

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOE LOUIS AMERSON, JR.

APPELLANT

VS.

NO. 2009-CP-0389-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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PROCEDURAL HISTORY:

On August 26, 2004, Joe Louis Amerson, Jr., “Amerson,” pled guilty to robbery as a habitual offender before the Circuit Court of Lauderdale County, the Honorable Larry E. Robertson presiding. R. 104. After advising and questioning Amerson, the trial court found his guilty plea was “a free and voluntary decision to take the best option available to him.” R. 130-131. Amerson was given a fifteen year sentence as an habitual offender in the custody of the Mississippi Department of Corrections. C.P. 131.

In January 16, 2009, Amerson filed a pro se motion for post conviction relief. C. P.3- 43. The trial court denied relief. The court found that Amerson was barred by the three year statute of limitations, and that his petition, including his claim of an unlawful sentence, was lacking in merit. C.P. 133-138.

From that conviction, he appealed to the Mississippi Supreme Court. C.P. 139.

ISSUES ON APPEAL

I.

WAS AMERSON'S PETITION TIME BARRED?

II.

DID AMERSON QUALIFY FOR AN EXCEPTION UNDER M. C.A. SEC. 99-39-5(2) OR BECAUSE OF AN ALLEGED UNLAWFUL SENTENCE?

STATEMENT OF FACTS

In the March term, 2004, Amerson was indicted as an habitual offender by a Lauderdale County Grand jury. C.P. 44-45. He was indicted for robbing Ms. Nichole Hunt, an employee of a Super Stop convenience store, on July 11, 2003. The indictment included an enumerated specific statement of Amerson's seven prior convictions for which he had served more than one year in prison. This included two felonies convictions in Mississippi, as well as five felonies from the state of Florida. C.P. 44-45.

On August 26, 2004, Amerson pled guilty to robbery as a habitual offender before the Circuit Court of Lauderdale County, the Honorable Larry E. Roberts presiding. C.P. 104-131. Amerson was represented by court appointed counsel, Mr. E. Pat Jordan. R. 104. After advising and questioning Amerson, and his counsel, the trial court found that his guilty plea was voluntarily and intelligently entered. R. 130. Amerson was given a fifteen year sentence as an habitual offender in the custody of the Mississippi Department of Corrections. C.P. 131.

In January 16, 2009, Amerson filed a pro se motion for post conviction relief. C. P. 2- 43. Amerson claimed that he had an unlawful sentence. It was alleged unlawful because one of his prior felony convictions occurred before the enactment of the 99-19-83 in 1977. The trial court of Lauderdale County, the Honorable Lester F. Williamson, Jr., denied relief, finding that Amerson was barred by the three year statute of limitations. The Court also found that the claims for relief in his petition, including a claim of

an alleged unlawful sentence, were lacking in merit. C.P. 133-138.

From that denial of relief , Amerson appealed to the Mississippi Supreme Court. C.P. 139.
Appellant's brief page 1-7.

SUMMARY OF THE ARGUMENT

I.

THE RECORD REFLECTS THAT AMERSON WAS TIME BARRED UNDER 'THE UPCCRA.'

The record reflects that the trial court correctly found that Amerson was time barred. C.P. 133-138. He was procedurally barred by the provisions of the Mississippi Uniform Post Conviction Collateral Relief Act, "the UPCCRA." On August 26, 2004, Amerson pled guilty with the benefit of counsel and was sentenced to fifteen years as an habitual offender. C. P. 104-131.

On January 16, 2009, Amerson filed a pro se motion for post conviction relief with the trial court. C. P. 3-43. This was clearly not "within three years after entry of his judgment of conviction." See M. C. A. 99-39-5 (2).

Therefore, the appellee would submit that trial court correctly found that Amerson's petition was procedurally barred.

II.

THE RECORD REFLECTS THAT AMERSON DID NOT QUALIFY FOR ANY EXCEPTION UNDER THE UPCCRA NOR WAS THERE EVIDENCE OF AN UNLAWFUL SENTENCE.

In Amerson's pro se petition, he did not claim or provide any basis for finding that he qualified for any specific exception to the three year statute of limitations. Motion page 3-43. Amerson claimed he had an alleged "unlawful sentence" because one of his Mississippi convictions was "out dated," meaning it occurred before 1977, the date of the enactment of the enhanced sentencing statutes. See 99-19-83) annotations. C.P. 7.

However, the record reflects, as noted by the trial court, that Amerson had more than enough prior convictions, five combined felonies in Mississippi and Florida that he admitted under oath to having, for which he served more than one year to qualify for enhanced sentencing. One of those felonies was for a

crime of violence. C.P. 44-45; 133-138.

