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In The Court Of Appeals Of The State of Mississippi

Carl D. Watts — Appellant

vs. — No. 2007-CP-0708-COA

State of Mississippi — Appellee

Appellant's Reply Brief

Appellant Does Not Request Oral Argument

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Table of Contents

Table of Cases

27- Rutherford v. Blankanship, 468 F. Supp. 1357, W.D. VA. 1979

28- State v. Morgan, 389 So. 2d 364, LA. 1980

29- Stevenson v. State, 674 So. 2d 501, Miss. 1996

30- Stewart v. State, 372 So. 2d 257, Miss. 1997

31- Temple v. State, 671 So. 2d 58, Miss. 1996

32- U.S. v. Abushaar, 761 F. 2d 954, 3d Cir. 1985

33- U.S. v. Cothran, 855 F. 2d 749, 11th Cir. 1988

34- Weaver v. State, 764 So. 2d 479, 2000

35- Wyche v. State, 197 GA. App. 148, 397 S.E. 2d 738, GA. Ct. App. 1990

36- Willis v State, 904 So. 2d 200, Miss. Ct. App. 2005

Authorites

1.- Miss. State Constitution

2.- U.S. Constitution

3.- Miss Comm. on Jud. Per.

4.- Code of Jud. Conduct of Miss. Judges

5.- Griffin's Miss. Chancery Pratice, Section 621

6.- M.C.A. - S.S. - 47-7-33

7.- M.C.A. - S.S. - 47-7-35

8.- M.C.A. - S.S - 47-7-37

9.- M.C.A - S.S - 47-7-47

10.- M,CA - S.S - 99-19-29

11.- M.CA. - SS - 99-15-26

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vs. — CASE NO. 2007-CP-0708-COA

State of Mississippi — Appellee

Appellant's Reply Brief

This is the Appellant's Reply Brief with respect to the Appellee's Brief filed on/or about October 22, 2007 concerning Carl D. Watts' appeal from a trial court's summary denial of post conviction collateral relief.

Statement Of The Case

With regards to the State's Statement Of The Case (page 1 and 2); the Appellant would bring to the Court's attention that the State admits that:

(1) - Watts was sentenced to a 30 year "straight suspended sentence";

(2) - The trial court made the 30 year sentence suspension contingent upon "Watts good behavior and 7 conditions";

(3) - Watts was never placed on probation under the supervision of the M.D.O.C.

Statement of Facts

With regards to the State's Statement Of Facts (page 2 thru 5,) the Appellant would show his contentions to the Court that the State erronously indicates that Watts' Attorney had negotiated a plea bargin.

The State refers to the "petition to enter plea of guilty, signed and initialed in various places by Watts on November 28, 2005, states, inter alia, in paragraph 13 that save for a 30 year banishment, no promise or suggestions have been made. (cp at 36)"

The Appellant would bring to the Court's attention that the State failed to recognize that the "petition to enter plea of guilty, signed and initialed in various places by Watts on November 28, 2005, states, inter alia, in paragraph 7 that the maximum sentence which could be imposed upon Watts for transfer of a controled substance upon entry of a guilty plea was 30 years." (R035) Paragraph 7 also states:

"I also know that the sentence is up to the Court, that the Court is not required to carry out any understanding made by me and my Attorney with the District Attorney, and further, that the Court is not required to follow the recommendation, if any, of the District Attorney." (R035)

In the case of Berry v. State, 800 so 2d 1233, this Court in 2001 held: "Because the State offered Berry a plea recommendation, not a plea bargain, the court was not obligated to follow such recommendation." Id at (p11.)

The State erroneously refers to a letter written by the Appellant's attorney 4 months after Watts pled guilty as evidence of a plea bargain, (R033). The letter or the Appellant record does not contain any evidence that the trial court was obligated to impose a particular sentence upon entry of Watts' guilty plea; and thereby the State's argument that the sentence imposed was the product of a plea bargain fails. (see page 9)

The State also refers to the Sentencing Order (Order of Conviction, R042) as speaking in plain and ordinary English that "the violation of any condition of Defendant's suspended sentence shall violate the terms and conditions of the [sic] his suspended sentence, and the Court shall have the authority to revoke the Defendant from his suspended sentence and remand him back into the custody of M.D.O.C. to serve the entire thirty (30) year sentence. (CP at 42-43)"

The State failed to address the Appellant's arguments contained in his Opening Brief concerning sections 47-7-35, -37 and did not recognize that these 2 statues of state law also speak in plain and ordinary English in that:

"Miss. Code Ann. 47-7-35 states, the courts referred to in S.S. 47-7-33 shall determine the terms and conditions of probation and may, at anytime during the period of probation, alter or →

modify the conditions. Miss. Code Ann. s.s. 47-7-35." Id. at HN-2 "Miss. Code Ann. ss. 47-7-37 provides in part: The period of probation shall be fixed by the Court, and may at any time be extended or terminated. Such period with any extension thereof shall not exceed 5 years." Id at HN-3, cited in Tunstall v. State, No. 97-CA-00252-SCT, Miss 1998. Also, pursuant to section 47 7-37, (p2.) in pertinent part: At any time during the period of probation the Court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested."

Therefore, as shown in the Order of Conviction (R042); "the violation of any condition of the Defendant's suspended sentene shall violate the terms and conditions of the suspended sentence"; compared to section 47-7-37 in pertinent part: "At any time 'during the period of probation' ... may issue a warrant for 'violating any of the conditions of ... or suspended sentence' and thereby "If a defendant's sentence is suspended upon specific terms and conditions (as set out and authorized in section 47-7-35) he is given probation and released under the supervision of the M.D.O.C. and a probation officer. The defendant must agree to these terms and conditions and any violation of such terms and conditions will subject the defendant to a revocation of probation." Robinson v State, 836 So. 2d 747, Miss 2000 Id. at (P20.)

