IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY P. JONES — APPELLANT

VS. — NO. 2009-KA-2017

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

ANTHONY P. JONES **APPELLANT**

vs. **CAUSE No. 2009-KA-02017-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Forrest County, Mississippi in which the Appellant was convicted and sentenced for his felony of **ROBBERY BY USE OF A DEADLY WEAPON**.

STATEMENT OF FACTS

The issue or issues on this appeal concern the propriety of an alleged amendment to the indictment in this cause as to the habitual offender allegations of the indictment, and the propriety of the habitual offender sentenced meted out to the Appellant. There being no issues raised in this appeal requiring a discussion of the facts demonstrating the Appellant's guilt for armed robbery, it will not needful to set out those facts. A discussion of the facts appurtenant to the issues raised by the Appellant will be set out in our argument in response to the Appellant's argument.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN SENTENCING THE APPELLANT UNDER AUTHORITY OF MISS. CODE ANN. SECTION 99-19-81 (REV. 2007) AS AN HABITUAL OFFENDER

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT UNDER AUTHORITY OF MISS. CODE ANN. SECTION 99-19-81 (Rev. 2007) AS AN HABITUAL OFFENDER

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT UNDER AUTHORITY OF MISS. CODE ANN. SECTION 99-19-81 (Rev. 2007) AS AN HABITUAL OFFENDER

FACTS

In the indictment exhibited against the Appellant, it was alleged that the Appellant had been previously convicted on 7 October 2002 in the Circuit Court of Genessee County, Michigan of the felony of attempted unlawful driving away of an automobile, and sentenced thereon to serve a term of twenty to thirty months imprisonment, and that, on the same date and in the same court, the Appellant had been convicted of the felony of attempted police officer feeling (*sic*), and sentenced thereon to twenty to thirty months imprisonment. The State of Mississippi sought sentencing under Miss. Code Ann. Section 99-19-81 (Rev. 2007) on the basis of these prior convictions. (R. Vol. 1, pg. 8).[1]

After the jury returned its verdict convicting the Appellant of armed robbery, the trial court began a sentencing hearing. The State introduced into evidence a "pen pack" from the Michigan

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[1] The Appellant claims that the State moved to amend Her indictment so as to allege habitual offender status after trial. (Brief for the Appellant, at 4.). However, the Appellant appears to have been tried on an amended indictment dated 29 April 2009, which alleged habitual offender status, trial occurring on the second and third of December, 2009. The particular prior offenses alleged in the indictment were those proven at the sentencing hearing. (R. Vol. 1, pp. 8 - 9; Vol. 2, pg. 8). It is clear that the Appellant had been charged as an habitual offender prior to his arraignment. (R.; Vol. 2, pg. 2). We do not find that the State moved to amend the indictment so as to charge habitual offender status at the conclusion of the guilt phase of the trial, and the Appellant provides no citation to the record to support his claim that the indictment was amended subsequent to the guilt phase of the trial so as to allege habitual offender status.

Department of Corrections, certified by that Department, documenting the fact that the Appellant had been convicted of and sentenced and for the felonies alleged in the indictment. (R. Vol. 3, pg. 274; Exhibit 33).

The Appellant asserted that the felonies established by the "pen pack" and alleged in the indictment arose out of the same set circumstances and did not arise out of "separate circumstances". The defense sought a hearing on the issue, and it further requested a pre-sentence investigation. The court then set a date and time for a hearing. (R. Vol. 3, pg. 275.).

At the hearing, the defense renewed its argument that the Michigan felonies alleged in the indictment and established by the "pen pack" arose from the same "set of circumstances and events". It further asserted that felonies used to enhance sentence under Miss. Code Ann. Section 99-19-81 must "arise out of separate incidents at different times".

According to the defense, it was in possession of a report from authorities in Flint County, Michigan concerning the felonies. The Appellant took a vehicle from a rental company and kept it longer than permitted by the company. When an attempt was made to arrest the Appellant, the Appellant fled. The defense maintained that the act of taking or unlawfully keeping the vehicle occurred at the same time as the Appellant's flight from arrest. (R. Vol. 3, pg. 277).

