

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHELBY PARHAM

APPELLANT

VS.

NO. 2009-CP-1276

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE APPELLANT'S MOTION FOR POST CONVICTION COLLATERAL RELIEF IS TIME-BARRED AND COULD HAVE BEEN DENIED ON THAT BASIS ALONE.

THE TRIAL JUDGE PROPERLY DENIED THE APPELLANT'S MOTION FOR POST-CONVICTION COLLATERAL RELIEF ON THE MERITS.

STATEMENT OF THE FACTS

In April of 2004, the Appellant, Shelby Parham, was indicted for seven separate charges including one count of false pretenses in violation of Miss. Code Ann. §97-19-55, five counts of uttering a forgery in violation of Miss. Code Ann. §97-21-59, and one count of fraudulent use of identity to obtain a thing of value in violation of Miss. Code Ann. §97-19-85. (Record p. 36). On October 5, 2004, the Appellant appeared before Judge James T. Kitchens to accept a deal from the State wherein he agreed to plead guilty as a habitual offender under Miss. Code Ann.

§99-19-81 to Count 2 of the indictment, uttering a forgery, and the State agreed to dismiss the remaining counts. (Record p. 48 - 58). Prior to the guilty plea hearing, the State informed Judge Kitchens that it had previously filed a motion to amend the indictment to charge the Appellant as a habitual offender under Miss. Code Ann. §99-19-83, but that it did not intend to proceed on that motion. (Record p. 49). Instead the State moved to amend the indictment to charge the Appellant as a habitual offender under Miss. Code Ann. §99-19-81. (Record p. 49). The Appellant joined in the motion and his counsel stated on the record that he had no objections. (Record p. 50). The Appellant's counsel further stated on the record that there was no dispute as to the authenticity of the prior convictions presented by the State in connection with its motion to amend the indictment. (Record p. 50). After Judge Kitchens granted the motion, the guilty plea hearing began. (Record p. 51). The Appellant was sworn in and stated on the record that he wanted to plead guilty to the charge of uttering a forgery as a habitual offender. (Record p. 52). He further stated that he was satisfied with his counsel and agreed with his counsel's prior statement that there was no contention that he was not the same person convicted of the crimes as alleged by the State. (Record p. 54 and 57). At the conclusion of the plea hearing, Judge Kitchens noted on the record that he found beyond a reasonable doubt that the Appellant was a habitual offender as contemplated by Miss. Code Ann. §99-19-81 and accepted the Appellant's guilty plea. (Record p. 57). The Appellant was sentenced to serve ten years in the custody of the Mississippi Department of Corrections without the possibility of parole or early release. (Record p. 57). Judge Kitchens further ordered that this sentence run consecutively to any other sentences the Appellant was currently serving. (Record p. 58). After sentencing, the State moved to dismiss the remaining counts charged in the indictment. (Record p. 58).

On April 29, 2009, the Appellant filed a Motion for Post Conviction Collateral Relief

arguing that 1) “the state illegally amended the indictment to charge habitual offender language without providing the information needed for such habitual offender status which thereby denied Parham due process of law and created plain error which cannot be subject the 3 year bar under Miss. Code Ann. Sec. 99-39-5” and 2) “Petitioner Parham was subjected to a denial of due process in sentencing where the trial court, without the approval of the jury, imposed a mandatory habitual sentence which included a penalty which would in excess of that would be available under the normal statutory sentencing guideline and limitation for the offense of uttering a forgery and where the trial court imposed such enhancement without allowing a jury to make the final determination of such enhanced penalty. . . Parham has been sentenced to an illegal term of imprisonment under the provisions of an unconstitutional procedure carried out by the trial court. Such action by the trial court constituted a fundamental constitutional violation which resulted in an illegal sentence and an exception to the three (3) year bar under Miss. Code Ann. §99-39-5” (Record p. 2 - 3). On July 24, 2009, Judge Kitchens entered an order dismissing the Motion holding the following:

The Petitioner has filed a Motion alleging that he was illegally indicted as a habitual offender since his indictment was amended subsequent to his case being brought before the grand jury. The Court finds this allegation to be without merit. A Rule 6.04 hearing was conducted to determine the Petitioner’s habitual offender status, and as a consequence of this hearing, an order was entered to reflect an amendment to the indictment stated the Petitioner to be a habitual offender pursuant to §99-19-83 MCA. As a part of a later plea bargain agreement, the Petitioner was allowed to plead guilty pursuant to §99-19-81 MCA, the “lesser” habitual offender statute, an agreement to which all parties consented.

(Record p. 60). It is from this Order that the Appellant appeals.

