

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

SHAUN DERRELL SPRATT

APPELLANT

VS.

NO. 2007-CA-0791-COA

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

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APPELLANT

VS.

NO. 2007-CA-07910-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the denial of a motion for post-conviction relief and reconsideration of sentence in the Circuit Court of Monroe County, Honorable Paul S. Funderburk presiding.

STATEMENT OF THE FACTS

On September 13, 2001, Shaun Derrell Spratt (hereinafter "Spratt") pleaded guilty to the sale of cocaine. (Vol.1, CP 19; 21-32). The court sentenced Spratt to serve twenty (20) years, with seventeen (17) years suspended, and five (5) years post-release supervision. (Vol. 1, CP. 15; 29).

While on post-release supervision, Spratt failed multiple drug tests and the Amory Police Department found him in possession of a firearm and a Lortab. (Vol. 2, Tr. 4-5). On February 15, 2007, Spratt received a petition seeking to revoke his post-release supervision and suspended sentence. (Vol.2, Tr.4). The petition noted

1. The offender failed to abstain from the use and possession of illegal drugs as directed in violation of condition (3) of his probation order. The offender submitted urine samples on 2/17/2005, 4/21/2005, 5/19/2005, 1/11/2007 which all had a positive result for marijuana.
2. The offender has failed to abstain from the possession of a firearm as directed in violation of condition (5) of his probation order. He was stopped by the Amory Police Department on 1/10/2007. He was alone in the vehicle and the officer found a 9MM handgun in the glove compartment.
3. The offender has failed to live at liberty without violating any laws as directed in violation of condition (9) of his probation order. The offender was stopped by Amory Police Department on 1/10/2006. The offender was also in possession of one (1) Lortab and was charged possession of a controlled substance. (Supplemental Vol.1, 1). (Emphasis added by Appellee).

During the revocation hearing on February 27, 2007, the Honorable Paul S. Funderburk presiding, Spratt testified that he read and understood the allegations of the petition to revoke. (Vol.2, Tr. 4). The trial court proceeded to ask Spratt to admit or deny each allegation. (*Id.* at Tr. 4-6). **Spratt admitted to the allegations of the petition**, with the exception that he could not remember if he informed his probation officer about any tickets. (*Id.* at Tr. 6). (Emphasis added by Appellee.) The trial court then stated:

The Court finds that the defendant has freely, knowingly, understandingly and voluntarily admitted the allegations of the petition filed against him, with the exception that he does not recall whether or not he informed his probation officer, or whether he was asked about any tickets.

As to the allegations that he has admitted, the Court finds that these acts and omissions as alleged in the petition constitute a violation of the terms and conditions of his post-release supervision and suspended sentence. *Id.* (Emphasis added by Appellee).

However, the written order, entered on the same date, stated that Spratt “. . . violated the terms of his suspended sentence by “(1) failing to pay court costs as directed, (2) failing to report as directed, and (3) failing to pay supervision fees as directed.” (Vol.1, CP. 34). The trial court sentenced Spratt to seventeen (17) years, with ten (10) years suspended, and five (5) years of post-release supervision. *Id.*

On March 23, 2007, the defense filed a Petition for Post Conviction Relief and for Reconsideration of Sentence claiming the sentence to be disproportionate to the crime and unconstitutional. The defense further asserted:

That the trial court was without jurisdiction to impose sentence; That the statute under which the conviction and/or sentence was obtained is unconstitutional; That the sentence exceeds the maximum authorized by law; That there exists evidence of material facts, not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice; That his plea was made involuntarily; That his sentence has expired; His probation parole or conditional release was unlawfully revoked and he is otherwise unlawfully held in custody; Or that the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy. (Vol.1, 9).

In his petition for post-conviction relief, Spratt fails to provide facts to support his general allegations, and fails to mention the discrepancy in the court’s oral pronouncement and the written order. In his prayer for relief, Spratt asked the court to reconsider the sentence and re-sentence him “utilizing the proportionality analysis under the Eighth Amendment.”*Id.*

On April 10, 2007, the trial court summarily denied the Petitioner’s Motion for Post-Conviction Relief filed pursuant to *Miss. Code Ann.* § 99-39-1. (Vol.1, 39). The court, apparently not realizing there was a discrepancy in its oral pronouncement of revocation and its written order,

was of the opinion that the revocation complied with the applicable statute, Mississippi Code Annotated § 47-7-37. In response to Spratt's assertion that his probation was wrongfully revoked, the trial court cited *United States v. Hinson*, 429 F.3d 114, 118 (5th Cir.2005)(citing *Johnson v. United States*, 529 U.S. 694, 700 (2000)), for the proposition "that a judge should apply a preponderance of the evidence standard and not a beyond a reasonable doubt standard when a petitioner is in a violation of a supervised release." (Vol.1, 39).

Feeling aggrieved, Spratt appealed the denial of relief.

