

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT JOINER, JR.

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

NUMBER 2009-CA-00220-COA

BRIEF OF APPELLANT

APPEAL

CIRCUIT COURT, LAFAYETTE COUNTY

JAMES D. MINOR, SR.
POST OFFICE BOX [REDACTED]
OXFORD, MISSISSIPPI 38655-1670
(662) 607-1846
MISSISSIPPI BAR NUMBER [REDACTED]
ATTORNEY FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for ALBERT JOINER, JR., Appellant herein certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Hon. Andrew K. Howorth
Circuit Judge
P. O. Box
Oxford, MS 38655
(Trial Judge)

Hon. Ben Creekmore
District Attorney
Post Office Box 1478
Oxford, MS 38655
(District Attorney)

Hon. Mike Wall
Attorney at Law
Post Office Box 387
Oxford, MS 38655
(Defense counsel below)

Mr. James Ellis
Address unknown
Listed victim of an assault charged against Appellant
Cause LK2007-133

Albert Joiner, Jr.
Appellant
Mississippi State Penitentiary
No. 48109, Unit 29
Parchman, MS 38738
Formerly a resident of Oxford, Lafayette County

James D. Minor, Sr.
(Attorney for Appellant)
P. O. Box 1670
Oxford, MS 38655

James D. Minor, Sr.

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<i>Leatherwood v. State</i> , 473 So. 2d 964, 968 (Miss. 1984), reversed in part, affirmed in part 539 So. 2d 1378 (Miss. 1989).	13
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STATEMENT OF THE ISSUES

I. Whether Albert Joiner, Jr. was properly charged under Mississippi's Habitual offender Statute;

II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's Habitual offender Statute;

III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel

STATEMENT OF THE CASE

The Grand Jury of Lafayette County in its April 2007 term, returned a one count indictment against Appellant charging him with "Robbery" as a habitual offender, pursuant to Section 99-19-83, Mississippi Code of 1972, as amended (Excerpts Page 3). The Appellant signed a petition to enter a plea of guilty on October 18, 2007. The petition was to enter a plea to "strong armed robbery" (Excerpts page 5). The Court accepted Appellant's plea of guilty to the reduced charge pursuant to Section 99-19-81, Mississippi Code of 1972, as amended. Appellant was sentenced to a term of fifteen (15) years in an institution to be designated by the Mississippi Department of Corrections (Excerpts page 26).

On or about the 21st of May, 2008, the Petitioner, pro se, filed a petition for post-conviction collateral relief in the Circuit court of Lafayette County challenging his sentence and moving the Court to vacate and set aside the invalid habitual offender portion of his sentence in this case based upon the following grounds:

- 1) The court erred in convicting and sentencing petitioner as a habitual offender, on a constitutional [ly] invalid indictment, wherein the portion of [the] indictment charging him as a habitual offender followed the conclusion of the indictment which concludes with the words "against the peace and dignity of the state", a violation of Article 6, Section 169 of the Mississippi Constitution, and;

2) The Court erred in the sentencing phase of the Petitioner's case, wherein during the sentencing phase the court found petitioner to be a habitual offender, pursuant to MCA [Mississippi Code Annotated] 99-19-81, absent submitted evidentiary document proof from the State that Petitioner was, at the least, a twice convicted felon sentenced to a year or more in a State or Federal institution.

On or about July 8th, 2008, Appellant amended his petition to include the grounds of ineffective assistance of counsel. The basis of this claim was the failure of his counsel to object to the procedures described above.

ARGUMENT

I. Whether Albert Joiner, Jr. was properly charged under Mississippi's Habitual offender Statute

Appellant was charged with armed robbery in an indictment ending in the words, "against the peace and dignity of the state". In a paragraph after the charge being a "continuation" the Appellant was charged as a habitual offender. Through plea negotiations this charged was reduced to robbery, "strong arm robbery", as a habitual offender. Appellant contends that the portion of the indictment following the words "against the peace and dignity of the state" violates the provisions of the Mississippi Constitution of 1890, Article 6, Section 169. Appellant does not challenge his conviction but the sentence as a habitual offender.

II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's Habitual offender Statute

Assuming that the indictment properly charged the Appellant as a habitual offender, there was no documentation or evidence submitted as to the existence of any prior conviction. This sentence was pursuant to a plea agreement but Appellant was never questioned about his convictions. Consequently, the State failed to prove the existence of any prior convictions.

III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel

Appellant raises this argument but concedes that this argument would be moot if his grounds above state are valid. However he alleges that his attorney should have objected to the failure to prove the existence of alleged past felonies. This performance was deficient and further if his plea constituted a waiver, the performance of his attorney did prejudice him.

