

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANIEL ZACHARY ROSS

APPELLANT

VS.

NO. 2010-CP-1078

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE TRIAL COURT'S DENIAL OF THE APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS NOT CLEARLY ERRONEOUS.

STATEMENT OF THE FACTS

The Appellant, Daniel Zachary Ross, along with Daniel Jeremy Lamb, Stefan R. Edwards, and James Steven Paden were indicted for armed robbery in violation of Mississippi Code Annotated §97-3-79 and for conspiracy to commit armed robbery in violation of Mississippi Code Annotated §97-1-1. (Record p. 4-5). On September 4, 2007, Ross, Edwards, and Paden entered guilty pleas. (Record p. 8 -14). As a result of Ross's plea, the State retired the conspiracy charge against him. (Record p. 13). With regard to the armed robbery charge, Ross was sentenced to thirty years with eighteen years suspended and five years post-release supervision upon release. (Record p. 6-7).

The record indicates that Ross filed a motion for post-conviction collateral relief on

December 3, 2008; however, a complete copy of the motion is not in the record. (Record p. 3). The only indication of the exact issues raised in the motion comes from the trial court's order denying the motion which states that Ross claims "that his sentence was illegal and disproportionate to the sentences received by his co-defendants." (Record p. 17). The order denying the motion ruled, in part, as follows on Ross's motion:

First, the Petitioner asserts that his sentence is illegal. Although it is unclear, it appears that the Petitioner is aggrieved by the classification that MDOC has assigned to his sentence. The Petitioner has asserted that he is entitled to be classified under Miss. Code Ann. §47-7-3(d)(i) as opposed to Miss. Code Ann. §47-7-3(d)(ii). The Court did not address the statute in either the sentencing order or at the plea colloquy.

First, the classification of MDOC inmates is within the administrative purview of MDOC and this Court will not interfere with those administrative duties unless they are performed illegally. Second, it is clear from the plain language of Miss. Code Ann. §47-7-3 that the Petitioner should be classified under section (d)(ii) of the statute. Section (d)(i) clearly states, "This paragraph (d)(i) shall not apply to persons convicted after September 30, 1994." As stated above, the Petitioner pled guilty in 2007 so (d)(i) would not be applicable in this matter.

The Petitioner also asserts that his sentence is grossly disproportionate to the sentences received by his co-defendants. The sentences imposed in this matter were all the results of plea negotiations and recommendations by the State of Mississippi. The Petitioner's sentence was within the statutory maximum for the crime of armed robbery. The Court cannot say that the sentence was disproportionate.

(Record p. 17-18). Ross now appeals the trial court's denial of his motion for post-conviction collateral relief.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's denial of the Appellant's motion for post-conviction collateral relief as the Appellant did not show that the denial was clearly erroneous.

ARGUMENT

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)) (*emphasis added*).

THE TRIAL COURT'S DENIAL OF THE APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS NOT CLEARLY ERRONEOUS.

On appeal, Ross first argues that he “was denied due process of law and subjected to a fundamental constitutional violation where the trial court imposed sentence for armed robbery offense and specified that such sentence was imposed pursuant to Miss. Code Ann. §47-7-3(d)(ii) and where such sentence should have been imposed pursuant to Miss. Code Ann. §47-7-3(d)(i) where the indictment charge Ross under Miss. Code Ann. §97-3-79 and not under Miss. Code Ann. §97-3-115 or any other statute related to carjacking.” (Appellant’s Brief p. 4). This is almost the identical issue as the one raised in *Banks v. State*, 37 So.3d 81 (Miss. Ct. App. 2009). In *Banks*, the appellant, who pled guilty to armed robbery and kidnapping and was sentenced in 2002, “argued that his sentence under Mississippi Code Annotated section 47-7-3(d)(ii) (Supp.2008) was illegal” asserting instead that “he should have been sentenced under Mississippi Code Annotated section 47-7-3(d)(i) (Supp.2008), which allows for parole.” *Id.* at 83. This Court held that the issue was “wholly without merit” stating that:

Section 47-7-3(d)(i), which Banks alleges applies to him, provides that it does not apply to any person convicted after September 30, 1994. Furthermore, “Mississippi Code Annotated section 47-7-3(d)(ii) (Supp.2003) pertains to convictions for robbery, attempted robbery, or carjacking through the display of a deadly firearm, and to drive-by shooting convictions. The statute indeed forecloses armed robbers convicted after October 1, 1994, from parole eligibility.” *Thomas v. State*, 881 So.2d 912, 916(¶ 11) (Miss.Ct.App.2004). Accordingly, Banks was properly denied eligibility for parole because he pleaded guilty to armed robbery on March 20, 2002.

Id. at 84. As in *Banks*, the trial court in Ross’s case properly held that section 47-7-3(d)(i) is not applicable in that Ross pled guilty after October 1, 1994. (Record p. 17-18).

Next Ross argues that he “suffered a denial of due process of law where the court accepted a plea of guilty and imposed a sentence for armed robbery and subsequently accepted a plea of simple robbery from co-defendant and imposed a lesser sentence where both defendants were

charged with the same identical actions.” (Appellant’s Brief p. 10). However, Ross is procedurally barred from questioning the legality of his sentence as he could have, and yet did not, raise the issue at his sentencing hearing. See *Walley v. State*, 25 So.3d 386, 390 (Miss. Ct. App. 2009) (citing *Moore v. State*, 906 So.2d 793, 795(¶ 5) (Miss. Ct. App.2004) and Miss. Code Ann. § 99-39-21(1) (Rev.2000)) (holding that “[f]ailure to raise this issue at the sentencing hearing waived [the Appellant’s] right “to raise the issue for the first time in his motion for post-conviction relief”). Without waiving the bar, the issue is also without merit. “In Mississippi, sentences which are within the statutory limits will generally be upheld.” *Addison v. State*, 957 So.2d 1039, 1041 (Miss. Ct. App. 2007). Ross’s sentence is within the statutory guidelines. Ross was sentenced pursuant to Miss. Code Ann. §97-3-79 which states that the minimum sentence for violation of the statute is three years and the maximum sentence is life. Ross’s thirty year sentence with eighteen years suspended clearly falls within those guidelines. Furthermore, as the trial court noted in the order denying post-conviction relief and as evidenced by the transcript of the guilty plea, the sentence was “the result of plea negotiations and recommendations of the State of Mississippi.” (Record p. 13 and 17-18). Finally, Ross’s assertion that the disparity between his sentence and that of his co-indictee is unfounded as “there is no requirement that co-conspirators receive identical sentences.” *Collins v. State*, 822 So.2d 364, 366 (Miss. Ct. App. 2002) (citing *Jones v. State*, 669 So.2d 1383, 1393 (Miss.1995)). See also *Walley v. State*, 25 So.3d 386, 389-90 (Miss. Ct. App. 2009) and *Leverette v. State*, 812 So.2d 241, 245-46 (Miss. Ct. App. 2002).

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the trial court's denial of Ross's Motion for Post Conviction Collateral Relief.

Respectfully submitted,

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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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