

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2011-CP-00825-COA

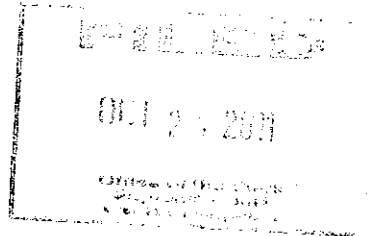
RONALD GENE JOHNSTON

VS.

STATE OF MISSISSIPPI

APPELLANT

APPELLEE



BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

Ronald Gene Johnston

RONALD GENE JOHNSTON, #33602
UNIT 30-D
PARCHMAN, MS. 38738

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NO. 2011-CP-00825-COA

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APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned pro se Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF ISSUES

1.DOUBLE JEOPARDY CLAUSE VIOLATED WHEN TRIAL COURT ACCEPTED
GUILTY PLEAS AND IMPOSED SENTENCES IN CAUSE NUMBERS 7858
7859

2.APPELLANT'S POST--CONVICTION RELIEF MOTION IS AN EXCEPTION TO
ANY PROCEDURAL BARS WHICH WOULD PRECLUDE REVIEW

3.TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S POST
--CONVICTION MOTION WITHOUT A HEARING ON THE MERITS

STATEMENT OF CASE

On or about the 8th day of February, 1983, it was alleged that the Appellant, Ronald Gene Johnston, entered the Ramada Inn Motel on Highway 45 North in Columbus, Mississippi. While in the motel, the Appellant came upon a group of people who were having a meeting in one of the banquet rooms. It was alleged that the Appellant demanded money of the which the Appellant took from the presence said money from the individuals in the banquet room.

On or about the 18th day of February, 1983, the Grand Jury of Lowndes County, Mississippi, returned separate and distinct indictments charging in Cause Number 7855; Armed Robbery, Cause Number 7858; Armed Robbery, and Cause Number 7859; Armed Robbery. On the same day, Appellant entered a plea of guilty to the charge of armed robbery in Cause Number 7855, and was subsequently sentenced to a Term of Thirty(30) years in the Mississippi Department of Corrections. Then, Appellant did also enter a plea of guilty to the charge of armed robbery in Cause Number 7858, and was sentenced to a Term of Thirty(30) years in the Mississippi Department of Corrections, to be served consecutively to the sentence imposed in Cause Number 7855. Finally, Appellant entered a plea of guilty to armed robbery in Cause Number 7859, and was sentenced to a Term of Thirty(30) years in the Mississippi Department of Corrections to be served consecutively to the sentence imposed in Cause Number 7858.

On or about the 12th day of April, 2011, Appellant filed into the

Circuit Court of Lowndes County, Mississippi, his Motion to Vacate Judgment and Sentence, being Cause Number 2011-0036-CV1. In said motion, the Appellant raised the fact that he had suffered Double Jeopardy in the judgment and sentence in Cause Numbers 7858 and 7859. The Circuit Court of Lowndes County, Mississippi, denied said motion without a hearing on the 26th day of May, 2011. This appeal stems from the denial of his post-conviction motion by the Circuit Court of Lowndes County, Mississippi.

SUMMARY OF THE ARGUMENT

1. DOUBLE JEOPARDY CLAUSE VIOLATED WHEN TRIAL COURT ACCEPTED GUILTY PLEAS AND IMPOSED SENTENCES IN CAUSE NUMBERS 7858 AND 7859

The factual allegations presented by the State, was that, Appellant Ronald Gene Johnston, (hereinafter known as Appellant), entered a banquet room in the Ramada Inn and robbed the individuals in the room. Thus, constituting one armed robbery. But, the district attorney drafted the indictments in Cause Numbers 7855; 7858; and 7859, in a manner that did seek to turn one armed robbery into multiple armed robberies, when, it is clear that there was but one robbery. This was a violation of the Double Jeopardy Clause of the federal constitution as well as the Mississippi Constitution.

When the Appellant had entered a plea of guilty in Cause Number 7855, and the trial court imposed sentence on that indictment, the State was barred by the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and Article 3, §22 of the Mississippi

Constitution from proceeding against the Appellant in Cause Numbers 7858 and 7859.

