

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-01317 COA**

**MAJOR L. TROTTER A/K/A MAJOR LEE  
TROTTER**

**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:	11/30/95
TRIAL JUDGE:	HON. KENNETH LEVENE THOMAS
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	P. J. TOWNSEND, JR. JOHN H. MCWILLIAMS ROBERT LAWSON HOLLADAY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	GLENN J. ROSSI
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DRIVING UNDER THE INFLUENCE: SENTENCED AS A HABITUAL TO LIFE IMPRISONMENT; SENTENCE TO RUN CONSECUTIVE TO ANY PREVIOUS; SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR SHALL THE DEFENDANT BE ELIGIBLE FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED IN PART, REVERSED IN PART AND REMANDED - 3/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/8/98

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

PAYNE, J., FOR THE COURT:

Major L. Trotter was convicted of driving under the influence of alcohol, third offense. Trotter was sentenced as a habitual offender to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. Trotter's motion for JNOV or, in the alternative, a new trial was denied. Finding that the trial court erred in sentencing Trotter as an habitual offender under Miss. Code Ann. § 99-19-83 (Rev. 1994), we affirm the conviction and remand for re-sentencing pursuant to Miss. Code Ann. § 99-19-81 (Rev. 1994).

### FACTS

On April 12, 1995, Major L. Trotter was involved in a two car accident and was subsequently charged with driving under the influence of alcohol (D.U.I.). Trotter was indicted for a felony third offense D.U.I. as a habitual offender under Mississippi Code Annotated § 99-19-81 (Rev. 1994). The original indictment alleged that Trotter was a habitual offender within the meaning of Section 99-19-81 inasmuch as he had been previously convicted of aggravated assault which occurred on January 9, 1977, and was sentenced to three years in prison and previously convicted of burglary which occurred on July 13, 1978, which also carried a three year sentence. On the morning of the trial, the district attorney moved to amend the indictment to charge Trotter as a habitual offender under Miss. Code Ann. § 99-19-83 (Rev. 1994). Over objection of defense counsel, the trial court entered an order amending the indictment. The amended indictment alleged that Trotter was a habitual offender within the meaning of Section 99-19-83 inasmuch as he had been convicted on April 11, 1985, of attempted aggravated assault and carrying a deadly weapon; that he had been sentenced to terms of eight and four years, respectively; and that he had actually served one year or more on each sentence.

Following a trial on the merits, Trotter was convicted and sentenced as a habitual offender pursuant to § 99-19-83 of the Mississippi Code to serve a term of life imprisonment. Feeling aggrieved, Trotter filed this appeal asserting six issues. Because Issues I and II are dispositive of this case, we will not address the other four issues.

### ANALYSIS

**I. WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AS A HABITUAL OFFENDER UNDER SECTION 99-19-83, SINCE THE GRAND JURY INDICTMENT OF THE DEFENDANT DID NOT SET FORTH THE ESSENTIAL ELEMENT THAT THE DEFENDANT HAD ACTUALLY SERVED MORE THAN ONE YEAR IN A STATE OR FEDERAL PENAL INSTITUTION ON PREVIOUS CONVICTIONS DATED MAY 17, 1977, AND NOVEMBER 21, 1978.**

**II. WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AS A HABITUAL OFFENDER UNDER SECTION 99-19-83, SINCE THE CONVICTIONS SET FORTH IN THE AMENDMENT TO THE INDICTMENT WERE BOTH BASED ON AN INCIDENT OCCURRING ON FEBRUARY 16, 1985, AND WERE NOT BASED ON CHARGES ARISING OUT OF SEPARATE INCIDENTS AT DIFFERENT TIMES.**

As to Issue I, Trotter argues that the action of the trial court in sentencing him to a term of life imprisonment without parole under Miss. Code Ann. § 99-19-83 (Rev. 1994) was erroneous in that

the indictment returned by the grand jury against Trotter charged him with being a habitual offender under Miss. Code Ann. § 99-19-81 (Rev. 1994) and did not contain necessary information required for sentencing under Section 99-19-83. Specifically, Trotter argues the original indictment did not allege that the defendant actually *served* separate terms of one year or more in any state and/or federal penal institution which is required under Section 99-19-83. Trotter contends that the absence of the time actually served on the 1977 and 1978 offenses renders the indictment fatally defective.

