

CCNY

Patrick Fluker #101069

S.M.C.I. Area 2 Bldg B-1

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FILED

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Clerk of the Court

Betty W. Sephton

P.O. Box 249

Jackson, MS 39205

Re: Enclosed Appellant's Reply Brief

Dear Mrs. Sephton,

Enclosed you will find Mr. Fluker's Appellant's Reply Brief

for the referenced cause, please file it in your regular

manner. Additionally enclosed is a S.A.S.E. with extra copy of

the brief page for your convenience.

Please stamp it "Filed" and return it to me.

Respectfully Submitted,
Patrick Fluker #101069

In The Court of Appeals of The State of Mississippi

Patrick Fluker

Appellant

VS

State of Mississippi

Appellee

No. 2007-CP-1068-COA

Appellant's Reply Brief

Request for appointed of counsel (Halbert vs Michigan, 125 S.Ct. 2585)

Request Oral Argument

Request Evidentiary Hearing

Filed This 9th Day of April, 2008.

Filed By:

Patrick Fluker (Pro Se) #101069

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In The Court of Appeals of The State of Mississippi

Patrick Flaker

Appellant

vs

No. 2007-CR-1068-COA

State of Mississippi

Appellee

Appellant's Reply Brief
Statement of The Case

The Appellant filed a Pro Se Petition for Post-Conviction Relief

with the Circuit Court of Forrest County, Mississippi. The Court,

Honorable Bob Helrich presiding, summarily dismissed the motion in a

memorandum and order filed 6-5-07. Feeling aggrieved of that ruling

the Appellant appeals raising the following issues: (1) Appellant was illegally

put on Post-Release Supervision and subsequently revoked; and (2) his sentence

was illegal to begin with because it was beyond the statutory maximum

under (Miss. Code Ann. § 99-3-73)

Statement of The Facts

Patrick Fluker, Appellant, filed his appeal of his Post-Conviction Relief which was dismissed by the Circuit Court of Forrest County, Mississippi.

The Grand Jury of Forrest County indicted Appellant on Armed Robbery under (Miss. Code Ann. § 97-3-79) but Appellant entered a plea of guilty

to a lesser Robbery count under (Miss. Code Ann. § 97-3-73) on or about 12-17-2003 before the Honorable Bob Helfrich who imposed a fifteen (15)

year sentence, three (3) years of fifteen (15) years to be served within the custody of M.D.C., twelve (12) years suspended and four (4) years

Post-Release Supervision.

Fluker completed his three (3) year sentence, released on Earned

Release Supervision ("E.R.S.") subsequently put on Supervised Post-Release

Supervision which was later violated on or about 5-4-2005 for being

arrested for Armed Robbery and Poss. of a firearm (violating M.C.A. § 97-5-1).

A Preliminary Hearing was held on 6-23-2005 where the lower

court revoked the supervised Post-Release Supervision and re-instated

the twelve (12) years suspended which Fluker now serves. Fluker also

received a additional twenty (20) year sentence (consecutive) for the new

Armed Robbery which violated his Post-Release Supervision.

Fluker filed a Post-Conviction Relief, on or about 6-05-2006,

Hen. Bob Helfrich denied it which Fluker now appeals seeking relief

on the basis that he was illegally put on Post-Release Supervision and

subsequently revoked under (M.C.A. 899-39-5(1)(g)) as the sentence was

illegal to begin with due to being beyond the statutory maximum

under (Miss. Code Ann. 899-39-5(1)(d)), which the trial court found

in error and should grant Appellant relief.

Argument

I. The Trial Court's Sentence Did Exceed The Maximum Allowed By Statute.

The Miss. Supreme Court decided (*Johnson v. State*)¹ - which served to overrule (*Goss v. State*)² and clear up various discrepancies between (M.C.A. § 47-7-33; 34; 37,) and crediting sentence combinations for calculation towards the maximum allowed on any given crime, portions, as:

- a.) Time to be served within M.D.O.C.;
- b.) Portions that are suspended, and not to be used interchangeably with suspended sentences or between each other;
- c.) Non-Supervised Probation, or Post-Release Supervision, ("P.R.S.");
- d.) Supervised Probation, or Post-Release Supervision under the auspice of M.D.O.C.

The practical effect of the finding was centered around the problem that the Supreme Court found this court to have erred in modifying (Johnson's) sentence of fifteen (15) years, seven (7) to serve in M.D.O.C., eight (8) suspended with five (5) years on P.R.S. only because the trial court intended that the five (5) years P.R.S. derive from the eight (8) suspended years and not to be stacked atop it.