This is so, because of the fact that the trial court's acceptance of the pleas of guilty and the imposition of the sentences in Cause Numbers 7858 and 7859 is a violation of Due Process, since the State could not constitutionally charge separate armed robberies for the same offense. Thus, making the Appellant's pleas of guilty in Cause Numbers 7858 and 7859, and the subsequent sentences that were imposed to be legal nullities.

For this reason, the judgment and sentences imposed in Cause Numbers 7858 and 7859 should be vacated as a matter of law.

2. APPELLANT'S POST-CONVICTION MOTION WAS AN EXCEPTION TO ANY
PROCEDURAL BARS WHICH WOULD PRECLUDE REVIEW

The motion that the Appellant had filed into the Circuit Court of Lowndes County, Mississippi, was not precluded from review on the merits by any procedural bars cited by the Mississippi Uniform Post-Conviction Collateral Relief Act, as stated in the Mississippi Code Ann. §§99-39-5(2); 99-39-21(1); and 99-39-23(6), as, the claim of double jeopardy and an illegal sentence are errors affecting fundamental constitutional rights.

So that, because the motion did raise conclusory allegations of his fundamental due process right not to be placed twice in jeopardy for the same offense, and the fact that any sentence imposed in violation of the double jeopardy clause are to be considered as an illegal sentence. Due to this fact, this Court should excuse any procedural bars

that would preclude a determination on the merits of the issues that are presented in this appeal.

3. POST-CONVICTION COURT ABUSED ITS DISCRETION IN DENYING
APPELLANT'S POST-CONVICTION MOTION WITHOUT A HEARING ON
THE MERITS

It has long been held in the courts of the State of Mississippi, that, errors affecting fundamental constitutional rights cannot be precluded from review by procedural bars that would preclude review. Also, the protection against double jeopardy, and the right to a legal sentence has been found to be fundamental.

The post-conviction court was in error to dismiss Appellant's post-conviction motion without first having the state to respond, or, have the Appellant brought before that court for a hearing. Once Appellant did raise the issue of double jeopardy, and, an illegal sentence, the post-conviction court should have ordered the state to file an answer, or in the alternative, had the Appellant brought before the court for a hearing. The post-conviction court did abuse its discretion in failing to do so.

The post-conviction court erred in its findings that the Appellant failed to meet any of the exceptions enumerated in §99-39-5(2), Miss. Code Ann. (Rev. 2000). Appellant had raised the question that he is not only suffering from double jeopardy, but, rather triple jeopardy, as he has been convicted and sentenced three times for the same crime. So that, the claims presented in his post-conviction motion, that is, the

right to be free from an illegal sentence, was an exception to any procedural bars, as these rights have been found to be fundamental as a denial of due process.

The Post-conviction court also erred in finding that the Appellant did not rely on an intervening higher court decision. Appellant had presented to the post-conviction court the ruling by the Mississippi Supreme Court in Rowland v. State, 42 So.3d 503 (Miss. 2010), which was an intervening decision from a higher court on the issue of double jeopardy in the guilty plea context. The Rowland Court did find that the question of the right to be free from double jeopardy, and, an illegal sentence to be fundamental, and, an exception to any procedural bars. Thus, the post-conviction court erred in failing to hold an evidentiary hearing, or, in the least, require the state to file an answer.

Also, Appellant had requested that an expansion of the record pursuant to Mississippi Code Ann. §99-39-17 (Rev. 2000), to be allowed in his post-conviction motion. This request, which the post-conviction court did ignore, was a proper request pursuant to the claims that were raised in the post-conviction motion, and should have been granted. The post-conviction court erred when that court failed to address the request for the expansion of the record.

Appellant's claims, as asserted in his post-conviction motion, were such that required a hearing on the merits. The motion stated claims that the Rowland Court *supra* stated that if proved, would justify relief via post-conviction relief motion. This Court should find that

the post-conviction court was in error, and remand this case back for a full evidentiary hearing.

ARGUMENT

1. DOUBLE JEOPARDY CLAUSE WAS VIOLATED WHEN TRIAL COURT ACCEPTED GUILTY PLEAS AND IMPOSED SENTENCES IN CAUSE NUMBERS 7858 AND 7859

It goes without saying that there was a robbery committed by the Appellant on the 8th day of February, 1983. Appellant does not contest his conviction for the charge of armed robbery and the Thirty(30) year sentence that he did receive in Cause Number 7855. But, Appellant asserts that once the trial court accepted his plea of guilty and imposed sentence in Cause Number 7855, that, Appellant suffered double jeopardy when the trial court accepted pleas of guilty and imposed additional sentences in Cause Numbers 7858 and 7859, as, these alleged armed robberies were part of the robbery committed in Cause Number 78-55.

