

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WENDELL DUNCAN A/K/A WENDELL AVERY DUNCAN

APPELLANT

VS.

NO. 2011-CP-0354-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

**ISSUE: WHETHER THE TRIAL COURT PROPERLY DENIED DUNCAN'S
MOTION TO VACATE CONVICTION AND SENTENCE AS TIME-
BARRED AND SUCCESSIVE WRIT BARRED?**

STATEMENT OF THE CASE

On April 11, 1983, Wendell Duncan, was convicted of aggravated assault in Washington County Circuit Court cause number 18,246 and of shooting into an occupied dwelling in cause number 18, 245.

On September 30, 1994, in cause number 23,995, Wendell Duncan was indicted for conspiracy, and business burglary as a habitual offender under Mississippi Code Annotated section 99-19-83, with the 1983 aggravated assault and shooting into occupied dwelling serving as the predicate crimes. (CP). On December 20, 1994, Duncan was tried, convicted, and sentenced to five years on the conspiracy charge, and seven years on the business burglary as a habitual offender under § 99-19-81, with the sentences to run consecutively. (CP 638).

In Washington County Circuit Court cause number 23, 996, a totally unrelated case, Duncan was indicted for armed robbery as a habitual offender under Mississippi Code Annotated section 99-18-83, with the 1983 aggravated assault and shooting into occupied dwelling serving as the predicate crimes. Duncan was tried and convicted of armed robbery on March 28, 1995. During the hearing to determine whether Duncan qualified to be sentenced as a habitual offender, the trial court found that the 1983 aggravated assault and shooting into dwelling were not separate offenses. Therefore, the trial court sentenced Duncan to thirty years as a non-habitual offender. (CP 364).

Beginning in early 2005, Duncan began filing numerous motions and other documents with both the trial court and the supreme court seeking review of his habitual offender sentence. These motions included motions for “de novo review,” motions for writ of mandamus, motions to compel, and motions to reconsider. His first motion for a de novo review of his sentence was dismissed by the circuit court on December 14, 2005 as being time barred. (CP 113). Duncan filed a motion for post-conviction relief in early 1996 which the trial court dismissed. The Mississippi Supreme Court affirmed the trial court’s denial of post-conviction relief in *Duncan v. State*, 96-CA-1017SCT (Miss. June 11, 1998).

On January 3, 2008, Duncan filed a motion to vacate his business burglary and conspiracy convictions and sentences. The trial court, treating the pleading as a motion for post-conviction relief, dismissed it on May 14, 2008, as being both time barred and successive writ barred. Duncan appealed; this Court affirmed the dismissal in *Duncan v. State*, 28 So.3d 665 (Miss. App. 2009).

On January 21, 2011, the Supreme Court dismissed Duncan’s *pro se* motion for permission to proceed in the trial Court with post-conviction collateral relief. The Supreme Court, finding no direct appeal of the conspiracy and burglary convictions, dismissed the motion without prejudice so Duncan could seek post-conviction collateral relief in the trial court regarding his conspiracy and

business burglary convictions. (CP 621).

On January 28, 2011, Duncan filed the subject Motion to Correct Sentence. On February 8, 2011, the trial court denied the motion under Mississippi Code Annotated section 99-39-23(6) as being a successive writ. (CP 702). Aggrieved, Duncan appealed raising the issue of whether the circuit court erred in sentencing him as a habitual offender.

SUMMARY OF THE ARGUMENT

Under the holding in *Rowland v. State*, 42 So.3d 503 (Miss. 2010) and *Bergeron v. State*, 60 So.3d 212 (Miss. 2011), Duncan's motion for post-conviction collateral relief attacking his habitual sentence for business burglary in cause number 23,995, is not time barred or successive writ barred. However, Duncan's claim is barred from consideration as he is no longer incarcerated for the 1994 conviction and has no standing.. *Dung Thank Tran v. State* 2011 WL 2811443, 1 (Miss.App.) (Miss.App. 2011).

ARGUMENT

I. Duncan is not entitled to post-conviction collateral relief because he is no longer in custody for the sentence of which he complains.

An appellate court will not disturb the factual findings of a trial court in denying a petition for post-conviction collateral relief unless such findings are clearly erroneous. *Moore v. State*, 986 So.2d 928, 932 (Miss.2008). "However, where questions of law are raised the applicable standard of review is de novo." *Rowland v. State* 42 So.3d 503, 506 (Miss. 2010) (quoting *Lambert v. State*, 941 So.2d 804, 807 (Miss.2006)).

Duncan argues that his twelve-year sentence as a habitual offender for conspiracy and burglary of a business was unlawful. Duncan asks this Court to reverse his sentence and remand the case back to the trial court for re-sentencing. This is Duncan's third or fourth motion for post-conviction relief

and well after his twelve-year sentence has been served. In *Duncan v. State*, 28 So.3d 665 (Miss. App. 2009) this court held Duncan's second motion for post conviction relief was time barred and successive writ barred. However, since that ruling the Mississippi Supreme Court held that errors affecting fundamental rights are excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act. *Rowland v. State*, 42 So.3d 503 (Miss. 2010).

