

COPY

NIGEL O. DAVIS #L2857

FILED

MAR 05 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

J. F. C. F

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FAYETTE, MS 39069

STATE OF MISSISSIPPI SUPREME COURT

COURT CLERK

JACKSON, MS

RE: FILING OF THE ENCLOSED "Brief in Support of Appeal"

2007-~~75~~-00224 - COA
CP

Dear Court Clerk,

Enclosed is my "Brief in Support of Appeal" in cause no. C2006-160 from Calhoun County Circuit Court decision.

Please accept this notice for filing with the Mississippi Supreme Court in your usual manner, and return a copy to me marked filed to the address heading this letter.

Thank you,

Nigel O. Davis

Nigel O. Davis # L2857

IN THE STATE OF MISSISSIPPI COURT OF APPEALS

NIGEL O. DAVIS

APELLANT

VS.

CAUSE NO. C2006-160

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The appellant of record, acting pro-se certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and or the Justices of the Court of Appeals may evaluate possible disqualification or recusal.

NIGEL O. DAVIS APPELLANT

JIM HOOD, ATTORNEY GENERAL

JUDGE HOWARTH OF CALHOUN COUNTY CIRCUIT COURT

CHRISTOPHER EPPS, MDOC COMMISSIONER

SAM WINCHESTER, WARDEN JEFFERSON/FRANKLIN COUNTY CORR FACILITY.

Respectfully submitted,



Nigel O. Davis, pro-se appellant

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NIGEL O. DAVIS

APPELLANT

VS.

CAUSE NO. C2006-160

STATE OF MISSISSIPPI

RESPONDENT

BRIEF IN SUPPORT OF APPEAL

COMES NOW, Nigel O. Davis # L2857, pro-se and informia pauperis, and files this his Brief in Support of Appeal, of the decision given him by the Circuit Court of Calhoun County, Mississippi. Following rules set in the State statute 99-39-1 et seq, regarding Post Conviction Collateral Relief, and under M.R.A.P. rule 28.

ISSUES AT HAND

1. The Mississippi Supreme Court revised the statute under which the appellant was sentenced (97-21-33) in a 2005 legislative session. This new law lowered the penalty for forgery from 2-15 years to 2-10 years (see attached ex b).

2 . The Mississippi Supreme Court observed that under the old law the amount of an utterance was too low (then 100.00 dollars or more) and revised it to 500.00 or more, which resulted in felony convictions that could best be punishable by fines and/or

restitution , county jail time, or both under misdemeanor status, ultimately saving the taxpayers money, and reducing prison overcrowding.

3. The appellants forgeries were clearly under the determined amount of 500.00 for felony cases, this should allow the appellant to be re-sentenced under the new law.

4. The statute regarding Post Conviction Collateral Relief (99-39-1 et seq) states clearly that an intervening decision by the Mississippi Supreme court is grounds for Post Conviction Relief.

5. On January 17, 2007, the Honorable Judge Andrew Howorth issued an order denying relief stating: (see exhibit a)

“After reviewing the document filed by Defendant in relation to the Motion for Post Conviction Collateral Relief, as well as the court file in this case, and considering all matters in a light most favorable to the Defendant, the Court is of the opinion that the Defendant is not entitled to the requested relief. Accordingly all requested relief is denied.”

The appellant contends that no such regard was given to him by the Calhoun County Court, as any right minded jurist would surely see that even if a ‘light most favorable to the Defendant’ were not used, the law is the law regarding decisions by the Mississippi Supreme Court.

6. The Calhoun County Court gave no reason for their decision in its response. No statute

or case law was cited. In short, the appellant finds it difficult to appeal this decision, because it seems to be baseless.

7. The Calhoun County court seemed to respond more to the fact that the petitioner failed to file the appropriate paperwork to be given In Forma Pauperis status, for which it went into great detail describing the error. As stated in the prior Notice of Appeal, the appellant is not a lawyer, he filed an affidavit of poverty, and failed to file a motion for informa pauperis. This could have easily been corrected if the appellant would have been told of his mistake.(see ex a) He has responded to this denial by filing a Motion for leave to appeal In forma Pauperis , with the lower court. It has not been answered as of this date.