Looking at the factual allegations presented by the district attorney in drafting the three separate indictments. All three alleged the same elements and circumstances of the charge of armed robbery, only the names of the alleged victims were different. So, in essence, the district attorney had drafted three indictments in such a manner that sought to turn one armed robbery into multiple robberies. This was a

clear violation of the protection against double jeopardy as delineated by the Fifth Amendment of the United States Constitution and Article 3, §22 of the Mississippi Constitution. Article 3, §22 states in pertinent part:

"[n]o person's life or liberty shall be twice placed in jeopardy for the same offense."

The bellwether case applicated to the question of double jeopardy presented by the Appellant in this appeal is Blockburger v. United States, 284 U.S. 299(1932). The United States Supreme Court held:

"In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same element' test, the double jeopardy bar applies...."

In the case sub judice, all three indictments contained the same factual elements, and neither required proof of a different element, as there was only one armed robbery. And, the Double Jeopardy protection applies to successive prosecutions for the same criminal offense. In United States v. Dixon, 509 U.S. 688,694(1993) the United States Supreme Court held that: "In both the multiple punishment and multiple sentencing contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same element' test, the double jeopardy bar applies...."

Appellant had been indicted for armed robbery pursuant to Mississippi Code Ann. §97-3-73. The indictments in Cause Numbers 7855,7858, and 7859, were factually the same, all contained the same elements as

defined in §97-3-73, and, neither contained an element not contained in the other, and using the same element test put forth by the Mississippi Supreme Court in White v. State, 702 So.2d 107,109(Miss.1997), the inquiry is "whether each offense contains an element not contained in the other; if not, they are the same offense," and double jeopardy bars additional punishments and successive prosecutions. See also Meeks v.State,604 So.2d 748(Miss.1992).

All three armed robberies stemmed from the same armed robbery, so they were not distinct and separate incidents of armed robbery. None of the offenses created required proof of a different element. Application of the "Blockburger Test" focuses on the statutory elements of the offense charged. So that, the Double Jeopardy Clause bars a subsequent prosecution, if, to establish an essential element of an offense charged in the prosecution, the government will prove conduct that constitutes an offense which the defendant has already been prosecuted. See, e.g., Illinois v.Vitale, 477 U.S. 410 (1980).

Such is the case of the Appellant, there was only one armed robbery, and when the trial court accepted his plea of guilty in Cause Number 7855, the Double Jeopardy Clause did forbid the state from proceeding on the indictments in Cause Numbers 7858 and 7859, as,they were the same offense charged in Cause Number 7855, only the names of the alleged victims had been changed.

The Mississippi Supreme Court has stated that the Fifth Amendment protection against double jeopardy encompasses three separate sub-

protections: (1) protection against a second prosecution for the same offense following an acquittal; (2) protection against a second prosecution for the same offense following a conviction; and, (3) protection against multiple punishments for the same criminal offense. See on, Thomas v.State, 711 So.2d 867,870(Miss.1998). In the case sub judice, Appellant was both prosecuted and sentenced for the same offense three times.

Justice Kitchens of the Mississippi Supreme Court in his dissenting opinion in the case of Rowland v.State, 42 So.3d 503(Miss.2010), looked at a factual situation somewhat similar to the case of the Appellant. In doing so, Justice Kitchens opined that, Rowland could have been only indicted for one armed robbery in the case where there were eight people robbed during a poker game. Id.

The Mississippi Supreme Court held that: "The inviolate right of any person not to be prosecuted twice for the same offense. This treasured right is so deeply imbedden in our national consciences and in our system of laws that any violation is absolutely odious."See Harden v.State, 460 So.2d 1194(Miss.1984).

Since the Appellant's conviction and sentence in Cause Numbers 7858 and 7859 is a violation of Due Ptocess and the protection against Double Jeopardy, the state could not constitutionally prosecute, and, both convictions and sentences should be vacated as a matter of law.

