

IN THE MISSISSIPPI COURT OF APPEALS

RUSSELL CAMPBELL

APPELLANT

COPY

Vs.

CASE No. 2007-CP-00931-COA

STATE OF MISSISSIPPI

APPELLEES

FILED

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APPELLANT'S BRIEF

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Dear Clerk ,

Please Find here is the "APPELLANT'S BRIEF" for filing in the proper court. Also included in the Certificate of interested persons which have been forward a true and corrected copy of same.

Thank You for your usual attention and care in this matter.

Cc.

HON. JIM HOOD, THE MISSISSIPPI
ATTORNEY GENERAL

HON. PAUL FUNDERBURK, JUDGE OF
CIRCUIT COURT ALCORN COUNTY, Ms.

HON. JIM POUNDS, DISTRICT ATTORNEY
FOR ALCORN COUNTY, Ms.

HON. JOE CALDWELL, CIRCUIT CLERK
FOR ALCORN COUNTY, Ms.

RESPECTFULLY SUBMITTED,
Appellant

Russell Campbell
RUSSELL CAMPBELL
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CASE NO. 2007-CP-00931-COA

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CERTIFICATE OF INTERESTED PERSONS

The undersigned, in 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 this court may evaluate possible disqualifications or recusal.

1. STATE OF MISSISSIPPI
2. HON. PAUL FUNDERBURK, JUDGE OF ALCORN COUNTY, MISSISSIPPI
3. HON. JIM POUNDS, DISTRICT ATTORNEY OF ALCORN COUNTY, MISSISSIPPI
4. MR. RUSSELL CAMPBELL, Mississippi Prisoner Number ,59288

THIS 12 Day of September, 2007 .

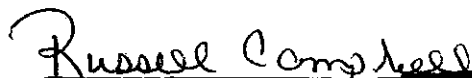



RUSSELL CAMPBELL #  

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STATEMENT OF THE ISSUES

ISSUE ONE

THAT THE DECISION OF THE TRIAL COURT IS CLEARLY ERRONEOUS ?

ISSUE TWO

THAT RUSSELL CAMPBELL WAS NOT FULLY APPRISED OF CONDITIONS OF RELEASE UNDER §47-7-34 WHEN RELEASE FROM THE IMPOSITION OF CONFINEMENT ON THE ORIGINAL IMPOSITION OF SENTENCE; WAS NOT VIOLATED FOR "ANY NEW CHARGE" HOWEVER, WAS VIOLATED FOR NOT REPORTING, AND NOT PAYING "ANY" PORTION OF THE FINES .

STATEMENT OF THE CASE

The record reflects that Russell Campbell, MDOC # 59288 , may not have been informed fully of the conditions of his Post Release Supervision (C.P. at 22-24) . Nor, is there any indication in the record before the Court that Russell Campbell was given Proper "NOTICE" of the Conditions in the Court of Alcorn County Mississippi . The Record does not reflect that Russell was revoked based on the possession *Charge he alledgedly was arrested for .

No Field Officer's Signature, or Department of Corrections Post Release Supervision Office can be found in the record until after Russell Campbell was arrested in MAY 2006, SIX (6) years after he received Post Release Supervision, and a fine in open Court . Pursuant to Mississippi Code Annotated §99-39-5(3) there is no Procedural bar when a Petitioner raises a claim that his Probation, Parole , or conditional Release has been illegally revoked . The decision of the Trial Court to impose the Post-Release supervision on the Petitioner Russell Campbell is Clearly ambiguous to, contrary of.....

pursuant to other laws in the State of Mississippi which do not allow sentences under the Mississippi Controlled Substance Act (MCA 41-29-139) to earn any form of (Additional Time) given from the EARNED RELEASE STATUES as intrepreted by the Mississippi Department of Corrections POLICY/PROCEDURES which deem to make all Possession/Possession with the Intent To Distribute, Barter, sell, Transfer Mandatory Sentences.....by not allowing the Offender such as Russell to Receive any "EARNED TIME ALLOWANCE" .

Because He cannot receive any earned time allowance his time may none-the-less discribed as "MANDATORY". If Russell Sentence under the Controlled substance Act is Discribed as "MANDATORY" because he cannot receive any Good time then the Post-Release supervision Program may have been illegally imposed on him . See, Mississippi Code Annotated §47-7-47 this Statue may Conflict the imposition of 47-7-34 , and validate MCA §47-7-33 .

