testified that on January 20, 2004, he was working at the Dillards store located at Northpark Mall. He observed two suspects selecting merchandise and carrying it to one location. They were taking the items off the hangers and piling them together. (Tr. 58) Wilson was positioned in a breeze way located in the department that exits the store. Wilson observed the Williams standing behind some of the clothing racks in the Junior Denim department. She had items of clothing merchandise in her hands. (Tr. 60) Williams concealed the clothing in a bag. She did not stop at the cash register or check out stand and entered the breeze way that exits the store. (Tr. 60) Wilson then escorted Williams and the other suspect back into the store and to the loss prevention office. (Tr. 61) Williams had ten (10) items of clothing in her possession. (Tr. 61)

None of the merchandise had “pop labels” which are placed on the item at the time of sale. (Tr. 63) Wilson inventoried the items he recovered from Ms. Williams and found that the purchase price of the items would have been \$505.00. (Tr. 64)

After Wilson’s testimony, the court recessed for lunch. After the lunch recess, Ms. Williams did not return to the courtroom. (Tr. 95-102) The defense rested and closing arguments were heard. (Tr. 103) The jury returned a verdict of guilty of felony shoplifting. (Tr. 116) Williams’ Pen-Pack showed a conviction of felony shoplifting in the Circuit Court of Warren County on the August 17, 1995. (Tr. 118) For that offense, Williams was sentence to three years in the custody of the Mississippi Department of Corrections. (Tr. 118) On July 21, 1999, Williams was convicted of possession of less than an ounce of marijuana with intent to distribute and was sentenced to one year in the custody of the Mississippi Department of Corrections. (Tr. 119) The trial court adjudicated Williams to be an habitual offender under § 99-19-81 of the Mississippi Code of 1972, and sentenced her to ten (10) years in the custody of the Mississippi Department of Corrections and to pay a fine in the amount of ten thousand dollars (\$10,000.00). (Tr. 122)

SUMMARY OF THE ARGUMENT

Williams' appeal is untimely pursuant to the Mississippi Rules of Appellate Procedure thus depriving the Mississippi Court of Appeals of jurisdiction over the matter and the State therefore reasserts its Motion to Dismiss. Direct appeal is appropriate only with the time frames stated in Rule 4 of the Mississippi Rules of Appellate Procedure and only from an Order denying a timely filed Motion for New Trial. Therefore, this putative appeal should be dismissed as this court does not have jurisdiction no jurisdiction to determine the merits of this issue and the matter should be dismissed.

Williams' sentence did not violate the Eight Amendment, since "[t]he correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." *Oby v. State*, 827 So.2d 731, 734, (Miss.Ct.App.2002) (citing *Bell v. State*, 769 So.2d 247, 252 (Miss.Ct.App.2000)).

Pursuant to the terms of Mississippi Code Annotated § 97-17-41 (1972), as amended, and Mississippi Code Annotated § 97-23-93 (1972), as amended, the maximum sentence for felony shoplifting of merchandise *valued at more than \$500.00 (five hundred dollars)* was 10 (ten) years in the custody of the Mississippi Department of Corrections and a fine of Ten Thousand Dollars (\$10,000). Pursuant to the terms Mississippi Code Annotated § 99-19-81 (1972), as amended, whereby Williams clearly meets the definition of an habitual offender, said habitual offenders "shall be sentenced to the maximum term of imprisonment prescribed for such felony and such sentence *shall not* be reduced or suspended nor shall such person be eligible for parole or probation." Therefore, the Trial Court was without discretion to sentence her to anything less.

ARGUMENT

I. Williams' appeal is untimely pursuant to the Mississippi Rules of Appellate Procedure thus depriving the Mississippi Court of Appeals of jurisdiction over the matter and the State therefore reasserts its Motion to Dismiss.

