IN THE COURT OF APPEALS STATE OF MISSISSIPPI

COPY

NO. 2007-CP-01142-COA

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COURT OF APPEALS

RAY CHARLES LENOIR — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
MONROE COUNTY, MISSISSIPPI

REPLY BRIEF FOR APPELLANT

BY: Ray Lenoir

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RAY CHARLES LENOIR APPELLANT

VERSUS

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REPLY BRIEF FOR APPELLANT

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

Lenoir asserted that in the trial court his 15-year sentence for uttering forgery in September, 2003, involving a check in the amount of $250.00, was illegal in light of the new statute setting forth the penalty for forgery, Miss . Code Ann. §§ 97-21-33,[1] as amended July, 2003, and in light of Miss. Code Ann. §§ 99-19-33.[2]

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[1] § 97-21-33. Penalty for forgery. Persons convicted of forgery shall be punished by imprisonment in the Penitentiary for a term of not less than two (2) years nor more than ten (10) years, or by a fine of not more than Ten Thousand Dollars ($10,000.00), or both; provided, however, that when the amount of value involved is less than Five Hundred Dollars ($500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars ($1,000.00), or both, within the discretion of the court.

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

[2] § 99-19-33. **Where penalty modified milder penalty may be imposed.** If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court but no conviction, otherwise valid, shall be set aside and new trial granted merely because of an error of the court in fixing punishment. Such error shall only entitle the party injured to vacate or reverse the judgment as to the punishment, and the legal punishment shall then be imposed by another sentence based on the original conviction or plea of guilty.

SOURCES: Codes, 1906, § 1574; Hemingway's 1917, § 1336; Laws, 1942, § 2609; Laws, 1930, § 1362.

The Brief filed by Appellee never addresses this issue. This Court should consider the issue as confessed where the brief do not respond to such matter. Ashburn v. Ashburn, 970 So.2d 204 (Miss.App. 2007).

> In the case sub judice, Mrs. Ashburn did not file a brief in response to Mr. Ashburn's appeal. The "`[f]ailure to file a brief is tantamount to confession of error and will be accepted as such unless the reviewing court can say with confidence, after considering the record and brief of [the] appealing party, that there was no error.'" Sanders v. Estate of Chamblee, 819 So.2d 1275, 1277(¶ 5) (Miss. 2002) (quoting Dethlefs v. Beau Maison Dev. Corp., 458 So.2d 714, 717, (Miss. 1984)). "`Where the appellant's brief makes out an apparent case of error . . ., we do not regard it as our obligation to look to the record to find a way to avoid the force of the appellants' argument.'" Id.

While the ruling in Ashburn applied to a civil proceeding, Appellant would assert to this Court that a post conviction proceeding is a civil proceeding which Ashburn should be applicable to. *"The motion under this article shall be filed as an original civil action in the trial court."* McLamb v. State, 2007-CP-00496-COA (Miss.App. 1-29-2008); A civil action brought under the Uniform Post-Conviction Collateral Relief Act is a collateral attack on a judgment of conviction and is separate and distinct from the underlying criminal proceeding. Miss. Code Ann. §99-39-5 (1) (Rev.2007). Holmes v. State, 966 So.2d 858 (Miss.App. 2007). The rationale of the law is therefore correct. While the state did file a brief, the state's brief do not address the claim and therefore is tantamount to confession of error, The state did embrace the trial court's order rendered in this case. Said instrument is attached to the very back of the state's brief and identified as Exhibit "A". While all evidentiary documents should be confined to those in the record, the state appears to not be accustomed to following protocol.

The ruling by the Court in regards to this claim also failed to fully address the argument and point. The Court's finding in this matter was:

At the time of his guilty plea on June 25, 1999, uttering a forgery was punishable as a felony if the amount in question exceeded one hundred dollars. and punishable in the state penitentiary for not less than two (2) years nore more then fifteen (15) years. The statute was amended in July 2003 to provide:

> when the amount of value involved is less than Five Hundred Dollars ($500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars ($1,000.00), or both, within the discretion of the court.

Miss. Code Ann. §97-21-33 (1972).

