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IN THE SUPREME COURT OF MISSISSIPPI

Larry Wayne McKenzie — Appellant

Verses — Cause Number: 2008-TS-01603 COA

STATE OF MISSISSIPPI — Appellee

Appeal from the Circuit Court of Lauderdale County

State of Mississippi

Brief of Larry Wayne McKenzie

The appellant is currently housed within the Mississippi Department of Corrections at The Stone County Correctional Facility, (SCRCF), Wiggins, Ms.

CERTIFICATE OF INTERESTED PERSONS

I, Larry Wayne McKenzie, hereby certify that the following listed persons have an interest in this case. This representation is made in order that justices of this Court may evaluate possible disqualifications or recusal.

1. Larry W. McKenzie – K4202
SCRCF B-zone
1420 Industrial Park Rd.
Wiggins, MS 39577

2. Hon. Robert W. Bailey
Circuit Court Judge, 10th Judicial District
P.O. Box 1167
Meridian. MS 39302

3. Hon. Bilbo Mitchell
District Attorney, 10th Judicial District
P.O. Box 5172
Meridian, MS 39302

This the ___ Day of December, 2008 A.D.

_____
Larry W. McKenzie

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PROCEDURAL HISTORY

For a more complete chronology of this case, see trial court court's order denying petition.

As to this instant appeal, the procedural history is as follows:

On September 9, 2007, the appellant filed a **Petition for Writ of Error Coram Nobis** in the Mississippi Supreme Court. The issue raised in that petition was that the appellant's sentence is unenforceable because the appellant committed no offense or broke no law in Lauderdale County.

On September 20, 2007, before Supreme Court Justices Waller, P. J., Carlson and Lamar J. J., the appellant's petition for writ of error Coram Nobis was "dismissed 'without prejudice' to be filed in the Trial Court." R. E. page 36.

On October 10, 2007, the appellant filed a **Petition for Writ of Error Coram Vobis** in the Mississippi Supreme Court, again arguing that his sentence is unenforceable because he committed no offense or broke no law in Lauderdale County.

On November 8, 2007, before Supreme Court Justices Diaz, P. J., Graves and Dickerson J. J., the court ruled that the "current petition should also be dismissed 'without prejudice' to be filed in the Trial Court." R. E. page 37.

On February 6, 2008, the appellant filed a **Petition for Writ of Error Coram Vobis** in the Court of Appeals for the 5th Circuit, still arguing that his sentence is unenforceable because he committed no offense or broke no law in Lauderdale County. By way of letter from the Clerk of that court, dated March 3, 2008, it was also the opinion of the Court of Appeals for the 5th Circuit, that the appellant file his petition in the trial court. R. E. Page 38. Although there was no instruction given to the trial court as

to what actions it should take, the Court of Appeals for the 5th Circuit and six of Mississippi's Supreme Court justices ruled that this petition be filed in the trial court without any mention of a successive writ or any other procedure bar as it relates to the issues raised in this petition.

On June 12, 2008, the appellant filed in the Mississippi Supreme Court a Petition for Post conviction Collateral Relief and a Motion for Leave to proceed in the trial court. In that petition, the appellant argued that his sentence is unenforceable because he committed no offense or broke no law in Lauderdale County. The appellant further sought relief from the Mississippi Supreme Court and argued that this was his third post conviction petition. On July 9, 2008, the appellant's Petition for Post conviction Collateral Relief was dismissed, to be filed in the trial court.

On July 21, 2008, the appellant filed a third and successive Petition for Post Conviction Collateral Relief in the Circuit Court of Lauderdale County. In that petition, the appellant raised two issues; 1.) That his sentence is unenforceable, and 2.) That he committed no offense or broke no law in Lauderdale County.

On September 8, 2008, Hon. Robert W. Bailey, Circuit Court Judge, denied the appellant's Petition for Post Conviction Collateral Relief as successive. R. E. Page 49-50. This brings this appellant back before this Court for a third time appealing the denial of his Petition for Post conviction Collateral Relief by the Lauderdale County Circuit Court.

