IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY DALE CHAPELL — APPELLANT

VS. — NO. 2011-CA-0336

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATEMENT OF THE ISSUES

I. The lower court did not err in finding that the sentencing court was not required to find personal or subject matter jurisdiction before imposing a sentence.

II. The lower court did not err in finding that the issue of sentencing proportionality is barred from review.

III. The lower court did not err in finding that Chapell's sentence was not disproportionate.

IV. The lower court did not err in finding that Chapell was not entitled to credit for time served on while out on bond.

STATEMENT OF THE FACTS

Chapell was indicted in September of 2006 for seven (7) counts of sexual battery and three (3) counts of fondling in criminal cause CR2006-719CD. On June 25, 2007, Chapell entered please of guilty to three counts of sexual battery and two counts of fondling. The only plea agreement was a cap of forty (40) years on each count concurrent to each other and the remaining counts would be remanded to the file. After a sentencing hearing on July 27, 2007, the lower court sentenced Chapell to twenty-five (25) years on each count of the sexual battery to run concurrently with each other and fifteen (15) years of post-release supervision on the fondling counts to run consecutively with the twenty-five (25) years. On July 21, 2010, Chapell filed his petition for post-conviction relief. The lower court denied the Chapell's Petition February 17, 2011. The instant appeal ensued.

SUMMARY OF THE ARGUMENT

The lower court did not err in finding that the sentencing court was not required to find personal or subject matter jurisdiction before imposing a sentence. Jurisdiction attached when the indictment was served. Further, Chapell consented to the jurisdiction of the trial court when he filed his Petition to Enter Plea of Guilty. (C.P. 62-66) The lower court did not err in finding that the issue of sentencing proportionality is barred from review. The failure to raise sentencing issues on direct appeal bars consideration of the issues in [proceedings for] post-conviction relief." *Dennis v. State*, 873 So.2d 1045, 1049 (Miss.Ct.App.2004). The lower court did not err in finding that Chapell's sentence was not disproportionate. The sentence does not trigger the application of the test set out in *Solem v. Helm*, 463 U.S. 277, 290 (1983). The lower court did not err in finding that Chapell was not entitled to credit for time served on while out on bond.

ARGUMENT

I. The lower court did not err in finding that the sentencing court was not required to find personal or subject matter jurisdiction before imposing a sentence.

Chapell asserts that the sentencing court erred in its finding that the sentencing court was not required to find personal or subject matter jurisdiction before imposing a sentence. However, once the indictment, which sets out jurisdiction, a court having subject matter jurisdiction is empowered to proceed. There is no need for a separate finding of personal and/or subject matter jurisdiction at each stage of the proceeding. Further, in pleading guilty, Chapell submitted himself to the jurisdiction of the court.

> A proper reading of Section 27 of our Constitution initially requires an indictment that charges the essential elements of the criminal offense. See Rule 2.05, Miss.Unif.Crim.R.Cir.Ct.Prac. Once the indictment has been served on the defendant, a court having subject matter jurisdiction is empowered to proceed. A subsequent event such as a guilty plea to a lesser related offense in no way ousts the court of personal jurisdiction. This reading is consistent with the purposes which an indictment serves-the reasons it has been accorded the status of a constitutional right-(1) to furnish the accused such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, (2) to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be obtained and (3) to guard against malicious, groundless prosecution. Indictments and Informations, 41 Am.Jur.2d § 3 (1968). It is also the reading that accords with this Court's nonconstitutional cases involving indictments and its recent lesser offense instruction cases.
>
> *Jefferson v. State*, 556 So.2d 1016 (Miss. 1989).

All jurisdictional elements were satisfied. Chapell was indicted and therefore received notice of all the elements of the crimes with which he was charged, including subject matter jurisdiction. In filing his Plea Petition in this case, Chapell consented to the trial court's

continuing subject matter and personal jurisdiction. At the plea hearing, the State set forth its proof on each of the charges to which Chapell pled guilty and stated that all the events took place in DeSoto County, thus establishing jurisdiction and venue.

Jurisdiction, both subject matter and personal attached with the indictment. Once jurisdiction attached, no further findings were needed. Additionally, Chapell consented to the trial court's jurisdiction by filing his Petition to Enter Plea of Guilty and by entering his guilty plea at the plea hearing. This issue is without merit and the rulings of the trial court should be affirmed.