FACTS

The State of Mississippi by and through a Empanelled Jury in the County of Alcorn, state of Mississippi indicted Russell Campbell, in Vacation Term, 1999, in Cause No. CR99--053 for the alleged sell and transfer of a controlled substance, Schedule II Controlled Substance in violation of the Mississippi Uniformed Controlled Substance Act; (C.P. at 6-7);

The indictment, Supra also charge Campbell as a Habitual Offender under Mississippi code Annotated § 99-19-81 . (C.P. At 6-7).

Russell was Appointed Counsel (C.P. AT 13) (Mr. DAVID COLEMAN, Esq.) and Discovery was Conducted (C.P. 14-17).

Russell Moved to Reduce the Charges, eliminating the possibility of being convicted as a Habitual offender (C.P. at 19) and an ORDER issued amending, by Quashing the Habitual Poprtion of the indictment, See (C.P. at 20).

On November 17, Russell Pleaded "NOT GUILTY" to the charges, but it is unclear (C.P. at 21) sentencing was set for January 6, 2000. (HON. BARRY W. FORD PRESIDING) . (Hearing ?)

On January 6, 2000, Russell appeared before the court and was sentenced to a term of [TWELVE (12) years in the custody of the Mississippi Department of Corrections at a facility to be designated by said department, that SIX (6) year(s) of said sentence shall be and same is hereby suspended and the defendant shall be placed under Post-Release Supervision upon release from the terms of incarceration for a period of FIVE (5) years pursuant to Mississippi Code Section §47-7-34, and the Suspension of said sentence is based

upon the following conditions:'] (C.P. at pg. 22-24)

(Russell's Signature does not appear on the terms of the Post- (Form) Release Supervision, Nor, does the signature of the Field Officer appear. (C.P. At 25) . The Form is "BLANK" .

Russell Campbell served the imposition of said sentence, was released from the imposition of sentence, and an AFFIDAVIT was issued for his arrest for [violation of Post Release Supervision] in cause 99-053 , Mississippi Prisoner Number 59288 to wit :

" Russell T. Campbell, MDOC #59288, has violated the the terms of his Post Release Supervision to wit: "

" Failed to report as directed, missing the month of January, Febuary, March, April, May, June, July, and August 2005 "

" Failed to pay supervisory fee as directed having a balance due of \$420.00 on 17th August 2005 "

" Failed to pay court ordered monies as directed having a balance of \$ 2,923.00 on 17th August 2005 "

See, (C.P. at page 71) .

The Petition to revoke Post Release Supervision and Impose Suspended Sentence was issued (C.P. 74-76) after ["Arrested and charged by the Corinth Police Department on the 12th May 2006 for the crime of Possession of Controled substance"] (FILED OCT 13 2006, JOE CALDWELL) (C.P. at pg. 76) and ORDER REVOKING POST RELEASE SUPERVISION (ORDER OCT 18 2006, HON. PAUL FUNDERBURK, JUDGE) (C.P. at pg 77) imposed [" 6 YEAR(S) OF THE SIX YEAR(S) SUSPENSION OF SENTENCE"] is revoked and the defend is required to serve SIX (6) YEARS of SAID SENTENCE .

Russell Agrieved filed a Motion For Post Conviction Collateral Relief under Mississippi Code Annotated § 99-39-1 thru § 99-39-29.

See, (.P. 80-96) .

Russell complains that his conviction was secured in violation of the Laws and Constitution of the State of Mississippi, and the United States of America; Specifically Russell Argues that he should not have been given POST RELEASE SUPERVISION under Mississippi Code Annotated §47-7-34 because he had been previously convicted of a felony, that he was ineligible to receive a Suspended Sentence or Probation. The Circuit Court of Alcorn County, Mississippi returned an ORDER (C.P. at pg 101-102) denying relief under JOHNSON V. STATE, 925 So.2d 86 (2006), and Russell Appeals from this ORDER .

Russell's release was in December 2003, Russell was not revoked, or Warrant /AFFIDAVIT for his arrest until 2006, more than three (3) years elapsing ?

SUMMARY OF THE ARGUMENT

That Russell Campbell's Post-Conviction Motion for Collateral Relief is illegal and was improperly dismissed because he was not only a previously convicted felon, his sentence was Mandatory and he is not eligible to receive any earned time allowance, and he may not be eligible for " ANY" EARN TIME PROGRAM(S) .

