

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BOBBY L. DEERE

FILED

APPELLANT

VS.

AUG 02 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0584

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

BOBBY L. DEERE

APPELLANT

VS.

NO. 2007-CP_0584

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal from summary denial of post-conviction relief sought in Sunflower County, Ashley Hines, Circuit Judge, presiding. (Appellee's exhibit A, attached)

Seventeen (17) years ago on June 11, 1990, Bobby Deere, a thirty-five-(35)-year-old African-American male (C.P. at 6), entered a plea of guilty to armed robbery in Sunflower County. Following a plea-qualification hearing Deere's plea was accepted (C.P. at 39-45), and he was sentenced on June 22, 1990, by Howard Q. Davis, Circuit Judge, to serve twenty (20) years in the custody of the MDOC with the last fifteen (15) of those twenty (20) years suspended and the first five (5) of the fifteen (15) suspended years to be served on probation. (C.P. at 46, 47-54)

It is undisputed that Deere subsequently violated his probation by committing another armed robbery within the window of opportunity inviting revocation of his probation. A probation revocation hearing was conducted on March 2, 2000, before Ashley Hines, Circuit Judge, and Deere was revoked. (C.P. at 65-69)

Deere complains on appeal he was improperly remanded to serve the entire fifteen (15) years rather than the five (5) years which, according to Deere, was the duration of his probation. Deere claimed in a motion to clarify sentence “. . . this [five (5) year] probation time is what the Sunflower Judge revoked . . .” He argued in both his motion to clarify sentence and his subsequent motion for PCR that his inmate time sheet should be corrected to reflect the true balance of his sentence which Deere contends should be five (5) years, not fifteen (15) years.

In a short but “straight to the point” appellate brief, Deere argues (1) the trial judge improperly amended his sentence after his sentence had already begun, and (2) Deere was improperly revoked to serve the full 15 years instead of 5 years which Deere claims was the balance of his sentence.

This is a legitimate argument worthy of some consideration. We have concluded, however, that Judge Hines was eminently correct in revoking Deere’s probation and remanding him to the custody of the MDOC to serve the balance of his original sentence in its entirety, viz., fifteen (15) years. **Johnson v. State**, 925 So.2d 86 (Miss. 2006).

SUMMARY OF ARGUMENT

Judge Hines denied Deere’s motion for post-conviction relief on the ground the order of revocation of probation misrecited the original sentence as twenty (20) years to serve with execution of said sentence suspended and Deere placed on probation for a period of five (5) years.

Unfortunately, it did. (C.P. at 8; appellee’s exhibit B, attached)

It is clear, however, the original sentence imposed in 1990 was 20/15/5. We quote:

“[BY JUDGE HOWARD Q. DAVIS:] Mr. Deere, the Court is going to sentence you to serve a term of twenty (20) years in the Mississippi Department of Corrections. I am going to suspend the last fifteen of those years, and direct that the first five (5) of those suspended years be served on probation on the same terms and

conditions as if on parole, and I am going to order you to pay all costs and assessments in this cause.” (C.P. at 54)

Judge Hines issued an amended order of probation which stated correctly that Deere was originally sentenced in 1990 “. . . to a term of twenty (20) years in the custody of the Mississippi Department of Corrections [and] [t]he Court did suspend the last fifteen (15) years of said sentence and placed [Deere] on probation for a term of five (5) years, in accordance with the provisions of . . . Sections 47-7-33 and 47-7-35.” (C.P. at 60)

In denying post-conviction relief, Judge Hines stated the following: “After due consideration of said motion and having reviewed the facts of Mr. Deere’s case, this Court determined that Mr. Deere was revoked to serve the full fifteen (15) suspended years and not just the five (5) years he was placed on probation.” (C.P. at 25) This ruling, we submit, was eminently correct.

“Mississippi law authorizes a trial judge to summarily dismiss a motion for post-conviction relief without the benefit of an evidentiary hearing ‘[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief.’ ” **Buckhalter v. State**, 912 So.2d 159, 160 (¶6) (Ct.App.Miss. 2005).

“If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed.” **Johnson v. State**, *supra*, 925 So.2d 86, 92 (Miss. 2006).

“Under Mississippi law, a trial court may only impose probation for a maximum of five (5) years. Miss.Code Ann. §47-7-37 (Supp.1999) . . . A suspension of a sentence does not automatically mean that the defendant will be on probation and under a duty to report to a probation officer. **It simply means that part of his entire sentence has been postponed pending the defendant’s good behavior or such other conditions as the court may see fit to establish.** **Johnson v. State**, *supra*, 925 So.2d at 93 quoting with approval the Justice Mills dissenting opinion in *Carter v. State*, 754 So.2d 1210-11 [emphasis ours.]