II. The trial court did not err in finding that the issue of sentencing proportionality is barred from review.

The trial court held that as in *Hamilton v. State*, 44 So.3d 1060, 1065-1066 (Miss.Ct.App.2010), at the time that Chapell pleaded guilty, Miss. Code Ann. § 99-35-101 denied an appeal from the circuit court to the supreme court "in any case where the defendant enters a plea of guilty." In *Trotter v. State*, 554 So.2d 313, 315 (Miss. 1989), the court interpreted *Hamilton* to allow the defendant the right to appeal a sentence given as a result of a plea, holding that "an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself." In *Hamilton v. State*, 44 So.3d 1060 (Miss.Ct.App. 2010)[1], the Mississippi Court of Appeals held:

> We find an additional procedural bar because Hamilton failed to take a direct appeal from his sentence. At the time that Hamilton pleaded guilty, Section 99-35-101 of the Mississippi Code Annotated (Rev. 2007) denied an appeal from the circuit court to the supreme court in any case where the defendant enters a plea of

[1]See *contra*, Bergeron v. State, 60 So.3d.212 (Miss.Ct.App.2011) (record did not support Bergeron's status as an habitual offender.)

> guilty." However, this section was not interpreted to deny the defendant the right to appeal the sentence given as a result of that plea. *Trotter v. State*, 554 So.2d 313, 315 (Miss. 1989) ("an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself"). "The failure to raise sentencing issues on direct appeal bars consideration of the issues in [proceedings for] post-conviction relief." *Dennis v. State*, 873 So.2d 1045, 1049 (Miss.Ct.App.2004).

Any data regarding sentencing of other similar crimes could have been collected prior to Chapell's sentencing and could have been presented to the trial court at the time of the sentencing. It is not newly discovered evidence that was unavailable at the time of the sentencing. It was readily available to the extent that Chapell's counsel thought it pertinent at the time. Chapell's complaint regarding his sentence existed immediately after the sentencing hearing and was appropriate for direct appeal. The trial court correctly dismissed Chapell's Motion for Post Conviction Relief on the ground that Chapell's sentence was grossly disproportionate to the crimes he committed. In *Dennis v. State*, 873 So. 2d 1045 (Miss.Ct.App.2004), the Court of Appeals opined:

> Dennis contends that the trial judge sentenced him to a longer sentence than allowed by law for each of his three convictions. Dennis also asserts that the judge erred in imposing one sentence for two separate crimes in each of his multi-count indictments. Our supreme court has ruled that a defendant who has pled guilty may take a direct appeal from an aggrieved sentence. *Trotter v. State*, 554 So.2d 313, 315 (Miss.1989). This Court has further held that the failure to raise sentencing issues on direct appeal bars consideration of the issues in post-conviction relief. *Swindle v. State*, No.2001-CP-01668-COA, ---So.2d ----, 2003 WL 22708166 (Nov. 18, 2003). Dennis' challenge to his sentence existed immediately after the sentencing hearing and was an appropriate issue for a direct appeal. Dennis' failure to raise these issues on direct appeal precludes consideration in post-conviction relief proceedings. *Id.*

In *Swindle v. State*, 881 So.2d 281 (Miss.Ct.App.2003) (rev'd on other grounds) [2], the appellant attacked the sentences as based on an allegedly inflammatory victim impact statement and a crime of which Swindle alleged he had been acquitted. The Court of Appeals held that these issues regarding Swindle's sentence were not properly brought in a Motion for Post-Conviction Relief since they were available for review by direct appeal. The Court in Swindle held:

> The law is clear that, even when a defendant pleads guilty to the crime itself, if he is aggrieved as to the sentence imposed by the trial court for any reason cognizable under the law, the defendant is entitled to have the sentence reviewed by a direct appeal. Campbell v. State, 743 So.2d 1050, 1052 (Miss.Ct.App.1999). All of the complaints raised by Swindle directly relating to the manner in which he was sentenced existed immediately at the conclusion of the sentencing hearing and were, thus, appropriate matters for a direct appeal. The Mississippi Uniform Post-Conviction Collateral Relief Act specifically provides that [d]irect appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.
>
> Miss.Code Ann. § 99-39-3(2) (Supp.2003) (emphasis supplied).
>
> This Court is satisfied that each of Swindle's direct complaints regarding the manner in which he was sentenced could and should have been the subject of a direct appeal, and for his failure to take such an appeal, we conclude that those issues are barred from consideration in this post-conviction relief proceeding. Miss.Code Ann. § 99-39-21(1) (Supp.2003)

