

**COPY**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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2007-CP-00092-COA

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ANNIE WALTON IVORY  
APPELLANT

VS.

STATE OF MISSISSIPPI  
APPELLEE

**FILED**

FEB 27 2008

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

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On Appeal From the Circuit Court  
of Monroe County, Mississippi

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**APPELLEE'S SUPPLEMENTAL BRIEF**

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## **POINT OF REVIEW**

**I. What Was the Effect of the Expiration and Re-enactment of the Statute Governing the Intensive Supervision Program Codified at Mississippi Code Annotated Sections 47-5-1001 Through 47-5-1015 as it Relates to the Appellant, and If the Application of the Statute Failed to Comport with the Appellant's Rights, What Remedy Is Appropriate.**

### **SUMMARY OF THE ARGUMENT**

If, at the time Ivory was sentenced, the court had no authority to place her in ISP then the minimum sentence required by law for a conviction of Felony DUI conviction would have been one (1) year in the custody of MDOC without reduction or suspension and the minimum sentence required by law for a conviction of possession of more than two (2) grams of cocaine would have been four (4) years in the custody of MDOC. Ivory can not complain now about being placed on house arrest since it was a more lenient sentence than allowed by law at that time. Since the Appellant was not prejudice by being sentenced to the Intensive Supervision Program at a time when the statutes governing the program had expired, no remedy is warranted in this matter.

## ARGUMENT

### **I. What Was the Effect of the Expiration and Re-enactment of the Statute Governing the Intensive Supervision Program Codified at Mississippi Code Annotated Sections 47-5-1001 Through 47-5-1015 as it Relates to the Appellant, and If the Application of the Statute Failed to Comport with the Appellant's Rights, What Remedy Is Appropriate.**

On August 19, 2004, Annie Walton Ivory pleaded guilty to Felony DUI and possession of more than 2 grams of cocaine. Pursuant to Miss. Code Ann. § 63-11-30(2)(c) a person convicted of a third DUI within a five (5) year period “shall serve not less than one (1) year nor more than five (5) years in the custody of the Department of Corrections.” The statute goes on to state that “[t]he minimum penalties shall not be suspended or reduced by the court...” Pursuant to Miss. Code Ann. § 41-29-139(c)(1)(C) a person convicted of possession at least two (2) grams but less than ten (10) grams of cocaine shall be punished “by imprisonment for not less than four (4) years nor more than sixteen (16) years and a fine of not more than Two Hundred Fifty Thousand Dollars (\$250,000.00).” Ivory was sentenced to the maximum term of imprisonment on each charge, the sentences to run concurrently. However, the trial court ordered that instead of being sent to prison, Ivory was to be placed in the Intensive Supervision Program (“ISP”) pursuant to Miss. Code Ann. § 47-5-1001 through § 47-5-1015 and that if Ivory successfully completed ISP then the remainder of her sentence was to be suspended and she was to be placed on four (4) years Post-Release Supervision. The trial court further ordered that if Ivory failed to successfully complete ISP then the Mississippi Department of Corrections (“MDOC”) could, without further order of the court,

place Ivory in an MDOC facility to complete her sentence.<sup>1</sup> Ivory failed to successfully complete ISP and was placed in MDOC's general population to complete her total sixteen (16) year term.

Ivory committed her crimes in 2003, at a time when the ISP statutes were in effect, but before she was sentenced on August 19, 2004, the statutes establishing the Intensive Supervision Program were repealed when the Legislature neglected to extend the automatic repealer found at Miss. Code Ann. § 47-5-1015. Miss. Code Ann. §§ 47-5-1001 through 47-5-1015 were automatically repealed after June 30, 2004. Effective April 6, 2005 the Legislature reenacted sections 47-5-1001 through 47-5-1015 and extended the date of the repealer. *See*, Miss. Code Ann. § 47-5-1015 (Supp. 2005).

The question presented by the Court is what effect the expiration and subsequent re-enactment of these statutes had on Appellant's sentence and if her rights were violated what remedy, if any, is appropriate. The State would argue that even if the court had no authority to place Ivory on ISP no remedy is necessary because she in effect received a sentence more lenient than that required by statute. It is well settled that a "defendant who benefits from the receipt of a sentence more lenient than required by statute may not later be heard to

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<sup>1</sup>While Miss. Code Ann. § 47-5-1003(4) states that a court "may not require an offender to complete the intensive supervision program as a condition of probation or post-release supervision" it does not prohibit the court from making successful completion of ISP a prerequisite to a suspended sentence and placement on post-release supervision. An offender can not, however, be on ISP and probation/post-release supervision at the same time, meaning that while on probation/post-release supervision a condition of that probation/post-release supervision can not be that the offender also be on ISP. This would require an offender to be both probation status and inmate status at the same time.

complain that [her] sentence is illegal.” *Minchew v. State*, 967 So.2d 1244, 1248 (Miss.Ct.App. 2007) (citing *Cook v. State*, 910 So.2d 745, 747 (Miss.Ct.App. 2005); *Sykes v. State*, 895 So.2d 191, 196 (Miss.Ct.App. 2005)).

By statute, Ivory should have received a minimum sentence on the Cocaine Possession charge of four (4) years and minimum sentence of the Felony DUI of one (1) year without suspension or reduction. Ivory was sentenced to concurrent terms of sixteen (16) years and five (5) years respectively, the maximum terms for each conviction. However, if she had successfully completed one year of ISP the remainder of her sentences would have been suspended. If that had happened she would have simply served one (1) year of house arrest followed by four (4) years post-release supervision. If, at the time Ivory was sentenced, the court had no authority to place her in ISP then the minimum sentence on the Felony DUI conviction would have been one (1) year in the custody of MDOC without reduction or suspension and the minimum sentence on the cocaine possession would have been four (4) years in the custody of MDOC. Ivory can not now complain about being placed on house arrest since it was a more lenient sentence than allowed by law at that time.

The fact that she violated the terms of the Intensive Supervision Program and was placed in general population to serve her entire term is likewise irrelevant. The five (5) year sentence for felony DUI and the concurrent 16 year sentence for possession of more than 2 grams of cocaine do not exceed the maximums allowed by statute. *See*, Miss. Code Ann. § 63-11-30(2)(c) and Miss. Code Ann. § 41-29-139(c)(1)(C). Sentencing is within the trial



court's discretion and a sentence generally will not be disturbed on appeal if it is within the terms provided by statute. *White v. State*, 958 So.2d 290, 292 (Miss.Ct.App. 2007). Although Ivory did receive the maximum term of incarceration allowed by statute on both convictions, the sentences are running concurrently, not consecutively, and the judge gave her the opportunity to serve only one year of house arrest. It was because of her own failure to abide by the conditions of ISP that the remainder of her sentences was not suspended. Since in all likelihood this Court would have upheld these sentences had they not included the ISP provision, the court should not reverse now just because Ivory was given the opportunity to participate in the ISP program at a time when the statutes governing the program had expired. The court's decision to place Ivory in the on ISP only gave her the opportunity to have a portion of a sentence that was within the statutory limits suspended, an opportunity Ivory failed to take.

### **CONCLUSION**

Based on the arguments herein above, the Appellant was not prejudice by being sentenced to the Intensive Supervision Program at a time when the statutes governing the program had expired, therefore no remedy is warranted in this matter.

Respectfully submitted,

STATE OF MISSISSIPPI  
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## CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Appellee's Response to Amicus Brief** in the above-styled and numbered cause to the following:

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This, the 27<sup>th</sup> day of February, 2008.

A handwritten signature in cursive script, appearing to read "Jane L. Mapp", is written over a horizontal line.

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