IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LONNIE LEE WARDEN — APPELLANT

VS. — NO. 2009-CP-0639-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LONNIE LEE WARDEN **APPELLANT**

VS. **NO. 2009-CP-0639-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On June 1, 2004, Mr. Lonnie Lee Warden, "Warden" pled guilty to possession of controlled substance, methamphetamine, and possession of precursor chemicals for the manufacture of methamphetamine. C.P. 34. This was before the Circuit Court of Forrest County, the Honorable Robert B. Helfrich presiding.

On that same day, Warden was sentenced to serve two "concurrent" twenty year sentences in the custody of the Mississippi Department of Corrections. C.P. 34.

On August 30, 2006, Warden filed a pro se "Motion to Review and Reduce Sentence." C.P. 6-31. Warden also filed a Petition for appointed counsel to assist him on his motion. C.P. 20-23. The trial court denied these motions. C.P. 37-38. Warden filed notice of appeal to the Mississippi Supreme Court. C.P. 39.

ISSUES ON APPEAL

I.
WAS WARDEN ENTITLED TO A SENTENCE REDUCTION?

II.
WAS WARDEN ENTITLED TO COUNSEL ON HIS MOTION?

STATEMENT OF FACTS

On February 20, 2004, Mr. Warden was indicted by a Forrest County Grand Jury for possession of controlled substance, methamphetamine, and an additional count of possession of numerous precursor chemicals for manufacture of a controlled substance, methamphetamine as part of a common scheme and plan. Among those precursors chemicals used in manufacturing meth in Warden's possession were ethyl ether, hexanes, heptane, toluene, sulfuric acid, and pseudoephedrine. C.P. 32.

On June 1, 2004, Mr. Warden with the benefit of counsel pled guilty to possession of controlled substance, methamphetamine, and possession of precursor chemicals for the manufacture of methamphetamine. C.P. 34. Warden was represented by Mr. Jonathan Farris from the public defender's office. C.P. 34. This was before the Circuit Court of Forrest County, the Honorable Robert B. Helfrich presiding.

After advising and questioning Warden and his counsel about Warden's understanding of the two charges, his constitutional rights, and the consequences of his plea, if voluntarily entered, the trial court accepted his pleas as "voluntarily, intelligently and freely made." C.P. 34.

Warden was sentenced to serve "concurrent" twenty year sentences for his two convictions in the custody of the Mississippi Department of Corrections. C.P. 34.

On August 30, 2006, Warden filed a pro se "Motion to Review and Reduce Sentence." In that motion he complains of alleged excessive sentences when compared with others allegedly convicted

of the same offense as first offenders. C. P. 6-31. There were no affidavits filed in support of that motion. C.P. 6-31.

The trial court denied the motion, finding no basis for any reduction of Warden's concurrent sentences. C.P. 37-38.

Warden filed notice of appeal to the Mississippi Supreme Court. C.P. 39.

SUMMARY OF ARGUMENT

1. The record reflects Warden's motion came long after the term of court in which he was sentenced had expired. C.P. 6-31. There were also no affidavits in support of any of Mr. Warden's claims for relief. C.P. 6-31. Therefore, the trial court found no basis for any reduction in sentence under M. C. A. Sect. 99-39-11(2). C.P. 37-38.

Additionally, the fact that other offenders in the same jurisdiction might have received sentences of less than twenty years for alleged similar drug offenses does not provide a legal basis for reduction of a validly imposed sentence. Motion, page 6-31. Appellant's brief page 1-5.

The trial court lacked jurisdiction after the term of court in which Warden was sentenced had ended. **Robinson v. State** 849 So.2d 157, 158 (¶3-4) (Miss. App. 2003).

The remedy for a petitioner after the expiration of his term or court would be through the executive branch of government. **Harrigill v. State** 403 So.2d 867, 869 (Miss. 1981).

2. The record reflects no basis for providing Warden with a public defender for his appeal of the trial court's denial of relief. **Moore v. State**, 587 So. 2d 1193, 1195 (Miss 1991). Even if there was some basis for counsel, there were no affidavits or proposed witnesses in support of Mr. Warden's claims for a reduced sentence. See M. C. A. Sect. 99-39-8 (1)(d) and (e) and **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998) and **Ford v. State** 708 So. 2d 73, 76 (¶15) (Miss.1998)

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE CIRCUIT COURT LACKED JURISDICTION. THERE WAS NO BASIS FOR A REDUCTION IN SENTENCE.