The State responds that Trotter's argument is moot. The State concedes that the original indictment did not comport with the requirements of Section 99-19-83 to the extent that the indictment does not reflect the time actually served. The State contends that since Trotter was not initially charged under Code Section 99-19-83 but charged, rather, under Section 99-19-81, the indictment only had to reflect that the defendant was twice convicted of "any felony or federal crime upon charges separately brought and 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 . . . ." (emphasis added). **Miss. Code Ann. § 99-19-81 (Rev. 1994)**. The State goes on to point out, however, that the amendment which charges Trotter under Section 99-19-83 added two other felony convictions and that each of these additions reflect the sentence imposed as well as the time actually served. Thus, the State seems to imply that it does not need the offenses listed in the original indictment to support enhanced sentencing under Section 99-19-83 because the offenses in the amendment are sufficient to meet the requirements of the pertinent code section in that the amended portion of the indictment reflects the time actually served.

As to Issue II, Trotter argues that the charges of attempted aggravated assault and carrying a concealed weapon which were added by amendment and which were relied on by the prosecution to support an indictment under Miss. Code Ann. § 99-19-83 were not based on charges "separately brought and arising out of separate incidents at different times" as required by the statute. Trotter points out that the two charges appearing on the amendment order were brought in consecutive cause numbers in the Circuit Court of Bolivar County and both showed the date of conviction as April 11, 1985, and both showed the incident date as February 16, 1985. Trotter contends that the charges obviously arose out of the same incident at the same time and therefore cannot be considered separately as authorizing enhanced sentencing under Section 99-19-83.

The State, seemingly contradicting its response to Trotter's argument in Issue I, contends that Trotter's argument is "spurious on its face." The State seems to be arguing that it does not matter that the charges added in the amendment are not separate incidents because the charges in the original indictment are clearly separate incidents. Thus, the State now contends that it is relying on the charges in the original indictment as well as the charges in the amended portion of the indictment to support enhanced sentencing under Section 99-19-83.

Trotter is correct in that the charges of attempted aggravated assault and carrying a deadly weapon contained in the amended portion of the indictment are not convictions arising from "charges separately brought and arising out of separate incidents at different times." **Miss. Code Ann. § 99-19-83 (Rev. 1994)**. As such, these charges fulfill only one of the two previous felony convictions required by statute. Therefore, in order to proceed under code Section 99-19-83, the State must use at least one of the felonies committed by Trotter in 1977 and 1978 which appear on the face of the original indictment. Our question then becomes whether the absence from the face of the indictment

of time actually served on the 1977 and 1978 convictions renders the indictment fatally defective. We think that it does.

Our analysis must begin with the language of **Uniform Circuit and County Court Rule 11.03** which reads in pertinent part as follows:

In cases involving enhanced punishment for subsequent offenses under state statutes:

1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege *with particularity* the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

(emphasis added). We believe that the drafters of this rule in stating that previous convictions must be alleged with particularity meant that all the elements necessary to proceed under the pertinent habitual offender statute must be contained on the face of the indictment. Thus, in order to satisfy the "alleged with particularity language" of URCCC 11.03, the indictment must show the elements of Section 99-19-83 which are (1) two previous felony or federal crime convictions, (2) separately brought and arising out of separate incidents at different times, (3) imposition of a sentence of one year or more for each conviction, and (4) *actual service of one year or more for each conviction*. Additionally, per URCCC 11.03, the indictment must also contain the state or federal jurisdiction of any previous conviction and the date of judgment.

Clearly, the indictment under which Trotter was convicted and sentenced does not contain the required elements for charging and sentencing a defendant as a habitual offender under Section 99-19-83. Granted, the evidence presented by the State at the sentencing hearing proved conclusively that Trotter had two previous felony convictions for which he served a sentence of one year or more and that at least one of these felony convictions was for a violent crime. The proof satisfies the requirements of Section 99-19-83 but the indictment is lacking the necessary elements. We cannot gloss over this omission as we are bound by the language of the uniform rules and the requirements of each applicable statute. We therefore affirm Trotter's conviction but remand for re-sentencing pursuant to Miss. Code Ann. § 99-19-81 (Rev. 1994). *See Ellis v. State*, 520 So. 2d 495, 496 (Miss. 1988).

As a further note, we caution prosecutors to pay closer attention to the preparation of their indictments. We have rules and statutes for a reason. While an omission or oversight in the preparation of an indictment may seem like a mere technicality, failure to draft it or amend it appropriately will often times render the indictment fatally defective as is obvious by the present case.

**THE JUDGMENT OF THE CIRCUIT COURT OF BOLIVAR COUNTY OF CONVICTION OF FELONY D.U.I. IS AFFIRMED AND SENTENCE PURSUANT TO MISS. CODE ANN. § 99-19-83 (REV. 1994) AS A HABITUAL OFFENDER TO SERVE A TERM OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS REVERSED AND REMANDED FOR RE-SENTENCING PURSUANT TO MISS. CODE ANN. § 99-19-81 (REV. 1994), WITH SENTENCE TO RUN CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND  
SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., NOT PARTICIPATING.**