In addition a reading of the enhanced sentencing statute and annotations provides no basis for drawing any distinction between convictions that occurred before or after the enactment of the statutes at issue for habitual offender status, i.e. M. C. A. Sect. 99-19-81 , and Sect. 99-19-83. Rather the statute distinguishes the prior convictions on the basis of their having been committed prior to the felony for which a recidivist has been indicted.

ARGUMENT
PROPOSITION I

**THE RECORD REFLECTS THAT AMERSON WAS
PROCEDURALLY BARRED UNDER THE UPCCRA.**

The record reflects that Amerson pled guilty as an habitual offender voluntarily and intelligently before the Circuit Court of Lauderdale County on August 26, 2004 with the benefit of counsel, Mr. E. Pat Jordan. C.P. 104. After he and his counsel had been advised and questioned by the trial court in a lengthy guilty plea proceeding, Amerson's plea was accepted as voluntarily and intelligently entered. C.P. 130. He was sentenced to receive a fifteen year sentence as an habitual offender. C.P. 131.

The record reflects that Amerson admitted to taking \$145.00 out of the Super stop cash register in the presence of Ms. Hunt. He admitted to allegedly being on cocaine at the time of the robbery. C.P. 124-125. Amerson also admitted to having the previous felony convictions for which he served a year or more in prison. These convictions were included on his original indictment for robbery of a Super Stop convenience store under 99-19-83 in Lauderdale County. C.P. 45; 118-119.

Q. How many times have you been in the penitentiary in Mississippi?

A. Two.

Q. How many times have you been to prison in Florida?

A. Three times.

Q. For what?

A. Forgery, grand theft, and that what you are talking about there.

Q. Robbery?

A. Yes, sir. R. 118-119. (Emphasis by appellee).

On January 16, 2009, Amerson filed his pro se post conviction relief petition. C.P. 3-43. From the

dates on the filed stamped copies in the record, it can be determined that the petition filed in this cause came more than three years “after entry of his (Amerson’s) judgment of conviction.” Under M. C.A. Sect. 99-39-5 (2), one has to file “within three years after entry of the judgment of conviction.” Otherwise, one is barred by the three year statute of limitations provided by ‘the UPCCRA.’.

The trial court’s Order denying relief stated as follows:

In M. C. A. Sect. 99-39-5(2), Mississippi law provides for exceptions to the three year statute of limitations in cases where there are intervening cases from the Mississippi Supreme Court or United States Supreme Court that would have a bearing on the case or where there is newly discovered evidence. ..Like **Hudson**, and **Cochran**, (cases where the court rejected a claim of waiver of the three year statute of limitation because of a petitioners unsubstantiated claim of some lack of fairness in sentencing) this court does not find any denial of a fundamental right in sentencing. C.P. 135

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance where a defendant was time barred from filing for relief under “the UPCCRA” was not enough to constitute an exception to the statute of limitations. As stated:

Bevel raises a claim of ineffective assistance of counsel. It is conceivable that under the facts of a particular case, this Court might find that a lawyer’s performance was so deficient, and so prejudicial to the defendant, that the defendant’s fundamental constitutional rights were violated. However, this Court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court’s failure to advise a defendant of maximum and minimum sentences does not implicate a “fundamental constitutional right” sufficient to except a case from the procedural bar of Sect 99-39-5.

Therefore, based upon the record of this cause, and the documents contained herein, the appellee would submit that the trial court correctly found ,as stated in his Order denying relief, that Amerson’s pro se petition for post conviction relief was time barred. C.P. 131-138.

This issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT AMERSON DID NOT QUALIFY FOR ANY EXCEPTION UNDER THE UPCCRA AND THERE WAS NO EVIDENCE OF AN UNLAWFUL SENTENCE.

Under M.C.A. Sect. 99-39-5 (2), there are exceptions to the three year statute of limitations. This would be for “intervening decisions” which “would have adversely affected the outcome of a petitioner’s case or sentence,” or for evidence “not reasonably discoverable at the time of trial.” The record reflects, as stated in the trial court’s Order, that there was no claim and no evidence in support of a claim of any exception to the procedural barr included in Amerson’s motion for post conviction relief. C.P. 2-43.

In Amerson’s petition, as shown by the cite to the trial court’s order denying relief, he claims an alleged “unlawful sentence.” C.P. 7; 23. He opined it was illegal because one of his prior Mississippi convictions was in 1975. This would have occurred before the enactment of the enhanced sentencing statute for repeat offenders in 1977. Petition page 3-43 and appellant’s brief page 1-7.

