

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROOSEVELT BARNES

RESPONDENT/APPELLANT

VS.

NO. 2009-CP-1405-COA

STATE OF MISSISSIPPI

MOVANT/APPELLEE

MOTION TO DISMISS APPEAL, OR
IN THE ALTERNATIVE, BRIEF FOR THE APPELLEE
ON THE MERITS

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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ROOSEVELT BARNES

RESPONDENT/APPELLANT

VERSUS

NO. 2009-CP-01405-COA

STATE OF MISSISSIPPI

MOVANT/APPELLEE

MOTION TO DISMISS APPEAL, OR
IN THE ALTERNATIVE, BRIEF FOR THE APPELLEE
ON THE MERITS

COMES NOW appellee, State of Mississippi, through counsel, and respectfully moves this Court for an order dismissing, with prejudice, the present appeal from summary denial by the trial judge of post-guilty plea relief.

Post-guilty plea relief was sought in the form of a handwritten letter filed in a criminal case in lower court cause number 07-027-PKT. Although in the nature of either a direct appeal or a motion to withdraw guilty plea and/or set aside an allegedly illegal sentence, Barnes's papers were treated benevolently by the circuit judge as a motion for post-conviction collateral relief and summarily denied.

It seems to us this is yet another case where a person who enters a plea of guilty and is sentenced seeks to appeal his conviction and sentence directly to this Court.

The circuit court cause number appearing on Barnes's indictment (C.P. at 2), as well as his guilty plea-qualification hearing (R. 2) and the trial court's order summarily denying relief, are all

the same, viz., 07-027-PKT. (C.P. at 19) It does not appear to us that Barnes intended to initiate a separate action.

We respectfully submit the order issued by the lower court denying the requested relief in lower court cause number 07-027-PKT is an unappealable order. “[A]n attempt to appeal an unappealable order is a total departure from the orderly administration of justice and should not be approved.” **Alexander v. State**, 979 So.2d 716, 718 (¶2) (Ct.App.Miss. 2007), reh denied.

This Court, we opine, is without power to hear Barnes’s appeal. It should be dismissed for lack of appellate jurisdiction because “ . . . a direct appeal is not proper once a defendant enters a guilty plea.” **Calvert v. State**, 976 So.2d 406 (Ct.App.Miss. 2008). Cf. **Shanks v. State**, 906 So.2d 760 (Ct.App. Miss. 2004); **Fleming v. State**, 553 So.2d 505 (Miss. 1989). See also Miss.Code Ann. §99-35-101, as amended.

In addition, Barnes’s letter requesting relief is in the nature of a motion to vacate guilty plea or set aside an allegedly illegal sentence. No appellate jurisdiction exists over the denial of a motion to withdraw guilty plea or set aside sentence unless it is raised as part of a motion for post-conviction collateral relief. **Calvert v. State**, 976 So.2d 406, 407 (Ct.App.Miss. 2008).

BRIEF FOR THE APPELLEE
IN SUPPORT OF MOTION TO DISMISS APPEAL
OR, IN THE ALTERNATIVE, BRIEF FOR THE APPELLEE ON THE MERITS

ROOSEVELT BARNES seeks to appeal directly to this Court from an order entered on February 2, 2009, by the Circuit Court of Pike County, Michael M. Taylor, Circuit Judge, presiding, denying summarily post-guilty plea relief. (See appellee’s exhibit A, attached)

Barnes is a 49-year-old African American male and prior convicted felon who, on January 14, 2008, entered, freely and voluntarily, a plea of guilty to uttering a forgery. (R. 1-8; C.P. at 8-9, 12) After being advised by the prosecutor that Barnes had been convicted of grand larceny in 1994

(R. 5-6), the circuit judge generously sentenced Barnes to serve ten (10) years with the suspension of nine (9) years contingent upon Barnes's successful completion of one (1) year of house arrest.

Barnes, we surmise, has apparently violated the conditions of his house arrest. Otherwise he would not now be complaining about his sentence, and his present and permanent residence would not be a correctional facility in Leakesville.

