

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KP-00568 COA**

**DAVID E. LYONS A/K/A DAVID EARL LYONS
A/K/A "FOX"**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

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

DATE OF JUDGMENT:	5/10/95
TRIAL JUDGE:	HON. THOMAS J. GARDNER, III
COURT FROM WHICH APPEALED:	MONROE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	SAM REEDY AND ROBERT W. COLEMAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF BURGLARY AND SENTENCED TO 7 YEARS AS HABITUAL OFFENDER.
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

David E. Lyons was convicted of the burglary of Allmond Printing Company in Aberdeen, Mississippi. Lyons was sentenced as a habitual offender to serve a term of seven years in the custody of the Mississippi Department of Corrections with said sentence being served consecutively to any and all other pending sentences. Lyons's motion for JNOV or, in the alternative, a new trial was denied. Finding no error on the part of the circuit court, we affirm.

FACTS

On November 12, 1994, Sergeant James Harris, while on patrol, observed that the glass door to Allmond Printing Company had been broken. Sergeant Harris testified that upon further investigation, he found the lights on inside the building and found Lyons lying on the floor beneath some boxes. Following a struggle, Lyons was arrested. Officer Larence Swindle testified to finding two rolls of quarters, some change, two watches, and some screwdrivers in Lyons's pockets. Mr. John Allmond, the owner of Allmond Printing, identified the items found on Lyons's person as being his possessions. Allmond testified that the items had previously been in his office.

The jury returned a verdict of guilty, and Lyons was sentenced as a habitual offender. Lyons was qualified at the sentencing hearing as a habitual offender upon a showing by the State that he had two prior convictions for burglary for which he had been given two seven year suspended sentences. Prior to trial on the current charge, the suspended sentences were revoked, and Lyons was ordered to serve two consecutive seven year terms.

Feeling aggrieved, Lyons filed this appeal asserting ten issues. In the interest of clarity, we will consolidate some of the issues and address them as follows: **(1) Whether the circuit court erred in not granting dismissal of charges in cases CR93-067, CR93-068, and CR93-069 used for habitual offender status, (2) Whether the indictments for cases CR93-067, CR93-068, and CR93-069 were defective, (3) Whether the trial court erred in failing to grant Lyons's motion for a psychiatric examination.**

ANALYSIS

I. WHETHER THE CIRCUIT COURT ERRED IN NOT GRANTING DISMISSAL OF CHARGES IN CASES CR93-067, CR93-068, AND CR93-069 USED FOR HABITUAL OFFENDER STATUS.

Following a finding of guilty of business burglary by the jury, a sentencing hearing was held in which the State introduced into evidence the indictment and sentencing order for Cause Number CR93-067 and Cause Number CR93-068. On its own motion, the court further received into evidence an order dated January 19, 1995, revoking the suspended sentences in Cause Numbers CR93-067 and CR93-068. Thereafter, Lyons made the following objection:

We'd object to the defendant being sentenced under the Habitual Offender Act. The sentences were suspended sentences. They were not -- he did not do or serve a year on each one of those sentences. Further, the order revoking the suspended sentence, he was not given a hearing that he knows of on the imposition of those sentences and would therefore contest the validity of the same.

The judge overruled the objection finding that the State had properly complied with Mississippi Code Annotated § 99-19-81 (Rev. 1994) in establishing Lyons's status as a habitual offender.

On appeal, Lyons seems to be attacking the validity of his habitual offender status by arguing that the guilty pleas he entered for the offenses on which his habitual offender status was determined should

be dismissed on the ground that the guilty pleas were involuntarily given. Lyons further attacks the bond set for the previous offenses to which he subsequently pled guilty. Finally, Lyons argues that the trial court erred in indicting him on the current charge without disposing of his outstanding writ of habeas corpus which pertained to the guilty convictions in causes CR93-067 and CR93-068.

As the State correctly points out, the basis for sentencing a defendant as a habitual offender is governed by **Miss. Code Ann. § 99-19-81 (Rev. 1994)** which states that a defendant shall be sentenced as a habitual offender if he has previously been convicted of two felonies "separately brought or arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution" The Uniform Rules of Circuit and County Court Practice further provide for the procedures that must be followed when sentencing a defendant as an habitual offender, the most significant requirement being that separate trials must be held on the principal charge and on the charge of previous convictions. **URCCC 11.03.** In the present case, in a separate hearing, the prosecution provided competent evidence of Lyons's previous convictions. Lyons's only objection at that time pertained to the fact that he had been given a suspended sentence for the previous convictions which had since been revoked. We find that the trial court properly overruled the objection. Our case law clearly indicates that a previous conviction which carried a suspended sentence at the time may be considered when determining habitual offender status. *Hewlett v. State*, **607 So. 2d 1097, 1105 (Miss. 1992)** ("The fact that there was no actual incarceration does not affect the sufficiency of the sentence as evidence of habitual offender status.").