However, as found by the trial court, the fact that one of Amerson’s prior convictions occurred before the enactment in 1977 of the statute for enhanced sentencing under M. C. A. 99-19-83 does not provide him with any basis for an exception to the three year statute of limitations. C.P. 135-136. As stated by the Court in denying relief:

A clear reading of the statute indicates the purpose of this enactment is to enhance sentences for repeat offenders. Likewise, there is no evidence in the wording of the statute or in the attached annotation that indicates an intent to exempt offenses prior to the enactment of this statute. Also, the current conviction took place after the enactment of the habitual enhancement and the petitioner had a number of other felonies in Florida that would qualify him as a habitual offender under M. C. A. 99-19-81. According, the petitioner is not exempted from the three (3) year time limit under M. C. A. 99-39-5(2). C.P. 136.

The appellee would submit the record reflects, as found by the trial court, that Amerson’s petition was barred by the statute of limitations. There was no basis for finding either an exception to the statute of limitations or that Amerson’s fifteen year sentence was somehow unlawful, or unconstitutional.

The record reflects that Amerson admitted to having robbed Ms. Hunt and the Super Stop in Lauderdale County. C.P. 124-125. He admitted to having at least five of the seven convictions included with his indictment. C.P. 44-45.

The robbery in July, 2003 occurred long after the enactment of “the UPCCRA.” In addition, six of the listed seven prior felony convictions occurred after the enactment of the enhanced sentencing provisions for repeat offenders in 1977. C.P. 45. Only one of the seven, a conviction for escaping jail occurred before 1977. C.P. 45. At least one of the felonies for which Amerson served a year or more in jail was for a crime of violence.

In **Cochran v. State**, 969 So.2d 119, 122 (¶9-¶10) (Miss. App. 2007), the Appeals Court affirmed the trial court in finding that Cochran was procedurally barred even though he claimed an alleged illegal sentence.

¶ 9. Section 47-7-3 gives the parole board exclusive responsibility to grant or deny parole, and parole is not part of the court's sentencing power. **Mitchell v. State**, 561 So.2d 1037, 1039 (Miss.1990). Any such language included in a sentencing order is mere surplusage and will not render the sentence illegal. **Gardner v. State**, 514 So.2d 292, 294 (Miss.1987); **Norwood v. State**, 846 So.2d 1048, 1050(¶ 3) (Miss. Ct. App.2003).

[10] ¶ 10. Here, however, Cochran pled guilty to a sex crime. Under Mississippi Code Annotated Section 47-7-3(1)(b), he is not eligible for parole. He is not eligible for earned time allowance. Miss. Code Ann. § 47-5-139(1)(d) (Rev.2004). Given this, we find no error in the sentence. It is not the trial court which makes Cochran's sentence mandatory. It is the legislature, which acted within its constitutional power. **Hinton v. State**, 947 So. 2d 979(¶ 6) (Miss. Ct. App.2006).

The appellee would submit that Amerson's reliance upon **Ivy v. State**, 731 So. 2d 601,603 (Miss 1999) in his appeal brief is of no avail. Appeal brief page 4.

While the Court found that Ivy's petition was not procedurally barred, it, nevertheless, found it was lacking in merit. However, Ivy's claim of an alleged illegal life sentence was based upon the U. S. Supreme Court's intervening decision in **Furman v. Georgia**, 33 L. Ed. 2d 346 (1972). This decision found Mississippi's statutory scheme for imposing the death penalty insufficient for protecting a prisoner's

Constitutional rights. However, the statutory provisions for imposing a life sentence were not found lacking under the federal or state Constitutions.

In **Ivy v. State**, 731 So.2d 601, 604 (¶ 21) (Miss.1999), the Court found that the trial court did not err in sentencing Ivy to a life sentence in a death penalty case. In other words, contrary to Ivy's claim, he did not receive an illegal or unconstitutional sentence.

¶ 21. This Court holds that the court below improperly declined to hear Ivy's petition for post conviction relief. The Appellant filed his petition ten (10) years after the applicable statute of limitations had expired. However, as his petition alleged an illegal sentence, the time bar did not apply. Additionally, Ivy's second point of error is without merit. The sentencing judge properly gave Ivy the only sentence possible under the law as it then existed-life imprisonment. Therefore, after considering Ivy's petition for post conviction relief on the merits, it is denied accordingly.

As shown with cites to the record, there is a lack of evidence for finding that Amerson's fifteen year sentence as an habitual offender was unlawful, or improper.

The appellee would submit that this court should affirm the Lauderdale County trial court's denial of relief for the reasons cited in this brief. C.P. 133-138.


CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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:

Honorable Lester F. Williamson, Jr.
Circuit Court Judge
Post Office Box 86
Meridian, MS 39302

Honorable E.J. (Bilbo) Mitchell
District Attorney
Post Office Box 5172
Meridian, MS 39302

Joe Louis Amerson, #36217
Post Office Box 1419
Leakesville, MS 39451

This the 12th day of August, 2009.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680