Second, that he was not given "NOTICE"; there are two types of "POST RELEASE SUPERVISION" unsupervised, and/or supervised . From the record , it is impossible to determine whether Russell's Post-Release Supervision was Supervised, which would require him to physically report to a probation/parole officer under the ACT, or unsupervised which would put supervision of Russell in the court's, not the Mississippi Dept. of Corrections , Russell cannot be said to have violated terms of payment when he was not instructed on payments; Third, Russell cannot be said to have violated the terms to report, because Russell never knew who to report to. Confirming this (fact) in the specific point that, No AFFIDAVIT, and/or WARRANT was issued for Russell Campbell for failure to report or failure to pay fines for over (CAMPBELL MDOC #59288 was released from imposition of Original sentence in the year 2000, until his release in DECEMBER 2003) three (3) years . Not one time has the Court/MDOC attempted to contact Russell Campbell. The Mississippi Dept. of Corrections Probation Office/Department would have certainly issued a WARRANT in three (3) years . The Court of Alcorn County, Mississippi Would have certainly placed a BENCH WARRANT out for Russell Campbell in three (3) years , wouldn't this court think So ???

Fourth , that the Statues Conflict because MCA §47-7-47 does not allow Sentences under the Mississippi Contolled Substance Act , which are in essense Mandatory to receive any Earn Time incentives, thus making inapplicable MCA 47-7-34 to the conviction notwithstanding 47-7-33 .

ARGUMENT

ISSUE ONE (1) THE DECISION OF THE TRIAL COURT IS CLEARLY ERRONEOUS .

The trial Court denial of a Motion For Post Conviction Collateral Relief Should Be Reversed Finding that the Trial Court's Decision was clearly erroneous. See, CROWELL V. STATE, 801 So.2d 747 Miss. Ct. App. 2000)(Citing KIRKSEY V. STATE, 728 So.2d 565 (Miss. 1999) .

Russell is Basically arguing that he was sentenced illegally under Mississippi Code Annotated § 47-7-34 which states as follows:

(1) When a Court imposes a sentence upon a conviction for any felony committed after June 30, 1995, the court, in addition to any other punishment imposed if the other punishment includes a term of incarceration in a state or local correctional facility, may impose a term of post-release supervision. However, the total number of years of incarceration plus the total -number of years of post-release supervision shall not exceed the maximum sentence to be imposed by law for the felony committed. The defendant shall be placed under post-release supervision upon release from the term of incarceration. The period of supervision shall be established by the court .

The second (2) section of the Statue explains that the Post-release Supervision will be conducted [in the same Manner as a like period of Probation] and the procedures for termination. Third (3) the third section expresses that the Post-Release Supervision

[programs shall be operated through the probation and parole unit of the Division of Community Corrections] of the Department.

Because it is clear that MCA §47-7-34 is imposed here, a showing of 47-7-47 the 'EARNED PROBATION PROGRAM; RESTITUTION TO CRIME VICTIMS' demonstrates at Subsection (c) that:

['(c) The time limit imposed by paragraph (a) of the Subsection is not applicable to those defendants sentenced to the custody of the department prior to April 14, 1977. Persons who are convicted of crimes that carry mandatory sentences shall not be eligible for earned release" (EMPHASIS ADDED)]

Does Earned Release Equal "EARNED RELEASE SUPERVISION" ??

Russell Campbell was originally convicted under MCA 41-29-139 (Sell of Cocaine) Russell is not entitled to any form of Earned release, and/or Good Time/ Earned Time under Mississippi Dept. of Corrections Policy(s) and Procedure(s) DOC 15-04 See: Line 8-10:

[" Earned Release Supervision (ERS)- A Program whereby offenders eligible under State Code criteria may earn thier conditional release to community supervision by accrual of predetermined good conduct and performance credits "] .

Russell is not eligible for this program on the original portion of his sentence because of his conviction under MCA 41-29-139.... see also DOC 15-05 Line 21-21:

["Excluding Offenders with Mandatory, Habitual or Death sentences from receiving Executive Earned Time "].

Further [he] cannot receive "MERITORIOUS EARNED TIME" under Mississippi Dept. of Corrections Policy DOC 15-03 .

Additionally Russell is not entitled to "TRUSTY EARNED TIME" under SOP/DOC Policy Number 15-02-01 : See, Page 3 of 4, Lines 104 through 107 .

[' was convicted of a drug offense under §41-29-139(a) and sentenced under §41-29-139(b), (f) or (g). This uncludes sell, barter, transfer, distribute, dispense, manufacture, delivery, production, possession with intent, trafficking, attempting to commit any of these crimes"] SOP Number 15-02-01 pg 3 of 4 .