In Mr. Warden's "Motion For Review and Reduction of Sentence" he argued that his two twenty year concurrent sentences were greater than those received by others allegedly charged with and convicted for the same offense. In addition, Warden also filed a petition for appointment of counsel on his reduction of sentence motion. Motion, page 6-12; 20-23. Appellant's brief page 1-5.

The record reflects that Mr. Warden's motion for reduction of his sentence came several years after he was sentenced by the Circuit Court of Forrest County. He pled guilty and was sentenced on June 1, 2004. His pro se motion was filed on August 30, 2006. C.P. 6; 34.

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 court lacked authority to

reduce a validly imposed sentence. The remedy after this time frame had expired 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 no affidavits or statement of "good cause why' they could not be obtained were filed in support of any of Warden's allegations and claims for relief. C.P. 6-31; Motion, page 6-12. See M. C. A. Sect. 99-39-9(1)(c)(d)(e) and 3, and **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998).

In **Ford v. State** 708 So. 2d 73, 76 (¶15) (Miss.1998), the Supreme Court affirmed the trial court's dismissal without a hearing. The petitioner in that case did not meet his burden of proof by stating his allegations "with the specificity and detail" required for relief.

> ¶ 15. In the case at bar, we hold that Ford's Motion for Post-Conviction Relief was appropriately denied summarily without an evidentiary hearing. Ford failed to state his allegations with the "specificity and detail" required to establish a prima facie showing. Accordingly, this Court finds that it plainly appeared from the face of his motion that he was not entitled to any relief and thus his motion could not sustain summary dismissal under § 99-39-11(2).

While Warden asserts that Mr. Thomas Knight, Mr. Stacy Bynum, Mr. Michael Bonner, and Mr. John Shows all were allegedly charged with the same offense and yet received sentences less than twenty years, he has no affidavits or proposed witnesses in support of any of these alleged facts. C.P. 2-14.

Therefore the trial court found Warden did not meet his burden of proof for establishing the

need for a hearing. C.P. 37-38.

The appellee would submit that this issue is lacking in merit.

PROPOSITION II

WARDEN WAS NOT ENTITLED TO COUNSEL.

As previously stated Warden also filed a "Petition For Appointment of Attorney." This was in connection with his "Motion To Review and Reduce Sentence." C.P. 20-23.

In the instant cause, the trial court found no basis for either an evidentiary hearing on Warden's motion or for appointed counsel at any such hearing on Warden's post conviction relief motion. C.P. 38.

In **Moore v. State**, 587 So. 2d 1193, 1195 (Miss. 1991) the Supreme Court held that a defendant does not have either a state or a federal right to appointed counsel for post conviction relief proceedings.

> Moore cites no legal authority in support of this claim, and his argument is without merit for this reason, if for no other. Assignments of error that are unsupported by any authority lack persuasion on review. **Smith v. State**, 430 So.2d 406 (Miss.1983). See also **May v. State**, 524 So.2d 957 (Miss.1988).
> [2] In any event, a criminal defendant has neither a state nor federal constitutional right to appointed counsel in post-conviction proceedings. **Pennsylvania v. Finley**, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); **Neal v. State**, 422 So.2d 747 (Miss.1982); **King v. State**, 423 So.2d 121 (Miss.1982).

While the appellee finds the success of Mr. Warden in completing a drug and alcohol treatment program and in fulfilling work assignments in a controlled work environment commendable, issues related to the conditions under which he serves his sentence would be under the supervision and control of the department of corrections. C.P. 25-26.

However, the issue of any reduction of his sentence , as stated above with case law, would be something which Mr. Warden needs to bring to the attention of the Governor's Office, not the Courts.

The appellee would submit that the record reflects that the trial court correctly found that

Warden had no basis for a hearing or for appointed counsel on his motion for a reduction of sentence. C.P. 37-38. This related issue is therefore also lacking in merit.

CONCLUSION

The trial court's denial of Warden's motion for reduction of sentence 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 28th day of October, 2009.

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