STATEMENT OF ISSUES

1. The appellant committed no offense or broke no law in Lauderdale County.
2. The appellant's plea is invalid and the sentence imposed by the Lauderdale County Circuit is unenforceable.

STATEMENT OF CASE

This case is simple, it is supported by the record and begs for correction by this court. The record of this case shows that the appellant committed no offense or broke no law in Lauderdale County. Therefore, the appellant's plea in invalid and any sentence imposed by Lauderdale County is unenforceable. The report of the Lauderdale County Sheriff's Department alone, makes a prima facie case that supports the appellant's claim and for the granting of this petition. The court only need require the state to enter its proof that shows that the appellant did in fact commit the offense for which he is incarcerated in Lauderdale County. The court was in error in its assumptions when it denied the appellant's previous two petitions and the court is in error now.

STATEMENT OF FACTS

Just like this case is simple, the facts are simple. The fact on which this entire case hinges is the fact that the appellant committed no offense or broke no law in Lauderdale County. As the record before this court shows, this appeal is based on that issue of fact.

In July of 1998, the Lauderdale County School System hired the appellant as band director at North East high School. In January of 1999, the appellant carried a group of approximately 10 students on a school-approved trip to Mississippi State University in order to attend a band workshop. While on this trip to M S U, the appellant became sexually involved with a 15-½ year old female student who had accompanied him on this trip. Because of this sexual encounter, this student became pregnant and on October 5, 1999 gave birth to baby boy.

In August of 1999, when the mother of this student learned that she was pregnant, and that the appellant was the possible father, this offense was reported to school officials, and to the Lauderdale County Sheriff's Department.

On August 24, 1999, school officials, concerning this trip to Mississippi State and the subsequent sexual relationship with this 15-½ year old student questioned the appellant. The appellant was fired for his involvement with this student. This one-time act occurred while on a band trip to Mississippi State University, which is clearly not in Lauderdale County. There was no offense ever committed in Lauderdale County. These are the facts.

On September 27, 2000, on the advice of his attorneys, the appellant plead guilty to the charge of statutory rape and was sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections, with 5 years suspended, 15 years to serve day for day, and 5 years on post release supervision. R. E. page 11-12.

The appellant has filed two previous post conviction petitions, both of which were denied. In its denial of these previous two petitions, the trial court was mistaken in its assumption that there were at least two acts of intercourse and that one of those acts occurred in Lauderdale County. This assumption is totally unfounded, does not conform to what the record before this court show, and is prejudicial to the appellant's case. Both of these petitions were appealed. These petitions were affirmed by this Court and by the Mississippi Supreme Court on Certiorari. This Court and the Mississippi Supreme Court was also mistaken when it affirmed the appellant's conviction in these previous two petitions based on the trial court's misguided assumptions. This court only need examine the record, especially the report of the Lauderdale County Sheriff's Department. This report alone makes a prima facie case supporting the appellant's claim. The trial court has contended that it had jurisdiction over the offense that occurred in Lauderdale County. To show that the trial court's proposition is without merit, the state only need be required to enter its proof that the offense for which the appellant plead guilty, and is incarcerated did in fact occur in Lauderdale County as the trial court contends. The fact that the appellant plead guilty to this offense is not proof that an offense was committed in Lauderdale County, and it must not be treated as such. The absolute truth of this case is that the appellant's plea is invalid and his sentence is unenforceable because he committed no offense or broke no law in Lauderdale County.

TABLE OF AUTHORITIES

OTHER AUTHORITIES

IN THE SUPREME COURT OF MISSISSIPPI

Larry Wayne McKenzie — Appellant

Verses — Cause Number: 2008-TS-01603 COA

STATE OF MISSISSIPPI — Appellee

APPELLANT'S BRIEF IN SUPPORT OF APPEAL FROM FINAL ORDER DENYING PETITION FOR POST CONVICTION COLLATERAL RELIEF.

