

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2003-CP-00495-COA

CARLTON HUDSON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 2/4/2003
TRIAL JUDGE: HON. LEE J. HOWARD
COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: CARLTON HUDSON (PRO SE)
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: JEAN SMITH VAUGHAN
DISTRICT ATTORNEY: FORREST ALLGOOD
NATURE OF THE CASE: CRIMINAL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION: POST-CONVICTION RELIEF DENIED
DISPOSITION: AFFIRMED-11/15/2005
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED:

BEFORE LEE, P.J., GRIFFIS, AND ISHEE, JJ.

ISHEE, J., FOR THE COURT:

¶1. Carlton Hudson's motion for post-conviction relief was denied by the circuit court. Finding no error, we affirm.

STATEMENT OF FACTS

¶2. Hudson and two accomplices robbed a convenience store in Starkville, Mississippi on February 11, 1997. During the course of the robbery, one of Hudson's accomplices placed a revolver to the store clerk's head and pulled the trigger. The weapon malfunctioned and the clerk was not

shot. Hudson and his accomplices then fled the store and were apprehended a short time later. Hudson was subsequently indicted for armed robbery and attempted murder.

¶3. Prior to trial, Hudson entered into a plea agreement with the State. In exchange for Hudson pleading guilty to the charge of armed robbery, the State recommended a fifteen-year sentence to the trial court and agreed to retire the attempted murder charge to the file. Hudson subsequently entered a guilty plea to the armed robbery charge in August 1997, and he was sentenced to a fifteen year term of incarceration in accordance with the plea agreement.

¶4. Hudson then filed a motion for post-conviction relief in the trial court on November 4, 2002. Hudson argued that he had received erroneous advice from his court appointed attorney as to the issue of parole. Prior to entering his guilty plea, Hudson was told by his attorney that he would be eligible for parole after serving ten years of his fifteen year sentence. Hudson's attorney, however, was unaware that the law had changed and now required convicted armed robbers to serve every day of their sentence. *See* Miss. Code Ann. § 47-7-3 (Rev. 2004). After determining that Hudson's attorney had misstated the law, the trial court granted Hudson's motion for post-conviction relief.

¶5. As a result, Hudson was permitted to withdraw his guilty plea to the armed robbery charge, and both the armed robbery charge and the attempted murder charge were placed back on the docket. Hudson and the State attempted to negotiate a plea agreement, however, none was ever reached. Nevertheless, in November 2001, Hudson entered guilty pleas to both the armed robbery charge and the attempted murder charge. Hudson's sentencing was delayed in order for the trial court to consider the sentence that Hudson's accomplice, the actual trigger man, was to receive in another court. The trigger man eventually received a twenty-two year sentence on the armed robbery charge and a concurrent sentence of ten year on the attempted murder charge. Hudson was subsequently sentenced to an identical term of incarceration in May 2002.

¶6. Hudson then filed another motion for post-conviction relief in the trial court asserting that “he was denied due process of law as a result of vindictiveness in the imposition of his sentence.” The trial court denied Hudson’s motion. Aggrieved by his sentence, Hudson now seeks post-conviction relief from this Court arguing the following: (1) whether Hudson was denied due process of law as a result of vindictiveness in the imposition of his sentence, and (2) whether the trial judge abused his discretion in failing to recuse himself given the nature of the issue raised in Hudson’s motion for post-conviction relief.

DISCUSSION

¶7. We begin our discussion with the standard of review. Where questions of law are at issue, this Court conducts a de novo review of a trial court’s denial of a motion for post-conviction relief, and we will not reverse the factual findings of the trial court unless they are clearly erroneous. *Boddie v. State*, 875 So. 2d 180, 183 (¶6) (Miss. 2004).

¶8. Hudson argues here pro se, as he did in his motion to the trial court, that he was denied due process of law as a result of vindictiveness on the part of the trial judge in the imposition of his sentence resulting from his later guilty pleas. Hudson also asserts that the trial judge abused his discretion by failing to recuse himself from Hudson’s second motion for post-conviction relief.

