

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY PRENELL JONES

APPELLANT

V.

NO. 2009-KA-2017-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

On Appeal from the Circuit Court of Forrest County, Mississippi

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.


1. State of Mississippi
2. Anthony Prenell Jones, Appellant
3. Honorable John Mark Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 11th day of October, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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STATEMENT OF THE ISSUES

**THE TRIAL COURT ERRED IN SENTENCING JONES AS A HABITUAL OFFENDER
UNDER A FATALLY DEFECTIVE INDICTMENT**

a. Standard of Review

*b. The Prosecution Should Not Have Been Allowed to Amend the Indictment by Changing
the Dates of Jones' Prior Convictions*

*c. The Amended Indictment Was Ineffective Because the Trial Court Failed to Include
the Order Allowing Amendment*

STATEMENT OF THE CASE

This appeal proceeds from the Forrest County Circuit Court, Forest County, Mississippi. Anthony P. Young was convicted of armed robbery, as a habitual offender, pursuant to Mississippi Code Annotated Section 99-19-81 (1972). The Honorable Robert B. Helfrich presided over the jury trial that was held December 2-3, 2010. ~~Following the jury's guilty verdict, the court conducted a separate sentencing hearing.~~ The court sentenced Young to serve twenty-five years (25) years, without the

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benefit of parole, in the custody of the Mississippi Department of Corrections

Aggrieved, Young filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial. The court denied these motions and Young timely files this appeal. Young is currently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

In late summer, a masked robber entered the Circle K Convenience Store in Hattiesburg, Mississippi, and demanded money from the store clerk. The store was empty, except for the robber and Samuel Chappell - the store clerk.

The robber pointed a .22 revolver handgun at the Chappell's face and motioned for him to take the money out of the register. Chappell took the money from both of the store's registers. After failing in his attempt to lead Chappell to the back of the store, the robber instructed Chappell to lay down behind the counter. Looking for even more money, the robber searched for the keys to the store's safe. Unsuccessful, he decided to leave with a couple of cartons of cigarettes. He dropped several packs of cigarettes on the counter and the floor as he left.

Chappell stayed on the ground until after the robber fled the store. He called the police and they reviewed the store's surveillance tape together. Chappell told the police that he did not see the robber's face , but he did give the police a brief description of the robber's clothing and appearance.

Officer Stephen Harris was one of the responding officers on the scene. He discovered that the robber took two cartons of cigarettes and money from the convenience store. Crime scene analysts collected fingerprints from several fallen packages of cigarettes in the store. Jon Byrd, a latent print examiner, compared these prints to the known prints of Anthony Jones. Byrd concluded that three of the collected prints belonged to Jones.

After police reviewed the fingerprint results, an arrest warrant was issued for Jones at his mother's apartment. Police did not look for any other suspect after they received the information concerning the fingerprints. Jones was placed under arrest and his mother consented to a search.

Police took shoes, money, receipts, a box of bullets, stocking hoodie hats, and a .22 cartridge out of the bedroom where Jones slept. They took a .22 revolver that was located inside a pair of rubber boots, behind the refrigerator, in the kitchen area. They also found money under the cushion of the couch. At trial, the defense objected that there was no link shown between the robbery and these obtained items, however, the court overruled the objection.

The jury found Jones guilty of armed robbery. ~~Following the jury's verdict, the prosecution sought to charge Jones as a habitual offender by amending Jones' indictment to have him sentenced under the recidivism statute, Mississippi Code Annotated Section 99-19-81.~~ The prosecution introduced the following out-of-state convictions against Jones:

- (1) On **October 7, 2002**, Jones was convicted in Cause No. 02-009352-FH-U in Genesee County, Michigan for the felony of Attempted Unlawful Driving Away an Automobile and sentenced to twenty to thirty months (20-30).
- (2) - On **October 7, 2002**, in Cause No. 02-010651-FH-R in Genesee County, Michigan, Jones was convicted of felony Attempted Police Officer - Fleeing - Third Degree, and sentenced to twenty to thirty months (20-30), with both sentences to be served in the Michigan Department of Corrections.

Relying on the dates listed in the indictment, defense counsel objected that Jones' previous convictions on October 7, 2002 – Cause No. 02-009352-FH-U and Cause No. 02-010651-FH-R — were actually a part of the same occurrence. The defense's theory was that Jones was ineligible for sentencing under the habitual offender statute because his convictions were a part of the same occurrence. At the sentencing hearing, however, the prosecution informed the court that the first amended indictment ("habitual offender indictment") contained an error and once corrected, the

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indictment should reflect that the date of conviction for Cause 02-010651 (Attempted Fleeing Police Officer- 3rd degree) should have been **November 15, 2002**. According to the prosecution, Jones was actually convicted of two offenses on October 7, 2002 and one offense on November 15, 2002.