Also clarifying which sentencing combinations can be imposed on defendants with or without prior convictions in returning discession, "Moreover our Appellate Courts should recognize the intentions of our trial judges when they suspend a sentence and either impose probation under [§33], or [P.R.S.] under [§34],"³ the intention of the trial court was critical, in effect the (Johnson) court replaces the old Mechanistic rule under (Gross supra) and gives the illegal sentence determination middle ground by instituting a case by case basis review.

Fluker served out the three (3) years, released and put on "E.R.S." under §138, following completion of that, placed under supervision of M.D.O.C. "P.R.S."

Officer Stan Canoy which was subsequently revoked and the twelve (12) suspended years was re-instated now being served. Distinguished from the (Johnson) court,

the trial judge in the case at bar intended that the "P.R.S." be supervised and stacked on top or in addition to the three (3) and twelve (12) years respectively.

1.) 925 So. 2d 86 (Miss. 2006.)

2.) 721 So. 2d 144 (Miss. 1998)

3.) Johnson Supra @ 925 So. 2d 102-3 (p. 31)

This court may find a significant need to depart and distinguish cases where the total sentence is actually imposed as opposed to when they are not.

Finally the main point, the trial court sentenced Fluker pursuant to, (McA. 847-7-34) stacking each sentencing component atop each other in interpreting [§§] the (Johnsonsupra) court edicted that the courts undertake to calculate, that is a.) Total years of incarceration and

b.) The period of P.R.S.# Adding them together in order to determine in each case whether the individual was illegally sentenced, if the total of the two do not exceed the statutory maximum then the lower court acted within it's authority and jurisdiction, however, the sentence is illegal if it exceeds the statutory maximum cap.

Following those directions Fluker adds the three (3) years initially served with the twelve (12) years now imposed for part "a". Totalling fifteen (15) years, adding that to the... supervised... P.R.S. of four (4) years for part "b". The total is (19) years. However, under (M.C.A. § 97-3-73) for Robbery, the maximum penalty is fifteen (15) years under (M.C.A. § 97-3-5) and not life as the lower court found in error. Here after adding the two parts we find that the (19) years exceeds the fifteen (15) year statutorily allowed by four (4) years, the exact amount of time the P.R.S. was set for. That time cannot be magically converted into time that does not count, the conclusion being that as it stands when Fluker finishes the instant sentence, he will have served beyond fifteen (15) years under the direct supervision of M.D.O.C. which is above and beyond the statutory maximum and against the (Johnson supra) holding that "the period of [P.R.S.]

is limited only to the numbers of years, which when added to the total period of incarceration, would not exceed the maximum penalty statutorily prescribed for the felony offense committed⁵ and since it occurred exactly that way by the exact time of P.R.S., it was illegal to subsequently revoke the P.R.S. and re-instate the twelve (12) years. Fluker argues that since the placement and revocation was illegal this court should terminate the twelve (12) year sentence at the time it was revoked on or about 6-23-2005 and render it moot while transferring the time served since 2005 to date to the consecutively imposed Armed Robbery conviction and sentence that served as the basis of the revocation of P.R.S. Because to refuse to do so will constitute an illegal sentence where Fluker will have served more than fifteen (15) years under M.D.C. Jurisdiction.

The last question which must come up as a result of (Johnson supra) if this court hesitate to grant the relief asked, is how does the court resolve the question of the Appellant facing the danger of serving time above and beyond the statutorily maximum where the § 34 calculations are violated. The only other answer Fluker sees is that the courts would have to credit, toward the sentence, all time served under P.R.S. so if the trial court maxes out the statutorily maximum cap in the combinations of time to serve and suspended sentence alone, as was done here, 3 years and 12 years, then to avoid the danger of serving above the maximum with supervised P.R.S. (as is happening here, being illegal exceeding the max) time when given, the time served on the streets under supervised P.R.S. will have actually reduce the suspended time or rather be given credit for it so in the event the suspended time is revoked the sentence can be imposed but must subtract the P.R.S. time so that in the end the only time under direct supervision of M.D.O.C. meets the statutory maximum allowed but will not

Conclusion

Fluker prays that this court Nunc pro tunc terminate the revocation of June 23, 2005 and credit the time toward his Armed Robbery twenty (20) year sentence which should be granted. Based upon the arguments presented herein as supported by the record on appeal the Appellant would ask this reviewing court to reverse the trial court's denial of Post-Conviction Relief.

Respectfully Submitted,

Patrick Fluker # 101069
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Leakesville, MS 39451

Certificate of Service

I, Patrick Fluker, Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above

and foregoing Appellant's Reply Brief to the following:

1.) Honorable Robert B. Helfrich 2.) Tom Mark Weathers

~~Circuit Court Judge~~

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~~Hattiesburg, MS 39403~~

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Filed This 9th Day of April, 2008

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