Summary Of Argument

With regards to the State's Summary of Arguement; The State relies upon Johnson v. State, 925 So. 2d 86, Miss. 2006 quoting from Carter v. State, 754 So. 2d 1207, 1210-11, Miss 2000 (Mills, J., dissenting) for the proposition that Judge Helfrich had authority under section 99-19-29 to suspend the 30 year sentence as well as vacate the 30 year suspended sentence based upon conditions which Watts had violated; and while this is surely true, the state has refused to, at any point in their Brief, consider the fact that: "Banishment is, of itself, a probationary provision pursuant to section 47-7-35,"; Weaver v. State, 856 So. 2d 407, Miss. Ct. App. 2003 citing Cobb, 437 So. 2d at 1221. Therefore, as a result of the 30 year banishment provision, sections 47-7-33, -35, and -37 must come into play and thereby the State's argument clearly fails.

Also, the State failed to bring to this Court's attention that the Supreme Court in Johnson (supra) also cited Justice Mills in his dissenting opinion in Carter (supra) and held that: "Suspending a sentence and granting probation are not interchangeable mechanisms." Id. at (P12.), Johnson

Furtheemore, the State failed to akwowledge that the Supreme Court in Johnson (supra) cited Goss 721 So. 2d 144 Miss 1998, where Justice Mills was the author of the Court's opinion, and held: →

"A straight suspended sentence is not subject to the conglomeration of rules that can be attached to a sentencing order granting probation." Id. in (P12.) Johnson (supra)

The State erroneously indicated that Judge Helfrich found as fact "...that the banishment provision herein bear a reasonable relationship to the purpose of the suspended sentence ... (cp at 42)" and cited Cobb, 437 so. 2d 1218, Miss. 1983; but what the state failed to interpet from the Cobb case was; the fact found by the trial court must be shown in the record, and here the record (R042) is absent any such findings. In Cobb (supra); Cobb appealed the condition of his probation that required him to remain 125 miles away from Stone Co. for a period of five years after he was convicted of aggravated assault on his nephew. Id. at 1218. The Supreme Court Agreed with the trial court judge that given Cobb's uncontrolable temper and the nature of the crime, the ends of justice and the best interest of the public would be served through a period of banishment. Because the trial court judge made an on the record findings of the benefits of the banishment provision, the Supreme Court held that the banishment was reasonable and did not violate public policy or judicial authority. Id at 1219-20.

In Weaver v. State, 764 so. 2d 479; this Court in 2000, reversed and remanded for the trial court to articulate on the record the benefits of Weaver's banishment.

The State suggest that this Court Assume the suspended sentence and Watts banishment provision is illegal and that the Appellant should not be allowed to complain since both were more lenient than what is prescribed by statue, citing several supporting cases. This Argument fails, since the state is assuming such without addressing the issues rais-ed in the Appellant's Opening Brief in that:

(1) - Issue One (page 7-14) clearly demonstrate that the trial court violated Watts' constitutional Rights to due process of law when the judge made the 30 year sentence suspension contingent upon 7 specific terms and conditions, all of which are set out and authorized in section 47-7-35; with-out placing Watts on probation for a period of time not to exceed 5 years as required by section 47-7-37; and there-by Watts was prejudiced in that he was subject to terms and conditions of probation far beyond the statutory maximum of 5 years allowed by section 47-7-37.

(2) - Issue Two (page 14-17) unambigiously demonstrates that: "Banishment is of itself, a probationary provision pursuant to section 47-7-35 not to exceed 5 years pursuant to section 47-7-37"; see Cobb v State, 437 so. 2d at 1221, Miss. 1983 cited in Weaver v. State, 856 so. 2d 407, Miss. Ct. App. 2003; also see Jenkins v. State, No. 95-CA-01374-SCT, Miss. 1997; Weaver v. State, 764 so. 2d 479, Miss. Ct. App. 2000

Therefore, the 30 year banishment condition can only be imposed as a condition of probation pursuant to condition G of section 47-7-35; but Watts was never placed on probation. Also, a period of probation may not exceed 5 years pursuant to section 47-7-37 and thereby said 30 year banishment is statutorily unenforceable:

(1)- pursuant to section 47-7-35 in that Watts was never placed on probation;

(2)- pursuant to section 47-7-37 in that it exceeds the statutory maximum of 5 years.

The State argues the banishment is illegal, but does not specify how so. The Appellant has unquestionably demonstrated that the banishment provision which he is now serving a 30 year term of incarceration for violating is statutorily unenforceable and exceeds the statutory maximum allowed by the statue authorizing imposition and thereby this Court should find the 30 year banishment provision is in violation of the Appellant's state and federal constitutional rights to due process of law and a legal sen- in that said banishment provision has caused Watts to suffer the undue burden of incarceration by being imposed without due process of law and has made Watts subject to (30 years banishment) a greater sentence than what the law allows (5 years maximum).

Illegal Sentence Argument

The State erroneously indicates that the Appellant argues his suspended sentence was illegal because he was a prior convicted felon. The Appellant's Opening Brief (O. B.) clearly shows this is not the case. In fact, if the trial court Judge had suspended the 30 year sentence as authorized in section 47-7-33; made the 30 year suspension contingent upon terms and conditions, including a banishment provision, as authorized in section 47-7-35; and placed Watts on probation for a period of time not to exceed 5 years as authorized and required in section 47-7-37; if the trial court judge had acted with statutory authority, then this Court would be obligated, as the previous cited cases and the State suggest, to find that the Appellant recieved a sentence more lenient than the law allows.

As shown in the O. B., the basis of this appeal revolves around the fact that the trial court "knew" that Watts was a prior convicted felon and was not eligible for a "suspended sentence and probation" and that thereby the trial court judge elected to act without statutory authority and impose 7 specific terms and conditions upon Watts' 30 year suspended sentence without placing Watts on probation as required by sections 47-7-33, -35, -37.