Defense counsel objected to any changes in the already amended indictment. The court neither addressed the state's motion to again amend the habitual offender indictment, nor entered an order amending the indictment. This is evidenced by the habitual offender indictment contained in the appellate record, as well as the trial court's sentencing order, which still lists the same conviction dates for both cause numbers.

Instead of addressing the amendment to the habitual offender indictment, the court simply moved forward with an abbreviated analysis of whether or not the charges in the indictment arose out of separate incidents. ~~Although not recorded, the court allowed the amendment to the habitual offender indictment.~~ After finding Jones' previous convictions were applicable under the statute, the court sentenced Jones as a habitual offender to twenty-five (25) years, without the possibility of parole.

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SUMMARY OF THE ARGUMENTS

How many bites of the apple must the prosecution have before Jones is found guilty under an amended indictment? At the close of the jury trial, the prosecution sought to amend Anthony Jones' indictment and charge him as a habitual offender. Prior to sentencing, Jones prepared his defense to this indictment, arguing that his previous crimes were not applicable under the recidivism statute. However, at sentencing, the prosecution sought to amend the indictment again, to correct a date of one of Jones' convictions. This amendment not only prejudiced Jones' defense, the court failed to include this amendment in the court record. As the habitual offender indictment stands, Jones is not properly sentenced under the recidivism statute and this case should be reversed and

remanded.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING JONES AS A HABITUAL OFFENDER UNDER A FATALLY DEFECTIVE INDICTMENT

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~~Jones does not take issue with the court's ability to amend an indictment, post-trial, to charge a defendant under the recidivism statute.~~ The issue in this case, however, is that the court further altered a material element in the already amended habitual offender indictment. This twice- altered indictment proved to be fatally defective. The court should not have allowed the prosecution to materially alter the habitual offender indictment by changing the date to one of Jones' prior convictions. In addition, this amended indictment was ineffective because the trial court failed to include an order that allowed the amendment. For these reasons, the court should reverse Jones' sentence and remand this case to the trial court for re-sentencing.

a. Standard of Review

"The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this Court." *Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996) (overruled on other grounds). The Court reviews questions of law *de novo*. *Debrow v. State*, 972 So. 2d 550, 552 (¶6) (Miss. 2007).

b. The Prosecution Should Not Have Been Allowed to Amend the Indictment by Changing the Dates of Jones' Prior Conviction

A change to an indictment may be permissible if the change does not materially alter the facts of the originally stated offense or materially alter a defense that would have been previously available under the original indictment. *Shelby v. State*, 246 So. 2d 543, 545 (Miss. 1971). The issue is whether changing the dates on Jones' prior convictions amounted to a defect of form or substance.

While trial courts may allow amendments to correct the form of an indictment, substantive changes in the indictment must be corrected by a grand jury. *Spears v. State*, 942 So. 2d 772, 774 (¶6) (Miss. 2006). In this case, the amendment to the conviction dates was a change of substance that deprived Jones of a previously available defense, and therefore was impermissible.

Jones does not take issue with the court's authority to change the original indictment to charge a defendant as a habitual offender. "Amending an indictment in order to charge a defendant as a habitual offender affects only sentencing and not the substance of the offense charged. Therefore, such an amendment is permissible." *Williams v. State*, 766 So. 2d 815, 817 (¶5) (Miss. Ct. App. 2000). However, the court's second amendment to the habitual offender indictment, changing the date of his previous conviction, was a change of substance, and not a change of form.

Prior to the amended habitual offender indictment, Jones's defense counsel was prepared to argue that Jones' convictions did not meet the statutory requirements under Miss. Code. Ann. Section 99-19-81. Under the recidivism statute, the state had to prove that Jones' previous convictions were "... *separately brought and arising out of separate incidents* at different times. ... " Miss. Code Ann. §99-19-81 (emphasis added).

At the close of the jury trial, and again at the sentencing hearing, the defense argued that Jones' previous convictions - attempted unlawful driving away an automobile and attempted fleeing a police officer in the third degree - arose out of the same set of circumstances and events. Tr. 277. The defense indicated that these convictions were also not "separately brought" since Jones was convicted of both offenses on October 7, 2002.

At the sentencing hearing, however, the prosecution asked to court to amend the habitual offender indictment because Jones' convictions did not occur on the same day. Rather, the indictment should have been corrected to show that the attempted fleeing for a police officer

conviction occurred on November 15, 2002. According to the prosecutor, the indicted offenses could not have been a part of the same occurrence because the convictions arose from incidents that occurred roughly three months apart from one another.