On or about October 16, 2008, Barnes filed a handwritten paper with the circuit clerk of Pike County complaining, *inter alia*, that the house arrest portion of his ten (10) year conditional sentence was illegal because he was a prior convicted felon. (C.P. at 14-18)

The trial judge treated Barnes's papers as a motion for post-conviction collateral relief and summarily denied the motion as plainly without merit by virtue of Miss.Code Ann. §99-39-11(2). (C.P. at 19-20; appellee's exhibit A, attached)

The two page order states, in part, that "[t]he sentence imposed was reasonable in light of the conviction, and also finds that petitioners claims are without merit [and] are dismissed pursuant to §99-39-11(2)." (C.P. at 20; appellee's exhibit A, attached.)

We invite this Court to find that it lacks appellate jurisdiction given the subject matter and the context in which Barnes seeks to appeal his sentence.

But if we are wrong, the law is very clear that a defendant cannot complain about a sentence that is more lenient than the legal sentence that could have been imposed. Any error in the case at bar is harmless beyond a reasonable doubt. **Jefferson v. State**, 958 So.2d 1276, 1279 (Ct.App.Miss. 2007), and the cases cited therein.

FACTS

During a plea-qualification hearing conducted on January 14, 2008, Roosevelt Barnes, freely, voluntarily, and knowingly with a full understanding of his rights, entered a plea of guilty to uttering

a forgery. (R. 1-8)

Judge Taylor accepted the State's sentencing recommendation and thereafter sentenced Barnes "... to ten years in the State Penitentiary with nine years suspended for one year to serve on ISP house arrest, five years post-release supervision." (R. 6; C.P. at 8-9) Barnes was also fined \$2,500 and ordered to pay restitution in the amount of \$250.

Needless to say, Barnes got a real meal deal.

Barnes's appellate brief is handwritten and consists of a various conglomeration of papers filed in this Court. It is reasonably clear, however, that Barnes's primary complaint is that his sentence to house arrest, i.e., the intensive supervision program, was illegal because he is a prior convicted felon. (Brief for Appellant at unnumbered page 6)

As noted previously, Barnes would have never complained had he not violated his house arrest and ended up in a Leakesville correctional facility where he is presently incarcerated.

ARGUMENT

Barnes's post-conviction papers filed in the trial court are in the nature of either a direct appeal from his guilty plea and sentence in lower court cause number 07-027-PKT or, if not, a motion to withdraw guilty plea and/or set aside allegedly illegal sentence imposed in lower court cause number 07-027-PKT.

Although his claim lacks merit on its face, this Court, we think, is without jurisdiction to decide the merits of Barnes's complaint because the Legislature has declared that when a person pleads guilty and is sentenced, no appeal will lie therefrom.

Moreover, there can be no direct appeal from a denial by the trial court of a motion to withdraw guilty plea or set aside an allegedly illegal sentence.

"There are two primary ways a criminal defendant may challenge a trial court proceeding:

a direct appeal from conviction under Miss.Code Ann. §99-35-101 (Rev. 2002) or a proceeding under the Post-Conviction Collateral Relief Act, Miss.Code Ann. §§ 99-39-1 to 99-39-29 (Rev. 2000 & Supp.2004).” **Shanks v. State**, *supra*, 906 So.2d 760, 761 (Ct.App.Miss. 2004), citing **Fleming v. State**, *supra*, 553 So.2d 505, 506 (Miss. 1989). *See also* **Krickbaum v. State**, 990 So.2d 796 (Ct.App.Miss. 2008).

Barnes entered his plea of guilty and was sentenced on January 14, 2008. (C.P. at 8-9)

Miss.Code Ann. §99-35-101, effective from and after July 1, 2008, reads, in its entirety, as follows:

Any person convicted of an offense in a circuit court may appeal to the Supreme Court. However, where the defendant enters a plea of guilty and is sentenced, then no appeal from the circuit court to the Supreme Court shall be allowed.

“A defendant who pleads guilty waives his right to an appeal.” **Parkman v. State**, 953 So.2d 315, 320 (Ct.App.Miss. 2007).