The trial court failed, in the Order of Conviction (RO42) to indicate what statue of state law it was proceeding under and as shown in the O.B., the Judge was acting without statutory authority. The State tries to persuade this Court to think the trial court Judge was proceeding under the authority set forth in section 99-19-29, but this arguement undoubtly fails in light of the fact shown in the O.B. (exhibit A, page 10) that 2 of the conditions (F- section 47-5-603 and G- banishment) can only be imposed as a condition of probation under the supervision of the M.D.O.C. pursuant to sections 47-7-33;-35; and thereby said statues and section 47-7-37 must enter into the picture.

Section 47-7-33 in pertinent part; "Such court... shall have the power... to suspend the imposistion or execution of sentence "and" place the defendant on probation as herein provided."

Section 47-7-35 in pertinent part; "the courts refereed to in section 47-7-33 shall determine the terms and conditions of probation"...

Section 47-7-37 in pertinent part; "At any time 'during the period of probation' the court, ... may issue a warrant for violating any of the conditions of ... suspension of sentence

A close review of section 47-7-37 fully supports the Appellants contentions that his constitutional rights to due process of law were violated when Judge Helfrich imposed terms and conditions upon the 30 year suspended sentence (pursuant to section 47-7-35) without placing Watts on probation as required by section 47-7-37.

In a case dealing with the revocation of a suspended sentence where the defendant was not placed on probation, the Miss. Supreme Court in Artis v. State, 643 So. 2d 533, Id. at 537-38 cited Moore v. State, 585 So. 2d 738, Miss. 1991 and held: "It may be true, as the State suggest, (as in the case at bar) that a court is permitted to suspend a portion of a defendant's sentence without simultaneously placing him on probation. However, it does not logically follow that the court could thereafter revoke the suspended sentence. The courts are empowered to revoke any or all of the defendant's probation or any part or all of the suspended sentence if 'during the period of probation,' it is found that the defendant violated the 'conditions' of his probation / 'suspended sentence'"; and thereby, pursuant to section 47-7-37 the trial court judge could not revoke Watts' 30 year suspended sentence for violating the terms and conditions of the suspension of sentence since Watts was never placed on probation as required by sections 47-7-33, -35, -37.

The Supreme Court in Artis (supra) also held: "We are further of the opinion that the trial court did not follow the procedure set out in Miss. Code Ann. S.S 47-7-33, 47-7-35, and 47-7-37." Id. at 538

Therefore, Judge Helfrich suspended the sentence as set out in section 47-7-33; imposed terms and conditions as set out in 47-7-35; but never placed Watts on probation, as mandated by the legislature in section 47-7-37 as being necessary to authorize the court to revoke the suspended sentence. Judge Helfrich imposed 2 conditions upon the 30 year suspended sentence that could only be imposed as conditions of probation pursuant to section 47-7-35 for a period of time not to exceed 5 years pursuant to section 47-7-37; and thereby Watts was subject to the terms and conditions of probation for the entire 30 years. The 30 year banishment provision exceeds the statutory maximum of 5 years pursuant to section 47-7 37 and is thereby statutorly unenforcable. Judge Helfrich was without authority pursuant to section 47-7-37 to revoke the suspended sentence. All of these errors are a direct result of Judge Helfrich not following the statutorly authorized procedures set out in sections 47-7-33,-35,-37; and acting without statutory authority. A statutorly unenforceable sentence is a plain error, (Stevenson v. State, 674 so. 2d 501, Miss. 1996) and these plain errors have fatally impacted the Appellants state and →

federal constitutional rights to due process of law and a legal sentence. The banishment provision which the Appellant violated, was imposed without due process of law and exceeds the statutory maximum by 25 years. The Appellant's argument is that he is now serving a 30 year term of incarceration without having been afforded due process of law, which is guaranteed by both the United States and Mississippi State Constitutions.

The State seems to have but one erronous argument; all the errors shown in the Appellant's O.B. were harmless errors beneficial to Watts and that this Honorable Court should not allow him to complain of the subsequent constitutional violations.

The Appellant would respectfully ask this Honorable Court to carefully review the Supreme Court's decision in McCreary v. State, 582 so. 2d 425, Miss. 1991, before deciding to agree with the State's argument. For the purpose of verification, and clarity the Appellant has hereto attached (marked exhibit-A) a copy of said Supreme Court opinion.

This case would seem to indicate that the outdated form of punishment relating to banishment was passed on to Judge Helfrich from his predecessor in that this case involves an appeal from the Forrest County Circuit Court also

In this case the Honorable Judge Richard W. McKenzie accepted McCreary's guilty plea on May 9, 1988. The judgement of the court was inter alia that the sentence was under advisement of the court (suspended) for a period of 2 years contingent upon certain probation like conditions including that McCreary leave the state of Miss. (with permission to re-enter the State to exercise his vistation rights with his children at various times). Five (5) days later, on May 14, 1988, McCreary was found "in the State of Miss." and "at the place of employment of the victim"; both in violation of the Court's earlier order and the trial court thereby entered an Order Imposing Sentence which found McCreary in violation of the conditions and imposed a sentence of 20 years. McCreary's motion for P.C.R. was denied by the trial court and he appealed. Id. at 427-28.

The trial court in McCreary, as in the case at bar, did not indicate what statue of law it was proceeding under. The Supreme Court readily concluded that section 99-15-26 (supp. 1990) was not applicable, just as Watts has argued that section 99-19-29 did not apply to the case at bar in that the Supreme Court supported it's decision by holding; "<u>Banishment from the State is not one of the authorized conditions which may be imposed.</u> The only authority of which we are aware, is found in Miss. Code Ann. sections 47-7-33, -35 (1972 and supp. 1990). Under those sections a circuit court may in certain circumstances suspend →

sentence and place a defendant on probation. Again however we have no indication from the circuit court that it was proceeding under this authority, and given the insufficient record, we will not presume so and legitimate those actions." Id-427

The Supreme Court was particularly concerned with the trial court's requirement that McCreary leave the State and held: "Under section 47-7-35, the terms and conditions of probation may include a requirement that the defendant 'remain within a specified area.' We have held this to authorize a court to require a defendant to 'remain 125 miles from Stone County' for a period of five years. Cobb, 437 So. 2d 1218, Miss. 1983." Id-427

