IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1999-CP-01207-COA

HENRY JONES **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	08/06/1999
TRIAL JUDGE:	HON. BETTY W. SANDERS
COURT FROM WHICH APPEALED:	SUNFLOWER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: W. GLENN WATTS
DISTRICT ATTORNEY:	FRANK CARLTON
NATURE OF THE CASE:	CIVIL - POST- CONVICTION RELIEF
TRIAL COURT DISPOSITION:	PETITION FOR POST- CONVICTION RELIEF DENIED
DISPOSITION:	AFFIRMED - 11/07/2000
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/28/2000

EN BANC.

PAYNE, J., FOR THE COURT:

PROCEDURAL HISTORY AND FACTS

¶1. On September 29, 1995, Henry Jones pled guilty in the Sunflower County Circuit Court to escape and was sentenced to serve five years as an habitual offender in addition to the sentences he was already serving for other crimes. Jones filed a petition for post-conviction relief claiming his counsel was ineffective and that his indictment was faulty; such petition was denied August 13, 1999. The court, recognizing that the Mississippi Supreme Court overturned one of Jones's prior convictions, eliminated Jones's status as an habitual offender but denied relief concerning Jones's claim of ineffective assistance and those concerning the faulty indictment. Feeling aggrieved, Jones appeals to this Court.

ANALYSIS OF THE ISSUES PRESENTED

STANDARD OF REVIEW

¶2. With this appeal, Henry Jones raises the following issue for our review:

I. HENRY JONES'S COUNSEL WAS INEFFECTIVE.

A. COUNSEL ADVISED JONES TO PLEAD GUILTY TO AN INDICTMENT THAT FAILED TO CHARGE A CRIME.

B. COUNSEL FAILED TO INVESTIGATE AND OR CHALLENGE THE VALIDITY OF THE INDICTMENT.

C. COUNSEL FAILED TO CHALLENGE THE HABITUAL PORTION OF JONES'S SENTENCE ONCE ONE OF JONES'S PRIOR CONVICTIONS WAS OVERTURNED BY THE MISSISSIPPI SUPREME COURT.

¶3. With this appeal, Jones argues that he should be allowed to withdraw his guilty plea because his attorney was ineffective. "The standard of review for ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The test to be applied is (1) whether counsel's overall performance was deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. The defendant has the burden of proving both prongs." *Ratliff v. State*, 752 So. 2d 416 (¶6) (Miss. Ct. App. 1999). For the reasons cited herein, we find Jones's counsel was effective, and we affirm the trial court.

DISCUSSION OF THE ISSUES

¶4. Henry Jones argues that his counsel was ineffective in that he allowed Jones to plead to a faulty indictment, he failed to object to the faulty indictment, and he failed to challenge the habitual portion of Jones's sentence. First, Jones argues that the indictment did not specifically state that Jones was being charged with "escape." The required content of the indictment is described in Rule 7.06 of the Uniform Rules of Circuit and County Court Practice which states:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:
>
> 1. The name of the accused;
>
> 2. The date on which the indictment was filed in court;
>
> 3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
>
> 4. The county and judicial district in which the indictment is brought;
>
> 5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
>
> 6. The signature of the foreman of the grand jury issuing it; and

7. The words "against the peace and dignity of the state."

¶5. The heading of the indictment was entitled "Escape 97-9-45".[(1)] In the body of the indictment Jones's name appears, the date of filing is included, the phrase "in the name and by the authority of the State of Mississippi" appears, the county and judicial district are named, the date of Jones's escape is listed, the foreperson's signature appears, and the words "against the peace and dignity of the State of Mississippi" appear. Most of the information contained in Rule 7.06 stated above can be found in this indictment. However, this rule also requires that the indictment should "fully notify the defendant of the nature and cause of the accusation." From our review of the indictment, it appears that the word "escape" was omitted from the sentence "Jones . . . having been previously confined in the Mississippi State Penitentiary at Parchman, Mississippi, on or before March 20, 1995 did unlawfully, wilfully and feloniously from said penitentiary . . . ." While we find that this omission may be viewed as a defect, we also know that a guilty plea waives this type of defect in the indictment, with only two exceptions, neither of which apply here.

> Outside the constitutional realm, the law is well-settled that with only two exceptions, *the entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment.* A plea of guilty does not waive (1) the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, and a plea of guilty does not waive (2) subject matter jurisdiction.

