

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES L. SAMPSON

APPELLANT

VS.

NO. 2011-CP-1281

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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vs.

CAUSE No. 2011-CP-01281-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an order of the circuit court of Bolivar County, Mississippi, second judicial district, in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

On 9 May 2003, the prisoner filed a "Petition to Enter Plea of Guilty," in which he indicated his desire to enter a plea of guilty to the felony of sexual battery. The State, as a part of the plea bargain, agreed to recommend a term of five years' imprisonment. The State further agreed that all other accusations of sexual crimes against the prisoner prior to 3 February 2003 would be disposed of or settled by the prisoner's plea of guilty. (R. Vol. 1, pp. 5 - 10).

On 12 May 2003, the prisoner appeared before the circuit court. He withdrew his former plea of not guilty and entered a plea of guilty to sexual battery. After the usual colloquy, the plea was accepted and the prisoner convicted of sexual battery. The circuit court continued the case for

sentencing. (R. Vol. 1, pp. 11 - 19).

On 27 May 2003, the circuit court imposed a sentence of fifteen years imprisonment, with ten years to serve and five years suspended (R. Vol. 1, pp. 20 - 24).

On 22 July 2011, the prisoner filed a motion in post - conviction relief, in which he asserted that the circuit court had imposed a sentence upon him not authorized by law. Specifically, the prisoner alleged that he had been originally sentenced, on 12 May 2003, to a term of five years imprisonment but that the circuit court, on 27 May 2003, set aside that sentence and imposed a sentence of fifteen years imprisonment. The prisoner alleged that he had already begun serving the five - year sentence when the court set that sentence aside and imposed the fifteen - year sentence. Thus, according to the prisoner, the circuit court was without authority to set aside the lesser sentence and impose the greater sentence. The prisoner relied upon *Ethridge v. State*, 800 So.2d 1221 (Miss. Ct. App. 2001) and *Leonard v. State*, 271 So.2d 445 (Miss. 1973) in support of his allegation. The prisoner admitted that he had previously filed motions in post - conviction relief and that relief was denied upon them on 18 October 2006 and 14 April 2011. He also admitted that he had previously filed a federal habeas corpus proceeding concerning his conviction and sentence, relief upon which having been denied on account of the action being untimely. (R. Vol. 1, pp. 26 - 32).

The circuit court denied relief on the prisoner's motion without an evidentiary hearing by order filed 8 August 2011. It found that the prisoner had filed "numerous" motions with it and the Mississippi Supreme Court. It noted that, among other filings by the prisoner, the prisoner had twice previously filed motions in post - conviction relief. Relief upon them each had been denied. Relief on the motion in the case at bar was denied on the ground that the motion was successive. (R. Vol. 1, pg. 52).

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

The denial of a motion for post - conviction relief will not be reversed absent a finding that the circuit court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150 (Miss. Ct. App. 2002). However, when reviewing issues of law, this Court's proper standard of review is *de novo*. *Brown v. State*, 731 So.2d 595, 598 (Miss. 1999).

The circuit court found that the motion filed in the case *sub judice* was successive writ barred. Miss. Code Ann. Section 99-38-23(6) (Supp. 2011). For the reasons we shall presently set out, this was correct. But in addition to the successive writ bar, the motion in the case at bar was also barred by the period of limitations set out at Miss. Code Ann. Section 99-39-5(2) (Supp. 2011).

As noted by the circuit court and admitted by the prisoner, the motion in the case at bar was at least the prisoner's third motion in post - conviction relief. The prisoner attempted to avoid the consequence of this fact by asserting that the sentence imposed upon him was "illegal", illegal because the circuit court imposed at first a five - year sentence and then subsequently set that sentence aside and imposed a sentence of fifteen years. The prisoner did not and does not contend that a fifteen - year sentence is in excess of what may be imposed upon conviction of sexual battery. It is true that an illegal sentence is an exception to the operation of the successive writ bar and statute of limitations, *Ivy v. State*, 731 So.2d 601 (Miss. 1999), but the fifteen - sentence imposed for the prisoner's felony of sexual battery was not "illegal."

We do not find in this record that the prisoner was ever sentenced to a term of five years imprisonment. It is true that the State agreed to make that recommendation, and did so during the taking of the plea, which occurred on 12 May 2003. (R. Vol. 1, pg. 15). The plea was accepted. However, the court deferred sentencing at the time it accepted the plea and did not impose any sentence at that time. (R. Vol. 1, pp. 18 - 19).

No sentence was imposed upon the prisoner until the conclusion of the sentencing hearing, so far as this record shows. At the conclusion of the sentencing hearing, the sentence imposed was fifteen years imprisonment, ten to serve. (R. Vol. 1, pp. 20 - 21). Consequently, it appears from the record that the prisoner was never sentenced to a term less than fifteen years. It was within the circuit court's power to impose the sentence it considered meet, notwithstanding the recommendation by the State. *Avery v. State*, 2011-CP-00664-COA, Slip op. at 3 (Miss. Ct. App., decided 15 May 2012, not yet officially reported).

Assuming for argument, though, that the circuit court did originally impose a sentence of five years but later set it aside and imposed a fifteen-year sentence, the circuit court had the authority to do so as long as it was done during the term of court that the original sentence was imposed. In *Robinson v. State*, 585 So.2d 757 (Miss. 1991) the Court noted that:

all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them *during the term* at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court.

Id. at 758. While the prisoner claims that he began serving time on the five - year sentence prior to the time the circuit court supposedly set aside the five - year sentence and imposed the fifteen - year sentence, there is nothing to substantiate this beyond the prisoner's say so. *Ethridge v. State*, 800 So.2d 1221 (Miss. Ct. App. 2001), which appears to note an exception to the rule set out in *Robinson*

in an instance in which a prisoner has begun to serve the sentence originally imposed, does not appear to apply in the case at bar.

We will also point out that, while there is an exception in the case of an illegal sentence to the imposition of the successive writ bar and the statute of limitations, that exception should not have been available in the case at bar. The prisoner had at least two prior bites at the post - conviction relief apple. He should have raised his claim of an illegal sentence in his first motion, if he did not. His failure to raise the claim when he had the opportunity to do so should be seen as a waiver of it. Otherwise, finality in criminal cases becomes a chimera. The fact that one may have a fundamental right not to be subjected to a sentence not authorized by law ought not suggest that one may be lackadaisical in asserting a violation of this “fundamental right.” The world of post - conviction relief ought not be something akin to a shooting range in which prisoners may be permitted to fire successive writs at their convictions in the hope that they will somehow one day hit their target.

It is possible, though, that the prisoner did raise this claim at some point during his post - conviction tour of State and federal courts. If so, the issue raised here is *res judicata*.

Since there is nothing to show that the sentence imposed was illegal – one not authorized by law – and that no sentence other than the fifteen - year sentence was imposed, the circuit court did not err in applying the successive writ bar. It would not have erred had it applied the statute of limitations as well.

CONCLUSION

The order of the circuit court denying relief on the prisoner's successive motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

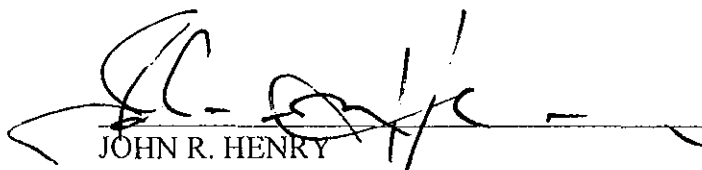
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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