The Court in McCreary also held: "In Cobb, the Court satisfied itself from the record, inter alia, the reasons for and benefits of the banishment provision and that Cobb's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution were not violated. 437 So. 2d. 1219-21"; the Court then cited "Wyche v. State, 197 GA. App. 148, 397 S.E. 2d 738 (GA. Ct. App 1990) (banishment condition must serve some rehabilitative function); Kerr v. State, 193 GA. App. 165, 387 S.E. 2d 355 (GA. Ct. App. 1989) (same); People v. Pickens, 186 Ill. App. 3d 456, 542 N.E. 2d 1253, 134 Ill. Dec. 746 (Ill. App. Ct 1989) (banishment provision must bear reasonable relation to offense, provided defendant may apply for permission to enter prohibited area for legitimate reasons); U.S. v. Cothran, 855 F. 2d 749 (11th Cir. 1988) [HN-1] (banishment →

provision must bear reasonable relation to offense and rehabilitation); Markley v. State, 507 So. 2d 1043 (Ala. Crim. App. 1987) (test is whether the conditions, including any geographic restrictions, are designed to meet the ends of rehabilitation and protect the public); People v. Watkins, 193 Cal. App. 3d 1686, 239 Cal. Rptr. 255 (Cal. Ct. App. 1987) (same); U.S. v. Abushaar, 761 F. 2d 954 (3d Cir. 1985) (same); State v. Morgan, 389 So. 2d 364 (La. 1980) (same)." Id. at 427

The McCreary Court concluded it's opinion and held: "In considering the overall sentence, and the banishment provision in particular, we direct the circuit court's attention to the considerations just noted, and to our view that banishment from a large geographical area, especially outside of the State, struggles to serve any rehabilitative purpose, and implicates serious public policy questions against the dumping of convicts on another jurisdiction. See U.S. v. Abushaar, 761 F. 2d at 959-60; Rutherford v. Blakenship, 468 F. Supp. 1357, 1360-61 (W.D. Va. 1979)." Id. at 427-28. Also see Willis v. State, 904 So. 2d 200, Miss. Ct. App. 2005 (failed to articulate reason or benefit for banishment on the record) Also see Weaver 764 So. 2d 479, (P.B.) Miss. Ct. App. 2000, (same)

The Court in McCreary reveresed and remanded the case to the active docket of the Circuit Court of Forrest County for proceedings not inconsistent with it's opinion (Id at 428); even though McCreary benefited from the sentence

In the case of Weaver v State, 764 So. 2d 479, Miss. Ct. App. 2000; Weaver entered a plea of guilty, Agreed and Accepted the terms of a sentence to serve 20 years with 15 years suspended on good behavior and banishment from a 100 mile radius of Houston, Ms for the period of the suspended sentence. Id. in (P2.)

This Court held that: "In order for the instant case to fall directly within the scope of the Miss. Supreme Court's decision in Cobb, the benefits of Weaver's banishment must be established and on the record. Here lies the error in the lower court's decision, and the basis for our reversing and remanding this case." Id at (P.8) This Court also held: "Likewise, we cannot tell if banishment applied during the 15 year suspension, which would not be legal, or for a period of time on probation. On remand the trial court needs to clarify it's sentencing order." Id at (P12.); even though Weaver recieved a benefical, lenient suspended sentence which was contingent upon a banishment provision, which he accepted and agreed to.

The State's argument is that Watts should not be allowed to complain about a banishment condition that:

(1)- Was imposed without statutory authority and in violation of the Appellant's state and federal constitutional rights to due process of law.

(2)- Exceeds the statutory maximum by 25 years and is thereby in violation of Watts' constitutional rights to a legal sentence;

(3)- The trial court failed to articulate on the record any reason or benefits of the banishment in violation of Watts constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution;

(4)- Is cruel and unusual punishment in violation of Watts constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution;

But yet, the State has not provided this Honorable Court with a single proceedings anywhere in which a court of law held that a defendant should not be allowed to complain about an illegal banishment provision. Here, in the case at bar, Watts has offered decisions in this Court, the Miss. Supreme Court, other state courts, and Federal Courts that have reversed because of an illegal or improper banishment provision; and thereby this Court should find that the State's argument is without merit and that Watts is entitled to have the 30 year banishment condition vacated and that his 30 year straight suspended sentence be re-instated.

Involuntary Guilty Plea

In the face of the State's arguement that the illegal sentence and improper banishment provision were a product of a plea bargain and that Watts "could not stand mute when he was handed an illegal sentence which is more favorable than what the legal sentence would have been" (see , page 8-9) and that "Insofar as this record reflects, Watts entered a knowing, intelligent, free and voluntary plea of guilty in 2005 to the crime charged." (see , page 13); the Appellant would thereby show his contentions to the Court that his guilty plea was not knowingly, intelligently and voluntarily entered as required by Rule 8.04 of the M.U.C.C.C. Rules and the due process of law clause of the United States Constitution.

The Appellant raised this issue in his Motion For P.C.C.R (R014) in the trial court, but did not in his O.B. In light of the aforementioned arguments presented by the State; Watts respectfully request that he be allowed to disclose to this Honorable Court via the Petition To Enter Guilty Plea, (R073) what actually occured in the trial court leading up to the Appellant's decision to enter a guilty plea and will thereby convey a fair, accurate, account of what transpired in the trial court, with respect to the record thereof.

Fuethermore, "the presentation of a case on it's merits should not be defeated by reason alone of any formal Rules of pleading and pratice, if within the legitimate power of a court of conscience to avoid it." Field v. Middlesex Bkg. Co., 77 Miss. 180, 26 So. 365 (1899), see M.R.C.P.