COMES NOW, Larry W. McKenzie, appellant, Pro'Se, and hereby files this his brief in support of his appeal from a final judgment denying his third Petition for Post Conviction Collateral Relief. The petition for post conviction collateral relief with its exhibits, its brief in support thereof, and the order denying appellant's petition for post conviction relief is attached hereto and incorporated herein by reference, as if fully stated herein in words, figures and numbers. The appellant respectfully presents the following argument and assignments of error in the case at bar:

I

THE APPELLANT COMMITTED NO OFFENSE OR BROKE NO LAW IN LAUDERDALE COUNTY.

The appellant is before this Court for a third time appealing the denial of his Petition for Post conviction Relief. The appellant asserts that his challenge to this case involves issues of fact. The primary fact and the issue most central to this cause, and that

upon which the error of the trial court and this Court rests, is the fact that the appellant committed no offense or broke no law in Lauderdale County.

In his first petition, filed October 3, 2001, and appeal, see appendix "A", this court noted that the appellant's petition was poorly pleaded. See *McKenzie V. State, 856, So. 2d 344*. With that assessment, the appellant agrees. As a layman in the law, the appellant did not speak to the heart of the issue of this case. However, the trial court denied the appellant's petition and this Court affirmed his conviction. From the outset, both the trial court and this Court has completely missed the heart of the issue of the appellant's case. In this third petition, the appellant makes plain, the error of the Court, and clarifies the issue(s) that he is raising and makes a clear and concise prima facie case for the granting of this petition. The appellant prays for a true and correct judgment based on the record and relevant case law. The central issue is that the appellant committed no offense or broke no law in Lauderdale County, therefore, his plea is invalid and his sentence is unenforceable.

In his first appeal this Court was in error when it affirmed the appellant's conviction concerning the jurisdiction of this case, see *McKenzie supra*, see also *Banana v. State*, 635 So 2d 851,853 (Miss. 1990). Also in its ruling on the appeal from the October 3, 2001 petition, this court held that "the state had more than enough evidence to convict the appellant, namely a 15 year old girl with a baby." See *McKenzie v. State, 634 So. 2d 551*. Where this reasoning may be true under ordinary circumstances, however, when this court considers the totality of the circumstances, the Court must come to a different conclusion. The appellant was charged and sentenced for having committed this offense in Lauderdale County on or about March 1, 1999.There was a baby born on

October 5, 1999. The math here does not add up. Nine months from March is not October. The very date of birth of this baby supports the appellant's claim that this offense occurred in Oktibbeha County in January 1999. Even though there is a baby, this still is not proof, that this offense occurred in Lauderdale County and must not be treated as such

In his second appeal, March 31, 2005, this court was again in error when it affirmed the appellant's conviction denying his argument that his sentence is illegal. If the appellant committed no offense or broke no law in Lauderdale County, why is this sentence not illegal? These are both valid arguments and the record before the Court supports them both. The record shows that the offense that is the essence of the appellant's conviction and incarceration did not occur in Lauderdale County. This is an issue of fact in light of the record before this court. See *Banana, Supra*, where the court held that "defendant must be tried in the county where the offense was committed," and McKenzie committed no offense or broke no law in Lauderdale County.

In its denial of the appellant's second post conviction petition, (3-31-05), the trial court erred when it denied appellant's petition based on two flawed and misguided assumptions. The court's first assumption was that the appellant and his 15-½ year old student was involved in more that one act of intercourse. This is not the case at all. The court's second assumption was that one of these acts occurred in Lauderdale County. This court affirmed the appellant's conviction based on the trial court's flawed assumptions. See *In Re McKenzie v. state*. The record before this Court proves the opposite. The record shows that the offense, which is the essence of this case, and the offence complained of in Oktibbeha County, is one and the same offense, not two

separate offences. There was only one act of intercourse and that one act occurred in Oktibbeha County, not in Lauderdale County. This court well knows that the state must first and foremost prove where the offense occurred in order to establish venue.

