

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2007-CP-01194

**DAVID E. LYONS A/K/A FOX
APPELLANT**

vs.

**CHRISTOPHER B. EPPS
APPELLEE**

**On Appeal From the Circuit Court
of Leflore County, Mississippi**

BRIEF OF APPELLEE

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record 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. David Lyons, Appellant
2. Christopher Epps, MDOC Commissioner, Appellee
3. Margaret Carey-McCray, Circuit Court Judge
4. Jim Hood, Attorney General

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellees:

1. Jane Mapp, Special Assistant Attorney General, State of Mississippi
2. James Norris, Special Assistant Attorney General, State of Mississippi

By: Jane Mapp

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ISSUE¹

I. Whether the Circuit Court Erred in Finding That Appellant's Inmate Time Sheet Reflects That His Sentence Is Accurate and That He Has Received Credit for All Time to Which He Is Entitled.

¹Lyons does set out a Statement of the Issues in his Brief, but since he does not separately address these issues the Appellee has presented his own Issue for Review that better reflects Lyons' argument. Lyons' State of The Issues reads as follows:

1. Mississippi Department of Corrections officials who's [sic] duty or authority it is to compute/calculate Petitioner's sentences in accordance with order(s), statutes, and law through omission of not crediting jail time served has infringed upon Petitioner's Rights by extending the time Petitioner had to do to complete sentence(s).
2. That M.D.O.C. Records Department official(s) has [sic] violated Petitioner's 5th Amendment Right not to be successively punished for the same conviction by making Petitioner serve 7 year mandatory sentence twice.
3. M.D.O.C. official has [sic] infringed upon Petitioner's constitutional rights by denying Petitioner due process of law, therefore offending the 8th and 14th Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

David Lyons, an inmate legally incarcerated within the Mississippi Department of Corrections (“MDOC”) is appealing to this Court from the May 18, 2007 Order of the Circuit Court of Leflore County, Mississippi, dismissing his pleading entitled “Amended Petition for Writ of Habeas Corpus and/or Motion to Show Cause”. (C.P. at 40).² Lyons was seeking judicial review of an adverse decision rendered by MDOC’s Administrative Remedy Program regarding the computation of his term to serve.

Lyons was originally convicted in Monroe County Circuit Court on or about August 5, 1994 on three counts of Burglary in cause numbers CR93-067, CR93-068, and CR96-069. He was sentenced to three consecutive seven (7) year terms which the court suspended for time served. On January 19, 1995, Lyons’ suspended sentences in these three cause numbers were revoked giving him a total term of 21 years with credit for all time served. (C.P. at 14). Subsequently, on May 10, 1995, Lyons was convicted by a jury of Burglary of a Building as a Habitual Offender in cause number CR95-022. He was sentenced to another seven (7) year term as a habitual offender to run consecutively to the three sentences previously imposed. (C.P. at 15). This gave Lyons a total term of 28 years to serve with the last seven (7) years being mandatory.

Lyons argued in his motion that MDOC has not computed his consecutive sentences correctly pursuant to Miss. Code Ann. § 99-19-21. (C.P. at 6-7). He also argued that he

²C.P. = Clerk’s Papers

should have retained his parole eligibility on his first three sentences even though he received a consecutive habitual sentence which he agrees is not parole eligible. (C.P. at 7). Lyons goes on to argue in his motion that MDOC has incorrectly applied his pre-sentence jail time credits. (C.P. at 9-10). Lastly, Lyons asserted that MDOC unfairly denied him meritorious earned time (M.E.T.) and trusty time on his non-mandatory sentences.³

Circuit Court Judge Margaret Carey-McCray denied Lyons' motion in an Order dated March 20, 2007 and stamped filed by the Circuit Clerk on May 18, 2007. (C.P. at 40). The lower court found that Horton's "inmate time sheet reflects that his sentence is accurate and he has received all the earned time to which he is entitled." (C.P. at 40).

Lyons did not mail his Notice of Appeal until July 10, 2007, almost two months after judgment was entered. Lyons filed a "Motion for Excuse" on July 17, 2008 seeking to reopen the time for appeal pursuant to M.R.A.P. 4(h) stating that he did not receive a copy of the trial court's March 20, 2007 order until some 97 days after that date. (C.P. at 61). Ninety-seven days after March 20, 2007 would be June 25, 2007, some 15 days prior to his original notice of appeal and 22 days prior to his Rule 4(h) motion. M.R.A.P. 4(h) requires that a motion to reopen the time for appeal be filed within seven (7) days of receipt of notice of judgment. Lyons' motion was not filed within seven (7) and therefore it was not timely filed.

³In his brief before this court Lyons states that this claim is now moot inasmuch as MDOC has since awarded him MET and Trusty time on his non-mandatory sentences. See Page 1 of Lyons' "Appeal Brief and Brief Memorandum in Support of Application for Extraordinary Writ."

