IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT JOINER, JR. **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

NUMBER 2009-CA-00222-COA

REBUTTAL BRIEF OF APPELLANT

APPEAL

CIRCUIT COURT, LAFAYETTE COUNTY

JAMES D. MINOR, SR.
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III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel

SUMMARY OF THE ARGUMENT

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

The authorities cited by the state do support the validity of the indictment returned against Appellant for felony flight. The issue is whether that count of the indictment also charges him as a habitual offender. The charging portion of the indictment ends with the words "against the peace and dignity of the state" as mandated by Mississippi Constitution of 1890 Article 6, Section 169. However there is no reference in that count or subsequently in the indictment as amended that charges him as a habitual offender.

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

Though the record below refers to habitual offender status there was no documentation or evidence submitted as to the existence of multiple prior convictions committed at separate times that included a year or more sentences. Since this or any appellate court is bound by the record before it, Appellant's conviction as a habitual offender should be reversed.

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

The trial level attorney should have objected to the failure to prove the existence of alleged past felonies. This performance was deficient and further if the plea constituted a

waiver, the performance of Appellant's attorney did prejudice him.

ARGUMENT

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

The States cites the cases of *Jones V. State, 878 So. 2d 254 (Miss. App., 2004); Foster v. State, 716 So.2d 538, 539 (Miss. 1998)* and *Brandau v. State, 662 So. 2d 1051, 1054-55 (Miss. 1995)* for the proposition that Appellant waives his rights relative to being sentenced as a habitual offender under the indictment. However, no irregularity in the indictment itself is alleged only that it does not charge the Appellant as a habitual offender.

The State also cites *Elliott v. State, 993 So. 2d 397 , 398 (Miss. App. 2008)*. In Elliot the Court stated:

> First, we note that by entering a voluntary plea of guilty, Elliot has waived any defects with respect to the indictment against him. In most cases, "[a] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial." *Banana v. State, 635 So, 2d 851, 853-54 (Miss. 1994) (quoting Anderson v. State, 577 So. 2d 390, 391 (Miss. 1991)*. The only two exceptions to this rule are if the indictment fails to state an essential element of the crime charged or if there exists no subject matter jurisdiction.

635 So. 2d at 853,54.

The indictment in the case sub judice charges the Defendant with felony flight but not felony flight as a habitual offender which is a necessary element to support

sentence as a habitual offender. The count of the indictment previously charging this offense, Count 2, had been dismissed.

Under the facts of this case, *Buford v. State, 756 So. 2d 815, 816 (¶4) (Miss. Ct App. 2000) has* no application.

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

The State cites *Evans v. State, 988 So. 2d 404, 405-06,* a case relying upon *Vince v. State, 844 So.2d 510, (Miss. Ct. App. 2003)* for the proposition that there is a distinction in the level of proof between a case that goes to trial and one that results in a plea of guilty. The reliance is valid so long it is seen as a matter of degree only. The State still has the burden of proof through the proof could come through the defendant.

To support its argument the State cites from the plea colloquy the following:

COURT: Mr. Joiner, in Cause Number LK07-133, the Court has before it a petition to enter a plea of guilty as a lesser habitual offender to the crime of strong armed robbery. Is that Correct?

DEFENDANT: Yes sir.

COURT: And in Cause Number LK07-399, which is, of course, also the State of Mississippi versus Albert Joiner, Jr., I have a petition to enter a plea of guilty to the crime of felony fleeing of

a law enforcement officer as a lesser habitual offender. Is that also correct?

DEFENDANT: Yes sir.

[Plea colloquy, Record Excerpts page 12, hereinafter (Exc. P.__).]

COURT: Did your attorney go over all the elements of the crimes that you're pleading guilty to with you and are you telling me that you're guilty of all of those elements?

DEFENDANT: Yes sir.

COURT: Are you telling me then that you are, in fact guilty of the crime of felony fleeing of a law enforcement officer, as well as strong armed robbery?

DEFENDANT: Yes Sir.

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 you receive you will have to serve day-for-day? Do you understand that?

DEFENDANT: Yes sir.

[Exc. AT 16-17]

COURT: Now, if the Court accepts your guilty plea in these two cases, they also will go on your record and they will be added to the felonies you already have on your record. You already qualify as a habitual offender, and you will continue to qualify as a habitual offender. Once you get out of the penitentiary, any other felony you're charged with, you can take these charges as well as your other prior felonies, and use them against you to make your punishment worse, to enhance it. Do you understand what I'm telling you?

DEFENDANT: Yes sir.

COURT: I except to receive a recommendation in your case, and that's going to be that the Court sentence to you to habitual time. It's 15 years to serve in one case and 4 years to serve in the other case consecutive for a total of 19 years

> which will be served as a habitual offender day-for-day. Do you understand that recommendation?