The trial court has now denied the appellant's third Post Conviction Petition asserting that it too, is successive. This successive writ is the essence of this appeal and the record fully supports the appellant's claim. This court know that if a plea of guilty is entered in a court where no offense was committed, that the plea is invalid and the sentence imposed is unenforceable, and not subject to the successive writ bar. Instead, it requires the dismissal of this case or in the alternative an open hearing, that the state may prove that this offense was committed in Lauderdale County.

Both the U.S. and the Mississippi Constitutions firmly establish that a defendant must be tried in the county where the offense was committed. The trial court was in error when it did not establish venue as a part of he factual basis at the appellant's plea hearing, or at an evidentiary hearing on this or any of the previous post conviction petitions. See *Jackson V. State, 246 So 2d 533.*

The intake report of Officer Sonny Vincent of the Lauderdale County Sheriff's Department, makes a prima facie case for the appellant's petition before this court. R. E. page 29. In this report Officer Vincent states that "it is not known where this offense occurred as it happened on a band trip." The record before this court clearly shows that this "band trip" was to Mississippi State University, which is clearly not in Lauderdale County. Had the appellant gone to trial, the state would have relied on this report as testimony. There was no other effort made by the state, or subsequently by the court to show where this offense occurred. They simply relied on the assumption that the

appellant plead guilty to the offense, therefore, it happened in Lauderdale County. It is error for the trial court to make such an assumption. The very investigating agency relied on by the state to make its case, states in its report, that this offense occurred on a band trip to another County.

When denying the appellant's second petition (3-31-2005), the trial court contended that "the indictment and the petition to enter plea of guilty 'asserted' that the offense occurred in Lauderdale County." This court well knows that the indictment is merely the charging instrument and not proof of a crime. It is the state's responsibility to prove venue. The court also knows that the petition to plead guilty is not proof of an offense and does not waive jurisdiction. Yet, the trial court was allowed to use these documents as proof when this court affirmed the appellant's conviction for a second time on May 16, 2006. It is the fact that the appellant did not commit any offense or brake any law in Lauderdale County that makes his plea invalid and his sentence unenforceable. This petition has nothing to do with chaste character as the trial court has previously held and this court has affirmed. The record further shows that according to the mother of the student, that this offense occurred while on a "band trip" and not in Lauderdale County, R. E. page 30, further making a prima facie case for the granting of this petition.

2

THE APPELLANT'S PLEA IS INVALID AND THE SENTENCE IMPOSED BY THE TRIAL COURT IS UNENFORCEABLE

Because of its own flawed assumptions, the trial court dismissed the appellant's previous petition, (3-31-05) as successive, frivolous and time barred. In *Ethridge V. State, 800 So 2d 1221; 2001 Miss. App. Lexis 479*, the Court held that there

are certain exceptions carved out to procedural bars where there is a question that a party's fundamental rights have been violated. *Sneed V. State, 722 So 2d 1255, 1257 P7 (Miss. 1998)*. When a defendant is sentenced in a county where he committed no offense or broke no law it violates his fundamental rights. The question now, is not whether this petition is successive, but whether a fundamental right was violated. In the case at bar the appellant does not challenge his guilt. He challenges the constitutionality of his sentence because the offense, for which he is incarcerated, occurred while on a band trip to Mississippi State University. He committed no offense or broke no law in Lauderdale County, which makes his plea invalid and his sentence unenforceable. The right to be free from an illegal sentence has been found to be fundamental. "In *Ivy V. State*, the Mississippi Supreme court reiterated its former ruling that errors affecting the fundamental constitutional rights, such as the right to a legal sentence may be excepted from procedural bars which would otherwise prevent their consideration." *Ivy v. State, 731 So 2d at 603 (P. 13) citing Luckett v. State, 582 So 2d 428, 430 (Miss. 1985).* According to the court's standard in *Stevenson v. State of Mississippi, 674 So. 2d 501, 505 1996 Miss. Lexis 212* and in *Banana, Supra*, the appellant at bar is serving an unenforceable sentence which excepts this petition from any and all procedure bars. Additionally **in *Stevens*, the supreme Court held that "even though an imposed sentence is otherwise barred, an unenforceable sentence is nevertheless plain error and capable of being addressed."** *Stevenson v. State, 674 So 2d 501, 505 (Miss. 1996), See also Grubb v. State, 584 So 2d 786 789 (Miss. 1991).*