Drennan v. State, 695 So. 2d 581, 584 (Miss. 1997) (citations omitted) (emphasis added).

¶6. Jones also argues that his counsel was ineffective because his counsel failed to object to the form of the indictment. However, Uniform Rule of Circuit and County Court Practice 7.09 states that "[a]ll indictments may be amended as to form but not as to the substance of the offense charged." Had the attorney voiced an objection concerning the indictment, the judge would have made the correction then and there, since it was to form. His counsel was not ineffective for failing to object.

¶7. Jones additionally argues that his counsel should have investigated or challenged the validity of the indictment. However, as we stated, the indictment was only defective as to form; thus, the outcome would not have been different had Jones's attorney objected, since the "defect" concerned only the omission of a word and did not affect the substance of the indictment. As well, in accordance with the *Strickland* test, even if the counsel's failure to object was counted as a deficiency in the counsel's performance, Jones would be required to show that he was prejudiced in some way. We cannot conceive how Jones was prejudiced by this, since all pertinent information was contained on the face of the document, and there was no doubt but that Jones knew of the crime with which he was being charged, and since he pled guilty to escape.

¶8. In the case of *Jones v. State*, 383 So. 2d 498 (Miss. 1980), the defendant claimed his indictment was fatally defective because it omitted a key word. In *Jones*, the defendant was indicted for "unlawfully, willfully, and feloniously carry[ing] a certain deadly weapon, to-wit: a 22 caliber pistol." The Mississippi Code section under which Jones was charged was § 97-37-1, which made it illegal to carry, concealed in whole or in part, weapons, including pistols. This section coincided with § 97-37-5, which stated that the possession of any deadly weapon as described in § 97-37-1 by a convicted felon, which Jones was, was prima facie evidence of violation of that section. Jones charged that since the indictment did not say he carried his weapon "concealed" that this fatally defected the indictment. The court in *Jones* pointed out:

> Sections 97-37-1 and 97-37-5 complement each other and must be read and considered together in

> passing on the question. There is no statute which makes it a violation to carry a deadly weapon, unless it be concealed in whole or in part. The indictment charged appellant with "unlawfully, willfully and feloniously carrying a certain deadly weapon, to-wit: a .22 caliber pistol . . . ." Considering the two sections together, we are of the opinion that the indictment informed the accused with accuracy the charge against him, and that it is sufficient to constitute former jeopardy on conviction or acquittal.

Jones, 383 So. 2d at 500. In *Jones*, the evidence was uncontradicted that Jones had possession of the deadly weapon and that the weapon was concealed; thus, there was no question that these code sections applied to Jones's situation.

¶9. Another case that is similar to the present case is *Greenlee v. State*, 725 So. 2d 816 (Miss. 1998). In *Greenlee* the defendant claimed the indictment failed to adequately inform him as to whether he was being charged with "murder" or whether the charge was "capital murder." The confusion resided in that the original indictment referred to his being charged pursuant to "97-3-19" which was divided into two sections, these sections containing definitions for both murder and capital murder. The amended indictment changed the section to "97-3-19(1)(a)" which defined murder. As defined in the statute, "capital murder" includes killing public officers, using a bomb to kill others, being paid for killing and similar crimes. In *Greenlee*, the facts showed that the boy killed his mother, and this scenario clearly pointed not to capital murder but to "non-capital" murder. The *Greenlee* court said:

> It is permissible to amend an indictment if the amendment is one of form and not of substance . . . . The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made . . . . If Section 97-3-19 is read in its entirety, there is no way that the original indictment can be construed as charging capital murder . . . .

Greenlee, 725 So. 2d at (¶¶10-11). In *Greenlee*, the defendant's confusion lay in that the code section had more than one crime defined in it. In the case *sub judice*, the code section that was printed on the face of the indictment only concerns the crime of escape. More importantly, it is imperative to point out that in both *Jones* and *Greenlee*, the defendants did not enter guilty pleas, but were convicted by a jury. Incidentally, the present case is even more compelling since Jones pled guilty, which unquestionably waives defects in his indictment, as previously described in this opinion.

¶10. With his final point, Jones argues that his counsel was ineffective in failing to challenge the habitual offender portion of Jones's sentence. This issue is moot since the trial court did recognize such change in Jones's status and granted that portion of his petition for post-conviction relief accordingly.

