

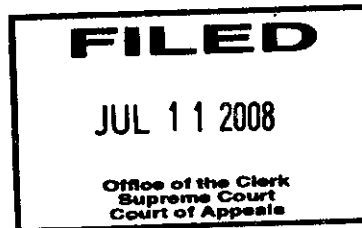
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHESTER SMITH, JR.

APPELLANT

VS.



NO. 2007-CA-1934-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. SMITH WAS NOT SUBJECTED TO RESENTINCING OR REVOCATION.**
- II. SMITH ABANDONED HIS SECOND ASSIGNMENT OF ERROR.**

STATEMENT OF FACTS

On August 9, 2004, Chester Smith pleaded guilty to armed robbery. At the hearing, the State presented testimony that during Smith's most recent arrest, he displayed extreme aggression and violence toward the arresting officers and threatened that he would harm an arresting officer and his family once he was released from jail. T. 15, 36. Smith also wrote a threatening letter while incarcerated to Jamie Vinson, a witness who planned to testify against Smith at trial, in which he notified Vinson that he knew her social security number and date of birth. T. 15. At the conclusion of the hearing, the trial court announced a sentence of thirty years with twenty to serve and ten suspended. T. 47. The court stated on the record that Smith deserved to serve more time, but the court would give him an arguably lenient sentence because his co-defendant, the gunman in the armed robbery, received only ten years to serve as the result of a plea bargain. T. 48. The court stated that Smith would receive more time to serve because testimony at the hearing indicated that Smith was the one in charge during the robbery and because of Smith's threats to law enforcement officers. T. 48. After announcing the sentence, the trial court noted on the record that Smith was giving threatening and intimidating looks to his codefendant and the victims in the courtroom. T. 48-49.

During recess, the court stated the following.

This is an unusual circumstance without the Defendant present, Mr. Smith, but I've instructed my court bailiff to go back there and tell the police officers, the deputy sheriff's [sic] taking him back to the jail, that I want to know anything and everything he says between here and the jail in case any more threats are made because this Court will not sign the sentencing order until after he gets a report back about what Mr. Smith's conduct and statements were between and the jail and when he gets back to the jail and will in fact retain jurisdiction for the purposes of changing the sentence and upping the sentence if more threats or violence toward police officers or such related incidents or statements are made or occur.

All right. I know this is a strange step, but the court is extremely concerned about Mr. Smith's behavior.

T. 52-53. The court's apprehension was warranted. Before Smith even left the courthouse, Smith stated that he should have killed Vinson. T. 60. The court had not yet entered a judgement into the minutes, and Smith was brought back to the courthouse. Two officers testified as to statements which Smith made in the holding room at the courthouse, leaving the courthouse, and in the squad car. T. 60-66. One officer also testified that Smith stated, "I should have killed the bitch, asshole, and he better not ever let me out." T. 66. Smith testified that the officers misunderstood him, and that he only made the statements about killing Vinson because onlookers were laughing at him when he left the courtroom. T. 68-69. The court found Smith's explanation unconvincing, and ordered that he serve the entire 30 years to which he was originally sentenced. T. 70.

On August 7, 2007, Smith filed a petition for post-conviction relief, claiming that his due process rights were violated because he was given no advance notice of the resentencing or revocation hearing and that his sentence was grossly disproportionate to the crimes he committed. C.P. 3-6. The trial court denied the motion, finding that Smith's sentence was not disproportionate to the crime of armed robbery, and that the trial court had the authority to amend the original sentence during the same term of court. C.P. 76-77.

SUMMARY OF ARGUMENT

Smith's due process violation argument must fail because he was neither resentenced nor was any portion of his sentence revoked. Instead, the sentence given after the court recessed was the only formal sentence given by the trial court. Smith had the benefit of counsel, and the sentence did not exceed or even meet the statutory maximum for armed robbery. As such, Smith's sentence should be affirmed.

ARGUMENT

I. SMITH WAS NOT SUBJECTED TO RESENTINCING OR REVOCATION.

Smith's first assignment of error is predicated upon the erroneous belief that he was either resentenced or that the suspended portion of the sentence originally announced by the trial court was revoked without prior notice of a revocation hearing. However, at the time Smith was brought back to the courtroom after the recess, the trial court had not yet filed a judgment of conviction and sentence with the clerk. T. 57. "[T]he date of rendition of the judgment of the circuit court . . . is the date when the judgment is signed by the judge and filed with the clerk for entry on the minutes; or if the judgment is not signed by the judge, the rendition date is the date it appears on the minutes of the court." *Mitchell v. State*, 792 So.2d 192, 214 (¶ 83) (Miss.2001). See also *Templeton v. State*, 671 So. 2d 58, 59 (Miss. 1996) ("[W]e hold that in order for a sentence to be valid, a judgment must be entered as of record. This marks formal evidence of a judgment's rendition which is necessary for its execution or appeal."). Accordingly, Smith's thirty year sentence with thirty years to serve was an original sentence, not the result of a resentencing order or revocation, and his first assignment of error must fail.

Without abandoning the aforementioned contention, the State would note that the trial court, in denying post-conviction relief, found that the trial court permissibly altered the original thirty year sentence with twenty to serve. In doing so, the trial court relied on *Ales v. State*, 921 So. 2d 1284 (Miss. Ct. App. 2006). In *Ales*, the defendant pleaded guilty to sale of marijuana. *Id.* at 1285 (¶3). The trial court, under the erroneous belief that Ales had just passed a drug test, sentenced Ales to twenty years with twelve suspended and eight to serve. *Id.* at (¶4). The court later learned, during the same term of court, that Ales had in fact failed the drug test. *Id.* at (¶6). The court resentenced Ales on the last day of term to serve sixteen years of the twenty year sentence. *Id.* On appeal to this

Court, Ales argued that the resentencing was illegal based on, among other complaints, a due process violation. *Id.* at (¶7). This honorable Court found that Ales' sentence was not illegal because "a circuit court has 'inherent authority' to alter a sentence until a regular term of court expires." *Id.* at 1286 (¶9) (quoting *Leverette v. State*, 812 So.2d 241, 244 (¶ 11) (Miss. Ct. App.2002)).

The State maintains its original position that the ultimate sentence of thirty years to serve was the only formal sentence given. Sentencing was held on the same day Smith pled guilty while Smith had the benefit of counsel. Further, the court did not abuse its discretion in sentencing, as Smith received less than the statutory maximum of life for armed robbery.¹ However, should this Court disagree, *Ales* dictates that the trial court could permissibly alter Smith's sentence in the same term of court. In either event, the trial court's sentencing order must be affirmed.

II. SMITH ABANDONED HIS SECOND ASSIGNMENT OF ERROR.

Smith argued that his sentence was unconstitutionally disproportionate in his motion for post-conviction relief filed in the trial court. In Smith's brief to this Court, he also raised the disproportionality issue in his statement of the issues and summary of the argument. However, Smith abandoned the argument in the body of his brief, stating that he could not meet the threshold showing of disproportionality. The State agrees.

¹Smith was 25 years old at the time of sentencing.

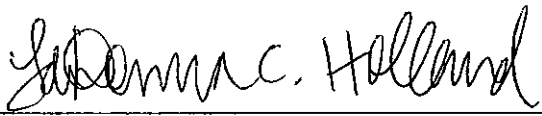
CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the lower court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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This the 11th day of July, 2008.



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