In *Stevenson*, about fourteen years after he was convicted of capitol murder and sentenced to life imprisonment without parole based on a plea agreement, Stevenson filed

a third motion for post conviction relief claiming the agreement was invalid and sentence unenforceable. The Circuit Court of Warren and Sharkey County entered an order denying the motion and Stevenson appealed. On appeal, the Court held that the plea agreement entered by Stevenson was unenforceable and invalid for statutory reasons. Surely then, a defendant such as the one here, who pleads guilty to any offense in a county where he committed no offense is unenforceable and the plea invalid. Even if the inmate's motion; whether it be *Stevenson*, or the appellant here was otherwise successive and time-barred, an unenforceable sentence is plain error and capable of being addressed.

In Stevenson the Court reversed the Circuit Court's order denying his motion, vacated his guilty plea, and ruled that his sentence was unenforceable and of no effect. The Court remanded Stevenson's case to the Circuit Court for further proceedings. Likewise, even if the appellant's petition for post conviction relief is successive, like *Stevenson's* the cases of *Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991); Smith v. State, 477, So. 2d 191, 195-196 (Miss. 1985), and Luckett v. State, 582, So. 2d 428, 430 (Miss. 1991)*, permits the Court to address the imposition of an unlawful sentence, as it was plain error involving a fundamental constitutional right notwithstanding a procedural bar.

The critical question this Court must consider is whether the appellant committed an offense in Lauderdale County. Where *Stevenson* could have waived this statutory right in his case, although the Court standardly allows the waiver of rights of constitutional proportion, Jurisdiction cannot be waived. It was the state's responsibility to establish venue and they have failed in that responsibility. The State's only defense is that this third petition for post conviction relief is successive, pursuant to Miss. Code Ann. Section

99-39-23(6). The successful resolution of this case will only be accomplished within the strict confines of the law and relevant case law support the appellant's case.

The Court found that *Stevenson's* case would generally be successive writ barred, procedurally barred and time barred. However, the Court nevertheless founds that *Stevenson* cannot be barred from challenging a sentence that it found as being unenforceable from the beginning in 1978. Likewise, the appellant here, (McKenzie), his case must be found to be unenforceable from the beginning, September 27, 2000. And likewise, the cases of *Grubb, Luckett and Smith, supra*, mean that, even though an imposed sentence is otherwise barred, an unenforceable sentence is nevertheless plain error and capable of being addressed. Therefore coupled with this Court's decisions in *Lanier* and *Patterson*, current case law requires that the apparent bars be disregarded and that the appellant's (McKenzie's) case be remanded.

As in *Petterson* and *Stevenson*, the appellant here plead guilty and was sentenced before having been convicted by a jury. Therefore, because the appellant's sentence is unenforceable because he committed no offense or broke no law in Lauderdale County, this case must be remanded with a vacated plea as well. *Lanier, 635 So. 2d at 817*, citing *Sullivan v. Pouncey, 469, So. 2d 1233, 1234 (Miss. 1985)*. If the Court finds that the sentence imposed on this appellant as case law indicates, is unenforceable and of no effect, the plea is of no effect either.

Just like in *Ethridge, supra*, neither the trial court nor the state addressed the merits of the appellant's claim that he committed no offense in Lauderdale County, but relied on the assumption that there were at least two acts of intercourse and that one of

these acts occurred in Lauderdale County, and that the petition was successive. This is purely conjecture on the part of the trial court and has no support in the record.