The sentence given was less then the sentence cap of 40 years agreed to in Chapell's Petition to Enter Plea of Guilty. Chapell was originally charged with 3 counts of fondling or

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[2]The Court of Appeals reversed the trial court on the issue of ineffective assistance of counsel. The Mississippi Supreme Court then reversed the holding of the Court of Appeals and reinstated the trial court's initial denial of Swindle's Motion for Post-Conviction Collateral Relief. *Swindle v. State*, 881 So.2d 174 (Miss. 2004).

molestation and 7 counts of sexual battery. In exchange for his guilty plea, 4 counts of sexual battery and 1 count of fondling were remanded to the file. Chapell pled guilty to 3 counts of sexual battery and two counts of fondling. He was sentenced to 25 years in each of the sexual battery charges, with all three sentences to run concurrently. He was sentenced to 15 years of post conviction relief in each of the molestation counts, to serve concurrently with one another, but consecutively with the 25 years for sexual battery.

At the time of Chapell's guilty plea and sentencing Chapell and his counsel clearly thought that anything less that 40 years to serve was proportionate to the crimes with which Chapell was charged. Chapell got a good deal in and arms length plea bargain and cannot now pretend that the sentence to which he and his counsel agreed is "grossly disproportionate" to the crimes with which he was charged and to which he plead guilty. This issue is without merit and the rulings of the trial court should be affirmed.

III. The lower court did not err in finding that Chapell's sentence was not disproportionate to the crimes he committed.

An appellate court generally will not disturb a sentence where it does not exceed the statutory maximum. *Long v. State*, 52 So.3d 1188, 1197 (Miss.2011) (citing *Cummings v. State*, 29 So.3d 859, 861 (Miss.Ct.App.2010)). But "if a sentence is grossly disproportionate to the crime committed, it may be reviewed on Eighth Amendment grounds." *Trotter v. State*, 9 So.3d 402, 412 (Miss.Ct.App.2008) (citing *Ford v. State*, 975 So.2d 859, 869 (Miss.2008)).

"Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Beamon v. State*, 9 So.3d 376, 380 (Miss.2009) (quoting *Wall v. State*, 718 So.2d 1107, 1114 (Miss.1998)). The supreme court

has held "that a sentence that is within the statutorily defined parameters of the crime, usually is upheld and not considered cruel and unusual punishment." *Id.* (citing *Barnwell v. State*, 567 So.2d 215, 222 (Miss.1990)).

The maximum sentence allowed by law for sexual battery is 30 years. Miss.Code Ann. § 97–3–101 (Rev.2006). For the three counts of sexual battery, Chapell could have received 30 years each, to be served consecutively for a total of 90 years to serve. His sentence of twenty-five years for each count, to run concurrently, is well below the maximum he could have received.

As the trial court noted in its decision, in *Calhoun v. State*, 849 So.2d 892, 897 (Miss. 2003), the Mississippi Supreme Court held that when a sentence is within the limits fixed by the statute, the sentence cannot be said to be excessive. As in *Calhoun*, Chapell was given less then the maximum. The Supreme Court in *Bell v. State*, 797 So.2d 945, 950 (Miss. 2001), held that a sentence of thirty years without probation or parole is not disproportionate to the crime of sexual battery and does not constitute cruel and unusual punishment. The court held in *Bell*, 797 So.2d at 951,

> It is the prerogative of the Legislature to determine the appropriate sentence for crimes and we do not consider the statutory punishment of thirty years for the crime of sexual battery to be excessive, especially when the victim is a child of tender years. Child molestation has become rampant in our society, and due to the nature of the offense, the emotional (and sometimes physical) harm to the child victim is irreparable.