The Department of Corrections has mislead the court, by creating policy in Contridistinction of Statutory intent that facially demonstrates that Russell is Eligible for "EARNEDTIME" under 15-01, the original policy at line 17 which states:

["EARNED RELEASE SUPERVISION PROGRAM (15%-After July 1, 1995)"]

Plainly Russell has demonstrated that MCA 47-7-47 limits mandatory sentences from EARNED RELEASE SUPERVISION, because all of the Policy(s) or Procedure(s) (ADMINISTRATIVE LAWS) have been construed as to not afford petitioners such as Russell any EARNED TIME PROVISIONS. Applying 47-7-33 is the only logical course . In MILLER V. STATE, 875 So.2d194, 199 (Miss.2004) The Mississippi Supreme Court Noted the Difference between Sentencing under the two (2) statues 47-7-33, and or 47-7-34 : See,

"[Supervis]ved probation and post-release supervision are totally different statutory creatures. Miss. Code Ann. §47-7-33 provides for supervised probation, while Miss. Code Ann. §47-7-34 provides for post-release Supervision. At least two major differences in these statues are (1) Supervised probation is limited to five years while post-release Supervision is not....While [§47-7-34] unquestionably limits to five years the period of time that the MDOC may supervise an offender who is on post release supervision, the clear language of the Statue does not limit the total number of years of Post release Supervision to five years."]

875 So.2d 194, 199 (Miss. 2004)

the Language of all the Statues (MCA §47-7-33 ; MCA §47-7-34 ; and/or MCA 47-7-47 dealing with Earned Release Supervision Conflict as to be Ambiguous depriving Russell of a Legal Sentence under MCA §47-7-34 .

ISSUES TWO (2) THAT RUSSELL CAMPBELL WAS NOT FULLY APPRISED OF CONDITIONS OF RELEASE UNDER 47-7-34 WHEN RELEASED FROM THE IMPOSITION OF THE ORIGINAL IMPOSITION OF SENTENCE; WAS NOT VIOLATED FOR "ANY NEW CHARGE" HOWEVER, WAS VIOLATED FOR NOT REPORTING, AND NOT PAYING "ANY" PORTION OF THE FINES .

Russell Campbell makes this his untimely suggestion of Error, that his "Post Release Supervision was Illegally Revoked" under the Probation/Parole Statue for filing untimely suggestions of errors while alleging such MCA 99-39-5(3) which states in pertinante part that there is no procedural bar when Petitioner's allege that probation /parole / conditional release has been illegally revoked and petitioner re-incarcerated;

Russell here demonstrates in the record that he was not informed of the conditions of his earned release supervision. That there is a standard form in the record before this court that is signed by all probationer'/parolee's which are explained to them, including those defendant's being placed on post-release supervision that gives notion of the Condition(s) of the term(s) of Post Release Supervision. Here the Form is only signed by the Judge, not the Defendant Russell Campbell, and or his Field Officer for which the Form has a Space for his Signature . Because there is no Signature and Nothing in the Record to Demonstrate that Russell was "FULLY" advised of the conditions of Post Release Supervision, the Court's decision to revoke based on the three (3) Specific violation(s) of those Condition(s)....and not violating Russell for any other infractions of those condition, laws of this state, demonstrate that the court's decision to place Russell back into general Population was abritrary, capricious.....violates the basics of procedural and substantive due process.....in the absense of notice

from the State's Department of Corrections Probation/Parole Field Office/ and/or, the Court's as to the conditions that Russell Campbell should have been aware of; Last Russell Campbell remained at large for over Three (3) years without the Probation/Parole Office, and/or, the Court's of Alcorn County, Mississippi attempting to locate him, or inform him that he had to pay fines that were due; Nowhere in the record can be found, the court's questioning of Russell as to why he never attempted to pay the fines and/or other monies owed to the court's. However, the record reveals that the sole reason why Russell was revoked was because of his failure to pay . This court has said that [On revocation of Parole, it must be shown that parolee has violated the terms and conditions of parole] See, ALEXANDER V.STATE, 667 SO.2d 1 Miss.1995, Cert denied, 517 U.S. 1145, 116 S.Ct. 1441, 134 Led.2d 562 (1996). The Mississippi Legislature has equated in Title 47 of the Mississippi at \$47-7-27 [Return of violator of parole or earned release supervision; arrest of offender; revocation of parole; board and hearing officers authorized to administer oaths and summons] earned release supervision, parole /post release supervision as a creature of due process, with liberty interest . Not only has the court here not demonstrated that Russell Campbell violated the conditions of his earned, or rather Post-release Supervision, the Fourteenth Amendment precludes state courts from automatically revoking probation and imposing a prison term when the probationer is unable to pay fine, without a finding by the court that Russell has made a Bona fide effort to pay fine, or that alternative forms of punishment are adequate. See, BEARDEN V.GEORGIA, 461 U.S. 660, 103 S.Ct. 2064, 76 Led.2d 221

(1983). on remand, 167 Ga.App. 334, 308 S.E. 2d.63 (1983) See, Mississippi Code Annotated § 47-7-27 (2006)at pg.[4] See, also, MOORE V. RUTH, 556 So.2d 1059 (Miss.1990) .

