IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-00813-SCT

MARLON HOWELL a/k/a MARLON LATODD HOWELL a/k/a MARLON COX

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	04/30/2018
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
TRIAL COURT ATTORNEYS:	BEN CREEKMORE C. JACKSON WILLIAMS
COURT FROM WHICH APPEALED:	UNION COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	C. JACKSON WILLIAMS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
DISPOSITION:	REVERSED AND REMANDED - 11/21/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. Marlon Howell is a death row inmate; but before he committed capital murder, he was convicted of possession of a controlled substance and sentenced to three years in the custody of the Mississippi Department of Corrections. In 2019, Howell filed a motion to vacate his three year sentence in the Circuit Court of Union County. Howell claimed that his three year sentence was illegal because it exceeded the statutory maximum penalty in effect at the time of his conviction. The State filed a motion to dismiss, arguing that he did not have standing because his sentence had expired. The circuit court granted the motion, found that Howell

did not have standing, and dismissed the case for lack of jurisdiction. Howell appeals, arguing that the circuit court erred. On the narrow question presented, interpreting Mississippi Code Section 99-39-5(1), we hold that Howell has standing. Therefore, we reverse the circuit court's judgment and remand the case.

FACTS AND PROCEDURAL HISTORY

¶2. On January 29, 1998, Howell was indicted for the sale of a controlled substance, 6.8 grams of marijuana, in violation of Mississippi Code Section 41-29-139(a) (Rev. 2018). In February 1998, Howell signed a petition to enter a guilty plea to "posses[s]ion of a control[led] substance[]." Howell's petition stated that "[t]he maximum punishment which the [circuit court] may impose for this crime that I am charged with is 3 years and $3,000 fine." Howell stated that "[i]t is my understanding that the District Attorney will recommend to the [circuit court] that I receive a sentence as follows . . . : 3 years[,] 1 year[] house arrest[,] 2 years [suspended, and] pay restitution [of] $200."

¶3. A year later, on February 3, 1999, Howell filed a petition to enter a guilty plea.[1] On March 3, 1999, Howell and the State filed an agreed motion requesting that the circuit court reduce the charge from sale of a controlled substance to possession of a controlled substance. The same day, the circuit court entered an order reducing the charge "of sale of a controlled substance to that of possession." On March 3, 1999, the circuit court accepted Howell's guilty plea, sentenced him to three years, and placed him in the intensive supervision

[1] Howell's motion for postconviction relief claims that his petition to enter a guilty plea was filed "in February 1998." While the petition to enter a guilty plea in the record is dated "February 1998," no file-stamped petition is in the record. The docket shows that Howell's petition to enter a guilty plea was filed on February 3, 1999, not 1998.

program, otherwise known as house arrest. The circuit court retained a right of review of the sentence for one year. The circuit court also ordered Howell to pay $200 in restitution. On February 11, 2000, the circuit court suspended the remaining balance of Howell's sentence and placed him on supervised probation for two years. ***Howell v. State***, 860 So. 2d 704, 755 (¶¶ 182-83) (Miss. 2003).

¶4. On May 15, 2000, Howell was arrested in connection with the murder of Hugh David Pernell, a newspaper carrier, who was shot and killed in his car on his newspaper route. ***Id.*** at 712-13 (¶¶ 1, 2, 4). On May 18, 2000, a field officer for the Mississippi Department of Corrections filed a petition in the circuit court stating that Howell had violated several terms of his probation. On May 18, 2000, the circuit court revoked Howell's probation and suspended sentence. The circuit court sentenced Howell to three years. On March 30, 2001, Howell was convicted of capital murder and sentenced to death. On October 23, 2003, the Court affirmed his conviction and death sentence. ***Id.*** at 712 (¶ 1).[2]

¶5. On June 23, 2016, Howell filed a motion to vacate his prior sentence for possession of a controlled substance. Howell argued that his sentence was illegal because he had been sentenced to three years of house arrest when the statutory maximum penalty was a $250 fine under the then-effective Section 41-29-139. Therefore, Howell requested that his possession sentence be vacated and that he be sentenced as provided by the statute.

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[2] Despite raising two issues surrounding the possession conviction and sentence in his capital case, Howell did not argue that his sentence was illegal. ***Howell***, 860 So. 2d at 754-55, 756-58 (¶¶ 179-83, 189-95).

