IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES MEDLIN — APPELLANT

VS. — NO. 2009-CP-0360-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE CASES

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VS. **NO. 2009-CP-0360-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On November 7, 2005, James Lewis Medlin, "Medlin" was tried for aggravated assault by a Marshall County Circuit Court jury. C.P. 7. He was found guilty and given a twenty years with five years suspended sentence in the custody of the Mississippi Department of Corrections. C. P. 7.

On May 29, 2008, Medlin filed a pro se motion entitled, "A Motion To Clarify Sentence." C.P. 1-5. The trial court denied relief. C.P. 15.

Mr. Medlin filed an appeal to the Mississippi Supreme Court. C.P. 17.

ISSUES ON APPEAL

I.

WAS MEDLIN PROPERLY SENTENCED?

II.
WAS MEDLIN ENTITLED TO RELIEF?

STATEMENT OF THE FACTS

In the November 2004 term, Medlin was indicted for "aggravated assault" of Mr. Bobby Neal Mannis by a Marshall County Grand Jury. This was the alleged result of Medlin's "running over" the victim with an automobile and as a result of these actions he did "knowingly cause bodily injury" to Mr. Mannis on or about August 25, 2004. C.P. 6.

On November 5, 2005, Medlin was tried for aggravated assault by a Marshall County Circuit Court jury. C.P. 7. He was found guilty and given a twenty years with five years suspended sentence in the custody of the Mississippi Department of Corrections. C. P. 7.

On May 29, 2008, Medlin filed a pro se, " Motion To Clarify Sentence." C.P. 1-5.

In Medlin's "Motion To Clarify Sentence," he stated that he believed that "the sentence exceeds the maximum authorized by law." C. P. 1-4. He believed he was sentenced under "the domestic violence" statute, M. C. A. Sect. 97-3-7, sub-section (4) rather than 97-3-7, sub-section (3). Under sub-section (3) the maximum sentence for simple assault is "ten years." Under sub-section (4) there is a "twenty year" maximum sentence for an aggravated assault conviction. C. P. 1-2. See M. C. A. Sect 97-3-7.

In the "Corrected Order Sentencing" in the record, the trial court stated that Medlin had been found guilty of "the charge of aggravated assault" on the 19th day of May, 2005. Medlin was given a twenty years with five years suspended sentence. C.P. 7. The certified copy of the notice of

criminal disposition in the record excerpts states that Medlin was found guilty of "aggravated assault." R.E. 1.

After reviewing the motion, and the record, the trial court denied relief, finding no merit to Medlin's claim. C.P. 15.

Medlin filed a pro se appeal to the Mississippi Supreme Court. C.P. 17.

SUMMARY OF THE ARGUMENT

1. The record reflects that Medlin was indicted for "aggravated assault" under M. C. A. Sect. 97-3-7. The caption on the indictment clearly stated "Aggravated Assault." C.P. 6. The indictment included the specific facts which constituted the charge. These facts were that Medlin allegedly did "knowingly cause bodily injury" by "running over" the victim, Mr. Manis, with "a vehicle, a deadly weapon" on or about August 25, 2005. C.P. 6.

While the indictment included "97-3-7(3)" instead of "97-3-7(4)," the other information on the indictment was sufficient for indicating that (3) was "a scrivener's error." **McKenzie v. State**, 856 So. 2d 344, 352 (¶24) (M.A. 03).

The sentencing order and criminal disposition order indicated that Medlin was found guilty of "aggravated assault." C.P. 7; R.E. 1.

There were no affidavits filed with Medlin's Motion. C.P. 1-5. And there was no claim or evidence in support of any claim indicating a contemporary objection by Mr. Medlin to his sentence on any basis, much less on the grounds claimed in his appeal.

The Court lacked authority to alter Medlin's sentence after the term of court in which he was sentenced had expired. **Robinson v. State** 849 So.2d 157, 158 (¶3-4) (Miss. App. 2003)

ARGUMENT

PROPOSITION I

THE RECORD INDICATES THAT MEDLIN WAS PROPERLY SENTENCED.