CONCLUSION

¶11. As described herein, though there did exist a defect in the indictment, Jones's guilty plea effectively waived his right to object to a defect thereafter. As well, since the change concerned the form and not the substance of the indictment it was amendable, and had he objected, the judge would have made the proposed correction at that time. Jones's attorney was effective in representing Jones, and none of the issues raised on appeal have merit. Accordingly, we affirm the trial court on all issues.

¶12. **THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT DENYING POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED**

TO SUNFLOWER COUNTY.

LEE, MOORE, MYERS, AND THOMAS, JJ., CONCUR. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, C.J., KING, P.J., BRIDGES AND IRVING, JJ.

SOUTHWICK, P.J., DISSENTING:

¶13. In my view this indictment failed to charge any crime. I would grant the requested relief.

¶14. The majority agrees that an indictment's failure to charge an offense is not waived by a guilty plea. However, it finds that this indictment did not suffer from that defect. The majority surely agrees that the body of the indictment in no manner charged the core illegal act that Jones was alleged to have committed, namely, escaping. It charged that Jones did an unstated act unlawfully "from said penitentiary." Escape is not the only crime that can be committed from a prison. The charging language of the indictment did not inform Jones of his alleged crime.

¶15. What must be utilized to correct the indictment's defect is the caption. Whether the caption is an adequate repair is the determination that divides me from the majority opinion.

¶16. My first point is basic. I find that knowing what statute applies to Jones's offense is not an adequate correction of the indictment. I quote all but the formal parts of the indictment:

INDICTMENT ESCAPE 97-9-45

HABITUAL 99-19-81

That Henry Lee Jones, #85448 late of the County aforesaid, having been previously confined in the Mississippi State Penitentiary at Parchman, Mississippi, on or before March 20, 1995, did unlawfully, wilfully and feloniously from said penitentiary or his housing unit at said penitentiary. . . . .

¶17. The majority argues that Jones knew that he was being charged with escape. The caption to the indictment used the word and cited the statute. We also appear to conclude that he knew that he was guilty of escape since he was found in Las Vegas. I find Jones's knowledge of the crime that he had actually committed was an insufficient basis to uphold the indictment that did not tell him which crime the State would attempt to prove. An appellate court should not measure validity depending on whether the accused after conviction appears reliably guilty. An indictment should leave no uncertainties about the charge either with the guilty or with the innocent.

¶18. An accused under this indictment would have several uncertainties. One is whether the State would attempt to prove an actual escape, which the hypothetical innocent inmate could try to disprove by showing that he never left the prison and the escapee was someone else. If instead the State only tried to prove an attempt, such a defense would not be permissible.

¶19. Another uncertainty arises from a different section in the statute that a "convict who is entrusted to leave the boundaries of confinement [by proper authorities] and who wilfully fails to return . . . shall be considered an escapee." Miss. Code Ann. § 97-9-45 (Rev. 1994).

¶20. Did the indictment captioned "escape" that said Jones had "wilfully and feloniously from said

penitentiary" charge him with an actual escape, with an attempted escape, or with leaving with permission and then failing to return? If a statute provides for alternative means of committing the same crime such as for assault, those options must be separately identified in the indictment or the State is limited to proving the alternatives that are listed. *Smith v. State,* 754 So. 2d 1159, 1163 (Miss. 2000).

¶21. The Supreme Court has held that the first section of the statute for escape from county jails provides for two separate offenses, escape and attempted escape. *Miller v. State*, 492 So. 2d 978, 981 (Miss. 1986) (citing Miss. Code Ann. § 97-9-49(1) (Rev. 1994)). That is because the elements for attempted escape from a county jail include the use of "force or violence," while prosecution for a successful escape does not require that force be proven. *Id.* Not relevant in *Miller* but subject to the same interpretation is that the second section of the county jail escape statute defines yet another separate offense, which is to leave the jail with permission and refuse to return. Miss. Code Ann. § 97-9-49 (2). The second unnumbered paragraph of the statute under which Jones was charged, escape from a state prison facility, also is a distinct crime separate from the first paragraph.

¶22. The defect in this indictment is the opposite of those just described from other precedents. The precedents dealt with indictments that identify some of the statutory means to commit a crime, followed at trial with proof of a means not charged. The most that can be said about this indictment is that it stated none of the various means to commit the crime and just mentioned the statute. I find that this constituted a failure to inform Jones at the very least "of the essential facts constituting the offense charged" as required by a criminal procedural rule that I will discuss below. It also failed to charge the most essential elements of the offense.