At the same time Lyons filed his "Motion to Excuse" he also sought leave to appeal *in forma pauperis*. (C.P. at 64). Judge Carey-McCray granted Lyons' motion to proceed *in forma pauperis*, but never ruled on his motion for an out-of-time appeal. (C.P. at 102).

SUMMARY OF THE ARGUMENT

This Court is without jurisdiction to hear this appeal in as much as the appeal was untimely filed.

Lyons has received credit toward his total term of sentence for all pre-sentence jail time.

Lyons had received a 50% earned time allowance of 10 ½ years off the 21 year non-mandatory portion of his sentence.

Lyons is not parole eligible due to the fact that he received a consecutive mandatory sentence. When an offender who is serving a parole eligible sentence subsequently receives a consecutive sentence that is not parole eligible, the offender must complete the term of imprisonment on the first sentence before the second or subsequent consecutive sentence begins to run. This is in conformity with Miss. Code Ann. § 99-19-21.

ARGUMENT

I. Whether the Circuit Court Erred in Finding That Appellant's Inmate Time Sheet Reflects That His Sentence Is Accurate and That He Has Received Credit for All Time to Which He Is Entitled.⁴

⁴Lyons does set out a Statement of the Issues in his Brief, but since he does not separately address these issues the Appellee has presented his own Issue for Review that better reflects Lyons' argument.

Although Lyons' argument is not completely clear, what is clear is that he takes issue with the way MDOC has computed his sentence. Both parties agree that Lyons received four consecutive seven (7) year sentences, the first three of which are non-mandatory and the last of which is to be served as a habitual offender.

Lyons argue that he has not properly received credit toward his sentences for all jail time. Lyons' seeks not only pre-sentence jail time, he also wants "jail time credit" for time spent in the county jail after being sentenced. His probation was revoked on the first three Burglary sentences on January 19, 1995 and he became a state inmate on that date. Lyons argues that since he actually remained in the county jail until June 27, 1996 he should receive "jail-time credit" for that time as well, even though he was getting credit as a state inmate as of January 19, 1995. If the post-sentence jail-time was credited toward his sentence in the "Pre-sentence/Pre-trial Jail Time" section of his time sheet he would be receiving credit twice for the same period of time, once as pre-sentence time and once as post-sentence time.

As of the date an offender is sentenced on any count he becomes a state inmate for computation purposes even though he may remain physically housed in the county jail for a period of time. Only time spent in a county jail prior to sentencing is posted to a time sheet as "Pre-trial/Pre-sentence Jail Time." This "Pre-trial/Pre-sentence Jail Time" is subtracted from the offender's earliest sentencing date to get his "Begin Date." The reason being that once an offender is sentenced he is considered a state inmate and is getting credit as such regardless of where he may be housed.

Lyon's "Begin Date" of March 24, 1993 does not mean that he did not receive credit for time spent in jail before that date, nor does it mean that Lyons was actually in jail from March 24, 1993 until he was sentenced on January 19, 1995. The "Begin Date" is just a working date that is obtained as the result of a mathematical formula whereby the number of days an offender spends in jail prior to sentencing is subtracted from the actual date of sentence.

Lyons admits and the record reflects that he was actually in jail prior to sentencing from December 19, 1992 - August, 5, 1994 and then again from November 12, 1994 until he was sentenced on January 19, 1995. This amounts to 662⁵ days of pre-sentence jail time. Lyons spent a total of 666 days in jail on these charges prior to being sentenced and when these 666 days are subtracted from his January 19, 1995 sentence date a "Begin Date" of March 24, 1993 is obtained.

Lyons' Inmate Time Sheet (C.P. at 19) reflects that he has received credit for all pre-sentence jail-time:

Sentence Date: 1/19/1995

Less 666 Days Pre-Trial/Pre-Sentence Jail Time

Sentence Begin Date: 03/24/1993

Lyons also takes issue with the order in which his sentences are listed on his time sheet. He seems to maintain that when he was first incarcerated his time sheet only reflected

⁵Although it is not explained in the record, Lyons was also given 4 days of pre-sentence Jail-Time credit from 11/19/1992 - 11/23/1992.

the seven (7) year habitual sentence, but then at some point when that sentence was set to expire the other sentences were loaded and so he is being required to serve the habitual sentence again since it is now the last sentence on his time sheet. While there was apparently some confusion early in his incarceration as to the number of sentences Lyons had received, that confusion has since been corrected. Lyons agrees that he has four consecutive seven (7) year sentences and that on the last sentence he received he was convicted as a habitual offender making it mandatory.