The other condition alleged to have been violated by Russell was failure to report ; well veiwing the record, how can Russell have failed to report for so long before ~~someone~~ **checked** on him ?? It has not been established that Russell's Post-Release Supervision was "Supervised". Post Release Supervision can be unsupervised, and/or [Court Supervised] . And, Failing to report none-theless equates to " not paying fees" . The Question goes back to, why did it take so long ((three (3)) years to catch up to Russell ?? Why was Russell only violated on condition(s) of his Post-Release Supervision that he was never Fully Advised of ??

The "Touchstone" of Due Process is "Notice", then the remaining Keystone is the oportunity to be heard; As Noted in time-tested rulings, Due Process deals with adherence to the law; the Case of MORRISSEY V. BREWER, 408 U.S. 471 (1972), and/or GAGNON V. SCARPELLI, 411 U.S. 778 (1973) and how those procedures apply to MILLER, Supra, 875 So.2d 194, 199 (Miss.2004) Post-Release Supervision as opposed to Probation/Parole Noting:

"Supervised probation and post-release supervision are totally different statutory creatures".

The Mississippi Supreme Court ruled that:

"Due Process....requires that procedure be in accord with that applicable to all civil and criminal trials, recognized in all common-law jurisdictions, and does not result in arbitrarily depriving defendant of any constitutional or common-law right." BROWN V. STATE, 161 S.465 [reversed on other point in 297 U.S. 278, 56 S.Ct. 461 .

Russell Campbell states here that the actions of the trial court may demonstrate that he was denied a substantial right . The statement that the factfinder relied on to revoke may except the procedural bar MCA 99-39-5(3) to the rule that questions not raised for the first time in the trial court can never-theless be raised on appeal. Remember, Russell is not revoked for a "NEW CHARGE", thus the error affecting fundamental rights might be raised in this court under READ V. STATE, 430 So.2d 832 (Miss.1983) BROOKS V. STATE, 209 Miss. 150, 46 So.2d. 94 (1950); IVY V. STATE, 731 So.2d 601 (Miss.1999) .

CONCLUSION

Russell here attempts to demonstrate how being sentenced to the Post-Release Supervision Program does not allow offenders to receive "any" [EARNED TIME ALLOWANCE] toward lessening there sentences and that the imposition of 47-7-34 to him was clear error because 47-7-33 is analogous to 47-7-47 which does not allow offenders serving mandatory sentencing (Mississippi Controlled Substance Act's MCA §41-29-139) to receive "any" [EARNED TIME ALLOWANCE] . That Russell's Sentence under the Statue is "MANDATORY" he could not be sentenced to "any" EARN TIME PROGRAM. This practice continues under the guise of MDOC POLICES/PROCEDURES interpreted as administrative Law to the detriment of Russell .

Russell was not apprised of "ANY" of the condition(s) of the POST=RELEASE SUPERVISION PROGRAM; He has been rein-carcirated for not paying up, and allegedly not reporting (paying - up) after being on the lamb for three (3) years, only to be discovered after an arrest which has not even been placed as a condition for revocation ?? Russell should be placed right back on Post-release and given an opprotunity to come up with a payment plan .

CERTIFICATE OF SERVICE

I, RUSSELL CAMPBELL, Mississippi Prisoner # 59288, do hereby certify that I have on the below subscribed date, mailed a Original Appellant's Brief, and True and corrected copies to the following listed person, U.S. Prepaid Postage :

1. MS. BETTY W. SEPHTON, CLERK, OFFICE OF THE MISSISSIPPI SUPREME COURT/ COURT OF APPEALS, POST OFFICE BOX 249, JACKSON, Ms. 39205.
2. HON. JIM HOOD, THE MISSISSIPPI ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, JACKSON, Ms. 39205-0220 (P.O. BOX 220)
3. HON. JIM POUNDS, DISTRICT ATTORNEY, ALCORN COUNTY, MISSISSIPPI, POST OFFICE BOX 212 , CORINTH, Ms. 38835-0212 .
4. MR. JOE CALDWELL, CIRCUIT COURT CLERK, ALCORN COUNTY, Ms. , POST OFFICE BOX 430, CORINTH, Ms. 38835-0430 .

ON THIS 12 DAY OF SEPTEMBER , 2007 .

RESPECTFULLY SUBMITTED,
Appellant

Cc.
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