In response, the State asserted that there was a "scribbler's error" on the indictment in that the date of the first felony alleged in the indictment was erroneously alleged to have been 17 October 2002.[2] According to the State, the correct date of that felony was 15 November 2002. The moved to correct the indictment in that regard, to which the defense objected.

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[2] We assume that the prosecutor, while attempting to correct what he viewed to be a "scribbler's error" in the indictment, erred in referring to the date as 17 October 2002, as opposed to 7 October 2002.

The State went on to assert that the "pen pack" demonstrated that the Appellant actually had three convictions. In Michigan cause number 02010651, the date of the offense was 15 September 2002. The Appellant was sentenced on that conviction on 15 November 2002. The next conviction was in Michigan cause number 02009352. The date of the offense was said to be 26 December 2001, and the Appellant was sentenced thereon on 7 October 2002. The trial prosecutor then described a third conviction, but, confusingly, referred to it by the same cause number as the last one just set out. However, the prosecutor did point out that the taking of a vehicle occurred and the Appellant's act of fleeing law enforcement officers occurred on different dates.

It was the contention of the defense, though, based at least in part upon the representation by the Appellant himself, that the driving away of a vehicle conviction was separate and distinct from the other charge.

It appears that the trial court found that the events that led to the two convictions set out in the indictment occurred at different times, and sentenced the Appellant as an habitual offender. (R. Vol. 3, pp. 278 - 282).

We think it will be of material assistance to this Court to review the documents included in the "pen pack," which was admitted into evidence, to understand the basis of and proof for the charge of habitual offender status in the case at bar.

The Appellant, on 23 December 2001, unlawfully took and drove away an automobile. The owner of the automobile filed a complaint. On 26 December 2001 the Appellant was seen in the automobile. As Michigan officers attempted to approach the Appellant, the Appellant sped off and eluded them. The automobile was found and impounded by law enforcement on 27 December 2001. The Appellant was found and arrested on 12 January 2002.

In consequence of the Appellant's actions on 23 and 26 December 2001, the Appellant was

charged with unlawful driving away of a motor vehicle, receiving and concealing stolen property, and fleeing and eluding a police officer. In consequence of a plea bargain, the receiving charge was dropped and the remaining two were amended to attempted offenses. (Exhibit 33, unnumbered page 17).

The Appellant was convicted on these two remaining offenses on 4 February 2002 and sentenced on these convictions on 25 February 2002. The Appellant was sentenced to a term of thirty - six months imprisonment on the unlawful driving away of a motor vehicle offense, and thirty six months imprisonment on the fleeing offense. It appears that the convicting court originally ordered probation for these two sentences. (Exhibit 33, unnumbered pages 28 - 29).

However, on 7 October 2002 the Appellant was actually incarcerated on these two offenses. (Exhibit 33, unnumbered page 30). This occurred because the Appellant was charged with a second and unrelated fleeing offense in September, 2002. (Exhibit 33, unnumbered pages 31 - 32; 39). A description of this second offense of fleeing will be found at unnumbered page 33 of Exhibit 33. As to this second fleeing offense, that offense occurred on 15 September 2002. The Appellant was convicted of it on 21 October 2002, and he was sentenced on 15 November 2002. (Exhibit 33, unnumbered page 40).

A "judgment of sentence and commitment to Department of Corrections" for these three convictions will be found at pages 56 and 57 of Exhibit 33.

ARGUMENT

It does not appear to us from the record that the trial court granted relief on the State's motion *ore tenus* to amend the indictment so as to change the date of sentencing as to the first conviction alleged in the habitual offender portion of the indictment to 15 November 2002. In our view, though, whether the trial court did or did not do so is unimportant.

What is very clear, as established by the "pen pack," is that the two convictions that occurred on 7 October 2002 arose from separate incidents. The unlawful driving away of a vehicle occurred on 23 December 2001; the fleeing or eluding a police officer occurred on 26 December 2002. The incidents that gave rise to these convictions were temporally and legally separate. While it is possible that the two offenses were prosecuted in one proceeding, in one indictment, if so that would not have adversely affected their availability for habitual sentencing purposes under Miss. Code Ann. Section 99-19-81. *Kolb v. State*, 568 So.2d 288 (Miss. 1990).

