

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CP-01217-COA

DONALD KEITH SMITH

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 07/09/2019
TRIAL JUDGE: HON. ROBERT P. KREBS
COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: DONALD KEITH SMITH (PRO SE)
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: SCOTT STUART
NATURE OF THE CASE: CIVIL - POST-CONVICTION RELIEF
DISPOSITION: AFFIRMED - 12/08/2020
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

CARLTON, P.J., FOR THE COURT:

¶1. In March 2017, Donald Keith Smith filed a motion for post-conviction relief (PCR) attacking his guilty plea and conviction for the charges of attempted kidnapping, armed carjacking, and felony evasion of a police officer. The Jackson County Circuit Court entered an order affirming in part and dismissing in part Smith’s PCR motion. In its order, the circuit court stated that Smith’s sentence exceeded the statutory limit for attempted kidnapping. The circuit court accordingly re-sentenced Smith for attempted kidnapping. However, the circuit court’s order dismissed Smith’s remaining PCR claims as successive-writ barred.

¶2. On appeal, this Court found that “[b]ecause Smith’s 2017 PCR motion was his first one following his 2016 guilty plea, it was not successive.” *Smith v. State*, 271 So. 3d 691,

692 (¶1) (Miss. Ct. App. 2018). This Court then reversed the circuit court’s order dismissing in part Smith’s PCR motion and remanded the case to the circuit court “for consideration of the issues presented by Smith’s motion.” *Id.* at 694 (¶14).

¶3. On remand, the circuit court reviewed the remaining claims in Smith’s PCR motion: (1) the circuit court erred in sentencing Smith for armed carjacking when he was properly indicted for the lesser-included offense of carjacking, and (2) as a result of issues with Smith’s amended indictment, the circuit court lacked subject-matter jurisdiction to convict him of armed carjacking. On July 9, 2019, the circuit court entered an order denying Smith’s PCR claims.

¶4. Smith now appeals from the circuit court’s order denying his PCR motion. Finding no error, we affirm the circuit court’s judgment.

FACTS

¶5. In March 2008, Smith was indicted on two counts of kidnapping, one count of carjacking while armed with a knife, and one count of felony evasion of a police officer. In June 2009, Smith pleaded guilty to one count of kidnapping, one count of armed carjacking, and one count of felonious evasion.¹

¶6. In December 2011, Smith filed his first PCR motion and attacked his armed-carjacking conviction and the 2008 indictment. The circuit court denied Smith’s PCR

¹ The record reflects that as part of the plea agreement, the State agreed to nolle prosequi the remaining count of kidnapping.

motion after finding that his claims lacked merit. Smith appealed from the circuit court's order denying his first PCR motion.

¶7. In February 2012, Smith filed a second PCR motion, arguing that there was no factual basis for the circuit court to accept his armed-carjacking charge and that he was entitled to a court-ordered mental evaluation prior to entering his guilty plea. The trial court entered an order denying Smith's second PCR motion as a successive motion, explaining that it had previously ruled on his claims stemming from his armed-carjacking conviction. The circuit court also stated that it did not err in failing to provide Smith with a mental evaluation prior to accepting his guilty plea. Smith appealed from the circuit court's order denying his second PCR motion.

¶8. This Court consolidated Smith's appeals from his first and second PCR motions and, on appeal, affirmed the circuit court's judgment. The supreme court ultimately reversed the judgments of this Court and the circuit court. *Smith v. State*, 149 So. 3d 1027 (¶20) (Miss. 2014), *overruled by Pitchford v. State*, 240 So. 3d 1061, 1035 (¶19) (Miss. 2017). The supreme court remanded the case to the circuit court for an evidentiary hearing on Smith's claim that he was entitled to a mental evaluation. *Id.* On remand, the circuit court entered an order finding that Smith should have received a full competency hearing. The circuit court accordingly set aside Smith's 2009 guilty plea and sentence, and the circuit court reinstated the case to its active docket. A competency hearing was eventually held, and the circuit court entered an order finding that Smith was competent to stand trial.

¶9. In June 2015, Smith filed a motion in the circuit court to quash Count III of the 2008 indictment, which charged him with carjacking. Smith argued that the indictment was insufficient because the State was attempting to convict him of “armed carjacking” when the indictment labeled the crime as “carjacking.” The State then filed a motion to amend Count III of the 2008 indictment to reflect the charge of “armed carjacking” under Mississippi Code Annotated section 97-3-117(2) (Rev. 2014). In its motion, the State asserted that the body of the indictment clearly set forth the crime of armed carjacking, even though “the heading in the indictment for Count III inadvertently stated Carjacking Section 97-3-117(1).” The State explained that a clerical error resulted in the heading of the indictment listing the subsection of section 97-3-117 as subsection (1) instead of subsection (2).

¶10. In a 2015 order, the circuit court granted the State’s motion and amended Count III of the 2008 indictment to set out the crime of armed carjacking. In so doing, the circuit court found that “that portion of the [i]ndictment was a scrivener’s error and that changing such language in the instant case is an amendment of form and not substance, and is not material to the merits of the case.” The record reflects that the State amended the heading of the indictment and not the body of the indictment. The State then re-indicted Smith in 2015 for the same charges in a new multi-count indictment.