The statute state that it is effective from and after July 1, 2003. Since Petitioner was indicted on March 18, 1999, and sentenced on June 25, 1999, clearly Mr. Lenior was indicted and sentenced well before this statute was effective. (R. 76)

The trial court never addressed nor made a finding on the statute and law presented under Miss. Code Ann. §99-19-23 (1972) which allows a milder penalty when the law is changed to allow such milder penalty. The statute do address whether such milder penalty is applicable only to those cases which has not become final before the passage of the milder penalty statute. Even where the conviction or plea of guilty has became final before the new milder penalty statute is effective. Miss. Code Ann. §99-19-23 (1972). The trial court asserted that Lenior was indicted on March 18, 1999 and sentenced on June 25, 1999. However, the record disputes this. Lenior was actually sentenced to the penitentiary on September 2003, months after the effective date of Miss. Code Ann. §99-19-23 (1972). The Mississippi Supreme Court held in Daniels v. State, , 1145(¶ 17) (Miss. 1999) that "when a statute is amended before sentencing and provides for a lesser penalty, the lesser penalty ***must*** be imposed." This ruling takes away assumption that the trial court has discretion in whether a lesser sentence will be imposed under the statute. The Supreme Court has fund, in mandatory language, that a lesser sentence must be imposed.

Appellant would urge that the Court reverse and remand this case to the trial court with instructions that Appellant be re-sentenced in accord with the provisions of Miss. Code Ann. §99-19-23 (1972).

In it's decision on the initial appeal of this case the Mississippi Court of Appeals issued a mandate, which was the law of the case, directing the trial court to conduct an evidentiary hearing to "***determine the status of Lenoir's federal sentence***." see Lenoir v. State, 943 So.2d 113 (p7) (Miss. App. 2006).[3] There can be little argument that this mandate is indeed constituted and should be "considered the law of the case." See Hymes v. State, 703 So.2d 258 (p14) (Miss. 1997). And, a trial court on remand "must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." See United States v. Matthews, 312 F.3d 652, 657 (5th Cir. 2002).

As the record on remand will demonstrate, the trial court went far beyond this Court's mandate during the evidentiary hearing conducted on remand. While the state acknowledges that Lenior presented this issue in his brief, the state never actually addresses this issue as to why and whether the trial court exceeded the court's mandate. All this court asked the trial court to determine was the staus of Lenior's federal sentences and a ruling made on the post conviction relief motion. The trial Court, while addressing many other matters, never yet made a determination on the status of the federal sentences.

This Court should reverse and render the sentence and direct that Appellant be released from custody.

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[3] Notable, "once the status of (the federal) sentences is determined, the trial judge should take appropriate action to ensure his original sentencing order is properly carried out." See Toney v. State, 906 So.2d 28 (p6) (Miss. App. 2004), quoting Bell v. State, 759 So.2d 1111 (p20) (Miss. 1999).

As previously pointed out by Lenior, The record demonstrates that the trial court considered evidence of Lenoir being convicted of an indicted charge of possession of a controlled substance. (R. 74)

The State has not refuted the fact that this evidence is irrelevant in that it has no tendency to make the existence of any fact concerning the status of Lenoir's federal sentence. See M.R.E. 401. The fact the mandate of this Court directed the trial court, after an evidentiary hearing, to determine the status of Lenoir's federal sentences. Lenoir, 943 So.2d at P7. Any new conviction for a state possession charge is not relevant to the status of Lenoir's federal sentence.

Lenoir would renew his contention to this Court that any new conviction is not relevant to the issue before this court; that is, whether Lenoir's state post-release sentence cannot begin until after the completion of his preceding federal post-release sentence, where said the state sentence was ordered to run consecutive to said federal sentence. Can Lenior be on two separate release supervisions at the same? Which would take precedent over the other? This case does not challenge the legality of a new felony sentence from a new conviction. This case only challenges a sentence given Lenoir for revocation of state post-release supervision. Moreover, Lenoir would assert, as the state has not demonstrated, that he has no new felony sentence. The alleged possession charged resulted in a guilty plea to a mere misdemeanor charge.

Finally, Lenoir contends that the irrelevant evidence of a new conviction improperly influenced the trial court. The trial court's decision was based on a line of authority which involved the state's authority to prosecute new charge committed while of federal probation. Such issue was fully set out in issue fourt of the Brief for

Appellant. But in the instant case Lenoir does not challenge the state's authority to prosecute new crimes committed while defendant is on federal probation. What Lenoir challenges is the state's authority to revoke a state probationary sentence when it is ran consecutive to a preceding federal probationary sentence while that federal probationary sentence is being served and/or when that federal probationary sentence has never been revoked.

Appellant would urge this Court to reverse and render this case and direct that Appellant be released from custody.

Lenior would demonstrate that throughout the post-conviction proceeding, including Lenior's initial appeal in this case, Appellant Lenoir claimed that where his state post-release supervision sentence was ordered to run consecutive to his preceding federal post-release supervision sentence, his state post-release sentence could not commerce until after the federal post-release sentence ended, thus the state court could not commence its post-release sentence, and revoke the same, while the federal post-release sentence remained running.[4]

However, in reaching this post-conviction claim for the second time after remand by the Mississippi Court of Appeals, the trial court rested its decision on case laws that decided whether state authorities could prosecute and convict defendant for a new charge that was committed while the defendant was on federal probation. See order June 14, 2007, citing Stand v. Schmittroth, 251 F.2d 590 (9th Cir. 1957); Pasela v.

