IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROGER HEIDELBERG — APPELLANT

VS. — NO. 2009-KA-0917

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The grand jury of Jones County indicted defendant, Roger Heidelberg, on May 8, 2008 for Sexual Battery and Incest, in violation of Sections 97-3-95(1)(d) and 97-29-5, respectively, of the Mississippi Code. (R. at 3). The State filed a motion to amend the indictment on November 12, 2008, to charge defendant as an habitual offender under Mississippi Code Section 99-19-81, attaching certified copies of defendant's prior sentencing orders. (R. at 16-21).

The State moved to dismiss the incest charge of the indictment with prejudice on January 26, 2009, once DNA testing indicated that the victim and defendant are not related biologically. (R. at 57). This motion was granted by Circuit Judge Billy Joe Landrum the same day it was filed. (R. at 58).

The State moved again to amend the indictment to charge defendant as an habitual offender under Mississippi Code Section 99-19-81, and attached the same certified copies of defendant's prior sentencing orders as were submitted with the November 12, 2008, motion to amend. (R. at 25-30). Judge Landrum properly granted this motion in his Order to Amend Indictment, which was issued on January 21, 2009. (R. at 52).

Defendant was tried and convicted for Sexual Battery by a jury of reasonable men and women on April 7, 2009, Judge Landrum presiding. (R. at 64, 145). Immediately after the jury returned its verdict, Judge Landrum began the sentencing hearing. (R. at 146). In accordance with Mississippi Code Section 99-19-81, and with affirmation by defense counsel that defendant was, in fact, an habitual offender under that section, Judge Landrum sentenced defendant to life in prison without the possibility of parole. (R. at 146-147). A Sentence Order was issued on April 9, 2009, stating that the trial court found that the evidence presented by the State proved beyond a reasonable doubt that defendant's prior convictions and sentences satisfied the requirements for him to be sentenced as an habitual offender. (R. at 65-66).

Defendant's post-trial motions for relief, none of which indicated a defect in his sentencing, were denied. (R. at 69, 73).

SUMMARY OF THE ARGUMENT

I.

DEFENDANT IS PROCEDURALLY BARRED FROM APPEALING HIS BEING SENTENCED AS AN HABITUAL OFFENDER.

Since defendant failed to raise any objection regarding his sentence, prior to this present appeal, he is procedurally barred from arguing it now. As will be shown below, this assertion is supported by clear precedent from this Court and the Mississippi Supreme Court.

II.

THE TRIAL COURT HAD SUFFICIENT EVIDENCE TO SENTENCE DEFENDANT AS AN HABITUAL OFFENDER UNDER MISSISSIPPI CODE SECTION 99-19-81.

Assuming for the sake of argument (without waiving any procedural bar) that defendant's appeal is not procedurally barred, the trial court had ample proof of defendant's prior convictions. In short, certified copies of two prior convictions issued by the same trial judge that presided over the case at bar, were submitted to and properly considered by the trial court. The trial court found this was proof beyond a reasonable doubt that defendant is an habitual offender under Mississippi Code Section 99-19-81.

ARGUMENT

I.

DEFENDANT IS PROCEDURALLY BARRED FROM APPEALING HIS BEING SENTENCED AS AN HABITUAL OFFENDER.

This matter is properly disposed of pursuant to this Court's ruling in *Sims v. State*. 775 So.2d 1291, 1294 (¶16) (Miss. Ct. App. 2000). There, defendant Sims argued that the State did not prove his prior convictions. *Id.* This Court stated then that "[w]hen an accused fails to object to the habitual offender issue during the sentencing phase, *he is procedurally barred to do so for the first time on appeal.*" *Id.* (emphasis added) (citing *Cummings v. State*, 465 So.2d 993, 995 (Miss. 1985)). It should also be noted that Judge Billy Joe Landrum was the trial judge in *Sims*, as he was in the case at bar. *Id.*

Defendant not only failed to object to this issue "during the sentencing phase," but he also failed to do so at any other point. *Id.* For this reason alone, and following this Court's own precedent, he is procedurally barred from raising this issue on appeal. (R. at 69).

II.

THE TRIAL COURT HAD SUFFICIENT EVIDENCE TO SENTENCE DEFENDANT AS AN HABITUAL OFFENDER UNDER MISSISSIPPI CODE SECTION 99-19-81.