SUMMARY OF THE ARGUMENT

The revocation of Spratt's post-release supervision was proper. The court based the revocation on Spratt's admissions of drug use and possession of a firearm. There was a scrivener's error in the preparation of the revocation order, in that the written order does not reflect the court's reasons for revocation, as announced at the February 27, 2007 hearing.

The inconsistency between the trial court's oral pronouncement of revocation and the written order does not violate due process. The trial court's denial of post conviction relief should be affirmed and the trial judge given an opportunity to enter an order in conformity with the sentence given at the revocation hearing on February 27, 2007.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED SPRATT'S REQUEST FOR POST-CONVICTION RELIEF.

A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150 (¶ 3) (Miss.Ct.App.2002). However, when issues of law are raised the proper standard of review is de novo. *Brown v. State*, 731 So.2d 595, 598(¶ 6) (Miss.1999).

In accordance with Mississippi Code Annotated § 99-39-11, the trial court found that Spratt's motion for post-conviction relief lacked merit and denied it without the benefit of an evidentiary hearing. Spratt claims the trial court erred in denying his motion and argues that this Court should reverse the revocation, or in the alternative, remand his case to the trial court for a new trial. We believe Spratt means remand his case to the trial court for an evidentiary hearing on the issue of his revocation.

In his brief before this Court, Spratt contends for the first time that “. . . his Eighth and Fourteenth Amendment rights under the United States Constitution were violated because his post release supervision was revoked for violations for which he neither admitted, was found guilty of at the revocation hearing nor had a right to testify in opposition of or confront at the revocation hearing.” (Appellant's brief 9).

Issues not raised in a motion for post-conviction relief are procedurally barred if assigned as error for the first time on appeal. *Smith v. State*, 973 So.2d 1003 (Miss.App., 2007); *Berdin v. State*, 648 So.2d 73 (Miss.,1994). Procedural bar notwithstanding, the State will address this case on the merits.

Spratt cites *Morrissey v. Brewer*, 408 U.S.471, 92 S.Ct. 2593, 33 L.Ed2d 474 (1972) and

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed2d 656 (1973) for the proposition that minimal due process requirements for parole revocation include a preliminary inquiry in the nature of a preliminary hearing to determine probable cause, to be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest, and a revocation hearing with respect to which certain specified minimal due process requirements must be observed.

Spratt supports his argument by relying on the due process requirements expressed in *Berdin v. State*, 648 So. 2d 73 (Miss. 1994) (finding that Berdin's due process rights were violated when the trial court revoked her probation without a hearing or any notice). However, *Berdin* is distinguishable because Spratt received a petition alleging the violations and a revocation hearing where he admitted to the violations.

The minimum requirements of due process in a revocation hearing include the following: written notice of the claimed violations of probation, disclosure to the defendant of the evidence against him, an opportunity to be heard and to present witnesses and evidence, the right to confront and cross examine witnesses, a neutral and detached hearing body, and a written statement by the fact-finders as to the evidence relied on and the reasons for revocation. *Riely v. State*, 562, So. 2d 1206, 1210 (Miss. 1990).

Spratt was afforded due process in the revocation of his post-release supervision and suspended sentence. The State concedes that the violations or basis for revocation as enumerated in the trial court's written order are not the same as those pronounced during the revocation hearing. The court's written order is a misstatement. The court's actual intent is clearly established by the petition for revocation, Spratt's admissions and the oral pronouncement during the revocation hearing of February 27, 2007. (Supplemental Vol. 1; Vol.2, 4-6; 10-11).

The case at hand is similar to *Willicutt v. State*, 910 So.2d 1189, (Miss.App.,2005). In

Willicutt, this Court affirmed the denial for post-conviction relief and held that where there was an incongruity between the sentence announced at the hearing and the sentence reflected in the written order, a remand was required. The trial judge was to be given an opportunity to enter a proper order in conformity with the sentence he gave Willicutt at a hearing on motion to vacate judgment and sentence. In *Willicutt*, this Court stated:

...the sentencing order, for whatever reason, does not reflect the modified sentence that the trial judge announced during the hearing on Willicutt's motion to vacate judgment and sentence. Perhaps it was a scrivener's error that caused the incongruity between the sentence announced at the hearing and the sentence reflected in the amended sentencing order. In any event, the trial judge should be given an opportunity to correct the error, and we remand this case to him for entrance of a proper order in conformity with the sentence given at the hearing on the motion to vacate judgment and sentence. *Id.* at 1197.

Spratt received, reviewed, and understood the petition that set forth the violations in his probation. He admitted to the allegations during the revocation hearing. The Court announced that Spratt's admissions violated the terms of his probation. It is the State's position that the Court simply misstated the reasons for revocation in the written order. Therefore, the appeal should be denied because inconsistency between the oral pronouncement of revocation and the written order did not violate due process.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the trial court's denial of Spratt's motion for post-conviction relief and remand the case for the sole purpose of the trial judge to enter an order in conformity with his ruling at the February 27, 2007 revocation hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Lisa L. Blount, 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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