In Medlin's pro se "Motion To Clarify Sentence," he stated that he believed that he was improperly sentenced. He believed he was mistakenly sentenced under M. C. A. Sect. 97-3-7 (4) rather than M. C. A. Sect. 97-3-7(3). Under sub-section (3) for simple assault the maximum sentence is "ten years," rather than "twenty years." Twenty years is what is specified by statute for "aggravated assault" under sub-section (4). C.P. 1-5.

See M. C. A. Sect 97-3-7, "the Domestic Violence Statute," that defines the elements for both simple and aggravated assault. The record reflects that Medlin was indicted for "aggravated assault" under M. C. A. Sect. 97-3-7. The caption on the indictment clearly stated "Aggravated Assault." C.P. 6.

The indictment included the specific facts which constituted the aggravated assault charge. This included the fact that Medlin did "knowingly cause bodily injury" by "running over" the victim, Mr. Bobby Neal Mannis, with "a vehicle, a deadly weapon" on or about August 25, 2005. C.P. 6.

In **McKenzie v. State**, 856 So. 2d 344, 352 (¶24) (M.A. 03), the court found "a scrivener's error" was not sufficient for invalidating the appellant's indictment. While the indictment included "97-3-7(3)" instead of "97-3-7(4)," the other information on the indictment was sufficient for indicating that the "(3)" was "a scrivener's error." This information included the caption, the specific statement of the facts, and the applicable "no more than twenty year sentence." C.P. 6.

There were no affidavits filed with Medlin's motion. C.P. 1-5. There were no affidavits

from Medlin, or his trial counsel who would have been present during his trial and sentencing. Nor was there any statement of "good cause why" these affidavits could not have been obtained. See M. C. A. Sect. 99-39-9(1)(d) and (e).

And there was no claim or evidence in support of a claim indicating any contemporary objection by Mr. Medlin to his sentence.

In **Robinson v. State** 849 So.2d 157, 158 (¶3-4) (Miss. App. 2003), the court found the trial court that imposed a sentence "does not have authority to reduce a sentence after the term expires."

> ¶ 3. There are two ways in which a criminal may challenge a trial court proceeding: (1) a direct appeal, or (2) a proceeding under the Post-Conviction Relief Act. Robinson is not directly appealing his conviction, nor would a petition for post-conviction relief be applicable due to the nature of the relief Robinson seeks. Robinson is seeking a reduction of his sentence.
>
> ¶ 4. Robinson is incorrect in his assertion that a judge has authority to reduce a sentence even if a judge does not have power to vacate a sentence after the term expires. A reduction or reconsideration of a sentence by a judge must occur prior to the expiration of the sentencing term. **Harrigill v. State**, 403 So. 2d 867, 868-69 (Miss.1981). The power to reduce the sentence after the expiration of the term is vested in another branch of the government. The trial judge was correct to deny the request.

In **Harrigill v. State** 403 So.2d 867, 869 (Miss. 1981), the Supreme Court found that after the term of court in which a prisoner had been sentenced had expired, the authority to reduce his sentence was non-existent. The remedy after this time period would be through the executive branch of government.

> The only avenue of relief available for people incarcerated is through the executive branch of our government, unless there is some statutory or constitutional right being violated, in which latter event to address the appropriate court by an appropriate original proceeding. Following conviction and final termination of a case, however, neither the circuit court nor this Court has power to simply review a case and decide whether or not the original sentence should be amended in any way. Any attempt to do so is a nullity. See **State v. Dunn**, 111 N.H. 320, 282 A.2d 675 (1971); **Hulett v.**

State, 468 S.W.2d 636 (Mo.1971); **People v. Fox**, 312 Mich. 577, 20 N.W.2d 732 (1945), 168 A.L.R. 703; 24B C. J. S. Criminal Law s 1952(7).