Assuming *arguendo*, and without waiving any procedural bar, that defendant is not procedurally barred from appealing his habitual offender status, his only contention on appeal is that the State failed to have evidence of his prior convictions admitted into evidence during the sentencing hearing. Defendant apparently feels that attaching certified copies of prior sentencing orders, issued by the same trial judge that will decide if he is an habitual offender, no less than five months before trial, is insufficient. Defendant rests this assertion almost entirely on *Vince v. State*, 844 So.2d 510 (Miss. Ct. App. 2003), and states that his case is "indistinguishable in any material particular from *Vince*." (Def.'s Br. at 8, *Heidelberg v. State of Mississippi*, No. 2009-KA-0917-COA (Miss. Ct. App. Dec. 23, 2009)). This assertion is patently false.

The trial court in *Vince* relied on uncertified, unverified NCIC printouts to sentence the defendant in that case as an habitual offender. 844 So.2d 510, 517. In defendant's case, actual certified copies of his prior convictions and sentences were submitted to the court on two separate occasions. (R. at 16-21, 25-30).

The State reiterates that Judge Landrum, the judge who sentenced defendant as an habitual offender, is the judge who oversaw and signed the sentencing orders in the

prior cases. *Id.* Even if Judge Landrum did not recognize defendant throughout the trial or at sentencing, he certainly would have seen and verified his own previous orders. Indeed, the copies of defendant's prior convictions and sentences are the ultimate in self-authentication since the judge determining whether defendant is an habitual offender is the one that made it possible for him attain that status.

While defendant's efforts to justify his appeal through case law are commendable, his analysis conspicuously omits any reference to the Mississippi Rules of Evidence. According to Rule 1101(b)(3), the rules are specifically inapplicable to sentencing proceedings. MISS. R. EVID. 1101(b)(3). This leads one to the obvious question: If there are no rules to govern admittance of evidence at a sentencing proceeding, how is evidence of prior convictions and sentences to be properly placed before the trial court?

The State answers that, as was done in this case, it is appropriate to include certified copies of defendant's prior convictions and sentences as an exhibit, either with the original indictment, or with a motion to amend the indictment to charge as an habitual offender. Both this Court and the Supreme Court seem to agree, since "...[the Supreme Court] has stated that the best evidence is the judgment of conviction, but that other evidence suffices as well." *Sims v.* State, 775 So.2d 1291, 1294 (¶14) (Miss. Ct. App. 2000) (citing *Stringer v. State*, 500 So.2d 928, 942 (Miss. 1986)).

Defendant and his trial counsel were on notice as early as November 12, 2008, nearly five months before trial, that the State was seeking to charge defendant as an habitual offender. (R. at 25). At no point in the record does it show defendant made anything that could be remotely construed as an objection to this. Indeed, in regards to sentencing, defense counsel stated that the judge did not have "...much choice in sentencing." (R. at 146). Nor did defense counsel even mention sentencing in any of his nine points asserted as grounds for a new trial. (R. at 69).

The bottom line is that the State proved that defendant was an habitual offender pursuant to Mississippi Code Section 99-19-81. It was sufficient that certified copies of past convictions and sentences were provided and accepted by the trial court in the State's two Motions to Amend Indictment to Charge the Defendant as an Habitual Offender. (R. at 16-21, 25-30).

Defendant is correct that the Supreme Court admonishes the "tendency to routinely allow the state to produce some documentation of prior offenses and for the trial court to perfunctorily find the defendant an habitual offender...." (Def.'s Brief at 8) (citing *Vince* at 517). Here, though, the trial judge was presented with certified copies of sentences he had signed. These were properly before the court as exhibits to a motion, were considered by the court, and are part of the record.

This was a deliberate process, and not, as defendant would have this Court believe, a "hastily undergone sentencing proceeding." *Id.* at 6. Having already ruled

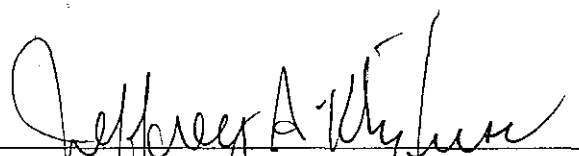
the evidence of prior convictions and sentences as sufficient, the court determined, beyond a reasonable doubt, that defendant was an habitual offender under Mississippi Code Section 99-19-81. (R. at 65-66). There was nothing left to decide at the sentencing hearing. The judge merely followed the statutory sentencing requirement of life in prison without the possibility of parole that was applicable to the crime for which defendant was just convicted.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the verdict of the jury and the sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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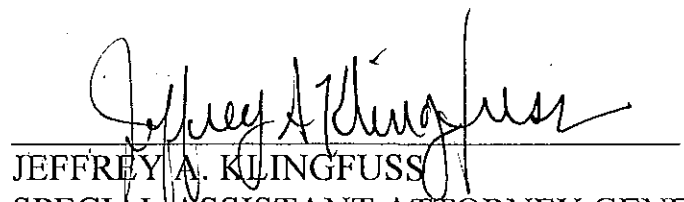
This the 25th day of February, 2010.



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