Because Barnes’s letter seeking relief was also in the nature of a motion to withdraw guilty plea and/or set aside an allegedly illegal sentence, the following language found in **Calvert v. State**, *supra*, 976 So.2d 406, 407 (Ct.App.Miss. 2008), is also applicable to Barnes’s appeal:

Darious Calvert appeals the denial of his motion to withdraw his guilty plea. As error, Calvert argues that: (1) his guilty plea was entered involuntarily and (2) he was denied effective assistance of counsel. We find that this Court is without jurisdiction to hear a direct appeal from a guilty plea and must dismiss the appeal.

* * * * *

The initial issue before this Court is whether an appellate court has jurisdiction to hear a direct appeal from the circuit court’s denial of Calvert’s motion to withdraw his guilty plea. Of course, that is not the issue argued by Calvert. Calvert does not mention the jurisdiction issue. **This Court does not have jurisdiction to consider Calvert’s appeal from the circuit court’s order because a direct appeal is not proper once a defendant**

enters a guilty plea. Miss.Code Ann. §99-35-101 (Rev. 2007).

The supreme court addressed this exact issue in *Berry v. State*, 722 So.2d 706, 707 (¶5) (Miss. 1998). There, like Calvert, the defendant filed a motion to set aside his guilty plea that was denied. Berry contended that the trial court erred in denying his motion because his plea was not entered voluntarily. *Id.* at (¶4) The supreme court held that it did “not have jurisdiction on direct appeal when only a guilty plea is being challenged. Miss.Code Ann. §99-35-101 (1994). Instead a defendant must file a motion for collateral conviction relief pursuant to Miss.Code Ann. §99-39-5 (1994). *Berry*, 722 So.2d at 707 (¶5). [emphasis ours]

Admittedly, Barnes assails his sentence and not his guilty plea *per se*.

No matter.

Prior to its amendment in July 2008, Miss.Code Ann. §99-35-101 read as follows:

Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty.

Miss.Code Ann. §99-35-101, in its recently amended form effective from and after July 1, 2008, reads, in its entirety, as follows:

Any person convicted of an offense in a circuit court may appeal to the Supreme Court. However, where the defendant enters a plea of guilty and is sentenced, then no appeal from the circuit court to the Supreme Court shall be allowed.

The Legislature has now made reasonably clear that which, we submit, was clear already, *viz.*, a defendant who enters a plea of guilty can appeal neither his conviction *nor* his sentence.

We are aware that Barnes entered his guilty plea and was sentenced on January 14, 2008, while the amendment to §99-35-101 did not take effect until July 1, 2008. *See Sanchez v. State*, 2 So.3d 780 (Ct.App.Miss. 2009), note 1, which held the amendment was inapplicable to Sanchez who entered his guilty plea on September 4, 2007.

The intent of the Legislature even prior to the amendment was to declare that a defendant who pleads guilty gives up his right to appeal directly both his conviction and sentence. This office has always felt that **Trotter v. State**, 554 So.2d 313, 315 (Miss. 1989), was erroneously decided.

This Court, we respectfully submit, is without jurisdiction and should dismiss this appeal.

In the event we are wrong, Barnes's complaint is devoid of merit on its merits. This is because "[i]t is well-settled in Mississippi that when a Defendant is given an illegal sentence that is more favorable than what the legal sentence would have been then he/she is not later entitled to relief through a post-conviction action." **Jefferson v. State**, 958 So.2d 1276, 1279 (Ct.App.Miss. 2007) and the cases cited therein.

"[A] defendant may not stand mute when he is given an illegal sentence which is more favorable than what the legal sentence would have been and later claim that he has been prejudice[d] as a result." **Ruff v. State**, 910 So.2d 1160, 1162 (Ct.App.Miss. 2005).

CONCLUSION

Barnes's post-plea paper attacking his plea and sentence was treated as a motion for post-conviction collateral relief. It seems to us his papers were in the nature of either a direct appeal of his guilty plea and sentence or a motion to withdraw guilty plea and/or set aside an allegedly illegal sentence.

When a defendant pleads guilty and is sentenced he gives up his right to appeal his conviction and sentence. Miss.Code Ann. §99-35-101.