Amendments and corrections to dates are liberally allowed if the time is not an essential element of the particular crime charged in the indictment. *Wilson v. State*, 515 So. 2d. 1181, 1182 (Miss. 1985). In this instance, the dates of the previous convictions were a material element of the habitual offender indictment.

“The test for determining whether the defendant is prejudiced by the amendment depends on whether a defense under the original indictment would be equally available under the amended indictment.” *Eakes v. State*, 665 So. 2d 852, 859 (Miss. 1995). Had the habitual offender indictment properly contained the accurate dates of Jones’ previous convictions (October 7, 2002 and November 15, 2002), the defense counsel could not have argued before the court that these previous convictions arose out of the same set of circumstances because the dates of conviction were more than one month apart. As the unamended habitual offender indictment stood, Jones was not properly notified as to the charges he would have to defend.

Because of the fatally defective indictment in this case, justice requires that Jones’s sentence be reversed and that his case be remanded to the trial court for re-sentencing. However, the trial court errors do not end at this issue. In addition to the fatally defective indictment, the court failed to enter its order amending the indictment into the court records. The amended habitual offender indictment should be deemed ineffective due to the lack of an order amending the habitual offender indictment.

c. The Amended Indictment Was Ineffective Because the Trial Court Failed to Include the Order Allowing Amendment

Mississippi law provides that “[t]he order of the court for amendment of the indictment,

record, or proceedings provided in Section 99-17-13¹, **shall** be entered in the minutes, and **shall** specify precisely the amendment, and **shall** be a part of the record.” Miss. Code Ann. Section 99-17-15 (Rev. 2007) (emphasis added).

The Mississippi Supreme Court has placed the burden on the State to make sure that the trial court order amending the indictment appears in the record. *Sturgis v. State*, 379 So. 2d 534, 536 (Miss. 1980). However, in order to preserve the error for appeal, the defense must object to the absence of the order. *Id.*

There are exceptions to the defendant’s requirement to have a noted objection on the record. In *Reed v. State*, 506 So. 2d 534, 536 (Miss. 1980), the trial court thwarted the defense’s attempts to the object to the absence of the order amending the indictment. The prosecution failed to ask the trial court to include the order granting the indictment and failed to include the order in the record. The Court held that the attempted amended order was therefore ineffective.

In this case, neither the court nor the prosecution attempted to enter the order that amended the habitual offender indictment. Defense counsel did not object to the absence of the order either. However, this analysis should turn on, rather, whether there was a fatal variance between the indictment and the proof presented at trial. As the original habitual offender indictment stands, Jones is not properly informed about the previous charges that the State sought to use against him in sentencing him as a habitual offender.

CONCLUSION

The trial court improperly amended the habitual offender indictment. For this reason, Jones

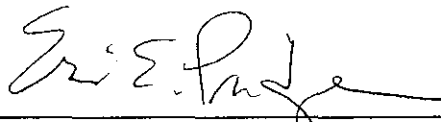
¹In summary, Section 99-17-13 provides that, in criminal proceedings, whenever there is a variance between the statement of the indictment and the proof of the evidence presented, the court should determine if the variance is material to the merits of the case. The statute then gives the procedure in which the court should handle the variance.

was sentenced under a fatally defective indictment. Even more, the court's order amending the habitual offender indictment, was not placed in the court records. Jones requests that this Honorable Court reverse and remand this case for re-sentencing.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Anthony Prenell Jones, Appellant

By:



ERIN E. PRIDGEN, MISS. BAR NO. [REDACTED]
STAFF ATTORNEY

CERTIFICATE OF SERVICE


I, Erin E. Pridgen, Counsel for Anthony Prenell Jones, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Robert Helfrich
Circuit Court Judge
6645 U.S. Highway 98, Suite 3
Hattiesburg, MS 39403-0309

Honorable John Mark Weathers
District Attorney, District 12
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Honorable Jim Hood
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This the 11TH day of October, 2010.



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STATE OF MISSISSIPPI

FILED

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SUPREME COURT
COURT OF APPEALS

Appellant

Appellee

ORDER

This matter came before the Court on Motion to Strike Language from Appellant's Brief, filed by the appellant, seeking to strike language from the appellant's brief "that says that the indictment was amended subsequent to the guilty plea so as to allege habitual offender status."

The Court finds that the motion is well taken and should be granted.

THEREFORE IT IS ORDERED that the Motion to Strike Language from Appellant's Brief be, and hereby is, granted.

SO ORDERED, this the 1st day of February, 2011.



DONNA M. BARNES, JUDGE