¶23. Next I examine the authorities relied upon by the majority. The first precedent discusses an indictment in which the word "concealed" was omitted in a charge of carrying a deadly weapon by a convicted felon. *Jones v. State*, 383 So. 2d 498 (Miss. 1980). The majority here states that in *Jones* the accused was charged under Miss. Code Ann. section 97-37-1, which is the general concealed weapon statute. Reading the indictment quoted in the opinion, though, which mentions both his possession and the fact that he was a convicted felon, it appears he was charged under section 97-37-5. *Id.* at 499-500. The latter statute states that "possession of any deadly weapon as described in Section 97-37-1 by any person who has been convicted of a felony" is unlawful. By using the phrase "possession of any deadly weapon as described in section 97-37-1," the possession by a felon statute is potentially incorporating only the list of deadly weapons -- "bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver," etc. Alternatively, it is adopting also the specific kind of possession required by section 97-37-1, which is that the weapon be "concealed in whole or in part." The *Jones* court held that there was no general crime of carrying a weapon by a felon - "There is no statute which makes it a violation to carry a deadly weapon, unless it be concealed in whole or in part." *Id.* at 500. Thus under the *Jones* interpretation a felon can carry a deadly weapon so long as it is not concealed. "Concealed" is a necessary element.

¶24. In *Jones* the indictment did not use the word "concealed." There is no mention in the case whether the indictment referred to the statute. Nonetheless, the court concludes that since the only way to commit the crime is by concealing the weapon, and since that defendant never denied that he concealed it, the indictment fairly informed him of the charge against him. *Id.*

¶25. *Jones* has only been cited once since 1980 and only for the statement that normally an accused must

demur to the indictment. *Gandy v. State*, 438 So. 2d 279, 285 (Miss. 1983). *Jones* is difficult to reconcile with cases to be discussed below that reversed convictions because an indictment did not charge each element of the offense. That an accused knew the charges despite omissions in the indictment has not been sufficient. *Jones* also seems in tension with the principle cited in the majority opinion here, namely, that a guilty plea does not waive the failure of an indictment to charge an essential element of the offense.

¶26. In my view *Jones*'s reasoning has since been overturned even if the case has not been formally overruled. The Supreme Court has since given a much different list of requirements.

> It is fundamental . . . that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient. . . . Every material fact and essential ingredient of the offense--every essential element of the offense--must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilty must be stated in the indictment.

Peterson v. State, 671 So. 2d 647, 654 (Miss. 1996) (quoting *Love v. State*, 211 Miss. 606, 611, 52 So. 2d 470, 472 (1951)). After acknowledging that a procedural rule now controls, the Court stated that "the appropriate inquiry . . . remains whether the indictment alleges the essential elements of the crime for which the defendant is charged by containing 'a plain, concise and definite written statement of the essential facts constituting the offense charged and . . . fully (notifying) the defendant of the nature and cause of the accusation against him.'" *Peterson,* 671 So. 2d at 654, (quoting *Hines v. State*, 472 So. 2d 386, 390 (Miss.1985)), which was partially a quote of Uniform Criminal Rules of Circuit Court Practice 2.05. This referenced rule is now Uniform Rule of Circuit and County Court Practice 7.06.

¶27. The *Peterson* indictment failed to assert that the sexual battery was "without the consent" of the victim, an omission that the State argued was corrected by the indictment's citation of the sexual battery statute. The Courts found that an inadequate correction.

> This Court has yet to hold that the essential elements of the crime charged are not necessary to be included within the indictment. This Court in *Roberson* held that an indictment which cited a statute, rather than the specific subsection of the statute, was sufficient to "provide the defendant with notification in fact of the nature of the charge against him and out of what transaction or occurrence it arose." *Roberson v. State*, 595 So. 2d [1310,] 1318 [(1992)]. In *Roberson*, as with the other cases in which indictments have been upheld, the facts supporting the essential elements of the offense were alleged within the indictment.

Peterson, 671 So. 2d at 654. The Court then stated that despite the mention in *Hines* of the indictment's citation of the criminal statute, in fact all the elements of the offense actually were present in the indictment. *Id.*

¶28. I find no case in which the Supreme Court has permitted an essential element of the crime to be supplied by the language that appears in a statute referenced in the indictment. In one case the court found that referring to the entirety of the murder statute, which involved both capital and non-capital murder, did not *create* a defect since the language of the indictment made it clear that a non-capital crime was charged. *Greenlee v. State*, 725 So. 2d 816, 821-22 (Miss. 1998).