STATEMENT OF CASE

The appellant was convicted in Calhoun County Circuit Court on August 4, 2004, on the charges of Uttering a Forgery (two counts) and was sentenced to serve 1 year in the custody of MDOC. He was currently serving time on another charge in another county.

In November of 2006 Appellant filed a motion to the court titled Petition to Clarify Sentence. It was denied by Calhoun County Judge Howarth on January 17, 2007 (see ex a).

State statute 99-39-1 et seq, states that the petitioner may appeal this decision to a higher court. Appellant seeks such redress. Because of the aforementioned issues, the appellant feels that this case should be remanded to the Calhoun County Court for resentencing under the new law. Because of the revision of 97-21-33, the most that the appellant could be charged with would be a misdemeanor, and/or fines or restitution.

SUMMARY

The decision of this court to lower the penalty for the charge of Uttering a forgery is a good one. The prison system is too full at this time to house an inmate who, though he committed a crime, it is not serious enough to require prison time. The appellant asks to be given the rights determined by this Mississippi Supreme Court, to be sentenced appropriately under the law. Appellant hopes that this Honorable court will receive this, his Brief in Support of Appeal, and render a decision favorable to him.

ARGUMENT

The argument for this case is simple. The appellant was convicted under a law, which the Mississippi Supreme Court found to be unjust. He was sentenced to 1 year incarceration for his offense, which the Supreme Court said should only be a misdemeanor. (see Miss Supreme Court ruling ex. b)

State statute 99-39-1 et seq. states that a petitioner is able to file a motion for post conviction relief because of an "intervening decision" by the Supreme Court. The County Court of Calhoun, disagreed with this issue, and denied his post conviction relief, stating that they considered the relief in a light most favorable to the petitioner. However, that light failed to shine upon the law of the Mississippi Supreme Court.

CONCLUSION

The appellant seeks to have the decision by the Calhoun County Circuit court overturned, and to be able to be resentenced under the revision of the law made by the Mississippi Supreme Court, regarding Uttering a Forgery. He further request that this felony be stricken from his record, and replaced with the misdemeanor that it is.

Appellant is more than agreeable to pay any restitution set by the court, or fines for such crime, he however is not agreeable to have a felony on his record, that he did not commit.

Respectfully submitted,

Nigel O. Davis

Nigel O. Davis # L2857

IN THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI

(A)

NIGEL O. DAVIS

PLAINTIFF

VS.

CAUSE NO. Q2006-160

STATE OF MISSISSIPPI

DEFENDANT

ORDER DENYING RELIEF REQUESTED

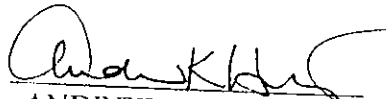
This cause is before the Court by virtue of the filing by the Defendant of certain documents with the Court, entitled "Affidavit of Poverty" and "Petition to Clarify Sentence." The considered the relief requested in the documents, treating the documents as a Motion to Proceed In Forma Pauperis and a Motion for Post Conviction Relief.

The Court is of the opinion that the Motion to Proceed In Forma Pauperis fails to specify what legal reasons, if any, the Petitioner has to proceed In Forma Pauperis. Without such reasons, the Motion should therefore be denied.

After reviewing the document filed by the Defendant in relation to the Motion for Post Conviction Collateral Relief, as well as the court file in this case, and considering all matters in a light most favorable to the Defendant, the Court is of the opinion that the Defendant is not entitled to the requested relief. Accordingly, all requested relief is hereby DENIED.

The Clerk is hereby directed to forward a copy of this Order to the Defendant.

SO ORDERED and ADJUDGED, this the 17th day of January, 2007.