¶11. Despite the State’s new indictment, Smith agreed to plead guilty under the amended

2008 indictment.² In December 2016, Smith entered a new guilty plea to attempted kidnapping, armed carjacking, and felony evasion. The circuit court accepted Smith's guilty plea and sentenced him to serve ten years in the custody of the MDOC for attempted kidnapping; thirty years in the custody of the MDOC for armed carjacking, and five years in the custody of the MDOC for felony evasion.

¶12. In March 2017, Smith filed his third PCR motion, attacking the armed-carjacking count of the indictment, the subject-matter jurisdiction of the circuit court to convict him of armed carjacking, as well as his sentence for attempted kidnapping. In June 2017, the circuit court entered an order dismissing in part and granting in part Smith's PCR motion. In its order, the circuit court determined that Smith's sentence was outside the statutory limits for attempted kidnapping, and the circuit court re-sentenced Smith for attempted kidnapping. However, the circuit court's order dismissed Smith's remaining claims as successive-writ barred. Smith appealed from the circuit court's order.

¶13. On appeal, this Court held as follows:

. . . . A review of the record and the handling of Smith's case upon remand reflects that Smith's 2017 PCR motion takes issue with a new, separate and distinct, plea, conviction, and sentence. Nothing in the record reflects any previous proceeding in which Smith requested relief from this new conviction and sentence. Consequently, Smith's 2017 PCR motion is not successive. Miss. Code Ann. § 99-39-23(5)-(6).

Because Smith's 2017 PCR motion is not successive, we decline to

²The record reflects that in exchange for Smith's pleading guilty to the amended 2008 indictment, the State nolle prosecuted the 2015 indictment.

address the merits, or lack thereof, of Smith's claims. We conclude that the circuit court erred in dismissing Smith's 2017 PCR motion as successive. We therefore must reverse the circuit court's summary dismissal of Smith's 2017 PCR motion and remand this case to the circuit court for consideration of the issues presented by Smith's motion.

Smith, 271 So. 3d at 694 (¶¶13-14).

¶14. On remand, the circuit court ordered the State to file an answer to the remaining claims in Smith's PCR motion: (1) the circuit court erred in sentencing Smith for armed carjacking when he was properly indicted for the lesser-included offense of carjacking and (2) due to issues with Smith's amended indictment, the circuit court lacked subject-matter jurisdiction to convict him of armed carjacking.

¶15. After reviewing the record and the motions from the parties, the circuit court entered an order on July 9, 2019, denying Smith PCR motion. In its order, the circuit court found as follows:

[T]he indictment contains the essential language to put [Smith] on notice of the crime of armed carjacking, the amendment to the indictment's heading did not alter material facts, and the amendment did not alter a defense so as to prejudice [Smith's] case. As the [c]ourt finds that the amendment to the indictment was proper, the [c]ourt also finds that the [c]ourt had jurisdiction to sentence [Smith] for armed carjacking.

¶16. Smith filed an appeal from the circuit court's order denying his PCR motion.

STANDARD OF REVIEW

¶17. "When reviewing a [circuit] court's denial or dismissal of a PCR motion, we will only disturb the [circuit] court's factual findings if they are clearly erroneous; however, we review the [circuit] court's legal conclusions under a de novo standard of review." *Funchess v.*

State, 283 So. 3d 214, 216 (¶3) (Miss. Ct. App. 2019).

DISCUSSION

¶18. On appeal, Smith argues that the circuit court erred in denying his PCR motion. Smith states that his original 2008 indictment charged him with carjacking, not armed carjacking. Smith maintains that as a result, the circuit court did not have subject-matter jurisdiction over an armed carjacking charge. The original 2008 indictment charged Smith with taking a car while armed with a knife, and Smith takes issue with the failure of the original 2008 indictment to specifically describe the knife.

¶19. We recognize that although “[a] voluntary guilty plea waives ‘all technical, non-jurisdictional defects in the indictment[,] . . . and [a] guilty plea does not waive an indictment’s failure to charge an essential element of the crime, and it does not waive lack of subject matter jurisdiction[.]” *Gavin v. State*, 170 So. 3d 1242, 1243 (¶¶4-5) (Miss. Ct. App. 2015) (quoting *Joiner v. State*, 61 So. 3d 156, 159 (¶7) (Miss. 2011)). “The primary purpose of an indictment is to notify an accused of the charges against him in order to allow him to prepare an adequate defense.” *Brown v. State*, 944 So. 2d 103, 106 (¶8) (Miss. Ct. App. 2006). This Court has explained that “[t]his simply means that an indictment must provide the accused with ‘a concise and clear statement of the elements of the crime’ with which the accused is actually charged.” *Id.* (quoting *Evans v. State*, 916 So. 2d 550, 551-52 (¶5) (Miss. Ct. App. 2005).

