IN THE SUPREME COURT OF MISSISSIPPI

COPY

Larry Wayne McKenzie — Appellant

Verses — Cause Number: 2008-TS-01603 COA

STATE OF MISSISSIPPI — Appellee

APPELLANT'S REPLY BRIEF

ORAL ARGUMENTS NOT REQUESTED

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COMES NOW, Larry W. McKenzie, appellant, Pro'Se, and hereby files this his reply brief in the above styled and numbered cause in support of his appeal from a final judgment denying his third Petition for Post Conviction Collateral Relief and would show unto this Honorable Court the following facts and matters to wit:

I

The total premises of this appeal is an issue of fact, that is, that McKenzie committed no offense or broke no law in Lauderdale County therefore making his plea agreement and his sentence unenforceable and of non-effect. This sentence is unenforceable and any procedure bar (successive or otherwise) is of non-effect. Naturally this petition is successive simply because this is McKenzie's third attempt to have his sentence corrected via post conviction petition. Before this court can rule that this petition is successive and therefore barred; the court must answer the question that is central to this entire case, did McKenzie commit the offense for which he is incarcerated or any offense in Lauderdale County? If that answer is yes, then the trial court and the appellee are justified in their reasoning. If the answer to this central question is no as McKenzie contends, then this case demands a different result. In order to render a fair and just decision, this court must first answer this central question. This question has not been

answered in either of McKenzie's two previous post conviction petitions by the trial court, or by this court. This is an issue of fact for which there is no successive writ bar; in that an affirmative answer will render this sentence unenforceable.

II

In its brief the appellee adds nothing new or of substance to this argument, but simply draws the same flawed conclusion that the trial court drew. The appellee does not deny the claims of the appellant but only argue that the petition is successive. It is plain sense that this is a successive petition. This was explained to the Mississippi Supreme Court in the appellant's motion for leave, and in the post conviction petition to the trial court. The successive writ bar is overcome by the fact that McKenzie committed no offense or broke no law in Lauderdale County making his plea agreement and his sentence unenforceable. Simply put, the offence, which is the essence of this case, did not occur in Lauderdale County. It is plain sense from the record that McKenzie committed no offense or broke no law in Lauderdale County making his sentence unenforceable, and when plain sense makes sense, seek no other sense. The appellee continues in their attempt to make other sense when the record before the court unequivocally answers the question at hand. This court too has sought other sense in this case and has on two previous occasions affirmed McKenzie's conviction based on the trial court's flawed and misguided assumptions when it is abundantly clear from the exhibits which are a part of the record before this court that the offence which is the essence of this case did not occur in Lauderdale County. These exhibits plainly show that McKenzie committed no offense or broke no law in Lauderdale County.

III

Stevenson v. State, 674 So. 2d 501; 1996 Miss LEXIS 212 and all of the cases cited therein is the controlling case law concerning filing a third and successive post conviction petition and an unenforceable sentence. The appellant committed no offense or broke no law in Lauderdale County, which makes his sentence unenforceable, and the court's holding in *Stevenson, supra* the controlling case law. Like the appellant here, Stevenson filed a third motion for post conviction relief. Stevenson claimed that his plea agreement was invalid and the sentence unenforceable. The Mississippi Supreme Court held that "Even if the inmate's motion was otherwise time barred, an unenforceable sentence was plain error capable of being addressed." The court reversed the circuit court's order denying Stevenson's motion, vacated his guilty plea and ruled that his sentence was unenforceable and of no effect. The court remanded the case to the circuit court for further proceedings. As in *Stevenson* and cases cited therein the court here should find that the sentence imposed on McKenzie by Lauderdale County, though it would generally be successive writ barred, procedurally barred, and time barred, because he committed no offense or broke no law in Lauderdale County, his plea agreement and his sentence is unenforceable and of no effect.

Further, the appellee in its brief does not deny the claim that McKenzie committed no offense or broke no law in Lauderdale County making his sentence unenforceable. According to the rules of this court, any issue not denied is deemed admitted to. Therefore the court must take the appellee's silence on this issue as an admission of the issue's veracity.

IV

In an attempt to compel the appellee/State of Mississippi to put forth its proof and answer the question that McKenzie committed no offense or broke no law in Lauderdale County, the appellant filed a 1983 federal law suit against Lauderdale County, the State of Mississippi, et al specifically requesting that the defendants prove that McKenzie committed the offense for which he is incarcerated in Lauderdale County or else he is being falsely imprisoned by a county and court where he committed no offense. Hon. Daniel P. Jordon dismissed the case for failure to state a claim for which relief could be granted. See McKenzie v. State of Mississippi, et al, 4:07-cv-113-DPJ-JCS. However, the question, that McKenzie committed no offense or broke no law in Lauderdale County, which is the question central to this case, was deemed a habeas corpus issue and was dismissed without prejudice, thus leaving the door open to challenge this issue in this court. This is a habeas corpus issue and demands an answer by the appellee and this court.

V

In a post conviction petition the burden of proof, which is by a preponderance of the evidence is on the petitioner. The exhibits offered by the appellant which is, and always has been part of the record establishes proof that the offense for which the appellant is incarcerated did not occur in Lauderdale County thus making his plea and his sentence unenforceable. The record also shows that McKenzie filed a motion for leave along with his post conviction petition in the Mississippi Supreme Court specifically addressing the successive writ issue. The Mississippi Supreme Court ruled that petition

be filed in the trial court. Therefore, the appellee's argument regarding the successive writ bar should be denied and the appellant's appeal granted.

WHEREFORE, PREMISES CONSIDERED, the appellant pray this court seek to answer, and require the appellee put fort its proof that he committed this offense in Lauderdale County as they claim before ruling on this petition. The record will and does show that McKenzie committed no offense or broke no law in Lauderdale County making his sentence unenforceable and not subject to the successive writ bar. On two previous petitions this court has affirmed McKenzie's sentence based on the trial court's flawed and misguided assumptions. See *McKenzie V. State, 856 So. 2d 344 (Miss .App. 2003)* and *McKenzie V. State, 946 So. 2d 392 (Miss. 2006)*. It was error then and would be error now because not only the fact, but the truth of this case is that no matter what this court rules, at the end of the day McKenzie still committed no offense or broke no law in Lauderdale County as the record clearly shows. He would not have persisted in challenging this sentence all of these years if his claim were not based on the absolute truth. The truth is that he has served over 8 ½ years of a fifteen-year sentence imposed by a court in a county where he committed no offense. The appellant further pray that in light of the exhibits in the record before you, that this court is not hesitant to correct this error and that all relief sought in the appellant's brief be granted.

RESPECTFULLY SUBMITTED and forever will pray. This 31 day of March, 2009.

Larry W. McKenzie

Larry W. McKenzie

CERTIFICATE OF SERVICE

This is to certify that I, Larry W. McKenzie have this date caused to be mailed a true and correct copy of the foregoing and attached appellant's reply brief VIA U.S. Postal service, first class postage prepaid, to the following persons to wit:

Hon. Betty W. Sephton, Clerk
P. O. Box 249
Jackson, MS 39205

Hon. Jim Hood
Attorney General
P. O. Box 220
Jackson, MS 39205

SO CERTIFIED, this 31 day of March, 2009.

Larry W. McKenzie
Larry W. McKenzie