¶6. The State filed a motion to dismiss Howell's motion for lack of jurisdiction. It argued that Howell lacked standing to seek post-conviction relief because he was no longer serving his sentence for possession of a controlled substance. The circuit court granted the State's motion to dismiss, finding that Howell lacked standing under Mississippi Code Section 99-39-5 (Rev. 2015). The circuit court found that Howell "has served this sentence and is not on probation, parole, or subject to sex offender registration." The circuit court concluded, "[b]ecause [Howell] is no longer serving under the sentence he now claims was illegal, [the circuit court] is without authority to grant him relief."

¶7. Howell appeals, arguing that the circuit court erred by finding that he had no standing under the statute. Howell argues that the 2009 amendment to Mississippi Code Section 99-39-5 removed the requirement that the movant must be in custody in order to have standing to proceed with a motion for postconviction relief. Howell argues that he had standing as a person sentenced by a court of record in Mississippi. Alternatively, Howell argues that he had standing even if custody is required because he has been in custody since he was arrested for capital murder. He claims that his sentences should be considered in the aggregate.

STANDARD OF REVIEW

¶8. The Court reviews questions of law *de novo*. ***Jackson v. State***, 965 So. 2d 686, 688 (¶ 6) (Miss. 2007). Because the only issue before the Court is whether Howell had standing under Section 99-39-5—a question of law—we apply a *de novo* standard of review.

DISCUSSION

¶9. The circuit court did not reach the merits of Howell's illegal sentence claim and dismissed his postconviction motion to vacate for lack of jurisdiction. Therefore, the merits of Howell's illegal sentence claim are not before the Court. Today's opinion is limited to whether Howell has standing to proceed with a motion for postconviction relief under Section 99-39-5(1) (Rev. 2015).

Howell has standing under the statute to file a motion for postconviction relief.

¶10. "[D]ifferent standing requirements are accorded to different areas of the law, and an individual's legal interest or entitlement to assert a claim against a defendant must be grounded in some legal right recognized by law, whether by statute or by common law." ***City of Picayune v. S. Reg'l Corp.***, 916 So. 2d 510, 526 (Miss. 2005).

¶11. The Mississippi Uniform Post-Conviction Collateral Relief Act's purpose "is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences." Miss. Code Ann. § 99-39-3 (Rev. 2015). Section 99-39-5(1)(a)-(j) (Rev. 2015) identifies who has standing to file a PCR motion. Section 99-39-5(1)(d), which pertains to claims of illegal sentences, provides as follows:

> (1) Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file a motion to vacate, set aside or correct the judgment or sentence, a motion to request forensic DNA testing of biological evidence, or a motion for an out-of-time appeal if the person claims:

. . . .

(d) That the sentence exceeds the maximum authorized by law;

. . . .

Miss. Code Ann. § 99-39-5(1)(d) (Rev. 2015).

¶12. Howell argues that he has standing to proceed under Section 99-39-5. The State argues that because Howell's sentence was completed years before filing the postconviction motion, the Act provides no remedy because there is no sentence to vacate.[3]

¶13. Section 99-39-5(1) was amended in 2009. Before the 2009 amendment, Section 99-39-5(1)(d) allowed "[a]ny prisoner in custody under sentence of a court of record of the State of Mississippi who claims . . . [t]hat the sentence exceeds the maximum authorized by law" to proceed with a motion for postconviction relief. Miss. Code Ann. § 99-39-5(1)(d) (Rev. 2007). The Court has held that

> [w]hen presented with a question regarding the application of a statute, this Court strives to give the statute its effect as intended by the Legislature. In so doing, this Court first looks to the statute's language. Accordingly, "[i]f the words of a statute are clear and unambiguous, we apply the plain meaning of the statute and refrain from using principles of statutory construction."

AmFed Nat. Ins. Co. v. NTC Transp., Inc., 196 So. 3d 947, 958 (¶ 39) (Miss. 2016) (citations omitted).

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[3] The State filed an affidavit of Rosetta Young, an MDOC records custodian, along with its appellate brief. The affidavit stated that Howell's sentence for possession of a controlled substance ended on November 5, 2001. Howell filed a motion to strike the affidavit because it was not part of the record before the circuit court and, as a result, was not considered by the circuit court in reaching its decision. The State did not file a response. The Court grants the motion. The affidavit is struck and is not considered part of the record on appeal.

