IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARENCE ARRINGTON — APPELLANT

VS. — NO. 2010-KA-0254

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO TESTIFY.

II. THE STATE SUFFICIENTLY ESTABLISHED THAT THE APPELLANT WAS A HABITUAL OFFENDER PURSUANT TO MISS. CODE ANN. §99-19-81.

III. THE INDICTMENT WAS NOT FATALLY DEFECTIVE AND THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ALLOWING JURY INSTRUCTION S-1 AS IT DID NOT CONSTITUTE AN IMPERMISSIBLE CONSTRUCTIVE AMENDMENT TO THE INDICTMENT.

STATEMENT OF THE FACTS

The Appellant, Clarence Arrington, who had a felony charge of grand larceny pending against him, was being temporarily held at the Laurel Police Department after a court appearance. (Transcript p. 36 and 52). Corporal David Marshall escorted the Appellant through the booking area. (Transcript p. 36). The Appellant was visibly upset so Corporal Marshall decided to allow him to step outside into a security area to smoke a cigarette. (Transcript p. 36). Both Corporal Marshall and the Appellant stepped into the security area. (Transcript p. 39). Corporal Marshall turned to speak to Officer Jim Thornhill who had just opened the doors to the area. (Transcript p. 39). As he

turned, the Appellant took off down the nearby stairs and was "headed unescorted to an area he had no business being in." (Transcript p. 39). Officer Thornhill radioed central dispatch. (Transcript p. 40).

Officer Vince Williams received information that the Appellant had escaped and was headed toward Maple Street. (Transcript p. 44). He began looking for the Appellant and eventually saw him in the back yard of a house on Elm Street. (Transcript p. 45). When the Appellant saw Officer Williams he darted under the carport of the house. (Transcript p. 45). Officer Williams obtained consent from the owner of the house, who was standing outside, to search the house. (Transcript p. 46). The Appellant was found hiding in a closet in the living room. (Transcript p. 46).

The Appellant was tried and convicted of felony escape. He was sentenced as a habitual offender pursuant to Miss. Code Ann. §99-19-81 to serve five years in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

This Court should affirm the Appellant's conviction and sentence as the Appellant did not establish that there were any reversible errors committed during his trial. Each of the Appellant's issues are procedurally barred as no contemporaneous objections were made. The Appellant's arguments that plain error occurred with regard to each issue are flawed. First, he failed to establish that any errors occurred. The record does not indicate that the Appellant was denied his right to testify. The State sufficiently established that the Appellant was a habitual offender pursuant to Miss. Code Ann. §99-19-81. Also, the indictment was not fatally flawed as it gave the Appellant sufficient notice of the charges against him and Jury Instruction S-1 did not constitute an impermissible constructive amendment of the indictment. Furthermore, the Appellant failed to establish how the alleged errors affected the outcome of the trial. Thus, there can be no plain error.

ARGUMENT

I. THE APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO TESTIFY.

The Appellant first argues that "the trial court and/or trial counsel deprived [him] of his constitutional right to testify." (Appellant's Brief p. 6). In so arguing, the Appellant relies on *Dizon v. State*, 749 So.2d 996, 999 (Miss. 1999), a case which was reversed because the record reflected that the defendant "was not fully advised of his right to testify on his own behalf." In *Dizon*, the Mississippi Supreme Court noted that not only had the trial court failed to inform the defendant of his right to testify but so had his attorney. *Id.* Unlike the defendant in *Dizon*, the Appellant testified, outside the presence of the jury, that his attorney informed him of his right to testify. (Transcript p. 58). His testimony reflected that his attorney fully advised him not only of his right to testify but also of all that testifying on his own behalf would entail. (Transcript p. 58 - 60). As such, the Appellant cannot complain that he was not fully informed of his right to testify.

After testifying that his attorney informed of his right, the Appellant initially indicated that he wanted to testify. Moments later the record indicates that he changed his mind. The Appellant argues on appeal that after he changed his mind the trial court should have once again informed him of his right to testify. However, the Appellant offers no authority to support this contention. Thus, the record does not indicate that the Appellant was denied his right to testify.

II. THE STATE SUFFICIENTLY ESTABLISHED THAT THE APPELLANT WAS A HABITUAL OFFENDER PURSUANT TO MISS. CODE ANN. §99-19-81.

The Appellant next argues that "the State failed to establish that [he] was a habitual offender under Mississippi Code Annotated Section 99-19-81." (Appellant's Brief p. 7). "At a bifurcated hearing, as required under the recidivist statutes, the State must prove the requirements set forth in the habitual offender statute beyond a reasonable doubt." *Davis v. State,* 680 So.2d 848, 851 (Miss.