Also, in a case similar to Duncan's, this Court held a defendant's right to be free from an illegal sentence constituted a fundamental constitutional right, and thus could not be barred under the Post Conviction Collateral Relief Act. *Bergeron v. State*, 60 So.3d 212 (Miss. App. 2011). Bergeron, like Duncan, claimed in a post-conviction collateral relief action that the circuit court erred in sentencing him as a habitual offender because the two prior convictions that served to qualify him as a habitual were not separately brought and did not arise "out of separate incidents and different times," as required under the habitual offender statutes. As in Duncan's case, both of Bergeron's two prior 1983 charges were brought in a single indictment and arose out of the same incident. Both agreed at a guilty plea hearing that the two prior convictions satisfied the requirements of the habitual offender statute. In *Bergeron*, this Court found the record did not support Bergeron's status as a habitual offender and remanded the case for re-sentencing as a non-habitual offender. Duncan asks for the same relief.

In the case *sub judice*, the State admits that the meager record does not appear to support that Duncan qualified as a habitual offender at his December 20, 1994 sentencing for business burglary. As shown at the March 1995 hearing to determine whether Duncan qualified as a habitual offender on the armed robbery conviction, the 1983 aggravated assault charge and shooting into an occupied dwelling arose from one incident and were in one indictment. The evidence showed Duncan fired one shot into a house and that one shot hit a person. (CP 379-382).

While the State admits that Duncan's sentence as a habitual offender appears improper, the length of his sentences were within statutory guidelines. Duncan incorrectly claims he was sentenced to 12 years as a habitual offender. Duncan was sentenced to five years for the conspiracy and to seven years as a habitual offender for the business burglary. Under Mississippi Code Annotated section 91-1-1, the maximum sentence for conspiracy was five years. Under Mississippi Code Annotated section 97-17-33(1), the maximum sentence at the time of his conviction for business burglary was seven years. "The imposition of a sentence is within the discretion of the trial court, and this Court will not review the sentence, if it is within the limits prescribed by statute." *Reynolds v. State*, 585 So.2d 753, 756 (Miss.1991) (citing *Reed v. State*, 536 So.2d 1336, 1339 (Miss.1988)). This Court will not disturb a sentence if it does not exceed the maximum term allowed by statute. *Robinson v. State*, 966 So.2d 209, 214-15 (Miss. App.2007) (citing *Fleming v. State*, 604 So.2d 280, 302 (Miss.1992)) (citing *Adams v. State*, 410 So.2d 1332, 1333-34 (Miss.1982)).

While there are many similarities in *Bergeron* and the case *sub judice*, a major distinction exists. At the time this Court granted him post-conviction relief, Bergeron had not completed the sentence of which he complained. However, Duncan has long since completed his 1994 five-year and seven-year sentences and is now serving 30 years as a non-habitual for an armed robbery charge.

Duncan is presently incarcerated only for his 1995 armed robbery conviction. To have standing to bring a motion for post-conviction relief, the prisoner must be currently incarcerated for the conviction he seeks to attack. *Wilson v. State*, 990 So.2d 828, 830 (¶6) (Miss. App. 2008) (citing Miss. Code Ann. §99-39-5; *Graves v. State*, 822 So.2d 1089, 1091 (¶6) (Miss. App. 2002)). This Court recently held post-conviction relief was not available to a defendant to collaterally attack a prior conviction for possession of cocaine, which was used to enhance his sentence on a later conviction for transfer of cocaine, as the defendant had completed his sentence on his conviction for possession

of cocaine. *Dung Thank Tran v. State* 2011 WL 2811443, 1 (Miss.App.) (Miss.App. 2011). Noting that Mississippi Code Annotated section 99-39-5(1) was amended in 2009 to state that persons who may file a motion for post-conviction relief include persons “on parole or probation or subject to sex offender registration....” this Court held, the statute still requires the person to be serving the sentence addressed in the motion. *Id.*

Even though Duncan’s claim is not time barred or successive writ barred, Duncan’s claim is barred from consideration as he is no longer incarcerated for the 1994 business burglary conviction. In a similar case, *Bowie v. State*, 976 So.2d 370, 371 (¶ 5) (Miss. App. 2008), this Court rejected a defendant’s claim that, although he had already completed his sentence, he could collaterally attack his previous conviction as it was used to enhance his habitual-offender status. This Court held that “unless he is being held under the sentence of which he complains, the post-conviction relief statutes provide no remedy.” *Id.* (quoting *Elliott v. State*, 858 So.2d 154, 155 (¶ 5) (Miss. App. 2003)). So while the circuit court may have denied Duncan post-conviction relief for the wrong reason it reached the right result. It is well established in our jurisprudence that the right result reached for the wrong reason will not be disturbed on appeal. *Delker v. State* 50 So.3d 300, 306 (Miss. 2010).

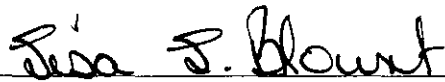
CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court's dismissal of Duncan's motion for post-conviction relief for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Lisa L. Blount, 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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