

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDERICK ALEXANDER

APPELLANT

FILED

MAY 30 2007

VS.

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

NO. 2006-CP-1176

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDERICK ALEXANDER

APPELLANT

VERSUS

NO. 2006-CP-01176-COA

STATE OF MISSISSIPPI

APPELLEE

**MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE,
BRIEF FOR APPELLEE**

STATEMENT OF THE CASE

Frederick Alexander was tried and convicted in the Circuit Court of Claiborne County on a charge of sale of cocaine. On January 6, 1997, the court entered an order sentencing him to 30 years in the custody of the Mississippi Department of Corrections. (C.P.6) The following January 16, Alexander filed in the circuit court a Motion to Reconsider, based solely on the ground that the sentence was "clearly excessive." (C.P.7) On June 14, 2006, the circuit court denied that motion. (C.P.8) Alexander has attempted to appeal that ruling. (C.P.9)

SUMMARY OF THE ARGUMENT

This purported appeal should be dismissed for lack of jurisdiction. Solely in the alternative, the state submits Alexander's challenge to his statutorily-authorized sentence is clearly meritless.

PROPOSITION:

**ALEXANDER'S ATTEMPTED APPEAL SHOULD BE DISMISSED;
SOLELY IN THE ALTERNATIVE, THE STATE SUBMITS THE
CHALLENGE TO HIS SENTENCE LACKS
SUBSTANTIVE MERIT**

Alexander has attempted to appeal from an order denying his motion to reconsider sentence. The state counters that such an order is not appealable; thus, this purported appeal should be dismissed.

"[T]here are two primary ways in which a criminal defendant may challenge a trial court proceeding: (1) a direct appeal from a conviction, or (2) a proceeding under the Post Conviction Relief Act. An appeal is a matter of statutory right and not based on any inherent common law or constitutional right." *Fleming v. State*, 553 So.2d 505, 506 (Miss.1989), quoted in *Smith v. State*, 742 So.2d 1188, 1189 (Miss.App.1999). As the Mississippi Supreme Court stated in *Pipkin v. State*, 292 So.2d 181, 182 (Miss.1974), quoted in *Swift v. State*, 952 So.2d 1039, 1040 (Miss.App.2007), an "attempt to appeal an unappealable order is a total departure from the orderly administration of justice and should not be approved." Because Alexander was not directly appealing his conviction, and was not proceeding under the Post-Conviction Collateral Relief Act, this appeal is not properly before the Court. *Smith*, 742 So.2d at 1189 (holding that denial of motion for reduction of restitution payments was not an appealable order). In the absence of statutory authorization, this appeal should be dismissed.

Solely in the alternative, the state points out for the sake of argument that Alexander has no valid basis for challenging the imposition of a statutorily-authorized sentence. As this Court expounded recently in *Westbrook v. State*, 953 So.2d 286, 288-89 (Miss. App. 2007),

A sentence that is within the statutory limits is within the complete discretion*289 of the trial court and is not subject to review. Nichols v. State, 826 So.2d 1288, 1290(¶ 10) (Miss.2002). Under Mississippi Code Annotated section 41-29-115(a)(4) (Rev.2005), cocaine is a controlled substance classified in Schedule II. The penalty for selling a Schedule II controlled substance is set out in Mississippi Code Annotated section 41-29-139(b)(1) (Rev.2005). The statute provides for a maximum sentence of thirty years and a fine of one million dollars. *Id.* It does not require the defendant to sell any minimum amount of the controlled substance, and there is no minimum penalty. *Id.* However, the penalty for possession of a controlled substance, cited by Westbrook, is found at Mississippi Code Annotated section 41-29-139(c) (Rev.2005).

Moreover, with respect to the offense of sale of cocaine, the amount of the substance is irrelevant; there is no minimum amount required to be guilty of selling cocaine and to receive a sentence of up to thirty years." *Id.* No basis exists for review of this statutorily-permitted sentence.

The state reiterates that this attempted appeal should be dismissed.

CONCLUSION

For the reasons stated above, the state respectfully asks this Court to dismiss this purported appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lamar Pickard
Circuit Court Judge
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Hazlehurst, MS 39083

Honorable Alexander C. Martin
District Attorney
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This the 30th day of May, 2007.



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