On appeal, Lyons asks this Court to consider the voluntariness of his guilty pleas to the previous felonies. We believe this request to be beyond the scope of this appeal. *Lester v. State*, **692 So. 2d 755, 772 (Miss. 1997)** ("[O]bjection on one ground at trial waives all other grounds for objection on appeal."). At trial, Lyons made no mention of his dissatisfaction with his previous guilty pleas nor did he challenge the accuracy of the information as stated in the indictments or the authenticity of the documents offered as evidence of Lyons's prior convictions and sentences. Notwithstanding this waiver, however, Lyons's allegations regarding his previous convictions would still not be properly before this court. We believe that a writ of habeas corpus would be the proper route, and we note that Lyons filed a habeas petition that was dismissed by the supreme court on October 11, 1994, more than a month prior to the burglary charge from which this appeal arises.

We therefore find Lyons's arguments to be without merit.

II. WHETHER THE INDICTMENTS FOR CASES CR93-067, CR93-068, AND CR93-069 WERE DEFECTIVE.

Lyons argues that the indictments used against him which include three previous felony indictments and the indictment for the present charge were defective because they did not conclude with the words "against the peace and dignity of the state of Mississippi." Lyons contends that Section 169 of the Mississippi Constitution of 1890 provides that the indictment must *conclude* with the "against the peace and dignity" language. In the indictments at issue, following the "against the peace and dignity language," are the signatures of the district attorney and grand jury foreman. Lyons, relying on *McNeal v. State*, **658 So. 2d 1345, 1350 (Miss. 1995)**, argues that the indictments are fatally flawed because the "against the peace and dignity" language is not the last thing printed on the face of the

indictments. In *McNeal*, the court found that McNeal's indictment was defective for sentencing purposes since the words that dealt with his prior offenses qualifying him for habitual offender status came after the "against the peace and dignity" language. *Id.*

The State argues that this issue is procedurally barred because Lyons failed to object to the form of the indictments at trial. *Brandau v. State*, 662 So. 2d 1051, 1054 (Miss. 1995). While the State is correct that failure to object at trial generally waives an issue on appeal, *Williams v. State*, 684 So. 2d 1179, 1189 (Miss. 1996), we decline to dignify Lyons's argument with a mere procedural bar. Our research indicates that no one to date has come up with the novel argument Lyons presents. While we give Lyons a good grade for creativity, we must not agree with him. Logical analysis leads us to the conclusion that the Mississippi Constitution does not mandate reversal when the signatures of the district attorney and grand jury foreman come last on the face of the indictment. Lyons's literal interpretation of the meaning of "conclude" is supported by the *McNeal* opinion but we firmly believe that the supreme court did not mean to imply that signatures must also precede the "against the peace and dignity" language. Were such the case, we dare say that every indictment in the State would have to be deemed flawed as the logical positioning of the signatures of the district attorney and grand jury foreman is at the end of the substantive portions of the indictment.

For the above reasons, we find Lyons's argument to be without merit.

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT LYONS'S MOTION FOR A PSYCHIATRIC EXAMINATION.

Lyons argues that the trial court erred in denying his motion for a psychiatric examination. Lyons contends that he suffers from memory lapses and as a result could not aid his attorney in preparing a defense. A pre-trial hearing was held on the motion and the trial judge determined that Lyons had not presented sufficient proof of his need for a psychiatric examination. The judge stated for the record that "[t]he defendant during his testimony demonstrated that he has a good recall of circumstances."

The decision of whether to grant a defendant's motion for a psychiatric evaluation is left to the discretion of the trial judge. *Dunn v. State*, 693 So. 2d 1333, 1340-41 (Miss. 1997). "There is no abuse of discretion in denying a mental evaluation where there has been no proof presented to the judge." *Id.* The *Dunn* court went on to state that "[w]hen the trial court has made a finding that the evidence does not show a probability that the defendant is incapable of making a rational defense, this Court will not overturn that finding unless the finding was manifestly against the overwhelming weight of the evidence." *Id.* We have reviewed the record in this case and find no abuse of discretion on the part of the trial judge. The State is correct in their assertion that Lyons's memory loss appears to be very selective. At his pre-trial hearing on the motion Lyons claimed that he could not remember the events leading to his arrest at Allmond Printing. However, at trial, while contrary to the testimony of the arresting officers, Lyons gave a detailed description of the events that he remembered taking place at the time of his arrest. We therefore find no merit in Lyons's argument and affirm the decision of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF MONROE COUNTY OF CONVICTION OF BURGLARY OF A COMMERCIAL BUILDING AND SENTENCE AS A HABITUAL OFFENDER TO SERVE A TERM OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SAID SENTENCE TO RUN

CONSECUTIVELY TO ALL OTHER PENDING SENTENCES IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO MONROE COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.