¶14. Before Section 99-39-5 was amended, the Court of Appeals routinely held that "[t]he post-conviction relief procedures, for setting aside a conviction, are only available while the prisoner is under the effect of the conviction he seeks to set aside." ***Gates v. State***, 904 So. 2d 216, 218 (¶ 7) (Miss. Ct. App. 2005) (citing ***Weaver v. State***, 852 So. 2d 82, 85 (¶ 7) (Miss. Ct. App. 2003) (holding that "an inmate cannot use [PCR] procedures to challenge a sentence that has already been served even though he is in custody under a sentence for a different crime")). After Section 99-39-5 was amended, the Court of Appeals continued to hold that unless the postconviction movant "is being held under the sentence of which he [or she] complains, the post[]conviction relief statutes provide no remedy." ***Dung Thank Tran v. State***, 92 So. 3d 1278, 1279 (¶ 7) (Miss. Ct. App. 2011) (internal quotation mark omitted) (quoting ***Bowie v. State***, 976 So. 2d 370, 371 (¶ 5) (Miss. Ct. App. 2008)). The Court of Appeals explained that "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 . . . .' However, the statute still requires the person to be serving the sentence addressed in the motion." ***Tran***, 92 So. 3d at 1279 n.1.

¶15. We disagree with the Court of Appeals' footnoted conclusion that the amended statute requires the person filing a motion for postconviction relief to be serving the sentence addressed in the motion. The 2009 amendment altered the class of individuals who have standing to proceed with a motion for postconviction relief. Through the amendment, the Legislature removed the requirement that the movant be under the effect of the sentence that he wishes to challenge. Before the amendment, the plain language of Section 99-39-5(1)(d)

provided standing to "[a]ny prisoner in custody under sentence of a court of record of the State of Mississippi who claims: . . . That the sentence exceeds the maximum authorized by law." Miss. Code Ann. § 99-39-5(1)(d) (Rev. 2015). In contrast, following the amendment, the plain language of Section 99-39-5(1)(d) now provides standing to "[a]ny person sentenced by a court of record of the State of Mississippi, including . . . if the person claims: . . . That the sentence exceeds the maximum authorized by law[.]" Miss. Code Ann. § 99-39-5(1)(d) (Rev. 2015).

¶16. Standing no longer hinges on the requirement of being "any prisoner in custody under sentence of a court of record of the State of Mississippi[.]" Instead, postconviction relief is available to "[a]ny person sentenced by a court of record of the State of Mississippi[.]" Miss. Code Ann. § 99-39-5(1) (Rev. 2015); *see also* ***Brown v. State***, 83 So. 3d 459, 462-64 (¶¶ 9-15) (Miss. Ct. App. 2012) (Roberts J., concurring in result only).

¶17. Howell argues that the amended statute contains language of inclusion, not exclusion. Specifically, Howell argues that the word "including" enlarges, but does not restricts the category of persons sentenced by a court of record. We agree. Black's Law Dictionary provides that "[t]he participle *including* typically indicates a partial list[.]" *Include*, Black's Law Dictionary (11th ed. 2019). The Court routinely uses the word "including" in accordance with the Black's Law Dictionary definition. For example, "As is customary, the Court reviews questions of law, *including* statutory interpretation, de novo." ***Edmonds v. State***, 234 So. 3d 286, 289 (Miss. 2017) (emphasis added) (citing ***Tellus Operating Grp., LLC v. Texas Petroleum Inv. Co.***, 105 So. 3d 274, 277-78 (¶ 9) (Miss. 2012)).

¶18. The amendment expands the category of individuals who have standing under the Act. Under the unambiguous plain language of Section 99-39-5(1)(d), Howell has standing to proceed with his illegal sentence claim because he is a "person sentenced by a court of record of the State of Mississippi" who "claims . . . [t]hat the sentence exceeds the maximum authorized by law[.]"

CONCLUSION

¶19. We reverse the circuit court's judgment dismissing the case for lack of jurisdiction because Howell has standing under Section 99-35-5(1)(d). The matter is remanded to the circuit court for further proceedings consistent with the Court's opinion.

¶20. **REVERSED AND REMANDED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.