(Exc. P. 18) (ALL EMPHASIS ADDED BY APPELLANT)

There are no general or specific references in the plea colloquy to any particular prior felonies or sentences. That fact distinguishes the case before the Court from *Jones v. State, 747 So.2d 249 (Miss. 1999)* wherein the Supreme Court observed:

> …, the order accepting the guilty plea states that Jones was sentenced as a habitual offender. Jones admitted the fact that there were two previous felonies. The record reflects that Jones was convicted of two previous felonies arising out of two separate incidents, and sentenced to a term of one or more years.

747 So.2d at page 252. Here the record does not reflect that Joiner admitted to any prior felonies nor does it reflect that they, if any, arose from separated incidents and that he was sentenced to a term of one of more years.

It is also worthy of note, in response to the Brief of Appellee, page 7, that Appellant's Petitions to enter pleas in the lower court in this and a companion case do not support the habitual offender status as shown by the petition in this case, Excerpts page 9 and in the companion case wherein an unsworn petition constitutes the record. In any event the petitions do not show that he was convicted of "felony or federal crime upon the charges separately brought and arising out of separate

incidents at different times and who shall have been sentenced to and served separate terms…" Miss. Cod Ann (1972) § 99-19-83. The Appellant never admitted to previous felony convictions of grand larceny, simple assault on law enforcement officer, attempted armed robbery, and burglary nor specific sentences for the alleged crimes. This might have been true if the Appellant had been specifically queried and asked the other questions to establish the record required by Sections 99-19-81 and 99-19-83 but he was not asked.

While the courts of this state have allowed admissions of a criminal defendant who has pled guilty to establish habitual status, *Corley v. State, 585 So.2d 765 (Miss. 1991); Short v. State, 929 So.2d 426 (Miss. Ct App. 2006); and Sanders v. State, 786 So.2d 1078, 1082 (¶14) (Miss. Ct. App. 2001)*, these cases seem not to rely upon the admission by a defendant that he is a habitual offender but that he has committed the requisite felonies in the circumstance envisioned by Miss. Code Ann. § 99-19-81.

Appellant would reiterate that there was no evidence given relative to Appellants prior convictions, if any. Additionally, the Appellant himself was never questioned about them specifically and individually. There is no evidence as to whether he was twice or more previously convicted, that the charges were separately brought and arose out of the separate

incidents at different times or his sentences that might have been received. In Short there was no proof presented consistent with the requirements of Miss. Code Ann 1972 § 99-19-81 as amended. Since there was no admission by the Appellant on the record and the document relied upon by the State in its brief was not completed this conviction should be reversed, *Taggart v. State, 957 So.2d 981 ¶23(2007).*

There is circumstantial evidence to support the argument of the State. However, Appellant would suggest that this court not surmise and "not consider matters that do not appear in the record", *Pulphus v. State, 782 So.2d 1220 ¶15 (2001).* Appellant also notes that the record indicates that he was sentenced in the Courthouse where any records of any previous convictions were stored and the failure of the prosecution to present them is inexcusable.

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

The State has cited *Smith v. State, 636 So.2d 1220 (Miss. 1994)* to argue that Appellant's petition contradicts the record in this case and *Ford v. State, 708 So.2d 73 (Miss. 1998)* to argue that "the record clearly belies every allegation" made by Appellant (Brief of Appellee, page 9). Not only does the record support that the Appellant was never questioned about prior

conviction nor were any records presented to show these convictions, but the record shows that his replacement counsel had not had time to enter an appearance in his case:

BY MR. WALL: I need to bring out one thing, your honor.

BY THE COURT: All right.

BY MR. WALL: Mr. Levidiotis was court-appointed to represent Mr. Joiner, and I have just recently been retained to represent him and have not filed a formal entry of appearance. Given the magnitude of this, you might need to get that on the record that he has retained me and I am, in fact, his attorney of record.

BY THE COURT; All right. You had court-appointed counsel, Mr. Levidiotis, correct?

DEFENDANT: Yes sir.

There was the failure to object to the indictment insofar as it is alleged to support a habitual sentence, and to the sentence issued without proof of the prior felonies. If either of the above would have supported a reversal but is deemed waived by Appellant then he has met the test of *Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. This decision set fort 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 the existence of the prongs of the *Strickland v. Washington* decision falls upon the Appellant here. The record before this Court shows that there was no evidence of the existence of the felonies as charged by the indictment or 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 burden of Appellant going forward should not be confused with the State's burden to document habitual offender status. "[T]he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble', *Ellis v. State, 520 So. 2d 595, 496 (Miss. 1988)*.

CONCLUSION

Because of the failure to include a charge in the indictment as a habitual offender and the failure to prove or to obtain admissions to the prior felonies alleged and that any such felony was based upon charges separately brought and arising out of separate incidents at different times that also required sentences over separate terms, this case should be remanded for re-sentencing, *Ellis v. State, 520 So. 2d 595 (Miss. 1988).*

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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 Rebuttal Brief by United States Mail, postage prepaid, to the following person at the addresses listed:

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This 21st day of October, 2009

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