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[4] Against, Lenior would point out that notably, the Mississippi Court of Appeals agreed with this point, finding that an evidentiary hearing must be held to determine the status of the federal sentence. Lenoir, 943 So.2d at P7. Otherwise, there would have been absolutely no need to conduct an evidentiary hearing nor to determine the status of federal sentences. If Lenior was on federal supervision then he could not have also been on state supervision. It is as simple as that. The trial court was only directed to make that determination. In this state, evidentiary hearings are not ordered until the prisoner's post-conviction motion states a claim upon which relief may be granted. Myers v. State, 583 So.2d 174, 176 (Miss. 1991), relying on Neal v. State, 525 So.2d 1279, 1280-1281 (Miss. 1987).

Fenno, 167 F.2d 593 (2d Cir. 1948); Stewart v. United States, 267 F2d 378 (10th Cir. 1959); United States ex. rel. Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954). Although these cases may correctly state the general rule, they are not dispositive in this case where the question is not whether state authorities can properly exercise jurisdiction to prosecute state crimes committed by person on federal probation. Lenoir has never claimed the state has no jurisdiction to prosecute state crimes committed by one on federal probation.

The trial court also relied on United States v. Cole, 416 F.3d 894 (8th Cir. 2005), Thomas v. Brewer, 923 F.2d 1361 (9th Cir. 1991) and Wright v. Benov, 201 Fed Appx. 541 (9th Cir. 2006). (R. 74-78) As previously stated, such cases are not dispositive of Lenoir's case since the issue presented by Lenior do not include whether Lenior would be entitled to credit on his federal sentence while in state custody. The state court directed that Lenior's state sentence would be served consecutive to the federal sentence. This means the state post-release sentence begins when the federal post-release sentence ends. Milam, 578 So.2d at 274, citing 99-19-21. To have such sentences run at the same time, or give credit for one while the other is being served, would amend the original sentencing order long after the court term ended, which is strictly forbidden by law. Bell, 759 So.2d at P19, citing Dickerson, supra.

The trial court also relied on ,United States v. Vann 207 F. Supp. 108 (E.D.N.Y. 1962). (R. 74-78) United States v. Vann is not dispositive because the situation of defendant being on probation or parole in one jurisdiction, but arrested and placed in custody for probation or parole violation in another jurisdiction. As previously pointed out, and not refuted by the state, when the prisoner in Vann was taken into federal

custody for service of his 1958 conviction, he was not on state probation or parole. The Vann prisoner claimed the federal authorities lost jurisdiction over his January 1958 conviction when they allowed him to be released from state prison in March, 1958 without placing him in custody. Vann, 207 F. Supp. at 109-110. Appellant Lenoir makes no such claim. Thus, Vann is not controlling nor applicable in this case.

Appellant believes that he should renew his point that the trial court cited Brewer v. Maroney, 315 F.2d 687 (3rd Cir. 1963) as authority to deny Lenoir's post- conviction claim. See Order dated June 14, 2007. The Brewer case was a close call because in that case the defendant was taken into custody by the state for violation of state parole, while he was serving federal parole. But the Brewer case is materially distinguishable because the prisoner's state parole started in May, 1952, long before the January, 1955 federal sentence, and before the June 1961 federal parole. Brewer, 315 F.2d at 687. In the case at bar the state post-release sentence did not take place before the federal post-release sentence. Had that been the case Lenoir would not be before the court. But where the state post-release sentence was after, and was ordered to run consecutive to, the federal post-release sentence, it was clear that the state post-release sentence could not begin until after the completion of the federal post-release sentence. Milam, 578 So2d 274, citing §99-19-21. Unlike in Brewer, supra, to begin the state post-release sentence, or any revocation of that state post-release sentence, before completion of the federal post-release sentence, would be to disregard the portion of the original sentencing order that the state post-release sentence runs consecutive to , thus after, the federal post-release sentence, and would in effect, be amending the original sentencing order after the end of the court term, "a

practice which this court has forbidden." Bell, 759 So.2d at P19, citing Dickerson, supra.[5] The state certainly has not satisfactorily addressed this issue in it's brief.

No case relied upon by the trial court governs Lenoir's post-conviction relief claim, and the the fact that the trial court erroneously denied Lenoir post-conviction claim. Rather, the cases governing Lenoir's post-conviction relief claim are those relied upon by Lenoir in his initial appeal of this case, Lenoir, Supra, as set out in the next, and final, issue of this appeal.