Appellant Bridgit Williams, is attempting to appeal from order of conviction and sentencing of the Circuit Court of Madison County entered on or about February 3, 2005. In the Final Judgment of Conviction, the Circuit Court adjudged Williams guilty of felony shoplifting. (C.P. 50) In the Order of Sentence, the Circuit Court having found and adjudicated Williams to be an habitual offender, sentenced Williams to a term of ten (10) years in the custody of the Mississippi Department of Corrections without the possibility of probation or parole and assessed a fine of ten thousand dollars (\$10,000) plus costs.

The Judgment of Conviction and Sentence in Williams' case was entered on April 21, 2005. On or about February 10, 2005, Williams filed a Motion for New Trial. The Motion was never set for hearing and no Order overruling or granting the motion was ever entered by the trial court. On or about February 23, Williams filed a Motion for Trial Transcript. On April 16, 2007, the trial court entered its Order requiring the court reporter to produce a transcript no later than April 30, 2007. On June 18, 2007, Williams filed an amended Motion for New Trial. On or about August 2, 2007, the trial court denied Williams' Amended Motion for New Trial. On or about, January 29, 2008, some 6 months later, Williams filed a Notice of Appeal from the Final Order entered on February 3, 2005. Rule 4 of the Mississippi Rules of Appellate Procedure provides that [i]f a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice for a judgment of acquittal notwithstanding the verdict or for a new trial, the time for appeal shall run from the entry of the order denying such motion. Williams' appeal is out-of-time since it was filed some six months after the entry of the Circuit Court's Order Denying New Trial and the Mississippi Supreme Court therefore does not have jurisdiction to hear this appeal and same must be dismissed.

The only statutory authority for a defendant to appeal in a criminal case is found in Section 99-35-101, Miss. Code Ann. (1972), which states as follows:

Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty.

Pursuant to Rule 4(e) of the Mississippi Rules of Appellate Procedure, if a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice for a new trial or for a judgment of acquittal notwithstanding the verdict, the time for appeal run from the

entry of the order denying such motion direct appeal is not ripe and his appeal should therefore be dismissed.

M.R.A.P. Rule 4(h) allows for reopening the time for appeal by the Trial Court, but limits that period to 180 days of the entry of the judgment or order overruling any motion for new trial.

M.R.A.P. 2(a)(1) states as follows: *Mandatory Dismissal*. An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5. M.R.A.P 3(a) states, in pertinent part, as follows: An appeal permitted by law as of right from a trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4.

M.R.A.P. 4(a) states, in pertinent part, that the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

Rule 4 of the Mississippi Rules of Appellate Procedure provides that [i]f a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice for a judgment of acquittal notwithstanding the verdict or for a new trial, the time for appeal shall run from the entry of the order denying such motion.

Williams' appeal is out-of-time since it was filed some six months after the entry of the Circuit Court's Order Denying New Trial and the Mississippi Supreme Court therefore does not have jurisdiction to hear this appeal and same must be dismissed.

Serving one year or more of concurrent sentences for separate convictions arising out of separate incidents at different time amounts to serving more than one year on each sentence for purposes of the habitual offender statute. *Issac v. State*, 968 So.2d 951 (Miss.Ct.App.,2007) (citing, *Otis v. State*, 853 So.2d 856 (Miss.Ct.App.2003)).

Direct appeal is appropriate only with the time frames stated in Rule 4 of the Mississippi Rules of Appellate Procedure and only from an Order denying a timely filed Motion for New Trial. Therefore, this putative appeal should be dismissed as this court does not have jurisdiction to determine the merits..

II. Williams was correctly sentenced as an habitual offender and her sentence does not violate her Eight Amendment rights.

The standard of review for a trial court's imposition of a sentence is abuse of discretion. "Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Nichols v. State*, 826 So.2d 1288, 1290(¶ 10) (Miss.2002). Williams's sentence fits within the statutory maximum. Further, since she was an habitual offender, the trial court was required to sentence Williams to the maximum pursuant to Mississippi Code Annotated § 99-19-81 (1972), as amended. Absent an abuse of discretion, the sentence is beyond the reach of appellate review.