¶9. As to Hudson’s first issue, vindictiveness, the Mississippi Supreme Court has held that “[t]he imposition of a harsher sentence by a judge following a new trial and conviction for the same charge is not violative of the federal, or Mississippi’s, Constitution.” *Ross v. State*, 480 So. 2d 1157, 1160-61 (Miss. 1985). The Mississippi Supreme Court further held that in order to assure on appeal that the sentence was not based on vindictiveness, the following must occur: the trial court must affirmatively state in the record the reasons for the harsher sentence; the trial court’s rationale must be based on identifiable conduct which may have shed new light on the defendant’s life, health,

habits, conduct, or mental or moral propensities; and the factual data upon which the harsher sentence was based must be a part of the record. *Id.*

¶10. Based on a thorough review of the record, we conclude that the trial court acted appropriately, both in sentencing Hudson and in denying his motion for post-conviction relief. Consistent with *Ross*, the trial court affirmatively stated for the record the identifiable conduct which was the basis for its rationale in imposing a harsher sentence. Specifically, the trial court stated that, after the time of the original sentencing, Hudson withdrew his original guilty plea to the armed robbery charge, and then pled guilty to both the armed robbery charge and the attempted murder charge. This Court specifically finds no evidence in the record to support the claim that the trial court's conduct was vindictive. Hudson's sentencing conformed to the *Ross* requirements, and as a result, the trial court properly denied Hudson's motion for post-conviction relief.

¶11. As to Hudson's second argument, recusal, we find that this issue is procedurally barred from our review due to Hudson's failure to raise this issue on direct appeal. *See* Miss Code Ann. § 99-39-21(1) (Supp. 2004); *Collins v. State*, 822 So. 2d 364, 366 (¶4) (Miss. Ct. App. 2002). This issue could have been determined in the trial court had it been raised on direct appeal, and Hudson has failed to make a sufficient showing of cause or actual prejudice which would justify this Court granting a waiver to the statutory bar.

¶12. THE JUDGMENT OF THE OKTIBBEHA COUNTY CIRCUIT COURT DENYING POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO OKTIBBEHA COUNTY.

LEE AND MYERS, P.JJ., CHANDLER, GRIFFIS AND BARNES, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., AND BRIDGES, J..

IRVING, J., DISSENTING:

¶13. This is a companion case to *Fowler v. State*, No. 2002-KP-00403-COA (Miss. Ct. App. Aug. 23, 2005).¹ I authored a dissent in *Fowler* because, in my judgment, the trial judge, in resentencing Fowler, failed to comply with the requirements of *Ross v. State*, 480 So. 2d 1157 (Miss. 1985). The same judge who resentenced Fowler resentenced Hudson. In neither case did the judge follow the guidelines in *Ross* which are designed to provide the appellate courts with an adequate basis for ascertaining whether the trial judge was motivated by vindictiveness in resentencing a defendant to a harsher sentence because of the defendant's successful challenge of his first conviction and sentence. *Id.* at 1160.

¶14. In *Ross*, the Mississippi Supreme Court specifically held, inter alia, that to enable the appellate court to determine the absence of vindictiveness, the following must occur:

(a) The trial court must affirmatively state in the record his reasons for the harsher sentence.

(b) *The reasons must be based upon objective information concerning identifiable conduct on the part of the defendant which occurred after the time of the original sentencing proceeding, or based upon objective information concerning events which occurred after the time of the original sentencing proceeding that may have thrown new light upon the defendant's life, health, habits, conduct, or mental and moral propensities.*

(c) *The factual data upon which the increased sentence is based must be made a part of the record.*

(d) This information and data upon which the judge bases his sentence may come to the judge's attention from evidence adduced at the second trial itself, from a new presentencing investigation, from the defendant's prison record, or possibly from other sources.

¹ Carlton Hudson, Robert K. Fowler, along with another individual, were indicted for the robbery of Green Oaks Superette in Starkville. However, they were tried separately.

Ross, 480 So. 2d. at 1160-1161 (emphasis added).

¶15. Here, as in *Fowler*, the trial judge resentenced Hudson to twenty-two years on the robbery conviction even though the initial sentence was only fifteen years. There is absolute nothing in the record which remotely resembles any *identifiable conduct on the part of Hudson which occurred after the time of the original sentencing proceeding* or any *information concerning events which occurred after the time of the original sentencing proceeding* that could be used to justify the harsher sentence. The operative word is “after.” The only information in this record regarding Hudson’s conduct *after* his initial sentence is Hudson’s feeble attempt to explain to the trial judge that Hudson had enrolled in some sort of school at the penitentiary in an attempt to rehabilitate himself following his incarceration under the initial sentence.

¶16. Therefore, for the reasons expressed herein and in my dissent in *Fowler*, I respectfully dissent. I would modify Hudson’s sentence to reflect the original sentence of fifteen years.

KING, C.J., AND BRIDGES, J., JOIN THIS SEPARATE WRITTEN OPINION.