Moreover, no appellate jurisdiction exists over the denial of a motion to withdraw guilty or set aside an illegal sentence unless it is raised as part of a motion for post-conviction collateral relief.

Assuming, on the other hand, Barnes's appeal is properly before this Court and the Court

elects to review his claim, we argue Barnes's attack on his sentence is without appeal on appeal because any error was harmless beyond a reasonable doubt. This is because Barnes benefitted enormously from the allegedly illegal sentence. **Jefferson v. State**, *supra*, 958 So.2d at 1279-80.

Barnes's appeal from the order of the circuit judge summarily denying his post-plea challenge to his guilty plea and the sentence imposed should be dismissed for want of appellate jurisdiction.

But if not, the ruling of the circuit court summarily denying relief should be forthwith affirmed.

Respectfully submitted,

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BY: 

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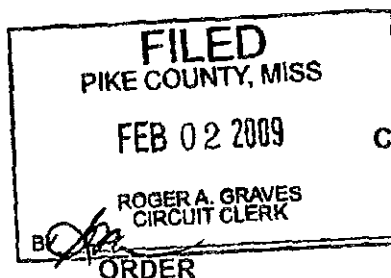
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IN THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI

ROOSEVELT BARNES

VS.

STATE OF MISSISSIPPI



PETITIONER

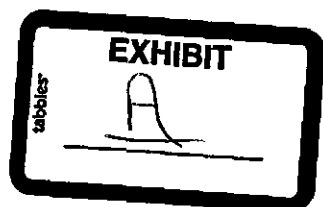
CAUSE NO. 07-027-PKT

RESPONDENT

THIS CAUSE IS BEFORE the court on petitioner's letter dated October 16, 2008 requesting relief from his sentence for uttering forgery. Mr. Barnes plead guilty to the charges and appears to allege that the court failed to consider that he was a prior convicted felon who had served prison time when sentencing him. Petitioner's letter also generally alleges numerous deficiencies in the sentencing order, and maintains that he was sentenced illegally, all apparently related to the initial allegation that the court failed to consider a past felony record when sentencing.

It is unclear exactly what relief the petitioner seeks, however, the court will indulge in speculation and assume that Barnes does not wish for the court to increase his sentence based on a prior felony conviction. However, it can be inferred from the letter that Barnes is displeased with his sentence, and therefore, petitioner's letter will be treated as a motion for post-conviction collateral relief pursuant to § 99-39-1 et seq. (Supp. 1989).

In his motion, Barnes requests no specific relief, alleges a general error with his sentencing, but fails to cite to any supporting case law, and fails to direct the court to any part of the record that would support his request. Barnes made an intelligent, knowing and voluntary plea of guilty to uttering forgery and was sentenced to ten (10) years in the custody of Mississippi Department of Corrections, with one (1) year to serve in the Intensive Supervision Program [I.S.P.], and upon successful completion of the I.S.P. the remaining nine (9) years to be suspended.



"[The court] is not required to address issues not argued or supported with authority or citations to the record." See *Edwards v. State*, 800 So. 2d 454, 468 (Miss. 2001). Barnes does not argue that his sentence was cruel and unusual, nor does he argue that it was disproportionate to the crime, however, the court specifically finds that the sentence imposed was reasonable in light of the conviction, and also finds that petitioners claims are without merit.

Petitioner's claims are dismissed pursuant to § 99-39-11(2). Miss.CodeAnn. (Supp.1989).

ORDERED that the relief requested in the letter, be **DENIED**, and that the clerk of this court shall place this order in the court file of the above styled case and a stamped "filed" copy of this order shall be forwarded to all parties and attorneys of record by the Clerk of this Court.

SO ORDERED this the 9 day of Jan, 2008.


CIRCUIT COURT JUDGE

MICHAEL M. TAYLOR
Circuit Court Judge
Post Office Box 1350
Brookhaven, Mississippi 39602
Phone: (601) 835-1576
Facsimile: (601) 835-5644
Mississippi Bar Number [REDACTED]

CERTIFICATE OF SERVICE

I, Billy L. Gore, 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 **MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, BRIEF FOR THE APPELLEE ON THE MERITS** to the following:

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This the 19th day of January, 2010.



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