There were no objections made by trial counsel. However, the procedure was plainly error affecting Albert Joiner's Substantive and fundamental rights.

SUMMARY OF THE ARGUMENT

I. Whether Albert Joiner, Jr. was properly charged under Mississippi's Habitual offender Statute;

In his pro se petition for post conviction collateral relief the Appellant submitted as one of his grounds that:

This Court [trial court] erred in convicting and sentencing Petitioner as a habitual offender, on a constitutional invalid indictment, wherein the portion of [the] indictment charging him as a habitual offender followed the conclusion of the indictment which concludes with [the] words "against the peace and dignity of the state", a violation of Article 6, Section 169 of the Mississippi Constitution,...

Appellant was indicted along with one Christopher Paten with robbery with a deadly weapon, "an unknown hard object". The indictment (excerpts page 3) charges the taking of a certain amount of money, provides the name of the victim, and cites the applicable statute and the minimum and maximum sentences and concludes with the words, "against the peace and dignity of the State of Mississippi." The indictment also seems to include all the requirements of Rule 2.05, Miss. Crim. R. Cir. Ct. Prac (Rule 7.06, Uniform Circuit and County Court Rules). The indictment then goes on to recite "Continuation of the Indictment Against the Defendant Albert Joiner, Jr." This continuation alleges five (5) other felonies allegedly committed by Appellant. As will be noted later, no evidence of any of

these convictions was ever presented nor was Appellant specifically questioned about any of them. This addendum also concludes with the words, "against the peace and dignity of the State of Mississippi."

In the case before the Court the written indictment form did conclude with the cited words. However, the charging part of the indictment was in the second paragraph of the "indictment" and concluded with the constitutionally prescribed words. There follows language referring to a continuation of the indictment and seven paragraphs alleging and setting forth other convictions and concluding again with the words, "against the peace and dignity of the State of Mississippi."

It would appear to be settled law in this state that the indictment must conclude with the language mandated by our constitution, Article 6, Section 169. *Love v. State*, 8 So. 465 (Miss.1891), and *Clingan v. State*, 135 Miss 621, 100 So. 185 (Miss 1924). The precise issue of those cases is not presented here since the "indictment" did end with language in dispute.

In a case more similar to the facts in this case, the Supreme Court dealt with a case where the issue of notice of the charges was not an issue as in the case before the Court. In *NcNeal v. State*, 658 So. 2d 1345 (Miss.1995) the court observed that the indictment there complied with Rule 2,05 of the Miss. Crim. Rules Cir. Ct Prac [Rule 7.06, Uniform Circuit and County

Court Rules], in setting forth the elements to be included in the indictment:

- (1) The name of the accused;
- (2) The date on which the indictment was filed in each court;
- (3) A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
- (4) The county and judicial district in which the indictment is brought;
- (5) The date and if applicable the time, on which the offence was alleged to be committed. Failure to state the correct date shall not render the indictment insufficient;
- (6) The signature of the foreman of the grand jury issuing it; and
- (7) The word "against the peace and dignity of the state".

(658 So. 2d at 1349) The *McNeal* Court then went on to analyze the case in light of § 169 of the Mississippi Constitution of 1890.

In the *McNeal* case the Court was confronted with facts that indicated that the words "against the peace and dignity of the state" preceded the habitual offender portion of the indictment. Here the words "against the peace and dignity of the state" appear at the end of the charging part of the indictment and again after a recitation of other offenses allegedly committed by Appellant. The Appellant would show unto this Court that his indictment ended after the charge of "robbery" and the concluding words "against the peace and dignity of the state". See *McNeal*, 658 So. 2d at 1350.

Appellant does not challenge his conviction but does urge that this court remand for sentencing without the habitual offender status, *Osborne v. State*, 404 So. 2d 545, 548, (Miss. 1981).

II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's Habitual offender Statute;

Assuming the validity of the indictment, the State would still have to set forth evidence of the prior convictions. In *Short v. State* 420 So. 2d 929 Miss. Ct.App. 2006), the defendant there claimed that the lower court had improperly sentenced him as a habitual offender. As here the criminal defendant was charged under § 99-19-81 Miss Code Ann 1972 as amended which states:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times 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.

The burden of proof of all elements of a crime and habitual offender status is upon the State. In *Vince v. State*, 844 So.2d 510, 518 (¶ 25) (Miss Ct. App 2003) this court said, citing *McIlwain v State*, 700 So. 2d 586, 589 (¶ 13) Miss 1997):

We have regularly upheld sentences under the habitual criminal statutes where the proof of prior convictions was made by certified copies of the judgments of conviction. *This accords with the basic principle that the best evidence of a conviction is the judgment of conviction.*

Short, 844 So. 2d at 518 (§ 25). The Court went on to observe in that same paragraph that prosecutors would do well to not use "remote and less reliable methods of proof".