The State erronously found that; "In so far as this record reflects, Watts entered a knowing, intelligent, free, and voluntary plea of guilty in 2005 to the crime charged." (see page 13) in that, as the State has shown; "A petition to enter a plea of guilty, signed and initialed in various places by Watts on November 28, 2005, states inter alia, in paragraph 13 that save for a 30 year banishment, no promises or suggestions have been made. (CP at 36)" (see , page 5)

Watts has demonstrated in his opening brief and herein that the aforementioned banishment provision Recommended by the state, exceeds the statutory maximum of 5 years allowed by section 47-7-35 and is thereby statutorly unenforceable in violation of his constitutional rights to due process of law and a legal sentence.

If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is, therefore, void. Id. at 466, Boykin v. Alabama, 395 U.S. 238.

This Court in 2001 in Berry v. State, 800 So. 2d 1233 held that: "The recommendation of the sentence the Petitioner would recieve upon entering a plea of guilty, made by the State, is an inducement to plead guilty even though the trial court is not obligated to follow the state's recommendation." Id at (P11.)

The Miss. Supreme Court has previously held "where a defendant plead guilty on the mistaken belief he was eligible for a suspended sentence, then the defendant must be allowed to withdraw his guilty plea and be allowed to either enter a new plea or have a trial." Robinson v. State, 585 So. 2d 757, 759 Miss. Sup. Ct. 1991, cited in Berry v State, 800 So. 2d 1233, (P10.) and Also in Johnson, 925 So. 2d 86, (P20.), Miss. Sup. Ct. 2006.

Therefore; "because the Appellant's guilty plea was induced by a sentence recommendation for an illegal sentence, he should be allowed to withdraw his guilty plea and be given the chance to enter a new plea or to go to trial", as this Court did in Berry. Id. at (P12) in Berry.

Furthermore, evidenced by the petition to enter guilty plea signed by Watts' attorney, no one ever informed Watts the 30 year banishment provision recommended by the State, was in excess of the statutory maximum by 25 years; not even his attorney, who signed the the petition to enter guilty plea. The record that is before this Court is clear, no one ever told Watts:

(1) that the Couet could only, by statutory law, impose banishment as a condition of probation for a maximum period of time not to exceed 5 years

(2) that if he pled guilty the State was going to recommend that the trial court impose a sentence that was in violation of his constitutional rights to a legal sentence and due process of law

(3) that if he stood mute when the (unknown) illegal sentence was passed upon him that he would be forever barred from claiming to have been thereby prejudiced.

The aforementioned facts go to the very heart of the plea and prevents it from being knowingly and intelligently entered. The State argues; "To allow Watts to withdraw his guilty plea after bargaining for what he wanted and →

after telling the trial judge, eyeball to eyeball, he was fully aware of the consequences in the event he violated the conditions attached to his suspension of sentence, would not, in our opinion, make any more sense than a stowaway in a Kamikaze plane." (, page 12). Well, it would if the stowaway didn't "know" it was a Kamikaze plane, because Watts would respectfully show his contentions that he would not have entered a plea of guilty if he had "known" that Judge Helfrich could not by statutory law impose a banishment provision that exceeded 5 years.

While it is true that Watts "stood mute when sentence was passed upon him" and that "he accepted and agreed to the terms thereof"; yet, as the record before this Court shows, no one, not the State, the Court, or his Attorney ever indicated that the 30 year banishment provision was anything other than a proper, legal condition Judge Helfrich was authorized to impose on the 30 year "straight suspended sentence". The aforementioned actions, or lack thereof, lead the Appellant to believe he was recieving a legal sentence the Court was authorized to impose. These facts undoubtly prevent the Appellant's guilty plea from being knowingly and intelligently entered as required by Rule 8.04 of the M.U.C.C.C.R. and guaranteed by the due process clause of the United States Constitution.

The State offered a sentence recommendation and not a plea bargain, and as shown in the Petition To Enter Guilty Plea (R-034-40) in paragraph 7, the Court did not have to follow the state's recommendation, but this kind of distinction in terms had no effect on the voluntariness of the Appellant's guilty plea and the fact the trial court did accept the states recommendations still led the Appellant to believe that the 30 year banishment, shown in paragraph 13 in the Petition To Enter Guilty Plea (R034-40), was within the Court's authority to impose and because of this, this Court should do as it did in Berry v. State, (supra) Id at (P11.) and allow Watts to withdraw his Guilty Plea.

Closing

In closing the Appellant would bring to this courts attention that the State has failed to address the claim raised in Issue 3 of Watts' O.B. (pages 18-20) concerning whether the 30 year banishment is cruel and unusal punishment with regards to the following facts:

(1) The 30 year banishment provision, (As well as the 30 year term of incarceration) exceeds Watts' life expectancy. Stewart v. State, 372 so. 2d 257, Miss. 1997; Lee v. State, 322 so. 2d 751, Miss. 1975; cited in Payton v. State, 845 so. 2d 713, Miss. Ct. App. 2003,

(2) The trial court did not provide any exceptions to the 30 year banishment which would have ever, (considering his age), allowed Watts to return home to his family in Hattiesburg, Ms. People v Pickens, (supra)(Ill. App. Ct. 1989) (banishment provision must bear reasonable relation to offense, provided defendant may apply for permission to enter prohibited area for legitimate reasons).

Also, with regards to Issue Five of the Appellant's O.B., (pages 25-32); the State presented no opposing argument concerning the following contentions:

(1) - Judge Helfrich failed, in the Order of Conviction (RO41-44), "to offer formal evidence" (what statutory law authorized him to impose a 30 year banishment provision on Watts' 30 year "straight suspended sentence") "necessary for the execution or appeal of the sentence" since "every decree is in the breast of the court until entered, and a decree has no validity until written out and signed by the chancellor." Orr v Myers, 223 Miss 856, 79 so. 2d 277, 278, (Miss 1955) citing v. Griffith's Miss. Chancery Pratice, Section 621. Also see Banks v. Banks, 511 so. 2d 933, 934-35 (Miss 1987) (quoting Jackson v. Schwartz, 240 so. 2d 60, 61-62 (Miss 1970.); cited in Temple v State, 671 so. 2d 58, Miss 1996. Therefore, based on the aforeshown cases and the Supreme Court's decision in McCreary, where the Court held: inter alia "we have no indication from the circuit court what authority it was proceeding under, and given the insufficient record, we will not presume so and legitimate those actions" Id. at 427; and thereby Watts would show his contentions that this error alone would warrant a reversal for clarification of sentence not inconsistent with the opinion of this Court.

