

RODNEY L. JONES

APPELLANT

FILED

VS.

MAR 20 2008

NO. 2007-CA-1051

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

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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Jones argument that he was subjected to an unauthorized and illegal probation and that and that in violation thereof, the Trial Court rendered an illegal sentenced and the violations were used for enhancement purpose is without merit and should be dismissed.

On September 4, 1991, the Lee County Grand Jury issued three separate indictments for Grand Larceny against Rodney L. Jones. On October 25, 1991, Jones pled guilty to grand larceny in all three cause numbers, CR 21,023, CR 21,024 and CR 21, 027, in *each* case and was sentenced to serve a term of five years in custody of the MDOC for the crime of Grand Larceny-Auto Theft. In Cause Number CR 21,023, the trial court recommended that Jones be placed ~~in~~ the RID Program and the court reserved the right of judicial review in 180 days. On October 22, 1992, the trial court found that Jones had successfully completed the RID program and entered an Order Suspending Balance of Sentence and Placing Defendant on Supervised Probation. The trial court ordered that Jones be transferred directly to the Greenwood Leflore County Restitution Center as previously ordered by the court. The court ordered that upon successful completion of the restitution program, Jones should report immediately to the court at which time an order would be entered specifying the terms of his probation. On October 23, 1992, the trial court entered an order suspending the balance of Jones' sentence and placing him on supervised probation. As a condition of probation, Jones was required to successfully complete the Greenwood Leflore County Restitution Center and pay costs of \$489.00 and \$1,974.71 in restitution. However, on October 28th, just five days after the court suspended the balance Jones' sentence, Jones absconded from the Greenwood Leflore County Restitution Center. Jones was apprehended on December 30, 1992 by the Tupelo police department.

On or about January 4, 1993, the State of Mississippi filed its Petition to Revoke Probation and To Impose Suspended Sentence. The State moved the Court to require Jones to

program of the Greenwood Leflore County Restitution Center in violation of condition “n” of the sentencing order by absconding supervision on October 28, 1992.

On January 19, 1993, the Lee County Circuit Court revoked Jones’ probation, finding that Jones had violated the terms of his probation by failing to successfully complete the Greenwood Leflore County Restitution Center by absconding supervision on October 28, 1992. (C.P. 27-33) The trial court ordered that Jones’ supervised probation and suspended sentence were revoked and required Jones to serve the five years of his sentence in the custody of MDOC. Jones was given credit for time served awaiting the hearing, and the trial court ordered that the reinstated sentence in 21,023 would run concurrently with the sentences imposed in Lee County Cause Nos. 21, 024 and 21, 027.

On November 18, 1997, Jones was convicted of armed robbery. Jones was sentenced to serve a term of thirty-five (35) years in a facility to be designated by the MDOC. Jones was sentenced pursuant to Mississippi Code Annotated § 99-19-81 (1972, as amended), and therefore his sentence could not be reduced or suspended and he was ineligible for parole or probation. (C.P. 38) The indictment cited Jones’ felony convictions in Cause Nos. CR 21,023, CR 21,024 and CR 21,027 as the basis for his indictment pursuant to Mississippi Code Annotated § 99-19-81 (1972, as amended). Jones was tried and convicted of armed robbery on November 18, 1997. (C.P. 37)

On or about May 15, 2007, Jones Moved to Vacate and Set Aside Conviction and Sentence. The Trial Court found that Jones was sentenced to complete the RID program as a

SUMMARY OF THE ARGUMENT

Jones argument that he was subjected to an unauthorized and illegal probation and that and that in violation thereof, the trial court rendered an illegal sentenced and the violations were used for enhancement purpose is without merit and should be dismissed. There is no requirement that a defendant sign a probation order for it to be valid. Jones' appears to be contesting the sentence in CR 21,023, one of the felonies which was used convict Jones as a habitual offender. That challenge must be brought as a PCR pursuant to that conviction and is improperly brought pursuant to Jones' conviction and sentence for armed robbery. Jones other two convictions support his conviction pursuant to the habitual offender statute. The trial court's orders of October 19 and October 23 are consistent with one another and are both correct and effective orders. To the extent that Jones argues that his pleas was not voluntary and intelligent in CR 21,023, 21,024 and 21,027, that claim is improperly brought pursuant to his conviction for armed robbery, Jones' does not submit sufficient evidence or affidavits to support such a claim, and the claim is time barred pursuant to the post-conviction relief statute. Jones' claims are all without merit and the judgment of the trial court dismissing Jones' Motion for Post-Conviction Relief should be affirmed.