This Court in *Vince v. State* went further saying that the State is not limited only to certified copies. Pen packs showing the defendant's prior convictions would also be sufficient, citing *Frazier v. State, 907 So.2d 985, 991 (§ 16) (Miss. Ct. App. 2005)*. In addition the defendant's in-court admission of prior felony convictions has been found sufficient to support the habitual offender status, citing *Sanders v. State, 786 So.2d 1078, 1082 (§ 14) (Miss. ct. App. 2001)*.

However, in *Evans v. State, 988 So. 2d 404 (Miss, Ct. App. 2008)* while this court observed that the defendant in that case had pled guilty and therefore a lesser degree of proof was required this court said:

The trial court must have before it "enough [evidence] that the court may say with confidence the prosecution could prove the accused guilty of the crime charged [.] *Corley v. State, 585 So.2d 765, 767 (Miss. 1991)*. Further, a defendant's own admission may suffice for the factual basis. Id.

988 So. 2d. at 406 (§ 10). This Court also reproduced some of the plea Colloquy in that case:

TRIAL COURT: Tell me what--you have several, three prior convictions, felony convictions that I am aware of. Are there more than that?

EVANS: Yes sir.

TRIAL COURT: How many total?

EVANS: Your Honor, I really don't know, to be honest.

TRIAL COURT: Do you have other felony charges pending other than what we're taking care of here today?

EVANS: No Sir, this is it.

988 So. 2d. at 406 (¶ 11). This Court also then added that the trial court in that case then questioned the defendant as to whether each prior conviction charged in the indictment was true. He responded that each was true.

In the case presently before the Court the applicable portion of the plea colloquy reads as follows:

TRIAL COURT: And in each of these two cases also are you telling me that you realize and understand that you qualify for habitual offender status and that you're going to be sentenced, if the Court accepts your guilty plea, as what we call a lesser habitual offender which will mean that the time that you receive you will have to serve day-for-day? Do you understand that?

JOINER: Yes, Sir. (Excerpts page 17)

There was no evidence given relative to Appellants prior convictions. Additionally, the Appellant himself was never questioned about them specifically and individually. There is no evidence as to whether he was twice previously convicted, that the charges were separately brought and arising out of the

separate incidents at different times or his sentences. In Short there was no proof presented consistent with the requirements of Miss. Code Ann 1972 § 99-19-81 as amended.

III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel

Appellant has alleged in his Petition ineffective assistance of counsel. This claim is based upon his trial counsel's allowing the plea to go forward without proof or evidence of prior convictions to support enhanced punishment. Under *Vince v. State* cited above this Court prior rulings make it clear that if his sentencing was flawed then his ineffective assistance of counsel claim is moot. This court in the *Vince State* case said:

Our decision to reverse and render on the propriety of sentencing Vince as a habitual offender renders moot another aspect of Vince's claim that he received ineffective assistance of counsel. Vince argued in his brief that his attorney's failure to oppose the introduction of the NCIC report on hearsay grounds rendered counsel's performance ineffective when measured against the level of competency guarantee him by the Sixth Amendment. Having decided the question of sentencing as a habitual offender in Vince's favor on other grounds, we need not consider that claim on the merits.

Vince v. State, 844 So.2d 510, 518 (§ 26).

However, to preserve this ground should any waiver of rights be found in the plea by Appellant he does show unto the

Court that Appellant was sentenced as a habitual offender with insufficient evidence being presented to support the sentence therefor.

A criminal defendant with charges of the nature faced by Appellant has a right to counsel as granted by the State and Federal constitutions. *Gideon v. Wainwright*, 372 U. S. 335, 23 S. Ct 792, 91 L. Ed 2d 799 (1963); *Argersinger v. Hamlin*, 497 U. S. 25, 92 C. Ct. 2006, 32 L. Ed. 2d 530 (1972).

Appellant here was appointed an attorney and later had retained counsel.¹ In 1984 the United States Supreme Court handed down a decision in the case of *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This decision set forth the standards to be applied to judge the effectiveness of counsel. This test is a two pronged one adopted by this Court in *Alexander v. State*, 605 So. 2d 1170, 1173 (Miss. 1992) and several other cases. *Strickland* requires (1) the showing of the deficiency of counsel's performance and (2) that it was sufficient to constitute prejudice to the defendant. The burden of demonstrating that both prongs have been met falls upon the defendant. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1984), reversed in part, affirmed in part 539 So. 2d 1378 (Miss. 1989). There is a strong but rebuttable

¹ The Appellant had just recently retained counsel but is submitted that the time of hiring of counsel does not diminish the responsibilities set forth for affective assistance on a point of law.

presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Appellant here must also show that there is a reasonable probability that but for this counsel's actions he would have received a different result in his sentencing before the trial court, *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992).