Another review of Lyons' Inmate Time Sheet shows that his sentences have now been correctly loaded and that only the last seven (7) years in mandatory. On January 19, 1995, Lyons' suspended sentences were revoked and he was sentenced to three consecutive terms of seven (7) years for a total term of 21 years in the custody of MDOC with the possibility of parole. Because of the date his crimes were committed, Lyons was entitled to a 50% earned time allowance pursuant to Miss. Code. Ann. § 47-5-138 (Supp. 1994) and to parole eligibility after serving 25% (5 years, 3 months) of his sentence pursuant to Miss. Code Ann. § 47-7-3 (Supp. 1994).

With a Begin Date of March 24, 1993 this made his Maximum Discharge Date approximately March 24, 2014. When the 50% Earned Time Allowance (10 ½ years) is subtracted, his Tentative Discharge Date became approximately September 24, 2003. His Parole Eligibility would have been approximately June 24, 1998. However, on May 10, 1995 Lyons was convicted in Monroe County on yet another count of Burglary and was sentenced to a consecutive seven (7) years as a habitual offender. This additional sentence pushed his

Tentative Discharge date out to approximately September 24, 2010 and his Maximum Discharge Date to March 24, 2021 which are correctly reflected on his Inmate Time Sheet.⁶ (C.P. at 27). It also caused him to lose his parole eligibility on his non-mandatory sentences.

Pursuant to Miss. Code Ann. § 99-19-21 when an offender is sentenced to two or more consecutive terms the imprisonment on the second or each subsequent term shall commence at the termination of the imprisonment for the preceding conviction.⁷ What this means is that when an offender who is serving a parole eligible sentence subsequently receives a consecutive mandatory sentence, the offender must discharge the non-mandatory sentences before the consecutive mandatory sentence begins to run.⁸ Otherwise, the offender would serve a portion of one sentence up until his parole eligibility date, then he would begin serving his mandatory sentence and once the mandatory sentence was completed he would recommence serving the rest of the original sentence. This is contrary to Miss. Code Ann. § 99-19-21 which states:

(1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

⁶There is a discrepancy of a few days on Lyons' time sheet because for computation purposes MDOC considers one year to be 365 days, therefore every Leap Year an offender receives an extra day off of his sentence.

⁷This would be his conditional discharge date or what is now known as his tentative discharge date.

⁸On non-mandatory consecutive sentences, Miss. Code Ann. § 47-5-139(2) does allow for commutation based upon the total term of the sentences.

The Court of Appeals in *Snow v. Johnson*, 913 So.2d 334 (Miss.Ct.App. 2005), citing *Taylor v. Mississippi State Probation and Parole Board*, 365 So.2d 621, 622 (Miss. 1978), has approved this interpretation of statutory law regarding consecutive mandatory sentences.

This means that since Lyons had already received non-mandatory sentences totalling 21 years at the time he was convicted and sentenced to the consecutive seven (7) year habitual sentence, he had complete his non-mandatory sentences before beginning to serve his consecutive habitual sentence. While Lyons' original sentences were parole eligible, when his parole eligibility date on those sentences came up he could not be paroled because he had a mandatory sentence that he had to serve following the termination those sentences.

Since he could not be paroled he continued to serve those sentences until his tentative discharge date and then he began serving the consecutive seven (7) year mandatory term.

In summary, Lyons has a total term to serve of 28 years. His earliest sentencing date was January 19, 1995. He had 666 days of pre-sentence jail-time making his "Begin Date March 24, 1993 and his Maximum Release Date March 24, 2021. Due to the law at the time he committed his crimes, he has received a 50% earned time allowance of 10 ½ years off the first 21 years of his sentence leaving him 17 ½ years to serve. When 17 ½ years his added to his Begin Date, this gives him a Tentative Discharge Date of September 24, 2010. Lyons does not have a Parole Eligibility Date because he must actually discharge his parole eligible sentences before his consecutive mandatory sentence begins to run. These dates all coincide with the dates on Lyons' Inmate Time Sheet. For this reason, it is clear that the trial court

did not err when it found that MDOC had correctly calculated Lyons' sentences and he has received all credits to which he is entitled.

CONCLUSION


Based on the arguments of fact and law herein above, the dismissal of Appellant's complaint by the lower court was appropriate and should be affirmed.

Respectfully submitted,

CHRISTOPHER B. EPPS
DEFENDANT-APPELLEE

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

JANE L. MAPP
SPECIAL ASSISTANT ATTORNEY GENERAL
MS BAR NO.: [REDACTED]

BY: 

CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Brief of Appellee** in the above-styled and numbered cause to the following:

David Lyons, #04687
Stone CCF
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Wiggins, MS 39577

Hon. Margaret Carey-McCray
Circuit Court Judge
P.O. Box 1775
Greenville, MS 38702-1775

This, the 5th day of September, 2008.

A handwritten signature in cursive script, appearing to read "Jane L. Mapp", is written over a horizontal line.

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