

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**KURT D. MIDDLETON**

**APPELLANT**

**VS.**

**NO. 2009-CP-0977**

**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**

**KURT D. MIDDLETON**

**APPELLANT**

**vs.**

**CAUSE No. 2009-CP-00977-COA**

**THE STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI**

**STATEMENT OF THE CASE**

This is an appeal against an Order of the Circuit Court of DeSoto County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

**STATEMENT OF FACTS**

The prisoner, on 28 July 2008, entered a plea of guilty to the felony of uttering a forged instrument. In the course of the plea colloquy with the prisoner, the prisoner admitted his guilt for the felony charged against him.

The indictment against the prisoner had been amended to charge him as an habitual offender. After the Appellant admitted the factual basis for his plea, the State moved to introduce "the certified priors" for purpose of the plea and sentencing. There was no objection to the State's motion. ( R. Supp. Vol. 1, pp. 22 - 25). In addition to the introduction of the

“certified priors,” the prisoner admitted the existence of the prior convictions which formed the basis for the habitual offender charge. ( R. Supp. Vol. 1, pg. 26). The court then went on with the usual enquiries; in due course the prisoner stated that he was entering his plea of guilty because he was guilty. ( R. Supp. Vol. 1, pg. 35). He further admitted that he was an habitual offender within the meaning of Miss. Code Ann. Section 99-19-81 and again admitted that he had in fact been convicted of the prior offenses upon which the habitual offender portion of the indictment was based. ( R. Supp. Vol. 1, pg. 38). The prisoner’s plea was accepted, as well as the plea agreement between the prisoner and the State, and the prisoner was convicted and sentenced accordingly. ( R. Supp. Vol. 1, pg. 51).

On 5 March 2009, the prisoner filed a “Motion for Post - Conviction Collateral Relief” in the Circuit Court. As grounds for relief, he asserted that the sentence imposed was in violation of the laws of Mississippi and of due process. Specifically, the prisoner claimed that his two prior convictions, which occurred in the State of Wisconsin, occurred on the same date and that in one of those convictions execution of the term of imprisonment imposed was entirely suspended. The prisoner further alleged that he successfully completed the probationary term for the conviction for which execution of sentence was suspended. The prisoner claimed that since he had served no time on one conviction, his sentence as an habitual offender was improper. ( R. Vol. 1 pp. 6 - 8).

On 5 May 2009, the prisoner filed a “Motion to “Amend” Motion for Post - Conviction Relief.” In this motion, the prisoner claimed that his two prior convictions had not been “separately brought,” for purposes of Section 99-19-81. ( R. Vol. 1, pg. 31).

On 8 May 2009, the prisoner filed a “Petition for Hearing.” In this filing, the prisoner attempted to demonstrate that the automobile involved in his felony in this State was not actually

worth more than five hundred dollars, if that, apparently in an effort to have his conviction set aside. ( R. Vol. 1, pp. 38 - 47).

On 5 June 2009, the Circuit Court denied relief on the prisoner's motion(s). The court found that there was no requirement under Miss. Code Ann. Section 99-19-81 that the prisoner actually served time in prison, as opposed to having been sentence to serve time in prison. It further found that the two prior convictions occurred about a year apart. ( R. Vol. 1, pp. 48 - 50). The prisoner apparently filed a petition for rehearing; this was denied by order filed on 24 June 2009. ( R. Vol. 1, pg. 51). The prisoner filed his notice of appeal on 16 July 2009. ( R. Vol. 1, pg. 52).

#### **STATEMENT OF ISSUES**

**1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?**

#### **SUMMARY OF ARGUMENT**

**1. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF**

#### **ARGUMENT**

**1. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF**

The prisoner raises two issues in his two briefs filed in this Court. It is said that the Circuit Court erred in failing to conduct a bifurcated hearing the habitual offender portion of the indictment. It is also said that the Circuit Court erred "in not proving Beyond a Reasonable Doubt each element of the Habitual Offender Status."

As for the claim concerning the lack of a bifurcated hearing, the prisoner did not raise such an issue in his post - conviction relief pleadings in the Circuit Court. For that reason it may

not be considered here. *White v. State*, 22 So.3rd 378 (Miss. Ct. App. 2009). Nonetheless, even had the claim been presented to the Circuit Court, there would have been no merit in it. A bifurcated hearing is not required in the course of the taking of a guilty plea. *Hudson v. State*, 891 So.2d 260 (Miss. Ct. App. 2004). During the plea colloquy in the case at bar, the State introduced certified copies of the prisoner's prior convictions, and the prisoner admitted the existence of those convictions. This was entirely sufficient, and it was not necessary to hold form over substance and conduct a separate sentencing hearing. The decisions relied upon by the prisoner with respect to the necessity of a bifurcated hearing are not applicable to sentencing on the basis of a guilty plea.

The second claim is that habitual offender status was not proved. This claim is a renewal of the claim in the Circuit Court that, in view of the fact that the prisoner's sentence in one prior conviction was suspended, and that he never served time on that conviction, that conviction was not useable for sentencing under Miss. Code Ann. Section 99-19-81. The prisoner was sentenced to serve a term of five years imprisonment, but the sentencing court suspended execution of the entire sentence.

We adopt here the Circuit Court's reasoning in its Order denying relief on the prisoner's motion. The prisoner may not have served time on one of his convictions, but he was sentenced to serve a term of five years. This made the conviction a useable one. *Hewlett v. State*, 607 So.2d 1097, 1105 (Miss. 1992). It is the fact of having been sentence to a term of a year or more imprisonment that makes a prior conviction eligible for sentencing under Section 99-19-81, not whether such a period of time was actually served.

## CONCLUSION

The Order denying relief on the prisoner's motion or motions in post - conviction relief should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

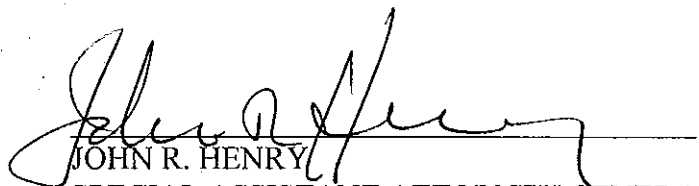
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 22nd day of January, 2010.

  
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