ANDREW K. HOWORTH
CIRCUIT COURT JUDGE

FILED

JAN 23 2007

DEBORAH DUNN
CIRCUIT CLERK
CALHOUN COUNTY, MS
MINUTE BOOK 4-38 PAGE 258



1 of 1 DOCUMENT

MISSISSIPPI CODE of 1972 ANNOTATED
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*** CURRENT THROUGH THE 2005 REGULAR SESSION ***
*** AND 1ST THROUGH 5TH EXTRAORDINARY SESSIONS ***
*** STATE COURT ANNOTATIONS CURRENT THROUGH APRIL 13, 2006 ***

TITLE 97. CRIMES
CHAPTER 21. FORGERY AND COUNTERFEITING

GO TO MISSISSIPPI CODE OF 1972 ARCHIVE DIRECTORY

Miss. Code Ann. § 97-21-33 (2006)

§ 97-21-33. Penalty for forgery

Persons convicted of forgery shall be punished by imprisonment in the Penitentiary for a term of not less than two (2) years nor more than ten (10) years, or by a fine of not more than Ten Thousand Dollars (\$ 10,000.00), or both; provided, however, that when the amount of value involved is less than Five Hundred Dollars (\$ 500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars (\$ 1,000.00), or both, within the discretion of the court.

HISTORY: SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(42); 1857, ch. 64, art. 124; 1871, § 2588; 1880, § 2840; 1892, § 1119; Laws, 1906, § 1200; Hemingway's 1917, § 930; Laws, 1930, § 957; Laws, 1942, § 2187; Laws, 1928, ch. 38; Laws, 1970, ch. 343, § 1; Laws, 2003, ch. 499, § 6, eff from and after July 1, 2003.

NOTES:

CROSS REFERENCES. --Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see § 97-43-1 et seq.
Limitations of prosecutions, generally, see § 99-1-5.

JUDICIAL DECISIONS

I. IN GENERAL.

Defendant argued that his sentence was contrary to the dictates of *Miss. Code Ann. § 47-7-34* because by failing to comply with the terms and conditions of postrelease supervision he could be required to serve a term exceeding the maximum allowed under the statute; defendant's sentence totaling 15 years, specifically 10 years to serve with 5 years of postrelease supervision, was unquestionably in accord with *Miss. Code Ann. § 97-21-33* as it was at the time of his sentencing, and therefore, his sentence did not conflict with *Miss. Code Ann. § 47-7-34*. *Kemp v. State*, 904 So. 2d 1162 (Miss. Ct. App. 2004).

Sentencing defendant to 15 years without possibility of parole, the maximum penalty for forgery, upon conviction for uttering a \$35 forged check, was not unconstitutionally disproportionate in violation of Federal Constitution's Eighth Amendment's cruel and unusual punishment clause, where sentence was imposed under habitual offender statute and defendant's 2 prior burglary convictions were not "truly non-violent" offenses; court noted that defendant's sentence was for 15 years, not life. *Burt v. Puckett*, 933 F.2d 350 (5th Cir. 1991).

A defendant convicted of uttering a forgery, who was also indicted as, and proven to be, a recidivist, was properly sentenced to 15 years in prison pursuant to *Mississippi Code § 99-19-81*. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

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DEBORAH L. JONES

The indictment in a forgery prosecution was not defective for failing to identify the defrauded party where it was obvious that the persons defrauded were those who had signed the forged deed at issue, a copy of which was attached to and made a part of the indictment; the sentence of one year in the county jail was not an abuse of discretion where it was within the limitations of the sentencing statute, even though the statute under which the defendant had been prosecuted did not require a criminal intent. *Sherman v. State*, 359 So. 2d 1366 (Miss. 1978).

In a prosecution for uttering a forgery, the case would be remanded to determine whether the maximum sentence had been improperly imposed pursuant to the habitual criminal statute, which was not part of the indictment, as required, or whether it had been properly imposed pursuant to the general sentencing statute for this crime. *Bell v. State*, 355 So. 2d 1106 (Miss. 1978).