Williams alleges that her sentence of ten (10) years violates her Eight Amendment rights and constitutes cruel and unusual punishment. Williams' sentence did not violate the Eight Amendment, since "[t]he correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." *Oby v. State*, 827 So.2d 731, 734, (Miss.Ct.App.2002) (citing *Bell v. State*, 769 So.2d 247, 252 (Miss.Ct.App.2000)).

Williams was correctly adjudicated to be an habitual offender and consequently was sentenced pursuant to Mississippi Code Annotated § 99-19-81 (1972), as amended, which requires that:

Every person convicted in this state of any felony or federal crime

upon charges separately brought and arising out of separate incidents at different time and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Williams was charged pursuant to Mississippi Code Annotated § 97-23-93 (1972), as amended, which states in pertinent part:

A person convicted of shoplifting merchandise for which the merchant's stated price exceeds Five Hundred Dollars (\$500.00) shall be guilty of a felony and, upon conviction, punished as provided in Section 97-17-41 (1972), as amended, for the offense of grand larceny.

Williams indictment specifically states that she was charged with "willfully, unlawfully, feloniously taking possession of merchandise . . . valued in excess of \$500.00 (five hundred dollars) . . . in violation of Mississippi Code Annotated § 97-23-93 (1972), as amended. Mississippi Code Annotated § 97-17-41 (1972), as amended, provides that the sentence for Grand Larceny is a term of imprisonment in the penitentiary for a term not exceeding ten (10) years; or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

Williams was not charged with a second or third shoplifting conviction pursuant to Mississippi Code Annotated § 97-23-93(5) or (6)(1972), as amended. Rather, she was charged and convicted for shoplifting merchandise valued at more than \$500.00, which provides that the defendant be sentenced according to the Grand Larceny statute, Mississippi Code Annotated § 97-17-41 (1972), as amended, which provides that the sentence for Grand Larceny is a term of imprisonment in the penitentiary for a term not exceeding ten (10) years; or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both. Her indictment was amended to reflect that she was an habitual offender pursuant to Mississippi Code Annotated § 99-19-81 (1972), as

amended, which *requires* that she be sentenced to the maximum penalty. Relating that requirement back to the statute designated to determine the penalty for shoplifting over \$500.00 worth of merchandise, § 97-17-41, the trial court had no choice pursuant to statutory authority but to sentence Williams to 10 (ten) years in prison and a \$10,000.00 (ten thousand dollar) fine.

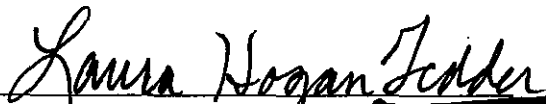

Thus, the maximum sentence for felony shoplifting of merchandise valued at more than \$500.00 (five hundred dollars) was 10 (ten) years in the custody of the Mississippi Department of Corrections and a fine of Ten Thousand Dollars (\$10,000). Pursuant to the terms Mississippi Code Annotated § 99-19-81 (1972), as amended, whereby Williams clearly meets the definition of an habitual offender, said habitual offenders “*shall* be sentenced to the maximum term of imprisonment prescribed for such felony and such sentence *shall not* be reduced or suspended nor shall such person be eligible for parole or probation.” Therefore, the Trial Court was without discretion to sentence her to anything less.

CONCLUSION

The Appellant’s assignments of error are without merit and the jury’s verdict and the rulings of the trial court should be affirmed. Further, this matter is time-barred and should be dismissed without further delay.

Respectfully submitted,

**JIM HOOD
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STATE OF MISSISSIPPI**

BY: 
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CERTIFICATE OF SERVICE

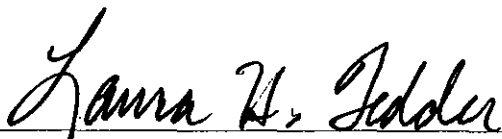
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 6th day of March, 2009.



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