I. Jones argument that he was subjected to an unauthorized and illegal probation and that and that in violation thereof, the Trial Court rendered an illegal sentenced and the violations were used for enhancement purpose is without merit and should be dismissed.

Mississippi Code Annotated § 99-19-81 (as amended) provides that:

Every person convicted in this state of a felony who shall have been convicted twice previously 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, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

On October 25, 1991, Jones pleaded guilty to Grand Larceny in CR 21,027, CR 21,024 and CR 21,023, pursuant to separate grand jury indictments filed September 4, 1991. Jones was sentenced to five years in the custody of the MDOC in the matter of CR 21,023. On October 23, 1992, the trial judge entered an order suspending the balance of Jones' sentence and placing him on supervised probation. As a condition of his probation, Jones was to successfully complete the program of the Greenwood-Leflore County Restitution Center and pay costs of \$489.00 and \$1,974.71 in restitution. On January 4, 1993, the State filed a Petition to Revoke Probation and to Impose a Suspended Sentence alleging that Jones had violated his probation by failing to complete the program of the Greenwood-Leflore County Restitution center and by absconding supervision on October 28, 1992. Jones probation and five years of suspension of sentence were

18, 2006, Jones was indicted for Armed Robbery as a habitual offender pursuant to Mississippi Code Annotated § 99-19-81, 1972 (as amended). The indictment recited Jones' convictions for Grand Larceny in CR 21,023, CR 21,024 and CR 21,027 as the basis for his indictment pursuant to § 99-19-81. The record does not reflect any challenge to the indictment and Jones was convicted of Armed Robbery and was sentenced on November 18, 1997, as a Habitual Offender, to serve a term of thirty-five years in the custody of the MDOC. Pursuant to § 99-19-81, Jones sentence could not be reduced or suspended and he was not eligible for parole. Jones moved the Trial Court for appeals from this sentence. Jones argued that his sentence was illegal because he did not sign the probation order. On May 15, 2007, the Trial Court held that Jones' failure to sign the probation order was irrelevant, holding that Jones had clearly violated probation and was a habitual offender and, therefore, his sentence was not illegal. The Trial Court held that all other claims were barred by Mississippi Code Annotated § 99-39-5(2). The Trial Court denied Jones' Petition for Post-Conviction Relief and to Vacate and Set Aside Conviction and Sentence or in the Alternative for Out of Time Appeal. (C.P. 55) On June 18, 2007, Jones filed his Notice of Appeal and this appeal ensued. (C.P. 60)

Jones' argument that the sentence resulting from his conviction for Armed Robbery is fatally flawed because he was convicted as a habitual offender pursuant to § 99-19-81 and that the indictment relied on a conviction for which he was wrongly sentenced. Jones alleges that the trial court coerced him to accept assignment to the RID program and that he did not sign the probation order and that therefore the sentence in CR 21,023. However, the instant appeal for

Jones would have to file a separate PCR Motion under one of those causes. In *Pruitt v. State*, the Mississippi Court of Appeals held that:

Pruitt's sixth assignment of error is that he was denied due process because the time bar limited his ability to attack his habitual offender status in post-conviction proceedings. *Phillips v. State*, 421 So.2d 476, 481 (Miss.1982), established that at a sentencing hearing to determine habitual offender status, the trial court's review of enhancing felonies is limited to facial review of the convictions to determine voluntariness. *Id.* **Any attack upon an enhancing felony which goes beyond the face of the record of the conviction must be prosecuted in a collateral proceeding.** Pruitt argues the Phillips rule prevented review of the 1993 sentence at the habitual offender sentencing hearing, and he was unable to attack the sentence on PCR because of the three year limitation. He alleges that he neglected to attack the 1993 sentence within three years after entry of judgment because he lacked incentive to do so until the sentence was used for enhancement.

Pruitt v. State 846 So.2d 271, 274 -275 (Miss.Ct.App., 2002)
(emphasis added)

Were Jones to file a petition for post conviction relief as to his plea entered October 25, 1991 in the matter of CR 21,023, a charge of grand larceny, his petition would be time barred, since Mississippi Code Annotated section 99-39-5(2) (Rev.2007) states, in pertinent part, “[a] motion for relief under this article shall be made ... in [the] case of a guilty plea, within three (3) years after entry of the judgment of conviction.” Miss.Code Ann. § 99-39-5(2).