(2) - Whether Judge Helfrich violated sections 47-7-33, -35-37; section 177A of the Miss. State Constitution (1890 as amended) and/or Cannons 1, 2, 2A, 2B, and 3A(1) of the Code of Judicial Conduct of Miss. Judges; and the Appellant's constitutional rights to due process of law; when he, as in the O.B and herein Alledged, acted without statutory authority pursuant to →

sections 47-7-33, -35, -37 when Judge Helfrich imposed 7 specific terms and conditions, including A 30 year banishment provision, upon Watts' 30 year "straight suspended sentence" without placing Watts on probation, As required by section 47-7-37 and was held by the Supreme Court in Moore (supra) cited in Artis (Supra), (Id at 537-38); and thereby the trial court judge failed by any statutory law and/or any statutorily authorized procedure to retain jurisdiction to alter or amend the Appellant's original sentence after the term of court which the sentence was given had ended; Miss Comm. on Jud. Per. v. Sanders, 708 so. 2d 866, Miss 1998; Also see Miss. Comm. on Jud. Per. v Russell, 691 so. 2d 929, Miss. Sup. Ct. 1997 And Miss. Comm. on Jud. Per. v Byers, 757 so. 2d 961, Miss. 2000.

All of these cases involve circuit court judges suspending sentences without statutory authority (Byers; Sanders) or suspending sentences and placing defendants on probation when the judge had no statutory authority to do so (Russell). Watts would thereby argue that the same legal principles apply to the case at bar. The defendants in all these cases greatly benefitted from the judges unauthorized actions, yet the State's Commission On Judicial Performance found the judges guilty of some type of judicial mis-conduct and thereby repremanded and/or fined them.

The Miss. Supreme Court supported the Commission's findings and in Russell (supra) cited Griffin v. State, 556 so. 2d 545, Miss. Sup Ct. 1990 and held:

"A trial court can only act as specifically authorized by either the constitution or statue of law." Id at 547 in Russell.

The Supreme Court in Sanders (supra, Id at HN-12) held: "When a criminal case has been completed and the term of court ends, unless the circuit court has deferred sentence, or placed the defendant upon a suspended sentence as authorized by statue, the power of the circuit court to alter or amend it's sentence is terminated."

Therefore, when Judge Helfrich imposed terms and conditions upon Watts' 30 year suspended sentence without placing him on probation as mandated by the legislature in section 47-7-37 as being necessary to authorize the Court to revoke the suspended sentence for violating the conditions of the suspended sentence; Judge Helfrich thereby failed by any statutory law and/or procedure to retain jurisdiction to alter or amend his original sentence of 30 years suspended on the Appellant's good behavior.

This Court should find, as did the State, that Judge Helfrich sentenced Watts to a "straight 30 year suspended sentence". This Court should also find, that Judge Helfrich committed plain error and acted without statutory authority pursuant to sections 47-7-33, -35, -37 when he imposed conditions upon Watts' straight suspended sentence without placing Watts on probation for a period of time not to exceed 5 years and that Judge Helfrich failed to follow the statutorly authorized procedures set out and authorized in the →

aforeshown 3 statues of law necessary for the trial court to retain jurisdiction to alter or amend its original sentence as did the Supreme Court in Russell (supra).

The Appellant has referred to the aforeshown cases concerning the Miss. Commission on Judicial Performance in full respect of Judge Helfrich and it is in no way intended as a suggestion that this Court should find Judge Helfrich guilty of judicial misconduct.

The Appellant has relied upon these cases in face of the fact the State has failed to present any opposing argument to the aforeshown issues other than the errors committed by Judge Helfrich were harmless errors that benefitted Watts.

These cases, such as Russell, undoubtly demonstrate that the Miss. Comm. on Jud. Per. and the Miss. Supreme Court does not consider a circuit court judge acting without statutory authority as a harmless error, no matter how much the defendant benefits.

In Russell, 4 defendant's sentences were suspended and they were placed on probation. The Supreme Court found that Judge Russell acted without statutory authority when he failed to follow the statutorily authorized procedure set out in section 47-7-47. All 4 of the defendants benifitted in that they were released from terms of incarceration.

In the case at bar, as argued by Watts and more or less admitted by the State; Judge Helfrich acted without statutory authority when he imposed the 30 year banishment provision upon Watts' suspended sentence without placing him on probation and also failed to follow the statutorly authorized procedure set out in sections 47-7-33, -35, and -37 Allowing the court to retain jurisidiction to alter or amend it's original sentence. Watts is now serving a 30 year term of incarceration without being afforded due process of law which is guaranteed by the State and U.S. Constitutions.

The Appellant would hereby show his contentions unto the Court, based upon his state and federal constitutional rights to due process of law; the rules and laws of the State applying to the power of a circuit court judge should be the same, whether the Court is granting freedom or imposing a sentence.

Conclusion

As the State has concluded, the trial court sentenced Watts to a "straight 30 year suspended sentence". The Appellant has proved by perponderous evidence that Judge Helfrich acted without statutory authority and committed plain error when he imposed a banishment provision as a condition of the sentence suspension without placing Watts on probation as required by sections 47-7-33, -35, and -37; and that there by the trial →

court also failed, by any statutory law and/or procedure to alter or amend it's original sentence. The Appellant has demonstrated that this Court, the Miss. Supreme Court, other state courts and our federal courts have previously held that a banishment provision is an outdated form of punishment in violation of the First, Fifth and Fourteenth Amendments to the U.S. Constitution. Therefore, this Court should find, as the Supreme Court did in McCreary, that the 30 year banishment provision is improper and that it was imposed without due process of law and that the trial court failed to follow the statutorily authorized procedures set out in sections 47-7-33, -35, -37.