The record reflects that the trial court denied relief, finding no merit to Medlin's claims for relief. C.P. 15.

> The court considered the relief requested in the document, treating the document as a motion for post conviction relief. **After reviewing the document filed by the petitioner, as well as the court file in this case, and considering all matters in a light most favorable to the petitioner, the court is of the opinion the requested relief is not well taken and hereby denied.** C.P. 15. (Emphasis by appellee).

In **Jenkins v. State** 888 So.2d 1171, 1174 (¶8) (Miss. 2004), the Mississippi Supreme Court found that the where there is substantial doubt about which statute applies then the court should impose the sentence with the lesser punishment.

> ¶8. Jenkins contends that his indictment referenced no particular code section and that he should have been sentenced under the statute with the lesser sentence. Generally, when facts constituting an offense may violate two or more statutes or, where there is substantial doubt as to which statute applies, then a sentencing court must apply the statute which imposes the lesser punishment. **Beckham v. State**, 556 So. 2d 342, 343 (Miss.1990). The State is not obligated to prosecute under the statute with the lesser penalty but may choose to proceed under either statute so long as the choice is clear and unequivocal. **Cumbest v. State**, 456 So.2d 209, 222 (Miss.1984).

However, as stated above, the record in the instant cause indicates in the indictment was for "aggravated assault," as indicated both by the caption at the top of the indictment, as well as by the statement of the facts which constituted the nature of this felony. These facts included "running over" the victim with "a vehicle, a deadly weapon," so as to "knowingly cause bodily injury." C.P. 6. The indictment for aggravated assault included on the front page a statement of the applicable "not more than twenty years" maximum sentence.

In the "Corrected Order Sentencing" in the record, the trial court stated that Medlin had been found guilty of "the charge of aggravated assault" on the 19th day of May, 2005. C.P. 7.

The certified copy of "the notice of criminal disposition" in the record excerpts states that Medlin was found guilty of "aggravated assault." R.E. 1.

Therefore, the appellee would submit that there was no ambiguity in the indictment as to the type of felony with which Medlin was charged under the domestic violence statute. There was no ambiguity as to the applicable "not more than twenty year" sentence for a conviction for aggravated assault under the domestic violence statute. And there was no ambiguity in the sentencing order which indicated that Medlin was found guilty of "aggravated assault" by a Marshall County jury on May 19, 2005. C.P. 7.

The error, as indicated , on the indictment was the typographical error in the statement of the code sub-section which followed the heading in capital letters, "Indictment: Aggravated Assault." C.P. 6. However, following the typographical error, was the following statement of the applicable maximum sentence, "(nm 20 years)." This indicates that the maximum sentence for the applicable subsection of the domestic violence statute was subsection (4). This is the subsection which states the elements for aggravated assault, which includes the inflicting of bodily harm of on a husband, wife, or member of one's household.

In **McKenzie v. State** 856 So.2d 344, 353 (Miss. App. 2003), the court found no cruel and unusual punishment where sentence was within "the term provided by statute."

> ¶ 34. Sentencing is generally within the sound discretion of the trial judge and the trial judge's decision will not be disturbed on appeal if the sentence is within the term provided by statute. **Davis v. State**, 724 So.2d 342, 344(¶ 10) (Miss.1998). In most instances, this means that a trial judge's sentencing decision has traditionally been treated as not reviewable so long as the sentence was within the statutory limits. As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal. **Wallace v. State**, 607 So.2d 1184.

For these reasons, the appellee would submit that the trial court correctly denied relief on Mr. Medlin's motion.

This issue is lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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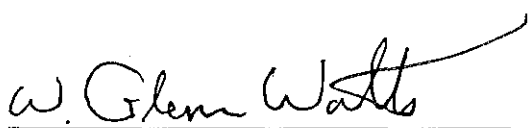
This the 12th day of November, 2009.



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