

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES E. PEGUES

APPELLANT

VS.

NO. 2010-CP-0744

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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vs.

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Lafayette County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner and another were indicted for possession of 6.7 grams of cocaine with the intention of distributing, transferring or selling same, the indictment being filed on 20 September 2004. (R. Vol. 1, pp. 46 - 47). On 10 January 2005, the prisoner signed a "Petition to Enter a Plea of Guilty," in which he indicated that he wished to enter a plea of guilty to the felony of possession of more than two grams but less than ten grams of cocaine. (R. Vol. 1, pp. 22 - 27). On that same day the petition was presented to the Circuit Court, and, after the usual colloquy, the prisoner's plea was accepted, and he was convicted and sentenced (R. Vol. 1, pp. 28 - 44).

On 7 January 2010, the prisoner filed a petition for the writ of habeas corpus, in which he sought to have his conviction and sentence set aside. The ground asserted was that he was serving an illegal sentence, the sentence supposedly being illegal because the indictment exhibited against him was allegedly defective for having failed to allege the venue of the offense set out in it. The usual ineffective assistance of counsel claim was raised as well, but this claim was merely an assertion that counsel had been ineffective for having failed to raise the alleged defect of the indictment. It was also alleged that the plea was involuntary because the indictment was defective. (R. Vol. 1, pp. 1 - 21).

The Circuit Court, treating the prisoner's filing as one in post - conviction relief, denied relief without an evidentiary hearing, this by Order filed on 22 March 2010. (R. Vol. 1, pg. 60). The prisoner then filed his notice of appeal on 30 March 2010. (R. Vol. 1, pg. 55).

STATEMENT OF ISSUES

DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where it plainly appears from the face of the motion and the prior proceedings in the case that the movant is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Supp. 2009). This

Court will not disturb a Circuit Court's denial of relief absent a showing that the Circuit Court was clearly in error. Questions of law, however, are reviewed *de novo*. *E.g. Simmons v. State*, 784 So.2d 985, 987 (Miss. Ct. App. 2001).

In the case at bar, the prisoner asserted in his pleadings in the Circuit Court that the indictment against him failed to allege the venue in which he committed his most recent offense. Because of this alleged failure, he asserted that his conviction was void and that the sentence imposed upon him was an illegal sentence. The ineffective assistance of counsel claim consists of a claim that the prisoner's attorney failed to attack the indictment on the basis of this alleged defect.

First of all, we note that the prisoner filed his motion in January, 2010 (R. Vol. 1, pg. 1) and that he was convicted and sentenced on 10 January 2005 (R. Vol. 1, pg. 28). The prisoner had three years from 10 January 2005 in which to file his motion in post - conviction relief, Miss. Code Ann. Section 99-39-5(2) (Supp. 2009). His failure to file in a timely fashion works a bar to his claim. While the prisoner did assert that his sentence was an illegal sentence, in point of fact and law, his sentence of sixteen years as an habitual offender upon his conviction of possession of cocaine in an amount between two and ten grams was authorized by law and was not "illegal." Miss. Code Ann. Sections 41-29-139(c)(1)(C) (Rev. 2009); 99-19-81 (Rev. 2007). There is no exception to the statute of limitations applicable in the case at bar. The decision of the Circuit Court to deny relief on the prisoner's motion should be affirmed on account of the prisoner's failure to file his motion within the time by law permitted.

The indictment exhibited against the prisoner in the case at bar does appear to have omitted statements concerning the county and State in which the prisoner committed his most recent offense.¹

¹ We will surmise that the failure to include these statements was no more significant than a simple oversight by the drafter of the indictment. Apparently, neither the trial court nor the defense

(R. Vol. 1, pp. 46 - 47). Those statements are to be included in indictments under URCCC 7.06. However, it does not appear that there was any challenge made against the indictment on this ground, and it is clear that the prisoner did enter a valid plea of guilty to the indictment. The question presented by this appeal, assuming for argument that the appeal is properly before the Court, is whether the failure to include statements concerning the county and State in the indictment are defects of such a nature as to prevent a circuit court of this State from acquiring jurisdiction of the cause involved in the indictment. If so, then any subsequent judgment entered would be void, and void for reasons having nothing to do with the grounds available in post - conviction relief. If not, though, then the failure to include such statements should be seen as defects which may be waived by a valid guilty plea, and were so waived in the case at bar.

The entry of a valid guilty plea works a waiver of all non - jurisdictional defects. Specifically, the entry of such a plea works of a waiver except where (1) the indictment fails to allege an essential element of the crime charged or (2) where the circuit court was without subject matter jurisdiction. *Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989).

In the case at bar, the indictment sufficiently set out the offense charged against the prisoner.² The Circuit Court clearly had subject matter jurisdiction regarding the charge set out in the indictment and its lesser - included offense. Art. 6, Section 156, Miss. Const. (1890); Miss. Code Ann. Section 99-19-5(Rev. 2007). Consequently, neither of the two exceptions set out in *Jefferson* is applicable here. While the prisoner appears to rely upon *Evans v. State*, 144 Miss. 1, 108 So. 725

attorney noticed it either.

² The prisoner, through a plea bargain with the State, entered a plea to a possession charge, which would have been a lesser - included offense. The felony alleged in the indictment was properly alleged, though, and the prisoner makes no claim otherwise.

(Miss. 1926), for the proposition that the failure to allege venue in an indictment is a fatal defect, in that case it was clear that a proper and timely objection had been made to the supposed defect. The error committed by the trial court there was in failing to enter an order allowing an amendment to cure the alleged defect, or enter same upon its minutes.

On the other hand, the Court in *Evans* noted that an error in an indictment in this regard is an amendable one. The point is significant for two reasons. First, since such a defect is curable on proper motion by the prosecuting attorney, rather than one that only a grand jury could correct, any such error is not fatal. Any such defect cannot be jurisdictional in nature. Secondly, it can be drawn from the opinion that the failure to object to such a defect in an indictment works a waiver of the issue. We submit that the issue was waived in the case at bar by the failure to object, and by entering the plea of guilty.

Having said this, we do not think it can be reasonably said that counsel for the prisoner was ineffective for having failed to demur to the indictment. The very most that would have come of a demurrer or some other objection would have been an amendment to the indictment. And even had it been necessary to put the case again before a grand jury to correct such an omission, which it was not, this would have gained the prisoner nothing. The failure to demur or otherwise object to the indictment did not compromise some defense, and the prisoner points to nothing to demonstrate some prejudice to his case. That perhaps the prisoner would not have pleaded guilty to an indictment which contained an inadvertent omission of a statement of the county in which the offense occurred hardly suggests that he would not have entered such a plea to an indictment that did contain that statement.

The indictment in the case at bar apparently failed to include a statement concerning the county in which the offense occurred. The indictment should have contained this statement. We


submit, though, that the prisoner's valid and effective guilty plea worked a waiver of the issue. The error was in the paperwork, not in the substance of things, and though regrettable, there is simply nothing to show that the prisoner was injured or in some way prejudiced by it. The prisoner freely admitted his guilt. The oversight was no more than a technical glitch.

CONCLUSION

The Order denying relief on the prisoner's motion in post - conviction relief 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 13th day of September, 2010.



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