The Appellant would respectfully show his contentions unto this Honorable Court that it would be a direct contradiction of cited case law and previous Miss. Court decisions if this case is not remanded to the trial court with instructions to correct it's mistakes by vacating the terms and conditions, including the 30 year banishment condition and re-sentence Watts, as the judge originally intended, to a "straight 30 year suspended sentence" contingent upon his good behavior.

As an alternative, Watts should be allowed to enter a guilty plea induced by a sentence that he "knows" the trial court can statutorily enforce or go to trial on the merits of the indictment.

Respectfully Submitted By:

Carl Watts

CARL D. WATTS, #18202

Certificate Of Service

I, CARL D. WATTS, Appellant pro-se, do hereby certify that I have this day via U.S. Mail, postage pre-paid, sent a true and correct copy of this "Appellant's Reply Brief" to the following:

State Attorney General
Hon. Billy L. Goree, Special Asst.
P.O. Box 220
Jackson, Ms 39205-0220

Hon. Bob Helfreich
Circuit Court Judge, District 12
P.O. Box 309
Hattiesburg, Ms 39403-0309

Hon. Jon Mark Weathers
District Attorney, Distrcit 12
P.O. Box 166
Hattiesburg, Ms 39403-0166

This the 5th day of November, 2007.

Carl D. Watts

CARI D. Watts, pro-se

Exhibit A-1

LEXSEE

JAMES McCREARY v. STATE OF MISSISSIPPI

No. 89-KP-0980

Supreme Court of Mississippi

582 So. 2d 425; 1991 Miss. LEXIS 391

June 26, 1991, Decided

PRIOR HISTORY: [**1] Appeal No. 12993 from Judgment Dated July 26, 1989, Richard W. McKenzie Ruling Judge, Forrest County Circuit Court.

DISPOSITION:

Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of the judgment of the Forrest County Circuit Court (Mississippi) that dismissed his motion for post-conviction relief under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1 et seq. (Supp. 1990).

OVERVIEW: Defendant had pled guilty to the crime of rape. Defendant attacked his plea on the basis that the plea was not knowingly and voluntarily made and that he was denied effective assistance of counsel. The court determined that the trial court erred in summarily dismissing defendant's motion for post-conviction relief. The trial court had imposed certain parole like conditions on defendant's sentence. If defendant complied with the conditions his conviction would have been reduced to a misdemeanor offense. Defendant violated several of the conditions and a 20-year sentence was imposed. The court determined that the banishment provision imposed in the sentence failed to serve any rehabilitative purpose and implicated grave public policy questions against the dumping of convicts on another jurisdiction. The court reversed the judgment of the trial court and remanded the case.

OUTCOME: The court reversed the judgment of the trial court that summarily dismissed defendant's motion for post-conviction relief.

CORE TERMS: sentence, banishment, advisement, post-conviction, guilty plea, probation, summarily, rehabilitative purpose, information charging, reasonable relation, criminal process, public policy, rehabilitation, involuntary, preserved, probation-like, misdemeanor, visitation

LexisNexis(R) Headnotes

Criminal Law & Procedure > Sentencing > Imposition > Factors

[HN1] A banishment provision must bear reasonable relation to the offense and rehabilitation. The test is whether the conditions, including any geographic restrictions, are designed to meet the ends of rehabilitation and protect the public.

COUNSEL:

FOR APPELLANT - James McCreary, Pro Se, Parchman, Mississippi.

FOR APPELLEE - Mike C. Moore, Attorney General, Deirdre McCrory, Sp Ass't Attorney General, Jackson, Mississippi.

JUDGES:

Roy Noble Lee, Chief Justice, for the court. Hawkins and Dan Lee, P.JJ., Prather, Robertson, Sullivan, Pittman, Banks and McRae, JJ., concur.

OPINIONBY:

LEE

OPINION:

[*425] I.

McCreary, an inmate at Parchman, appeals *in forma pauperis* the trial court's denial of his motion for post-conviction relief filed under the "Mississippi

Uniform Post-Conviction Collateral Relief Act," Miss. Code Ann. § 99-39-1 et. seq. (Supp. 1990). McCreary waived indictment and plead guilty to an information charging [*426] him with the crime of rape. He now collaterally attacks that plea on two grounds:

1) The plea was not knowingly and voluntarily made; and

2) He was denied effective assistance of counsel demonstrated in the illegal plea agreement and sentence.

On June 12, 1989, the trial court summarily dismissed the motion because it did not "comply with the Uniform Circuit Court Rules of Criminal Practice [sic]." From [**2] that Order, McCreary prosecutes this appeal.

II.

On May 9, 1988, McCreary entered a guilty plea to an information charging him with rape. The judgment of the Circuit Court contained the following pertinent language:

The sentence of James McCreary be, and it is hereby taken under advisement by the court from day to day and term to term and while said sentence is under advisement, the defendant shall:

1) Leave the State of Mississippi, he, the said James McCreary, being authorized to re-enter the State of Mississippi for the purpose of exercising his visitation rights with his natural children, during the first week of July, and during the week in December in which Christmas Day falls;

2) That he commit no crime against this State or any other State or of the United States.

It is further ordered and adjudged that while this sentence is under advisement, that he have no contact whatsoever or cause to be contacted [sic] the victim, Sarah Jones, or her family.

It is hereby noted that if the defendant successfully completes all the requirements dictated by this court while the sentence is under advisement from day to day and term to term, for a period not to exceed two years, [**3] that at some future time to be considered by this Court that [sic] this matter will be finally disposed of as a misdemeanor.

On May 31, 1988, the trial judge entered an "Order Imposing Sentence" which found McCreary to be in violation of certain conditions and imposed a sentence of twenty (20) years in the Mississippi Department of Corrections. That order imposing sentence found specifically that McCreary has been in the State of Mississippi "on or about the 14th day of May, 1988," and that he was present in this State at the "place of employment of the victim," both in violation of the court's earlier order.