Here there was suspension as well as probation with conditions which Deere failed to meet.

The judge was entitled to “unpostpone” “... *that part* of [Deere’s] entire sentence.” [emphasis ours]

Deere’s motion for post-conviction relief was plainly or manifestly without merit.

STATEMENT OF FACTS

In this appeal from summary denial of his “Motion for Post-Conviction Collateral Relief,” Bobby Deere assails the integrity of the balance of his suspended sentence re-imposed after he violated the terms and conditions of his probation by committing in December of 1999 another armed robbery.

Following his voluntary plea of guilty in Sunflower County on June 11, 1990, to armed robbery (C.P. at 39), Bobby Deere was sentenced on June 22, 1990,

“ . . . to twenty years in the custody of the State Department of Corrections, with last fifteen years suspended, with first five years of suspended years to be served on probation as same terms and conditions [sic] as if on parole . . . ” (C.P. at 46)

On January 16, 2007, nearly seventeen (17) years after entering his plea of guilty to armed robbery and receiving his twenty (20) year sentence with fifteen (15) years suspended and the first five (5) of the fifteen (15) suspended years on probation, Deere filed a motion to clarify sentence. He claimed his sentence had been incorrectly calculated following probation revocation on March 2, 2000. (C.P. at 2-14)

On February 12, 2007, Judge Hines, after reviewing the prior proceedings in the case, signed an order denying and dismissing the motion to clarify sentence. (Appellee’s exhibit C, attached) Judge Hines, ruled, *inter alia*, that “ . . . Mr. Deere was revoked to serve the full fifteen (15) suspended years and not just the five (5) years he was placed on probation.” (C.P. at 16-17)

Feeling aggrieved, Deere, on March 13, 2007, filed a motion for post-conviction relief claiming that his sentence would only require him to serve 5 years upon revocation of his probation

and inviting the court to adhere to the sentence imposed on March 2, 2000.

Deer suggests he could only be revoked to serve five (5) years because the original sentencing order only required “ . . . the first five (5) suspended years to be served on probation.”

In his post-conviction motion filed in 2007 Deere sought correction of his sentence to reflect that he was only revoked for five (5) years as opposed to fifteen (15) years. (C.P. at 19) Deere claimed, *inter alia*, the following:

The sentence imposed, 20 years in the custody of the M.D.O.C. with the first 5 to serve and 15 suspended - 5 of the 15 on probation, was well with statutory parameters. The sentence imposed upon revocation, 5 years, was also within parameters, and for the trial judge to attempt to increase said sentence is a violation of Double Jeopardy in that Petitioner had a legit[imate] expectation of finality in the sentence imposed on March 2, 2000 (5 years). (C.P. at 19)

We respectfully submit the trial court was correct when it revoked Deere's probation and remanded him to the custody of the MDOC to begin serving the entire fifteen (15) years, the balance of his suspended sentence.

ARGUMENT

DEERE'S MOTION FOR POST-CONVICTION RELIEF WAS PLAINLY WITHOUT MERIT.

Deere is incorrect when he states that the trial judge increased his sentence from the original sentence. Rather, Judge Hines simply corrected a clerical or scrivener's error made in the order of revocation of probation which incorrectly stated that the court, in the wake of Deere's guilty plea, had sentenced Deere to serve 20 years but had suspended execution of that sentence and placed Deere on probation for a period of five (5) years.

The truth of the matter is that Deere couldn't keep his nose clean for a probationary period of five years, He committed a second armed robbery on December 30, 1999, approximately six (6)

months before his probation was to expire on June 22, 2000.

The suspension of fifteen (15) years was contingent upon Deere meeting the conditions of probation for a period of five (5) years, viz., the first 5 years of the 15 suspended years. Deere violated those conditions and was revoked following a probation revocation hearing. The trial court was entitled to remand Deere to the custody of the MDOC to serve the balance of his sentence, i.e., fifteen (15) years. See **Johnson v. State**, *supra*, 925 So.2d 86 (Miss. 2006), which held that suspending a sentence and imposing probation are distinct events.

“If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed.” **Johnson v. State**, *supra*, 925 So.2d 86, 92 (Miss. 2006).