¶20. The record reflects that the heading of Smith’s original 2008 indictment stated that

Smith was charged with “carjacking,” and the heading cited Mississippi Code Annotated section 97-3-117(1), which is the statute setting forth the elements of the offense of carjacking. However, the body of the original 2008 indictment set forth the elements of the offense of *armed* carjacking, pursuant to Mississippi Code Annotated section 97-3-117(2):

in Jackson County, Mississippi, on or about September 2, 2007, did by force and violence, knowingly take from Evalyn Jerkins’ immediate actual possession, a motor vehicle, . . . armed with and having readily available a dangerous and deadly weapon, to-wit: a knife, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

¶21. Mississippi Code Annotated section 97-3-117(2) defines the crime of armed carjacking as follows:

Whoever commits the offense of carjacking while armed with or having readily available any pistol or other firearm or imitation thereof or other dangerous or deadly weapon, including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, Bowie knife, butcher knife, switchblade, razor, blackjack, billy, or metallic or other false knuckles, or any object capable of inflicting death or serious bodily harm, shall be guilty of armed carjacking.

¶22. We have held that “[g]enerally, if an indictment tracks the language of a criminal statute, it is sufficient to inform the defendant of the charged crime.” *Gavin v. State*, 170 So. 3d 1242, 1244 (¶7) (Miss. Ct. App. 2015) (quoting *Randall v. State*, 148 So. 3d 686, 688-89 (¶10) (Miss. Ct. App. 2014)). Our review of Smith’s indictment reflects that it tracks the language of section 97-3-117(2) and sets forth the elements of armed carjacking.

¶23. As stated, in 2015, the State filed a motion to amend Smith’s indictment to change the heading to reflect the charge of “armed carjacking” under section 97-3-117(2). The circuit

court granted the motion after finding that the amendment is one “of form and not substance, and is not material to the merits of the case.” In its 2019 order denying Smith’s PCR motion, which is presently before us on appeal, the circuit court explained that although the State amended the heading of Smith’s indictment to reflect the correct subsection of 97-3-117 to charge Smith with armed carjacking, the State did not amend the body of the indictment. The circuit court therefore held that “the amendment to the indictment’s heading did not alter material facts, and the amendment did not alter a defense so as to prejudice [Smith’s] case.” The circuit court further held that “the indictment contains the essential language to put [Smith] on notice of the crime of armed carjacking,”

¶24. This Court has held that “the incorrect citation of a statute number does not alone render an indictment defective, but rather is ‘mere surplusage’ and not prejudicial to the defendant.” *Shields v. State*, 130 So. 3d 160, 162 (¶12) (Miss. Ct. App. 2014) (quoting *Brown v. State*, 944 So. 2d 103, 106 (¶8) (Miss. Ct. App. 2006)). “When an indictment provides the essential elements of the crime, the statutory subsection under which the defendant was charged need not be specified.” *Id.* (quoting *Evans*, 916 So. 2d at 552 (¶6)).

¶25. As to Smith’s claim regarding the description of the knife in the indictment, the circuit court acknowledged Smith’s assertions that he never used the pocket knife in his possession and that a pocket knife is not a deadly weapon. In its 2019 order denying Smith’s PCR motion, the circuit court held that “[Smith’s] indictment described the knife used in the carjacking as a dangerous and deadly weapon. [Smith] elected not to proceed with a trial,

and he admitted at his plea hearing that he was in fact in possession of a knife at the time of the carjacking.” The circuit court further explained that “the armed carjacking statute does not require use of the weapon as [Smith] argues, rather it requires that the person committing the offense of carjacking be ‘armed with or having readily available’ a specified weapon or any object capable of inflicting death or serious bodily injury.” To the extent Smith now questions whether the knife in his possession was a “deadly weapon,” he waived this claim by pleading guilty. *See Jackson v. State*, 174 So. 3d 232, 239 (¶24) (Miss. 2015) (“[W]hether the knife is considered a deadly weapon under the circumstances is strictly a question of fact for the jury to decide.”); *Joiner v. State*, 61 So. 3d 156, 158 (¶7) (Miss. 2011) (“[A] knowing and voluntary guilty plea waives certain constitutional rights . . . [, including] the right to a jury trial[.]”).

¶26. Upon review, we find that both the original 2008 indictment and the amended 2008 indictment track the language of section 97-3-117(2) and set forth the elements of the crime of armed carjacking. Smith pleaded guilty under the amended 2008 indictment, and we find that this indictment provided Smith with proper notice of the elements of the crime charged against him. The plea-hearing transcript further reflects that with regard to the armed carjacking charge, Smith acknowledged under oath his full understanding that he was pleading guilty to the crime of armed carjacking. We therefore find the circuit court did not err in denying Smith’s PCR motion.

¶27. **AFFIRMED.**

**BARNES, C.J., WILSON, P.J., GREENLEE, WESTBROOKS, McDONALD
AND McCARTY, JJ., CONCUR. LAWRENCE, J., NOT PARTICIPATING.**