Chapell's sentence was fifteen years less than the 40 years total to serve negotiated and agreed to by Chapell and his counsel. Chapell was facing three sentences on the sexual battery charges, no more than 30 years on the first charge and no more than 40 years on the two

subsequent charges, for a potential sentence of 110 years, as well as a potential sentence of up to 30 years on the two fondling charges, for a grand total of 140 years that Chapell could have received as punishment for the charges to which he pled guilty. In addition to the trial court's obvious restraint in sentencing, additional charges of sexual battery and fondling were remanded to the file. The trial court states that it took Chapell's mental capacity into consideration in handing down his sentences, and this is apparent given severity of the crimes and the lower sentences Chapell received. The trial court sentenced Chapell to five years over the minimum on the three sexual battery charges and ran the sentences concurrently. Chapell received no time to serve on the fondling charges, only post-release supervision. The sentences are, as the trial court noted, consistent with other sentences for the same crime. The trial court therefore correctly found that Chapell's sentences were not cruel and unusual or grossly disproportionate.

Chapell argues that his cognitive limitations should have mitigated his sentence. However, Chapell stated in his Petition to Enter Plea of guilty that he was mentally competent to make the petition which included the details of the plea bargain, to cap Chapell's sentence at no more than 40 years to serve. This Petition was made with the assistance of his counsel. (C.P. 62-66) Therefore, Chapell has already conceded that he is mentally competent to be sentenced to 40 years or less. Chapell's sentence was well within the limits of the plea agreement. Chapell states that the State did not contradict his mitigation or proportionality evidence at the sentencing hearing, however, it should be noted that this was a sentence based on an established plea agreement which was satisfactory to the State.

The threshold comparison of the crime to the sentence does not lead to an inference of gross disproportionality triggering the analysis set out in *Solem v. Helm*, 463 U.S. 277, 290

(1983). Applying the *Solem* factors, it is clear that the sentence is not grossly disproportionate to the crimes committed. The sentence Chapell received was well within the statutory maximum and significantly below the cap of 40 years to serve which Chapell and his counsel agreed to in his Petition to Enter Plea of Guilty. This issue is without merit and the rulings of the trial court should be affirmed.

IV. The lower court did not err in finding that Chapell was not entitled to credit for time served on while out on bond.

Time spent in incarceration pending conviction should be applied to a defendant's sentence. Miss. Code Ann. § 99-19-23 provides:

> The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

Before his plea and sentence, Chapell bonded out on a 10% bond. Because Chapell did not qualify for a 10% bond under URCCC 6.02 due to the nature of his crimes, the Court waived the requirement in URCCC 6.02 but put conditions on the bond. One condition of his bond was "house arrest" supervised not by the Mississippi Department of Corrections, but the private Justice Network. Since Chapell was out on bond, he was not entitled to credit while he was out on bond.

Further, the Mississippi Court of Appeals has held that a post-conviction relief proceeding is not the proper means to calculate and receive credit for the initial time served. *McDonald v. State* 16 So.3d 83, 85 (Miss.Ct.App.2009). See also *Murphy v. State*, 800 So.2d 525, 527 (Miss.Ct.App.2001). In McDonald, the Court of Appeals held:

> While we agree McDonald should receive credit for the time he served prior to the

revocation of his supervised release, "a post-conviction relief pleading is not the proper means to calculate and receive credit for the initial ... time served." *Murphy v. State*, 800 So.2d 525, 527 (Miss.Ct.App.2001); see Miss.Code Ann. § 99-19-23 (Rev.2007). McDonald "should send such requests to the proper authorities within the Mississippi Department of Corrections['] administrative system. If he is denied the proper relief, or credit for time served, by the administrative system, he should then turn to the courts to seek remedy." *Murphy*, 800 So.2d at 527-28. Nevertheless, we note the record from the MDOC provided by McDonald shows he has received credit for time served prior to the period of post-release supervision.

This issue is without merit and the ruling of the trial court should be upheld.

CONCLUSION

The issues raised by Chapell are without merit and the trial court's denial of Chapell's Motion for Post-Conviction Collateral Relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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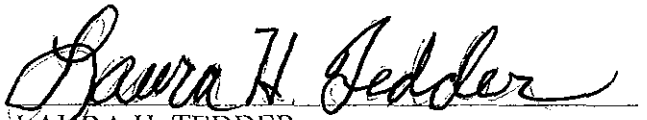
This the 12th day of September, 2011.



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