“Under Mississippi law, a trial court may only impose probation for a maximum of five (5) years. Miss.Code Ann. §47-7-37 (Supp.1999) . . . A suspension of a sentence does not automatically mean that the defendant will be on probation and under a duty to report to a probation officer. **It simply means that *part* of his entire sentence has been postponed pending the defendant’s good behavior or such other conditions as the court may see fit to establish.** **Johnson v. State**, *supra*, 925 So.2d at 93 quoting with approval the Justice Mills dissenting opinion in *Carter v. State*, 754 So.2d 1210-11 [emphasis ours.]

Here there was suspension as well as probation with conditions which Deere failed to meet. The judge was entitled to reinstate “ . . . *that part* of [Deere’s] entire sentence.” [emphasis ours]

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) **If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.**

(3) If the motion is not dismissed under subsection 2 of this

section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

Deere's post-conviction claims were properly denied because they were manifestly without merit.

CONCLUSION

Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Hebert v. State**, 864 So.2d 1041, 1045 (Ct.App.Miss. 2004). *See also* **Rowland v. Britt**, 867 So.2d 260, 262 (Ct.App.Miss. 2003) [“(T)he trial court is not required to grant an evidentiary hearing on every petition it entertains.”]

Deere’s motion seeking correction and/or modification of his sentence was correctly denied as manifestly without merit on the merits.

Appellee respectfully submits this case is devoid of any error. Accordingly, summary dismissal, as manifestly without merit, of Deere’s motion for post-conviction collateral relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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IN THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI

BOBBY DEERE

MOVANT

VS.

CAUSE NO. 2007-0007-M

STATE OF MISSISSIPPI

RESPONDENT

ORDER

THIS CAUSE came before the Court on Bobby Deere's Motion for Post-Conviction Collateral Relief. After due consideration of said motion, this Court has made the following determinations.

On June 22, 1990, Mr. Deere entered a plea of guilty to the charge of Armed Robbery in Sunflower County cause number 10,159. The Court accepted that plea and sentenced Mr. Deere to serve twenty (20) years in the custody of the Mississippi Department of Corrections, with the last fifteen (15) years suspended, and with the first five (5) suspended years to be served on probation. Mr. Deere was further ordered to pay court costs in the amount of \$172.50. On March 2, 2000, this Court entered an Order of Revocation of Probation in cause number 10,159, in which the Court ordered the revocation of petitioner's probation and remanded Mr. Deere to the custody of the Mississippi Department of Corrections. On January 16, 2007, Mr. Deere filed a Motion To Clarify Sentence. After due consideration of said motion and having reviewed the facts of Mr. Deere's case, this Court determined that Mr. Deere was revoked to serve the full fifteen (15) suspended years and not just the five (5) years he was placed on probation. Therefore, this Court found that Mr. Deere's motion should be denied. The Court further found that its Order of Revocation of Probation incorrectly stated that the Court sentenced Mr. Deere to serve twenty (20) years in the Mississippi Department of Corrections and suspended the execution of said sentence and placed the aforesaid on probation for a term of five (5) years. Due

EXHIBIT

A

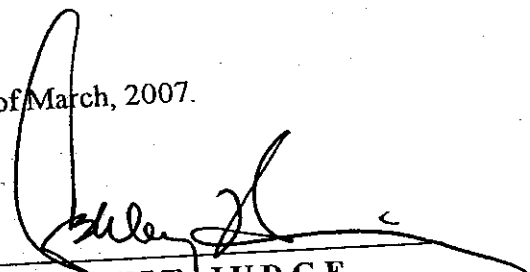
to the mistake in the Order of Revocation of Probation, this Court entered an amended order listing the original sentence.

Mr. Deere is now before this Court on his Motion for Post-Conviction Collateral Relief. After due consideration of said motion, this Court finds no merit to Mr. Deere's motion and finds that Mr. Deere is not entitled to any relief. Pursuant to Section 99-39-11 of the Mississippi Code, this Court may dismiss a motion without a hearing if it plainly appears on the face of such motion that the movant is not entitled to any relief. Furthermore, pursuant to Section 99-39-5 of the Mississippi Code, this Court finds that this action is barred by the three (3) year statute of limitations. As such, this Court finds the motion shall be dismissed with prejudice.

It is, therefore:

ORDERED that Motion for Post-Conviction Collateral Relief shall be **DENIED** and this cause shall be **DISMISSED** with prejudice. Pursuant to Section 47-5-76(1) of the Mississippi Code, all court costs are to be assessed to the Mississippi Department of Corrections. Pursuant to Section 47-5-76(2) of the Mississippi Code, the Mississippi Department of Corrections may withdraw all filing fees and costs associated with this cause automatically from the account of the inmate in the amount of twenty percent (20%) per month of the funds in the inmate's account, until all state funds are reimbursed.