1996). Mississippi Code Annotated §99-19-81 reads as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

In this case, the trial court found that the necessary proof had been presented that the Appellant was a habitual offender under §99-19-81. "Where a trial judge makes a factual finding supported by the record, [the Court of Appeals] will not overturn that finding of fact unless it is clearly erroneous." *Armstrong v. State,* 828 So.2d 239, 245 (Miss. Ct. App. 2002) (citing *West v. State*, 463 So.2d 1048, 1056 (Miss.1985)). The trial court's finding was not clearly erroneous.

A sentencing order in *State v. Clarence Arrington*, Case No. 9824 from the Circuit Court of the Second Judicial District of Jones County, Mississippi was submitted. (Record p. 9 - 10). It indicated that on November 18, 1996 the Appellant was convicted of grand larceny and sentenced to three years in the custody of the Mississippi Department of Corrections. (Record p. 9 - 10). A sentencing order in *State v. Clarence Arrington*, Case NO. 9710 from the Circuit Court of the Second Judicial District of Jones County, Mississippi was also submitted to the trial court. (Record p. 11 - 12). This order indicated that on June 10, 1996 the Appellant was convicted of burglary of a dwelling and sentenced to serve five years in the custody of the Mississippi Department of Corrections under the provisions of Miss. Code Ann. §47-7-47. (Record p. 11 - 12). The Appellant did not object to these documents during sentencing. (Transcript p. 76). As such, he cannot take issue with the documents on appeal. *See Tate v. State*, 961 So.2d 763, 767 (Miss. Ct. App. 2007).

Nonetheless, the Appellant, relying on *Vince v. State*, 844 So.2d 510 (Miss. Ct. App. 2003), argues that plain error occurred in that the above mentioned sentencing orders were not entered into

evidence. (Appellant's Brief p. 8). However, the Appellant's case is easily distinguishable from *Vince*. In *Vince*, the NCIC printout used to establish that Vince was a habitual offender was not only not made an exhibit, it was not found anywhere in the record. *Vince*, 844 So.2d at 517. In the Appellant's case, the sentencing orders were made a part of the record. (Record p. 9 - 12). As such, the State sufficiently established that the Appellant was a habitual offender under Miss. Code Ann. §99-19-81.

III. THE INDICTMENT WAS NOT FATALLY DEFECTIVE AND THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ALLOWING JURY INSTRUCTION S-1 AS IT DID NOT CONSTITUTE AN IMPERMISSIBLE CONSTRUCTIVE AMENDMENT TO THE INDICTMENT.

Finally, the Appellant argues that "the indictment was fatally defective, as it failed to allege an essential element of the crime, and the trial court committed plain error in granting Instruction S-1, which constituted an impermissible constructive amendment to the indictment." (Appellant's Brief p. 9). As noted by the Appellant in his brief, there were no contemporary objections made at trial to either the indictment or the instruction. (Appellant's Brief. p. 10). As such, the issue is procedurally barred. As such, the only way the Appellant can obtain relief is by proving that the issues constitute plain error. Mississippi law makes it clear that in order "[t]o determine if plain error has occurred, [the Court] must determine 'if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial.'" *Smith v. State,* 984 So.2d 295, 307 (Miss. Ct. App. 2007). These requirements have not been met in this case.

First and foremost, no errors occurred. The indictment was not fatally flawed. The standard of review on this issue is as follows:

> The issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows this Court a broad standard of review. *Steen v. State*, 873 So.2d

> 155, 161(¶ 21) (Miss. Ct. App.2004). The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense. *See Lewis v. State*, 897 So.2d 994, 996(¶ 9) (Miss. Ct. App.2004). All that is required is that the indictment provide "a concise and clear statement of the elements of the crimes charged." *Williams v. State*, 445 So.2d 798, 804 (Miss.1984).

Smith v. State, 989 So.2d 973, 979 (Miss. Ct. App. 2008). The indictment in question reads as follows:

> . . . CLARENCE ARRINGTON in said County, District and State, on or about the 3rd day of January, 2008 A.D., did willfully, unlawfully, and feloniously, escape from the Laurel Police Department, in which he was confined and in lawful custody, in violation of Section 97-9-49. The conduct described above is in violation of MCA Section 97-9-49, constituting the crime of Escape, and is at all times against the peace and dignity of the State of Mississippi.