It may be that the reason law enforcement officers in Michigan attempted to stop the Appellant on 26 December 2002 was related to what the Appellant had done on 23 December 2002, in the sense that they would not have attempted to stop him except for the fact that he was the suspect in unlawfully driving away the car three days before. But that would not make the two offenses committed by the Appellant one incident. While it may be that multiple felonies arising from one incident may count as only one, for purposes of Section 99-19-81, the decisions of the Mississippi Supreme Court make it clear that that rule has application only in an instance in which multiple felonies are committed together without any significant break in time. An example of this would be an instance in which a burglary is committed and then a rape and kidnaping in the course of the burglary. *Riddle v. State,* 413 So.2d 737 (Miss. 1982). Here, though, the Appellant's prior felonies were committed at different times and places. His act of fleeing law enforcement was not part and parcel of his act of unlawfully driving away an automobile. The incidents were clearly separate. The fact that it might have been the taking of the car that later prompted the attempted stop, which occurred days later, does not change this.

Under Section 99-19-81, a person convicted in this State of a felony who shall have been convicted twice previously of any felony upon charges separately brought and arising out of separate

incidents at different times and who shall have been sentenced to separate terms of one year or more is eligible for sentencing as provided by that statute. In the case at bar, the two felonies set out in the indictment were separate events, and the Appellant was sentenced separately on each of the convictions arising from those events and to a term of more than one year. Both convictions were available for use to demonstrate habitual offender sentence eligibility. While it may not be entirely clear whether the Appellant actually served one year or more on those sentences, it is unimportant for purposes of the application of Section 99-19-81 whether he did. *Reynolds v. State*, 784 So.2d 929 (Miss. 2001).

As we have said, we have not found in the record that the trial court addressed, much less granted, the State's motion to amend the indictment so as to substitute the 15 November 2002 conviction. It does not appear to us that the court granted relief on the State's motion, in view of the absence of an order granting such relief and in view of the sentencing order, which sets out the Appellant's 7 October 2002 convictions as the bases for habitual offender sentencing. (R. Vol. 1, pg. 50). However, should it be that the Court determines that the trial court did grant relief on the State's motion to amend, the trial court would not have been in error in doing so. *Lacy v. State*, 629 So.2d 591 (Miss. 1993).

The "pen pack" provided by the State established the November, 2002 conviction and some of its details. The Appellant thus was not unfairly surprised by its revelation. The Appellant recognizes that amendments as to dates are matters of form and thus may be amended on motion by the State. The Appellant did not at trial and does not here assert any particular reason as to how or why he was unfairly surprised or prejudiced by any such amendment, and we do not think he credibly could assert such in view of what he knew from the contents of the "pen pack." There would have been no error in allowing an amendment as to the date of the offense.

Peterson v. State, 37 So.3rd 669 (Miss. Ct. App. 2010).

Finally, and again assuming that the trial court amended the indictment in the course of the sentencing hearing, the Appellant is in no position to complain of the lack of an order granting any such amendment. The defense made no motion for such an order, did not object to the lack of such an order, and the issue is barred here. *Doby v. State*, 532 So.2d 584 (Miss. 1988). There is nothing whatever to show that the State thwarted or attempted to thwart the Appellant from objecting to the lack of such an order.

CONCLUSION

The Appellant's conviction and sentence 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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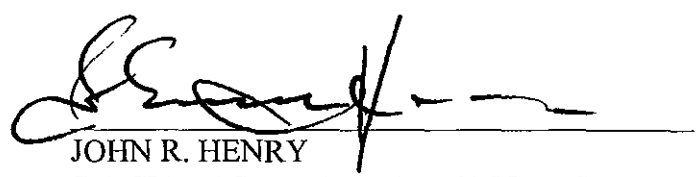
This the 14th day of January, 2011.



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