¶29. What to make of this requires deciding whether *Peterson* and subsequent cases are holding that the document that begins a person's criminal proceedings must meet certain formal requirements and not only satisfy the need for actual notice. *See also Hennington v. State*, 702 So. 2d 403, 408 (Miss. 1997). A lengthy dissent in *Peterson* identifies and criticizes the result as simply putting form over need. *Peterson*, 671 So. 2d at 660-61 (Pittman, J., dissenting). Reviewing various precedents after what is now Circuit and County Court Rule 7.06 was first adopted in 1979, the dissent finds that "the only requirement of the indictment is that it provide notice to the defendant and include the seven enumerated items in Rule 2.05 of the Uniform Rules of Circuit Court." *Id.* at 661-62.

¶30. This is an interpretative point being contested in *Peterson*. It is how to read what is now Rule 7.06. The choice is between making indictments strictly a matter of reasonable notice to the accused or instead requiring that each element of the offense be stated in the indictment. The *Peterson* majority held that each element must be charged. Actual notice of the charge is not enough. Rejected was the idea that an indictment could generally charge a crime, leaving elements out without voiding the indictment so long as a court ultimately decides enough information could be pieced together from other sources. The indictment is a formal presentation by the State of the charges. The *Peterson* majority might have considered that at the very instant that criminal proceedings are commenced, ambiguity should not threaten what follows. By choosing a formalistic approach, the majority was not making resolution of indictment issues invariably easy. It was simply keeping the focus on something essentially objective - inclusion of every element - and avoiding the subjective question of whether under some totality of the circumstances approach the accused had reasonable notice of the charge. This is strictly a matter of what Rule 7.06 means. A new majority may one day adopt the view of the dissent. In the meantime, it is this intermediate court's role to apply existing rules.

¶31. One result of applying the *Peterson* majority's holding is that it dovetails well with the related principles that this Court today must apply. The *Peterson* dissent's view that every element does not need to be in the indictment is in instant conflict with the rule the majority here is applying, which is that a plea of guilty does not waive an indictment's failure "to charge an essential element of the offense." A post-*Peterson* 1997 case is cited for that guilty plea requirement. *Drennan v. State*, 695 So. 2d 581, 584 (Miss. 1997). *Drennan* makes unwaivable what the *Peterson* dissent does not think is even a defect.

¶32. Though I find that the indictment must contain each element of the offense, and missing essential elements cannot be incorporated by referring to the statute that will contain all the elements, our case presents yet another consideration. What I find exceptional here, even if a reference to a statute is not generally sufficient to supply a missing element, is that the majority sees the missing element as the central but simple word that defines the crime - "escape." If the word "escape" is floating about on the face of the indictment somewhere, and that disembodied word is the only one missing, can it be grafted onto the charging language in the body of the indictment and thereby make it complete? The analysis would be something like this: (1) the only element of the crime missing is the word "escape"; (2) the word "escape" appears elsewhere on the indictment outside of the charging language; therefore, (3) the missing word, actually not missing at all but only inexpertly placed, can be inserted where it can complete the charge.

¶33. Because of *Peterson*, which in my interpretation is requiring almost ritualistic order and clarity to indictments, I cannot accept this as a repair of the defect. Moreover, what is floating in the indictment unmoored to any sentence is the reference to the escape statute, not just the word "escape." How that statute with its multiple means to commit an escape fleshes out the slim language of the charge itself is too

uncertain to be the answer to the problem in this case.

¶34. I find the indictment failed to charge the most essential element of the offense. That issue is not waived by a guilty plea. I would reverse.

MCMILLIN, C.J., KING, P.J., BRIDGES AND IRVING, JJ., JOIN THIS SEPARATE OPINION.

1. Miss. Code Ann. § 97-9-45 (Rev. 1994) states, "If any person sentenced to the Mississippi Department of Corrections for any term shall escape or attempt to escape from his particular unit or camp of confinement or the boundaries of the penitentiary as a whole, or shall escape or attempt to escape from custody before confinement therein, he shall, upon conviction, be punished by imprisonment in such prison for a term not exceeding five (5) years, to commence from and after the expiration of the original term of his imprisonment as extended in consequence of such escape or attempted escape . . . ."