Jones also argues that his counsel objected at trial that the proof of his prior convictions was inadequate, however, he does not provide a record that reflects the objections of his counsel or the method of proof used by the prosecutor. Jones also argues that he was not afforded a

“[T]here is a presumption that the judgment of the trial court is correct and the burden is on the Appellant to demonstrate some reversible error to this Court.” *Acker v. State*, 797 So.2d 966, 971 (Miss.2001) (quoting *Branch v. State*, 347 So.2d 957, 958 (Miss.1977)). “We have stated many times that it is the duty of the appellant to present a record of trial which is sufficient to support his assignments of error.” *Acker*, 797 So.2d at 971 (quoting *Peterson v. State*, 518 So.2d 632, 638 (Miss.1987) (citations omitted)). In *Acker*, this Court found that “[t]here is no hearing transcript, and therefore no basis to support Acker’s claim that the trial court erroneously denied her motion. Because of this fact, the presumption that the judgment of the trial court was correct must prevail.” *Id.*

Juarez vs. State, 965 So.2d 1061 (Miss. 2007)

Further, Jones contends that his probation was illegal because he “never signed the probation agreement, no probation officer was appointed and the order dated the 19th day of October 1992, supercedes the fabricated Order dated the 23rd of October, 1992, revoking a probation the Petitioner was never on.” First, there is no requirement that Jones sign a “probation agreement”. Second, the Order Suspending Balance of Sentence and Placing Defendant on Supervised Probation is fully within the power of the trial court pursuant to Mississippi Code Annotated § 47-7-33 1972 (as amended). Further, where the trial court elects to suspend imposition of a sentence during a period of probation, this statute continues to vest in the court power subsequently, in the event of a violation of the terms of a defendant’s probation, to impose any sentence which could have originally been imposed. *Leonard v. State*, 271 So.2d 445 (Miss.1973).

should be brought in a separate petition for post conviction relief from that sentence. Were such a petition filed, it would be time-barred. If the court were to reach the merits of this issue in the instant appeal, Jones was not per se entitled to counsel at his revocation hearing, and he has not provided a record which would allow the court to determine that he should have been provided counsel. The Mississippi Supreme Court has held:

...[P]robationers (and parolees) do not “have, per se, a right to counsel at revocation hearings.”(citations omitted). Whether probationers have a right to counsel must be answered “on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.” (citations omitted) Because the “facts and circumstances in [revocation] hearings are susceptible of almost infinite variation,” the United States Supreme Court opined that “[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines” for determining when counsel must be provided in order to meet due process requirements. (citation omitted) “Presumptively, it may be said that counsel should be provided in cases [which, for example, are] ... complex or otherwise difficult to develop.” (citations omitted) Finally, “[i]n every case in which a request for counsel at a ... hearing is refused, the grounds for refusal should be stated succinctly in the record.” (citation omitted)

Riely v. State, 562 So.2d 1206 (Miss. 1990).

Finally, even if Jones were wrongfully sentenced in CR 21,023, he still served concurrent five year sentences in CR 21,024 and CR 21,027. Section 99-19-81 requires only two felony convictions with sentences of one year or more. The provisions of Section 99-19-81 were met for purposes of sentencing Jones as a habitual offender pursuant to Section 99-19-81 even if the sentence in CR 21,023 were illegal as Jones’ alleges.

probation and was a habitual offender and, therefore, his sentence was not illegal. All other claims are barred by Mississippi Code Annotated § 99-39-5(2). The trial court's order dismissing Jones' Motion for Post Conviction Relief should be affirmed.

CONCLUSION

Jones' assignments of error are without merit his Petition for Post Conviction Relief should be denied and all judgments and rulings of the trial court should be affirmed.

Respectfully Submitted,

JIM HOOD, ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Laura H. Tedder", written over a horizontal line.

LAURA H. TEDDER

SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680

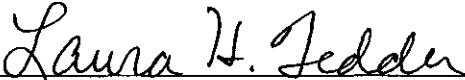
hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above
and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Thomas J. Gardner, III
Circuit Court Judge
P. O. Drawer 1100
Tupelo, MS 38802-1100

Honorable John R. Young
District Attorney
P. O. Box 212
Corinth, MS 38834

Rodney L. Jones, #79065
Unit 32 - A Bldg.
Parchman, MS 38738

This the 20th day of March, 2008.



LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680