(Record p. 3). The Appellant argues that this indictment "did not contain a definite allegation or statement that the confinement or custody from which Arrington escaped was pursuant to a felony arrest or conviction." (Appellant's Brief p. 10). Miss. Code Ann. §97-9-49 makes it a felony to escape when one has been arrested for or has a conviction for a felony and makes it a misdemeanor to escape when one has been arrested for or has a conviction for a misdemeanor. The Appellant is essentially arguing that the indictment did not clearly establish whether he was being charged with felony escape or with misdemeanor escape. However, the indictment clearly reads that the Appellant "feloniously" escaped from the Laurel Police Department. That coupled with the citation to the statute under which he was being charged sufficiently informed him of the charges he was facing. *See Madere v. State*, 794 So.2d 200, 212 (Miss. 2001) (holding that "[w]hile a statutory citation cannot, standing alone, meet [the test for a legally sufficient indictment], a citation to the statute reinforces other references within the indictment"). As the *Madere* Court held "the test of the validity of an indictment is 'not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards.'" *Id* (quoting

United States v. Webb, 747 F.2d 278, 284 (5th Cir. 1984)). That standard is whether from a "fair reading of the indictment, taken as a whole, [it] clearly describes the nature and cause of the charges against the accused." *Berry v. State*, 996 So.2d 782, 787 (Miss. 2008). The indictment clearly described the nature of the charges against the Appellant. Moreover, as recently noted by this Court, "[t]he ultimate test, when considering the validity of an indictment on appeal, is whether the [Appellant] was prejudiced in the preparation of his defense." *Lyles v. State*, 12 So.3d 532, 539 (Miss. Ct. App. 2009) (quoting *Fuqua v. State*, 938 So.2d 277, 281 (Miss. Ct. App. 2006)). The Appellant did not assert and the record did not illustrate in any way that he was prejudiced in preparation of his defense. Accordingly, the indictment was not fatally flawed.

Furthermore, there was no impermissible constructive amendment of the indictment. In determining whether a jury instruction constitutes an impermissible constructive amendment of the indictment, the Mississippi Supreme Court has held that "the central question is whether the variance [between the indictment and the instruction] is such as to substantially alter the elements of proof necessary for a conviction." *Bell v. State*, 725 So.2d 836, 855 (Miss. 1998). In this regard, the Supreme Court set forth the following guidelines:

> It is well settled in this state that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. (*citations omitted*). The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made. (*citations omitted*).

Spann v. State, 771 So.2d 883, 898 (Miss. 2000) (*emphasis added*). In the case at hand, the instructions did not substantially alter the elements of proof necessary for a conviction. Jury Instruction S-1 reads as follows:

> CLARENCE ARRINGTON has been charged with the offense of Felony Escape.

If you find from the evidence in this case beyond a reasonable doubt that:

1. CLARENCE ARRINGTON, on or about the 3rd day of January, 2008, in the Second Judicial District of Jones County, Mississippi;
2. Did willfully, escape, by virtue of an arrest warrant charging him with Grand Larceny, a felony, issued by the City Court judge, Cecelia Arnold, from the custody of the Laurel Police Department, in which he was confined.

then you shall find the defendant, CLARENCE ARRINGTON, guilty of Felony Escape as charged.

If the prosecution has failed to prove any one ore more of the above listed elements beyond a reasonable doubt, then you shall find the defendant, CLARENCE ARRINGTON, not guilty of Felony Escape.

(Record p. 20). As shown above, the indictment effectively charged the Appellant with Felony Escape under Miss. Code Ann. §99-9-49. In order to obtain a conviction under that indictment, the State had to prove that the Appellant was in custody for a felony charge. The instruction did nothing to change this burden of proof. Therefore, the instruction did not constitute an impermissible constructive amendment to the indictment.

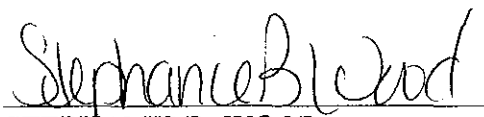
Additionally, the Appellant did not allege with any particularity how the indictment and jury instruction prejudiced the outcome of his trial. Moreover, the record does not evidence any prejudice to the outcome of the Appellant's case. As such, there was no plain error.

CONCLUSION

For the foregoing reasons the State of Mississippi respectfully requests that this Honorable Court affirm the Appellant's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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