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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BILLY LLOYD RAY

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APPELLANT

VS.

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NO. 2006-CP-1824

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

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

BILLY LLOYD RAY

APPELLANT

vs.

CAUSE No. 2006-CP-01824

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Jackson County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied without an evidentiary hearing.

STATEMENT OF FACTS

The prisoner was convicted upon his plea of sexual battery and, in November 1999, was sentenced to serve a term of imprisonment of ten years, with one year to serve and nine to be served in post - release supervision. (R. Vol. 1, pp. 4 - 5; 50 - 51).

On 30 April 2004, a hearing was held to determine whether the prisoner had violated the terms of his post - release supervision. He was alleged to have tested positive for marijuana on 3 March 2003 and 16 December 2003. He was alleged to have failed to refrain from consuming alcoholic beverages. And he was alleged to have been in possession of firearms.

In addition to these violations of the terms of post - release supervision, the prisoner was

further alleged to have been a felon in possession of firearms, to have committed domestic violence, simple assault, possession of a spotted fawn and to have been in illegal possession of a deer at night. Besides also having failed to avoid vicious habits, he also was said to have failed to pay certain court costs related to his conviction of sexual battery. (R. Vol. 1, pg. 5).

The prisoner, though counsel, confessed the allegation of marijuana usage. (R. Vol. 1, pg. 6).

Now, it seems that many of the allegations against the prisoner arose from an incident that occurred on 16 December 2003. It seems that the prisoner's wife found the prisoner behind a shed with his trousers down, groping her daughter. This discovery caused a row; the wife loaded her children in her truck and told the prisoner that she was leaving. The prisoner then threatened to shoot her tires out. The prisoner then threatened to kill her.

The wife took the prisoner at his word and called emergency services. Law enforcement arrived. They found a .22 caliber rifle, a twelve-gauge shotgun, a .270 caliber rifle that the wife had purchased for the prisoner and given to him by her, and a muzzle loading rifle. They also found a deer head "that had been taped out to be mounted." They also found a dead fawn on the back of the shed. The prisoner killed the deer by shooting it with the .270 caliber rifle, according to his wife. The prisoner, however, told law enforcement that he never touched the guns. (R. Vol. 1, pp. 12 - 13).

The prisoner was charged with disturbing the peace and domestic violence. He entered pleas of guilty to those charges. (R. Vol. 1, pg. 13; 56 - 57).

The winds of love changed later, though, and the wife began giving a different account about the prisoner's conduct in December 2003. (R. Vol. 1, pg. 16).

The prisoner's wife testified. She said she made up the story about having seen her

husband groping her daughter while his pants were down. However, she did say that the reason she started to leave was because the situation between her husband and her daughter "didn't look right." She was angry, so she called emergency services. At that particular moment, She wanted the prisoner to spend the rest of his life in prison.

She then said that she later found out the truth about what was going on between the prisoner and her daughter. Seems that the daughter was the one making overtures to the prisoner, or so the wife said. She did not say, though, whether the daughter's pants were down. According to the wife, once she found out that the prisoner was as pure as the driven snow, at least with respect to her daughter, she told law enforcement that she had lied about the prisoner.

So the wife then testified that the prisoner had not threatened her with a gun, that the prisoner did not possess any guns, and that the only reason the prisoner pleaded guilty was because the public defender told him to

The Circuit Court found that the prisoner had violated the terms of his post - release supervision in that he had used marijuana and had been convicted of two offenses in county

court.¹ The prisoner was ordered to serve the remaining nine years of his sentence. (R. Vol. 1, pg. 46).