The record before this Court shows that there was no evidence of the existence of the felonies as charged by the indictment nor any admission by Appellant to the existence and validity of the felonies alleged to have been committed. The record fails to show any objection to the proceedings below.

The Appellant has therefore shown that counsel should have seen to it that all elements of the crime or elements to support a sentence should have been shown by the State. Secondly, if objection had been made Appellant could not have been sentenced as a habitual offender under the facts in the record. The facts show the ineffective assistance of counsel, *Strickland v. Washington*, *supra*.

Both the State, Article 3 Section 14 of the Mississippi Constitution and the United States Constitution, Amendment 14, would guarantee the Appellant Due Process and the Equal Protection of the laws. The Court below erred in not setting aside the habitual designation in Appellant's sentence.

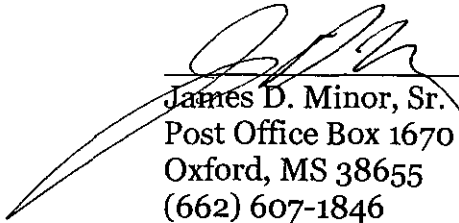
Counsel for Albert Joiner, Jr. did not object to the sentencing but such an omission by the lower court was plain error, *Gray v. State*, 549 So.2d 1316 (Miss. 1989). The omission was a "manifest Miscarriage of Justice" affecting "Substantive/fundamental rights", *Lawrence v. State*, 928 So.2d 894, 897 (¶ 10) (Miss. Ct. App 2005). In order for Appellant to prevail this court would need to find:

(1) that there was error ...; (2) that the error resulted in a manifest miscarriage of justice; and (3) that the error affected one of ... [Joiner's] substantive or fundamental rights.

928 So. 2d at 897 (¶ 10). Albert Joiner would submit: (1) that failure to prove the prior convictions was error; (2) the failure created a miscarriage, a habitual sentence, without the factual basis; and (3) that Appellant's liberty after serving his sentence is a substantive or fundamental right.

CONCLUSION

Because of the failure to include a charge in the indictment as a habitual offender and the failure to allege the conviction along with the failure to prove or to obtain admissions to the prior felonies alleged this case should be remanded for re-sentencing pursuant to *Ellis v. State*, 520 So. 2d 595 (Miss. 1988). The State "has being given one fair opportunity to offer whatever proof it could assemble", *DeBussi v. State*, 453 So. 2d 1030. 1033 (Miss. 1984) citing *Burks v. United States*, 437 U. S. 1, 15-16, 985 S. Ct. 2141, 2149, 57 L. Ed 2d 1 (1978). Furthermore, the State should therefore be prohibited from introducing any new evidence to establish Appellants status as a habitual offender. Furthermore, the State should therefore be prohibited from introducing any new evidence to establish Appellants status as a habitual offender, to do otherwise would be a violation of the Mississippi Constitution of 1890, Article 3, Section 22 and United States Constitution Amendment Five.



James D. Minor, Sr.
Post Office Box 1670
Oxford, MS 38655
(662) 607-1846
MSB # [REDACTED]

CERTIFICATE OF SERVICE

I, James D. Minor, Sr., attorney for Appellant, Albert Joiner, Jr. certify that I have this day mailed a true and correct copy of Appellant's Brief by United States Mail, postage prepaid, to the following person at the addresses listed:

Hon. Andrew K. Howorth
Circuit Judge
P. O. Box
Oxford, MS 38655

Hon. Ben Creekmore
District Attorney
Post Office Box 1478
Oxford, MS 38655

Albert Joiner, Jr.
Mississippi State Penitentiary
No. 48109, Unit 29
Parchman, MS 38738

This 30th day of April, 2009


James D. Minor, Sr.

CERTIFICATE OF SERVICE

I, James D. Minor, Sr., attorney for Appellant, Albert Joiner, Jr. certify that I have this day mailed a true and correct copy of Appellant's Brief in Case No. 2009-CA-00220-COA by United States Mail, postage prepaid, to the following person at the addresses listed:

Hon. Andrew K. Howorth
Circuit Judge
P. O. Box
Oxford, MS 38655

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

Hon. Ben Creekmore
District Attorney
Post Office Box 1478
Oxford, MS 38655

Albert Joiner, Jr.
Mississippi State Penitentiary
No. 48109, Unit 29
Parchman, MS 38738

This ^{15th}~~30th~~ day of ^{May}~~April~~, 2009


James D. Minor, Sr.