In a forgery prosecution, where the face of each check or warrant involved was copied in exact detail in the indictment and each warrant as copied showed not only the payee and his address but the check numbers and other numbers and symbols used by the departments involved, the indictment was not defective on the ground that it did not protect the defendant from prosecution by others because it did not name all the parties involved. *Langston v. State*, 245 So. 2d 579 (Miss. 1971).

Judgments of conviction of forgery were not void because the court was without authority to suspend sentence, since, even if the court did lack such authority, the judgment of conviction would not be affected but only the suspension of sentence. *Langston v. State*, 245 So. 2d 579 (Miss. 1971).

Failure of proof to show where the alleged crime was committed required a reversal and remand of case. *Brownlee v. State*, 15 So. 2d 209 (Miss. 1943).

RESEARCH REFERENCES

ALR. Forgery: use of fictitious or assumed name. 49 A.L.R.2d 852.

Procuring signature by fraud as forgery. 11 A.L.R.3d 1074.

Embezzlement, larceny, false pretenses or allied criminal fraud by a partner. 82 A.L.R.3d 822.

AM JUR. 36 Am. Jur. 2d Forgery § 68, 69.

2 Am. Jur. Trials, Investigating Particular Crimes § § 23-31 (forgery).

CJS. 37 C.J.S., Forgery § 98.

FILED

NOV 17 2006

DEBORAH DUNN
CIRCUIT CLERK
CALHOUN COUNTY, MS

D.C.

IN THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI

NIGEL O. DAVIS

PLAINTIFF

VS.

CAUSE NO. 02006-160

STATE OF MISSISSIPPI

DEFENDANT

ORDER DENYING RELIEF REQUESTED

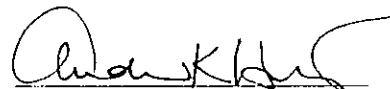
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The Court is of the opinion that the Motion to Proceed In Forma Pauperis fails to specify what legal reasons, if any, the Petitioner has to proceed In Forma Pauperis. Without such reasons, the Motion should therefore be denied.

After reviewing the document filed by the Defendant in relation to the Motion for Post Conviction Collateral Relief, as well as the court file in this case, and considering all matters in a light most favorable to the Defendant, the Court is of the opinion that the Defendant is not entitled to the requested relief. Accordingly, all requested relief is hereby DENIED.

The Clerk is hereby directed to forward a copy of this Order to the Defendant.

SO ORDERED and ADJUDGED, this the 17th day of January, 2007.



ANDREW K. HOWORTH
CIRCUIT COURT JUDGE

FILED

JAN 23 2007

DEBORAH DUNN
CIRCUIT CLERK
CALHOUN COUNTY, MS
MINUTE BOOK 4-58 PAGE 258

STATE OF MISSISSIPPI

COUNTY OF JEFFERSON

AFFIDAVIT OF OATH

Personally appeared before me the undersigned authority, in an for the aforesaid jurisdiction, the within named Nigel O. Davis, who after being duly sworn on his oath does state that he has signed the above prepared BRIEF IN SUPPORT OF APPEAL, and the statement stated therein are true and correct.

Nigel O. Davis

Nigel O. Davis

Subscribed and sworn to before me this the 2nd day of March, 2007

Notary public Brenda K. Ross

my commission expires MISSISSIPPI STATEWIDE NOTARY PUBLIC
MY COMMISSION EXPIRES SEPT. 11, 2008
SERVICE THROUGH STEGALL NOTARY SERVICE

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CERTIFICATE OF SERVICE

I, Nigel O. Davis, do hereby certify that I have on this date, caused to be mailed via U. S. Postal Service, and postage prepaid, a true and correct copy of the above and foregoing document identified as a Brief in Support of Appeal To the following addresses:

Mississippi Supreme Court

Court Clerk

Jackson, MS

On the 5 day of March, 2007

Nigel O. Davis

Nigel O. Davis (pro-se appellant)