Again, the Mississippi Court of Appeals directed the trial court to determine or remand "the status of Lenoir's federal sentence." Lenoir, 943 So.2d at P7.

The trial court record evidence demonstrates that Lenoir's federal post-release supervision sentence was running "unrevoked by the federal court" at the time of the state court's revocation of Lenoir's, state post-release supervision sentence.[6] It is undisputed that Lenoir had a 5-year federal post-release supervision sentence upon his release from federal prison in February, 2003, at page 5 (lines 26-27) and page 24 (lines 24-28). The trial court had knowledge that federal sentence had not been revoked at the time of the state revocation proceeding where the trial court said during that state proceeding that Lenoir "***may***" receive revocation of federal probation. Id. at page 33 (lines 4-5).

It is conclusive that the status of Lenoir's federal post-release sentence remains and, to this date, has not been revoked. No federal judge has ever revoked that federal sentence. F.R. Crim. P. 32.1 (b)(2).

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[5] The trial court also relied on Jones v. Cunningham, 371 U.S. 236 (1962). (R. 77). The Jones case is short and simple; it ruled that a person on parole is in custody for purposes of bringing federal petition for writ of habeas corpus. That issue is not before this court. Thus, Jones is not relevant.

[6] Federal law provides Lenoir due process prior to any revocation of his federal post-release supervision sentence. F. R. Crim. P. 32.1 (b)(1), (2).

In 1999, the state court judge ordered that Lenoir's state post-release sentence run "consecutive" with Lenoir's federal post-release sentences. (R. at pages 49, 50, 51, 57) All members of the bench, and bar, very well knows that a "consecutive sentence" is defined as one which begins to run after the preceding sentence. See Merriam -Webster's Dictionary of Law (1996). State law has spoken, and says, that "when, by express order, a person is sentence to serve consecutive terms, the terms of the second, or each subsequent, conviction shall commence at the completion of the service of the term for the preceding conviction." Milam, 578 so.2d at 274, citing Miss. Code Ann. §99-19-21. By express order in 1999 the trial judge ordered Lenoir's state post-release sentence to run consecutive to, thus at the completion of, the service of the terms of his preceding federal conviction. Thus, as a matter of state law, Lenoir's state post-release sentence, and its supervision, could not begin until the terms of federal post-release sentence ended.

Lenoir would urge this Court that to begin his state post-release supervision sentence before the post-release terms of his federal conviction ends, would, in effect, modify and amend the 1999 state sentencing order long after the end of the term of court in which Lenoir was sentenced, a practice which is forbidden by the Mississippi Supreme Court. Bell, 759 So.2d at p19, citing Dickerson, supra.

Lenoir also argues that to permit his consecutive state post-release supervision to begin, and be revoked, before the post-release supervision terms of his preceding federal conviction ends, would interfere with the United States power to enforce its criminal laws and its federal probation. But where the United States was not a party to the state prosecution in 1999 this power of the United States prosecution in 1999 this

power of the United States was not a party to the state persecution in 1999 this power of the united States cannot be affected by any proceedings in the state court. Bell, 759 So.2d at p29, citing United States v. Pudilla, supra. Appellant's consecutive state post-release supervision preceding should not be allowed to affect the post-release terms of the preceding federal conviction and the federal court's power to enforce those terms of the federal sentence.

Lenoir contends that the interference from the trial court in the instant case can bring nothing but reproach upon the administration of justice. The trial court has modified and amended the express consecutive terms of the original sentencing order years after the term of court ended. The trial court has begun a state post-release supervision term which was expressly ordered to run consecutive to the terms of a preceding federal sentence, although the terms of that federal sentence has not ended, setting at naught a federal judge's post-release sentencing order, a state circuit judge's expressed consecutive terms order, and the law cited in this issue.

Appellant would again point out that the express terms of the original sentencing order, that the state post-release sentence runs after the completion of the terms of the preceding federal conviction, must be carried out. This court should vacate the decision of the trial court and direct that the state post-release sentence begin, consecutive to, and at the completion of the terms of Lenoir's federal post-release sentencing.

CONCLUSION

This court should reverse the trial court's denial of post-conviction relief. Further, in view of the state's response and the actions of the trial court on remand, this court

should order Lenoir discharged to his pending federal post-release sentence. The trial Court was asked to determine the status of the federal sentences and failed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I, Ray Charles Lenoir, have this date served a true and correct copy of the above and foregoing Reply Brief for Appellant, by United States Postal Service, first class postage prepaid, upon:

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This, the 29th day of February, 2008.

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