

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00447 COA

EARNEST SUTTON A/K/A EARNEST MATTHEW SUTTON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

A. RANDALL HARRIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: BOBBY DeLAUGHTER

NATURE OF THE CASE: WHETHER APPLICATION OF MISSISSIPPI CODE ANNOTATED
SECTION 47-7-3 AS AMENDED IS EX POST FACTO?

TRIAL COURT DISPOSITION: HELD MISSISSIPPI CODE ANNOTATED 47-7-3 AS AMENDED WAS APPLICABLE.

BEFORE THOMAS, P.J., BARBER, AND McMILLIN, JJ.

PER CURIAM:

Earnest Sutton appeals his conviction of sexual battery, raising the following issues as error:

I. WAS THE SENTENCING OF APPELLANT PURSUANT TO THE AMENDED MISS. CODE ANN. 47-7-3, PRECLUDING AVAILABILITY FOR PAROLE WHEN PAROLE WAS ALLOWED AT THE TIME OF THE COMMISSION OF THE CRIME, AN IMPOSITION OF AN EX POST FACTO LAW?

II. DID THE LOWER COURT ERR IN SENTENCING APPELLANT PURSUANT TO A STATUTE WHICH WAS NOT IN EFFECT AT THE TIME OF THE CRIME?

As the sentence imposed by the lower court was correct, this Court affirms the commitment and sentence orders as corrected.

FACTS

Earnest Sutton was convicted of the crime of sexual battery. When this crime was committed, the maximum sentence was thirty (30) years in the custody of the Mississippi Department of Corrections. Although at the time of conviction the thirty (30) year sentence was still intact, the legislature amended the applicable parole eligibility statute. The amended provision of the statute removed the availability of parole for anyone convicted of a sex offense. The lower court sentenced Sutton and added to both the sentencing and commitment orders that the amended statute, Mississippi Code Annotated section 47-7-3, applied to Sutton's sentence.

ANALYSIS

The amended statute in question, Mississippi Code Annotated section 47-7-3, went into effect in July of 1995. The crime committed by Sutton occurred in December 1993. Sutton argues that the application of the amended statute, as it pertained to him, is *ex post facto* law.

The State argues that The Honorable James E. Graves merely sentenced Sutton to the statutory maximum and did not comment on the parole aspect. However, it is clear from both the hearing on the motion for new trial and Sutton's commitment and sentencing orders that Judge Graves intended that Sutton be sentenced to the maximum and that the amended version of section 47-7-3, which does not allow for parole, apply to Sutton's sentence.

Since this appeal was filed our Supreme Court decided *Puckett v. Abels*, No. 95-CA-00856-SCT, 1996 WL 671291 (Miss. Nov. 21, 1996). In this decision the court was asked to determine whether Senate Bill 2175, the eighty-five percent (85%) rule, was an *ex post facto* law. The court considered whether Senate Bill 2175, Section 3, paragraph (1)(g), amending Mississippi Code Annotated section 47-7-3, was an *ex post facto* law as applied to persons who were charged with committing crimes before July 1, 1995, but who were not sentenced until after July 1, 1995. The Mississippi Supreme Court determined that Senate Bill 2175 was *ex post facto* law when applied retroactively. *Id.* at *10.

As we are constrained to follow the above Mississippi Supreme Court decision, Sutton's sentence should not be subject to Mississippi Code Annotated section 47-7-3 as amended, but under section 47-7-3 as it existed when Sutton committed the crime. Sutton's whole argument centers around the *ex post facto* aspect of amended Section 47-7-3, and does not argue that the lower court erroneously sentenced him to thirty (30) years. The State urges this court to affirm the sentencing order, but to strike out the language concerning parole, as there were no other trial court errors. *Hill v. State*, 388 So. 2d 143, 146 (Miss. 1980); *Cain v. State*, 337 So. 2d 935, 936 (Miss. 1976). The State's argument has merit.

In *Hill*, the court held that the portion of the circuit court's judgment which read "without probation or parole" was without legal effect, as probation under section 47-7-3 was under the province of the Mississippi Parole Board and not the circuit court. 388 So. 2d at 146 (quoting *Cain v. State*, 337 So. 2d 935, 936 (Miss. 1976)). The court struck the language of the order which read without probation or parole. *Id.*

The portion of Judge Graves sentencing and commitment orders, which stated that Mississippi Code Annotated section 47-7-3, as amended, should apply was without legal effect. Because Sutton does not argue on appeal that his sentence was erroneous, but rather that amended section 47-7-3 does not apply, we affirm the lower court, but any language of the applicability of amended Section 47-7-3 will be deleted from the lower court's orders.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF SEXUAL BATTERY AND SENTENCE TO THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED, BUT THE LOWER COURT AND THE CLERK OF COURT ARE DIRECTED TO AMEND THE SENTENCE AND COMMITMENT ORDERS CONSISTENT WITH THE DICTATES OF THIS OPINION. ALL COSTS ARE ASSESSED TO HINDS COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.