On 14 July 2006, the prisoner filed a motion in post - conviction relief, asserting that the Circuit Court erred in revoking his post - release supervision. He alleged many grounds for relief. The following few are illustrative of them: (1) that the sentence the prisoner was ordered to serve was illegal; (2) that the Circuit Court of Jackson County was without jurisdiction to revoke the prisoner's post -release supervision; (3) that the prisoner was improperly punished for being a marijuana addict; (5) that the assistant district attorney who represented the State during the revocation hearing lied and demonstrated bias against the prisoner; (6) that the Circuit Court judge was biased in that she permitted the assistant district attorney to tell lies about the prisoner; (7) that the prisoner's wife lied about him and got him arrested, and that the prisoner's attorney

¹ A degree of ambiguity exists concerning the Circuit Court's finding. At the conclusion of the revocation hearing, the court found the violations we have stated. However, in the written order of revocation, a number of other findings of violations were set out. Those findings would have been supported by the evidence presented at the revocation hearing, but the Circuit Court did not state those as these basis for revocation at the conclusion of the hearing.

This unfortunate state of affairs would not, in most jurisdictions, present a difficulty. Ordinarily, where there is a conflict between an oral pronouncement and a subsequent written order, the oral order controls. *Boutwell v. State*, 847 So.2d 294 (Miss. Ct. App. 2003); *State v. Lane*, 288 Mont. 286, 957 P.2d 9 (1998). But not in this State. In *Temple v. State*, 671 So.2d 58 (Miss. 1996), the Mississippi Supreme Court, in a simple *ipse dixit*, and without apparently even being aware of the prevailing rule, decided to give a written order precedence over an oral order. It did not consider that some courts have concluded that giving a written order precedence may amount to sentencing a convict in *absentia*.

While we acknowledge the existence of *Temple*, we distinguish it from the case at bar for the following reasons. First, the reasons found for revocation at the end of the hearing were supported by the evidence and entirely sufficient of themselves to permit revocation. There was no particular need to find the existence of the other reasons, as set out in the written order. Secondly, unlike the situation in *Temple*, the Court is not confronted with potentially unenforceable conditions of parole. Thirdly, since the written order also included the reasons found at the conclusion of the revocation hearing there is, to that extent, no conflict between the written and oral orders.

in county court failed to properly advise the prisoner. The prisoner then went on and on with other similar complaints. Only one other issue of note was alleged – the prisoner alleged that the attorney who represented him at the revocation hearing was ineffective. (R. Vol. 1, pp. 91 - 134).

The Circuit Court denied relief on the prisoner's motion, without an evidentiary hearing. (R. Vol. 1, pp. 135 - 136).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

SUMMARY OF ARGUMENT

1. THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

1. THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

The prisoner presents some nine or so grounds here for reversal of the Circuit Court's action concerning his motion in post - conviction relief. These may or may not have been raised in the pleadings in the Circuit Court. There seem to be many more raised in the Circuit Court, but those there not renewed here are abandoned. *Walker v. State*, 861 So.2d 354 (Miss. Ct. App. 2003).

A Circuit Court may deny relief on a prisoner's motion in post - conviction relief without an evidentiary hearing where it plainly appears from the face of the motion, attached exhibits and the prior proceedings in the case that the prisoner is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Rev. 2000). The prisoner, plainly, was not entitled to relief.

The prisoner's post - release supervision was revoked because he had been convicted of

two crimes and because he had tested positive for marijuana.² Either reason and both reasons were sufficient basis for revocation. He failed to successfully complete the five-year period of post - supervision release. *Steele v. State*, 845 So.2d 758 (Miss. Ct. App. 2003); Miss. Code Ann. Section 47-7-34 (Rev. 2004); 47-7-35(a) (Supp. 2006).

These were the reasons the prisoner's post - release supervision was revoked. This being so, it is not necessary to consider the prisoner's complaints concerning charges against him that were dismissed. His revocation was not based upon those. It is also not necessary to respond to the claim that the wife lied about his actions. The fact of the matter is that the prisoner entered guilty pleas to two charges. It was the convictions, not the wife's testimony, that provided grounds for the revocation. The convictions could in no way be considered as set aside on account of the fact that the wife claimed that she told lies about the prisoner. In no way could the wife's testimony be seen as having the effect of setting the convictions aside. In any event, if it were true that the wife made up the story about the prisoner's conduct, the prisoner should not have entered guilty pleas. To the extent the prisoner would tell this Court that he entered pleas because his attorney told him to do so, there is no support in the record for this claim. It is to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). To the extent that the prisoner alleges defects of kind or another with respect to his misdemeanor convictions, there were all waived by his pleas of guilty.