SUMMARY OF THE ARGUMENT

The Appellant's Motion for Post Conviction Collateral Relief is time-barred pursuant to Miss. Code Ann. §99-39-5(2) as it was filed five years after he was sentenced. No exceptions to the bar are present. As such, the trial court could have denied the Motion on that ground alone.

Additionally, the trial court properly denied the Motion on its merits. The amendment to the indictment allowing the Appellant to be sentenced as a habitual offender pursuant to Miss. Code Ann. §99-19-81 was proper. Also, Mississippi law is clear that the accused has no right to a jury trial on the question whether he is an habitual offender.

ARGUMENT

THE APPELLANT'S MOTION FOR POST CONVICTION COLLATERAL RELIEF IS TIME-BARRED AND COULD HAVE BEEN DENIED ON THAT BASIS ALONE.

The Appellant raised the exact same issues on appeal that were raised in his Motion for Post-Conviction Collateral Relief. However, he is time-barred from raising the issues.

Mississippi Code Annotated §99-39-5(2) states in pertinent part as follows:

A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after the entry of the judgment or conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole, or conditional release has been unlawfully revoked. Likewise, excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

(*emphasis added*). As noted above, the Appellant was sentenced in 2004. His Motion was not filed until 2009, five years after his sentencing. The Appellant claims with regard to his second issue that he is exempt from the three year bar because there are intervening decisions by the United States Supreme Court. (Appellant's Brief p. 12 - 23). He asserts that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) are intervening cases as contemplated by the above referenced statute. (Appellant's Brief p. 12 - 23). His claims are invalid. First, both cases were decided prior to his sentencing and thus, are not intervening cases. Secondly, the holdings in those cases do not apply in the case at hand. The Appellant specifically cites to the following holding in *Apprendi*:

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (*citations omitted*).

(Appellant's Brief p. 13 (quoting *Apprendi*, 530 U.S. at 490)). This particular holding states that it is unconstitutional to increase the penalty for a crime beyond the prescribed statutory maximum unless a prior conviction is the reason for the increase. In the case at hand, the Appellant's sentence is within the statutory guidelines; thus, this holding does not apply. The Appellant specifically cites to the following holding in *Blakely*:

This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt.” This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the “truth of every accusation” against a defendant “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,” 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that “an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,” 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see 530 U.S., at 476-483, 489-490, n. 15; *id.*, at 501-518, 120 S.Ct. 2348 (THOMAS, J., concurring), and need not repeat them here.

Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed “ ‘with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.’ ” *Id.*, at 468-469, 120 S.Ct. 2348 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp.1999-2000)). In *Ring v. Arizona*, 536 U.S. 584, 592-593, and n. 1, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found 1 of 10 aggravating factors. In each case, we concluded that the defendant’s constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, supra, at 491-497, 120 S.Ct. 2348; *Ring*, supra, at 603-609, 122 S.Ct. 2428.

(Appellant’s Brief p. 22 (quoting *Blakely*, 542 U.S. at 301-03)). Again this holding is inapplicable as the Appellant’s sentence is within the statutory guidelines. As such, the Appellant is time-barred from asserting these issues in a Motion for Post-Conviction Collateral Relief.

THE TRIAL JUDGE PROPERLY DENIED THE MOTION FOR POST-CONVICTION RELIEF ON THE MERITS.

The trial court’s denial of a motion for post-conviction relief should not be reversed “absent a finding that the trial court’s decision was clearly erroneous.” *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)).

In his motion, the Appellant argues that the amendment to the indictment was illegal. (See Appellant’s Issue 1). However, as set forth in the “statement of facts” above, the Appellant

did not contest the motion to amend and stated on the record that the prior criminal convictions were valid. As such, the amendment was proper. *See Torrey v. State*, 891 So.2d 188, 194-95 (Miss. 2004). The Appellant also argues that he was denied his due process because he was given an enhanced sentence without the approval of a jury. (See Appellant's Issue 2). However, the Mississippi Supreme Court has held "that the constitution confers on the accused no right of trial by jury on the question whether he is an habitual offender." *Keyes v. State*, 549 So.2d 949, 951 (Miss.1989). Accordingly, the trial court's denial of the Appellant's Motion for Post-Conviction Relief was proper.

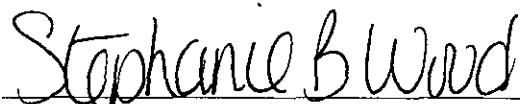
CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the trial court's dismissal of the Appellant's Motion for Post Conviction Collateral Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

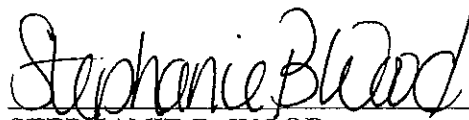
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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