

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2010-CP-00831

**AUGUSTA MCKENZIE
APPELLANT**

v.

**STATE OF MISSISSIPPI
APPELLEE**

**On Appeal From the Circuit Court
of Sunflower County, Mississippi**

BRIEF OF THE APPELLEES

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

**R. STEWART SMITH, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
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CERTIFICATE OF INTERESTED PARTIES

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. Augusta McKenzie, Inmate #02766, Appellant
Christopher Epps, Commissioner of Corrections
Hon. Betty W. Sanders, Circuit Court Judge
Jim Hood, Attorney General

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellee:

1. R. Stewart Smith, Jr., Special Assistant Attorney General
2. James Norris, Attorney, Mississippi Department of Corrections

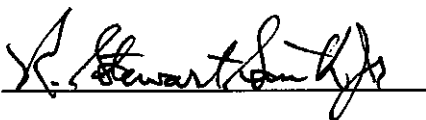
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STATEMENT OF ISSUES

- I. Whether Augusta McKenzie's Sentences Have Been Properly Calculated by the Mississippi Department of Corrections**

STATEMENT OF THE CASE

On October 14, 1992 Augusta McKenzie (“McKenzie”) was sentenced in the Circuit Court of Sunflower County to serve a term of thirty years in the Mississippi Department of Corrections (MDOC) for the sale of cocaine. (CP:18, 23).¹ On February 12, 1993 McKenzie was sentenced in the Circuit Court of Sunflower County to serve terms of twenty years for armed robbery and five years for conspiracy, to run concurrently with each other, but to be consecutive to the previous sale of cocaine sentence. (CP:19-20, 23). Furthermore, as part of the February 12, 1993 sentencing, he was sentenced as a habitual offender. (CP:19-20,23).

McKenzie initiated this action by filing a complaint requesting that the Circuit Court of Sunflower County order that his sentences run concurrently and the he be given credit for time served on the second sentence against his first sentence. (CP:10). On March 25, 2010 the Circuit Court of Sunflower County made findings of fact and denied McKenzie any relief. (CP:35-36). McKenzie then pursued this appeal.

SUMMARY OF THE ARGUMENT

McKenzie was sentenced to two terms of imprisonment in the MDOC, running consecutively, that total fifty years if served day for day. Since his sentences were consecutive to each other, he has to serve the first then the second. He may not have time served on the first sentence apply toward the second.

McKenzie is not eligible for a parole date. His second sentence, as a habitual offender, disqualifies him from parole eligibility.

¹Citations to the Record will be in the form of (CP:XX), with “CP” representing the Clerk’s Papers, and “XX” representing the specific page number.

McKenzie has been given credit for all the days he has earned toward an early release through trusty time or meritorious earned time. Therefore, McKenzie is not eligible to be released for time served, or be given any credit other than what he already has, or any other relief he may have requested.

ARGUMENT

I. Augusta McKenzie's Sentences Have Been Properly Calculated by the Mississippi Department of Corrections

A. McKenzie's Sentences Are Consecutive Not Concurrent

The sentencing judge is given the discretion to make a person's sentence run concurrently with a preceding conviction, or commence at the termination of the preceding conviction, thereby running consecutively. *Miss. Code Ann. § 99-19-21 (1972 as amended)*. *Coffey v. State*, 856 So. 2d 635, 638 (*Miss. Ct. App.* 2003).

McKenzie was sentenced to a term of thirty years on October 14, 1992. (CP: 18). The Judge who subsequently sentenced McKenzie to a term of twenty years on February 12, 1993 clearly used his discretion to order that sentence to run consecutively to the earlier sentence. (CP:19-20). He must serve his first sentence to its termination and then begin to serve his second sentence. This is correctly reflected in the "Max Discharge" date on his Time Sheet. (CP:23).

B. McKenzie Is Not Eligible for Parole

At the time McKenzie was sentenced, a person who was sentenced as a habitual offender was not eligible for parole. *Miss. Code Ann. § 47-7-3 (1972 as amended)*. Since McKenzie's second sentence was as a habitual offender he is not eligible for parole on that sentence.

Because his second sentence is mandatory, and ineligible for parole, he is not eligible for parole on his first sentence. One who is paroled leaves prison, however McKenzie has a mandatory sentence waiting behind his first sentence, therefore he cannot be paroled on his first sentence. This is why he has no parole eligibility date showing on his time sheet. (CP:23).

C. McKenzie's Time Sheet Is Being Calculated Correctly

At the time McKenzie was sentenced, an offender could get out of prison on earned release supervision after serving fifty percent of his sentence. *Miss. Code Ann. § 47-5-138 (1972 as amended)*. He could "flat time" his first sentence after fifteen years and then serve his mandatory twenty year sentence. This is reflected in his time sheet by the calculation of his "Tentative Discharge". (CP:23). Judge Sanders made reference to this in her Opinion and Order. (CP:35-36).

Judge Sanders also observed that McKenzie was being credited for (and occasionally losing) days of earned time for which he is eligible. (CP:36). Therefore, McKenzie is receiving all time which would effectively allow him to reduce his sentence, for which he is eligible.

CONCLUSION

The sentencing judge was within his lawful discretion when he ordered McKenzie's second sentence to run consecutive to his first. Because McKenzie's second sentence was as a habitual offender, he is not eligible to be considered for parole on that sentence or his prior sentence. McKenzie has been given credit for the earned time for which he is statutorily eligible.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
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BY: R. Stewart Smith Jr.

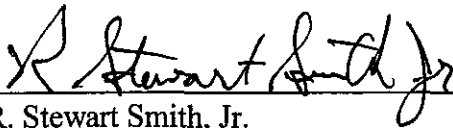
CERTIFICATE OF SERVICE

I, R. Stewart Smith, Jr., 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 OF THE APPELLEE** to the following:

Augusta McKenzie, # 02766
Marshall County Correctional Facility
833 West Street
Holly Springs, MS 38634

Hon. Betty W. Sanders
Circuit Court Judge Fourth District
P.O. Box 244
Greenwood, MS 38935

This the 1st day of October, 2010.



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