Nor is it necessary to consider the claim that the prosecutor told lies. Again, the revocation occurred on account of the convictions and marijuana usage. The said - to - be lies had nothing to do with the court's action and did not provide a basis for the court's action.

² See Note 1 above.

We then come to the claim of ineffective assistance of counsel. The prisoner claims that the attorney who represented him at his revocation hearing was ineffective.

First of all, we note that a revocation is a civil proceeding. There is no *per se* right to counsel at a revocation hearing. *Pruitt v. State*, 953 So.2d 301 (Miss. Ct. App. 2007). This being so, there is no right to effective counsel at a revocation hearing, as that is understood in *Strickland v. Washington*, 466 U.S. 668 (1984). The Sixth Amendment right to counsel does not extend to civil cases. This being so, it necessarily follows that decisions concerning the Sixth Amendment right to counsel, such as *Strickland*, do not extend to civil cases either.

In the event that the Court will consider the ineffectiveness claims, there is no merit in them. As to the claim that the attorney should not have stipulated the fact that the prisoner had tested positive for marijuana usage, we see no harm in this. The fact is that the State could have easily proved that fact. In any event, even had there been some potential defense to the marijuana usage basis for revocation, there was no prejudice to the prisoner. The fact of his two convictions were alone a sufficient basis for revocation. While the Court will find other whining about the prisoner's attorney scattered about the prisoner's brief, none of these demonstrate a deficient performance and prejudice.

The prisoner then claims that his sentence was illegal. The prisoner was sentenced to a ten-year terms, one year to serve and nine on post - release supervision. The Order was filed on 22 December 1999. (R. Vol. 1, pp. 50 - 51). While the record does not appear to demonstrate when the prisoner was released from prison and when he was served notice of the State's motion to revoke his post-release supervision, the hearing on it occurred on 30 April 2004. The revocation clearly occurred within five years, and thus satisfied Miss. Code Ann. Section 47-7-37 (Supp. 2006).

While it is true that the sentencing Order purported to place the prisoner on nine years supervised post-release supervision, there was nothing incorrect in this. While it may be that post - release supervision under the supervision of the Department of Corrections may not extend beyond five years from the time it begins such supervision, the statute does not limit the number of years set as to post -release supervision to five years. The limitation is that the combined number of “to serve” years and post - release years may not exceed the maximum sentence for the felony involved. *Miller v. State*, 875 So.2d 194, 199 (Miss. 2004).

The prisoner then complains that he was “violated” by the Circuit Court “. . . for not paying the court cost of Washington County. . . .” (Brief for the prisoner at 18). While it may be that the written order of revocation mentioned the fact that the prisoner failed to pay costs, as required by the sentencing order, the grounds for revocation found by the Circuit Court at the conclusion of the revocation hearing were entirely sufficient to justify revocation. Beyond this, the facts alleged to exist by the prisoner in his brief concerning the payment of the fine are not supported by the record. They should be ignored.

CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

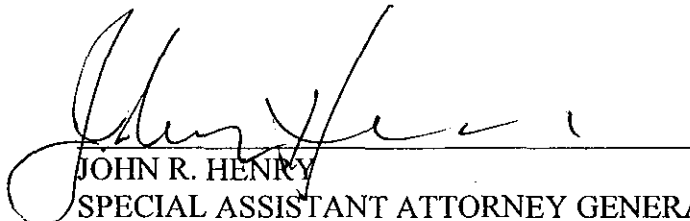
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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