2. APPELLANT'S POST-CONVICTION MOTION WAS AN EXCEPTION TO ANY
PROCEDURAL BARS WHICH WOULD PRECLUDE REVIEW

The Mississippi Supreme Court has held that claims of a violation of fundamental rights are exceptions to procedural bars which would otherwise preclude review. See Brooks v.State, 46 So.2d 94,97(1950). And, the right to be free from an illegal sentence has been found to be fundamental. United States v. Sine, 461 F.Supp. 565,568(D.S.C.1978). Also, the Mississippi Supreme Court has found that the protection against double jeopardy is a fundamental right. See, Twillie v.State, 892 So.2d 187,190(Miss.2004).

Appellant's motion had raised serious allegations concerning the violation of his protection against double jeopardy, and the Mississippi Supreme Court has held that: "Three-year limitation period for moving for post-conviction relief following entry of judgment in a case involving a guilty plea is irrelevant if a fundamental constitutional right is involved." Carter v.State, 726 So.2d 195 (Miss.1998); Also, Ethridge v.State, 800 So.2d 1221(Miss.Ct.App.2001).

Since the state was barred by the double jeopardy clause from the prosecution of the Appellant in Cause Numbers 7858 and 7859, the conviction and sentences that he has received violate due process and are illegal. The Mississippi Court of Appeals has held that claims of an illegal sentence can be reviewed even if the motion is successive. See Lyle v.State, 756 So.2d 1 (Miss.Ct.App.1999); Also Hughery v.State, 915 So.2d 457(Miss.Ct.App.2005)

For the foregoing reasons, Appellant's motion for post-conviction relief was an exception to any procedural bars that would have precluded review, and Appellant prays that this Court will review this issue on appeal.

3. TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S POST-CONVICTION MOTION WITHOUT A HEARING ON THE MERITS

It is well settled in the Courts of the State of Mississippi, that, "Constitutional rights in serious criminal cases rise above mere rules of procedure. Errors affecting fundamental rights are exceptions...." Brooks v.State, 45 So.2d 94(1950). And, it has long been held that the right to a legal sentence is fundamental. See Weaver v.State, 785 So.2d 1085(Miss.Ct.App.2001)

The post-conviction court erred in its findings that the Appellant failed to meet any of the exceptions enumerated in §99-39-5(2) of the Mississippi Code Ann.(Rev.2000). Appellant had raised the question that he is not only suffering from double jeopardy, but rather, triple jeopardy, as, he has been convicted and sentenced three times for the same crime. And, the question of an illegal sentence has been found to be an exception to procedural bars and should be addressed by the court on motion for post-conviction relief. See, Stevenson v.State, 674 So.2d 501,505(Miss.1996).

The post-conviction court erred in its holding that there was no intervening decision by a higher court that justified review of the Appellant's claims of double jeopardy. Appellant had directed the

post-conviction court's attention to the Mississippi Supreme Court's findings in Rowland v.State, 42 So.3d 503(Miss.2010), that clearly was an intervening decision by a higher court on the issue of double jeopardy. Thus, the post-conviction court did err in denying Appellant's motion as time-barred and without merit.

The post-conviction court also erred in failing to grant the Appellant's request for an expansion of the record. As, this expansion was required for the court to fully understand the Appellant's claim of double jeopardy. Also, Appellant's request via his post-conviction motion for the expansion of the record was proper pursuant to Mississippi Code Ann. §99-39-17(Rev.2000). See Harvard v.State, 986 So.2d 333(Miss.Ct.App.2007).

Because the Appellant raised an issue of the denial of due process in his conviction and sentence, due to the fact that he has suffered double jeopardy, the trial court abused its discretion in the denial of his motion without a hearing. See White v.State, 751 So.2d 481(Miss.Ct.App.1999).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant moves this Honorable Court to exercise its plenary authority and render the judgment and sentence in Cause Numbers 7858 and 7859. And for what other relief the Court deems just and proper.

Respectfully Submitted this the 24 day of October, 2011.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, Ronald Gene Johnston, Appellant, have caused to be delivered this day, via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the below listed person:

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS. 39205-0220

This the 24th day of October , 2011.

Ronald Gene Johnston
Ronald Gene Johnston, Pro Se