III.

McCreary properly requested a transcript of the proceeding; however, that before us does not contain the plea qualification or the hearing resulting in the imposition of the twenty year sentence. The court reporter, in a letter to the clerk, states there was likewise no record of the June 12, 1989, hearing on McCreary's PCR motion.

We take this opportunity to reiterate that the ends of justice are more efficiently served when a full record of each stage of the criminal process is preserved and available for review, although we caution to add that it is not always necessary [**4] to include everything as part of the record, so long as each and every stage of the criminal process is preserved and available. *See* Gibson v. State, 580 So.2d 739 (Miss. 1991); Garlotte v. State, 530 So. 2d 693, 694 (Miss. 1988).

Here we must decide if the trial court erred in summarily dismissing McCreary's motion for post-conviction relief. Clearly, if McCreary's plea of guilty is coerced or otherwise involuntary, a judgment of conviction is subject to collateral attack. Vittitoe v. State, 556 So. 2d 1062 (Miss. 1990); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). And because McCreary is proceeding *pro se,* his inartfully drafted pleadings will not be held to defeat a meritorious complaint. Moore v. Ruth, 556 So. 2d 1059, 1061 (Miss. 1990); Sanders v. State, 440 So. 2d 278, 283 (Miss. 1983).

[*427] On the record and the pleadings, we cannot safely conclude that McCreary will be unable to show that his guilty plea was unknowing and involuntary. McCreary presented in sworn form certain factual and conclusory [**5] allegations sufficient to pass the pleadings test of the Post-Conviction Relief Act. Miss. Code Ann. § 99-39-9 (Supp. 1990). Accordingly, the circuit court was in error to summarily dismiss McCreary's motion for post-conviction relief.

Another matter of moment appears quite conspicuously, that is, the lower court's disposition of the case following the entry by McCreary of a guilty plea. The circuit court purported to take the sentence under advisement and impose certain probation-like conditions on McCreary for an unspecified period not to exceed two years. If McCreary had successfully completed his "probation" then according to the lower court it was

obliged at its leisure to dispose of this felony rape case as a misdemeanor.

Although the lower court is not at all clear under what authority it proceeds, we can readily conclude that Miss. Code Ann. § 99-15-26 (Supp. 1990) is not applicable. That section allows a practice not unlike that utilized in the lower court. It provides that the circuit court may withhold acceptance of a guilty plea pending completion of certain specified probation-like conditions. Upon successful completion of the court-imposed conditions, the case would [**6] then be dismissed.

However, section 99-15-26 does not apply in cases involving crimes against the person. Furthermore, banishment from the State is not one of the authorized conditions which may be imposed.

The only other authority, of which we are aware, is found in Miss. Code Ann. §§ 47-7-33, 35 (1972 and Supp. 1990). Under those sections, a circuit court may in certain circumstances suspend sentence and place a defendant on probation. Again, however, we have no indication from the circuit court that it was proceeding under this authority, and, given the insufficient record, we will not presume so and legitimate those actions.

Of particular concern is the court's requirement that McCreary leave the State of Mississippi and return only twice a year for the purpose of exercising visitation rights with his children. Under section 47-7-35, the terms and conditions of probation may include a requirement that the defendant "remain within a specified area." We have held this to authorize a court to require a defendant to "remain 125 miles from Stone County" for a period of five years. *Cobb v. State*, 437 So. 2d 1218 (Miss. 1983).

In *Cobb*, the Court satisfied itself [**7] from the record that the banishment provision bore a reasonable relationship to the purpose of probation; that the ends of justice and the best interest of the defendant and the public would be served; that public policy was not violated and the rehabilitative purpose of probation was not defeated; and that Cobb's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution were not violated. 437 So. 2d at 1219-21; *see also Wyche v. State*, 197 Ga.App. 148, 397 S.E.2d 738 (Ga.Ct.App. 1990) (banishment condition must serve some rehabilitative function); *Kerr v. State*, 193 Ga.App. 165, 387 S.E.2d 355 (Ga.Ct.App. 1989) (same); *People v. Pickens*, 186 Ill.App.3d 456, 542 N.E.2d 1253, 134 Ill.Dec. 746 (Ill.App.Ct. 1989) (banishment provision must bear reasonable relation to offense, provided defendant may apply for permission to enter prohibited area for legitimate reasons); *U.S. v. Cothran*, 855 F.2d 749 (11th Cir. 1988) [HN1] (banishment provision must bear reasonable relation to offense and rehabilitation); *Markley v. State*, 507 So. 2d 1043 (Ala.Crim.App. 1987) [**8] (test is whether the conditions, including any geographic restrictions, are designed to meet the ends of rehabilitation and protect the public); *People v. Watkins*, 193 Cal.App.3d 1686, 239 Cal.Rptr. 255 (Cal.Ct.App. 1987) (same); *U.S. v. Abushaar*, 761 F.2d 954 (3d Cir. 1985) (same); *State v. Morgan*, 389 So. 2d 364 (La. 1980) (same).

In considering the overall sentence, and the banishment provision in particular, we direct the circuit court's attention to the considerations just noted, and to our view [*428] that banishment from a large geographical area, especially outside of the State, struggles to serve any rehabilitative purpose, and implicates serious public policy questions against the dumping of convicts on another jurisdiction. *See U.S. v. Abushaar*, 761 F.2d at 959-60; *Rutherford v. Blankenship*, 468 F.Supp. 1357, 1360-61 (W.D. Va. 1979).

IV.

We hold that this cause should be, and is, reversed and remanded to the active docket of the Circuit Court of Forrest County for proceedings not inconsistent with this opinion.

LOWER COURT'S DENIAL OF POST-CONVICTION RELIEF REVERSED [**9] *AND REMANDED.*

* Banishment would not allow Petitioner visitation rights with family,