SO ORDERED AND ADJUDGED this the 14 day of March, 2007.


CIRCUIT JUDGE

FILED

MAR 16 2007

By  SHARON McFADDEN
CIRCUIT CLERK D.C.

MB 140
PC 163-164

STATE OF MISSISSIPPI

Vs.

Bobby L. Deere
Defendant

In the Circuit Court

Sunflower County, Mississippi

No. 10,519¹⁵⁹

ORDER OF REVOCATION OF PROBATION

THIS CAUSE coming to be heard, and being heard in the March term of the Court before the Honorable Ashley Hines, Judge, and it appearing that Bobby Deere hereinafter referred to as the aforesaid, was on the 22 day of June A.D. 1990, convicted of the offense of Armed Robbery in the Circuit Court of Sunflower County, which Court sentenced him to serve 20 years in the Mississippi Department of Corrections and suspended the execution of said sentence and placed the aforesaid on probation for a term of 5 years, in accordance with the provisions of Mississippi Code 1972, Annotated Sections 47-7-33 and 47-7-35.

It further appearing that the aforesaid has not properly conducted him self, but has violated the conditions of his probation in a material respect by:

- 3) Failure to regularly report as directed ✓
- 6) Not own or carry with him any weapon
- 0) Not violate any law of the United States
- 6) Failure to pay supervision fees as directed ✓
- 8) Pay the following to the clerk of Sunflower County: \$172.00 ✓



IT, THEREFORE, IS ORDERED AND ADJUDGED that the probation of the aforesaid defendant ought to be revoked and it is hereby revoked in accordance with Mississippi Code 1972, annotated, Section 47-7-37 and the said defendant is hereby remanded into the custody of the Sheriff to await transportation to the Mississippi Department of Corrections.

DONE AND ORDERED IN OPEN COURT, this 2d day of March, A.D. 192000.

cc: Circuit Clerk
Deputy Commissioner of Community Services
Field Officer

FILED

MAR 16 2000

SHARON McFADDEN
CIRCUIT CLERK

By [Signature] D.C.

MB96
PG 114

Judge

IN THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI

BOBBY DEERE

MOVANT

VS.

CAUSE NO. 2007-0007-M

STATE OF MISSISSIPPI

RESPONDENT

ORDER

THIS CAUSE came before the Court on Bobby Deere's Motion to Clarify Sentence.

After due consideration of said motion, this Court has made the following determinations.

On June 22, 1990, Mr. Deere entered a plea of guilty to the charge of Armed Robbery in Sunflower County cause number 10,159. The Court accepted that plea and sentenced Mr. Deere to twenty (20) years in the custody of the Mississippi Department of Corrections, with the last fifteen (15) years suspended, and with the first five (5) suspended years to be served on probation. Mr. Deere was further ordered to pay court costs in the amount of \$172.50. On March 2, 2000, this Court entered an Order of Revocation of Probation in cause number 10,159, in which the Court ordered the revocation of petitioner's probation and remanded Mr. Deere to the custody of the Mississippi Department of Corrections. On January 16, 2007, Mr. Deere filed the present motion. In his motion, Mr. Deere is seeking to have his time sheet amended to show that he was only revoked to serve five (5) years. This would be incorrect, as Mr. Deere was revoked to serve the full fifteen(15) suspended years and not just the five (5) years he was placed on probation. Therefore, this Court finds that the motion shall be denied.

In reviewing the record in this cause, the Court found that its Order of Revocation of Probation incorrectly states that the Court sentenced Mr. Deere to serve twenty (20) years in the Mississippi Department of Corrections and suspended the execution of said sentence and placed the aforesaid on probation for a term of five (5) years. Due to the mistake in the Order of

EXHIBIT

C

Revocation of Probation, this Court will enter an amended order listing the original sentence.

It is, therefore:

ORDERED that Bobby Deere's Motion to Clarify Sentence shall be **DENIED** and this cause shall be **DISMISSED**. Pursuant to Section 47-5-76 of the Mississippi Code, all court costs are to be assessed to the Mississippi Department of Corrections.

SO ORDERED AND ADJUDGED this the 12th day of February, 2007.


CIRCUIT JUDGE

FILED

FEB 15 2007

SHARON McFADDEN
CIRCUIT CLERK

By AM D.C.

MB139
DC 443-444

CERTIFICATE OF SERVICE

I, Billy L. Gore, 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:

Honorable W. Ashley Hines
Circuit Court Judge, District 4
Post Office Box 1315
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Honorable Joyce I. Chiles
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Bobby Deere, #74890
E.M.C.F.
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This the 2nd day of August, 2007.



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