The appellant's plea is invalid and his sentence is unenforceable because he committed no offense or broke no law in Lauderdale County. Under the standards put forth by the Court in the above cited cases the appellant should have been heard on his petition for relief instead of being summarily dismissed. Even if the appellant's petition is successive, an unenforceable sentence because he committed no offense in Lauderdale County is plain error and capable of being addressed by this court. *Stevenson, Supra.* An unenforceable sentence overcomes the successive writ bar raised by the trial court.

Further making a Prima Facie case for this petition, the record shows that the appellant was questioned by school officials concerning this offense and according to Ed. Mosley, this meeting with the appellant was concerning an offense that had occurred while on a band trip to Mississippi State University. R. E. page 31. Roger Wright reported that this band trip was to "Starkville." R. E. page 32. The court can take judicial notice that "Starkville" is not in Lauderdale County. Based on the record before this court, this offence did not occur in Lauderdale County. The plea is invalid and the sentence imposed is unenforceable.

In its denial of the appellant's second petition, (3-31-05) the trial court contended that it had jurisdiction over the offence that occurred in Lauderdale County. This is error because this opinion is directly contrary to what the record shows. The record shows that any claim that an offense may have been committed in Lauderdale County, is refuted by Ben Tubberville, who has submitted an affidavit to that effect.. R. E. page 33-35. The trial court merely assumed that there was more than one act of intercourse. This is not the

case at all. There was no offense committed in Lauderdale County for the trial court to have jurisdiction over. In retrospect, there was nothing in Lauderdale County for the appellant to plead guilty to. The trial court further contended that the appellant "plead guilty to the offense, therefore, it happened in Lauderdale County." This reasoning is error and neither does it conform to the U. S. Constitution or the laws and constitution of the State of Mississippi. See *Banana, Supra; see also Stevenson v. State of Mississippi.*

The appellant plead guilty to this offense in Lauderdale County solely on the advice and at the urging of his attorneys. At no time had they discussed where this offense occurred. They too relied solely on the information that had been provided to them by the State. Based on the best information that he had at that time, the appellant plead guilty oblivious to any issue of venue as this had never been discussed with him by his attorneys. A plea of guilty and a twenty year sentence was the best of all the options presented to him by his attorneys. Facing the bar of justice for the first time and the range of emotions that you experience, no layman is cognizant of any issue of venue. For the trial court to reason that the appellant "plead guilty to the offense, therefore it happened in Lauderdale County" is error. It is contrary to the facts and begs for correction. Even though the appellant plead guilty, a guilty plea does not waive jurisdiction; especially in the appellant's case where he did not commit any offense in Lauderdale County. His plea is invalid and his sentence is unenforceable as a result.

CONCLUSION

The trial court erred when it denied the appellant's third post conviction petition as successive writ barred instead of ordering a hearing , and require the state to enter its proof on the single issue of did the appellant commit the offense for which he is

incarcerated in Lauderdale County or not. Otherwise, he stands convicted, illegally sentenced, and falsely imprisoned by a court and county where he committed no offense. This is an error of fact and if allowed to go uncorrected, is in itself an injustice. This court must understand, as the record clearly shows, that the offense complained of in Oktibbeha County and the offense complained of in Lauderdale County is one in the same offense, not two separate offenses. This is an issue of fact and does affect the constitutionality of the appellant's sentence, successive writ not withstanding. The fact upon which this claim is made is that the appellant did not commit any offense or break any law in Lauderdale County, as the offense which is the essence of this case occurred in Oktibbeha County and was a one time event.

WHEREFORE, PREMISES CONSIDERED, the appellant pray that Jurist of reason will enter its decision based on the record before the court and what this record show and grant the following relief;

1. Reverse conviction and order appellant's immediate release, and return his $5000.00 cash bond with interest.
2. Reverse and remand for a hearing on the issue that the appellant committed no offense in Lauderdale County.
3. Order whatever relief that the court deems just as the appellant committed no offense or broke no law in Lauderdale County.

RESPECTFULLY SUBMITTED and forever will pray. This 10 day of December, 2008.

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 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 10 day of December, 2008.

Larry W. McKenzie

Larry W. McKenzie