

COPY

Court of Appeals of The State of Mississippi

Sammuel L. Goudy

FILED

Appellant

vs.

FEB 22 2008 NO. 2007-CP-01569-COA

State of Mississippi

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Appellee

Appeal From The Circuit Court of Harrison County Miss.

Appellant's Opening Brief

(ORAL ARGUMENT NOT REQUESTED)

By: Sammuel L. Goudy, Appellant (pro-se)

Sammuel L. Goudy, # 39765

C-Zone, S.C.R.C.F.

1420 Ind. Pk. Rd.

Wiggins, MS 39577

I.

Statement Regarding Oral Argument

Appellant does not specifically request oral argument in this case as it is believed that the issues are capable of being adequately briefed by the parties. However, in the event the Court believes oral argument would be helpful or beneficial to the Court then the Appellant does not oppose oral argument and would in the Court's discretion, ask that counsel be appointed to deliver such oral argument for Appellant.

By: Samuel L. Goudy, Appellant, pro-se

Samuel L. Goudy, # 39765

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Certificate of Incarceration

Appellant, Samuel L. Goudy, was sentenced to the custody of the Mississippi Department of Corrections (M.D.C.) and is incarcerated at the Stone County Regional Correctional Facility, located at Wiggins, Ms., where he is continuously serving the sentence imposed by the trial court.

Respectfully Submitted,

By: ~~Samuel L. Goudy~~
Samuel L. Goudy # 39765
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Statement of Issues

Sammuel L. Goudy, Appellant pro-se, presents the following as his issues for this appeal:

Issue One

Whether Goudy's sentence contained in the "Corrected Sentencing and Post Release Supervision Order" (R-35 thru 37) is pursuant to M.C.A. Section 47-7-34 and contains a four (4) year term of p.r.s. or if said sentence is pursuant to M.C.A. section 47-7-33 and contains a four (4) year term of supervised probation.

Issue Two

Whether Goudy's counsel was deficient for advising him to enter a plea of guilty without first obtaining a ruling on the pending motions for a constitutional speedy trial violation in which, if had been competently pursued, there was a "reasonable probability" that Goudy could have been relieved of all criminal jeopardy, and would not have entered a plea of guilty.

Statement of Case

Samuel L. Goudy, Appellant pro-se, presents the following as his statements of this case:

On January 17, 2003, Goudy was arrested and charged with transfer of controlled substance. (R-27). The Appellant did not post bond and was incarcerated on said date.

Fourteen (14) months later, on March 8, 2004, Goudy was indicted for transfer of controlled substance in violation of section 41-29-139(a)(1), Miss. Code of 1972, as amended, and as a habitual offender pursuant to section 99-19-81, Miss. Code of 1972, as amended. (R-25, 26)

Thereafter, twelve months later, on February 15, 2005, Goudy enter a plea of guilty to said charge as a non-habitual offender upon the State's recommendation that Goudy be sentenced to "Fifteen (15) years, with all but twenty-six (26) months suspended" (R-34)

On February 18, 2005, Goudy was sentenced to thirty (30) years with twenty-seven (27) years and ten (10) months suspended and Goudy was then released on 4 years p.e.s. (35-37)

A petition to relocate p.e.s was heard on March 10, 2006 and Goudy was sentenced to serve twenty (20) years. (R-39)

On March 4, 2007, Goudy filed a motion for post-conviction relief on the grounds the sentence was statutorily unenforceable and that he received ineffective assistance of counsel. (R-5thau 39)

On August 22, 2007, the trial court denied the aforementioned pleadings for relief without an evidentiary hearing. (R-40thau 42) On September 6, 2007, following the denial of his post conviction pleadings, Goudy filed his Notice of Appeal to the Harrison County Circuit Court appealing said ruling to the Miss. Supreme Court. (R-50thau 57)

Statement of Facts

The Appellant hereby states the following facts:

Samuel K. Goudy was arrested and charged with transfer of controlled substance on January 17, 2003 (R-27)

Goudy was indicted on March 8, 2004 for transfer of controlled substance in violation of section 41-29-139 (a)(1) and as a habitual offender pursuant to section 99-19-81. (R-25, 26)

After entering a plea of guilty on February 15, 2005 (R-34); Goudy was sentenced as a non-habitual offender to 30 years with 37 years 10 months suspended. Goudy was then released and placed on 4 years P.R.S.; but the sentence suspension was contingent upon specific terms and conditions (R-35-37). Thereafter, a petition to revoke P.R.S. was heard on March 10, 2006 and Goudy was sentenced to serve 30 years (R-39).

Summary Of The Argument

The trial court erroneously indicated that Goudy's argument was that as a prior convicted felon he was not eligible for a suspended sentence. The bases of this appeal regarding the sentence is that "Miss. Code Ann. state statute 47-7-34 governs P.R.S.; a legislative creation, separate and distinct from probation" *Carter v. State*, 754 So.2d 1207, Miss. Sup. Ct. 2000 cited in *Richardson v. State*, 907 So.2d 404, Miss. Ct. App. 2005, Id. at 1141-42; and that said statute "does not mention, and therefore does not by its own terms authorize suspension of a sentence" *Hunt v. State*, 874 So.2d 448, Miss. Ct. App. 2004, Id. at (Pall.) Goudy's argument is that the trial court exercised the normal course of procedure set out in section 47-7-33 to sentence him to a suspended sentence and probation, but because of the prior felony conviction, indicated that the sentence was pursuant to section 47-7-34 and that he had been placed on P.R.S. These actions committed by the trial court violate the concept of fundamental fairness that is the foundation of the due process clause of our state and federal constitutions.

Furthermore, the trial court erroneously found that said sentence was proper under the Supreme Court rulings in Sweet and Johnson in that Goudy was not required to serve a term of p.r.s. concurrent (or equal to) his suspended sentence. Goudy would also argue that he received ineffective assistance of counsel when his attorney advised him to enter a plea of guilty, without first obtaining a ruling on the pending motions for a speedy trial violations.

Issue One

Whether Gaudy's sentence contained in the "Corrected

Sentencing And Post Release Supervision Order" (R-35 thru 37)

is pursuant to M.C.A. Section 47-7-34 and contains a four

(4) year term of p.r.s. or if said sentence is pursuant to

M.C.A. 47-7-33 and contains a four (4) year term of supere-

vised probation.

Argument

The aforementioned sentence reads in pertinent part:

"...and the defendant be and is hereby sentenced to thirty

(30) years with twenty-seven (27) years and ten (10)

months suspended in the custody of the M.D.O.C. Upon

release from the custody of the M.D.O.C. the defendant is

hereby placed under the supervision of the M.D.O.C. for

a period of four (4) years post release supervision...

and the suspension of said sentence is based upon the

following conditions: " (conditions A thru M). (R21-23)

As foreshown, the trial court failed to indicate what statute

of statutory law the judge was proceeding under Gaudy

would argue that in the Order denying relief (R-47) the

trial court erroneously found that the sentence was pur-

suant to M.C.A. Section 47-7-34 in that if a sentence is

suspended contingent upon specific terms and conditions the

defendant is placed on probation in the manner required by

M.C.A. Section 47-7-33, even if the word "probation" is

not used.

This argument is based upon the Supreme Court's decision in the case of *Tunstall v. State*, 767 So. 2d 167, Miss 1999 where Tunstall argued that "he was not placed on probation in the manner required by Miss. Code Ann. section 47-7-33, because the lower court did not specifically use the term "probation".

Id. in *Overviews* Section.

In *Tunstall* (supra), the Supreme Court cited *Goss v. State*, 721 So. 2d 144, Miss 1998, where the Court stated: "However, in its order allowing suspension of a sentence, the court will generally prescribe terms and conditions which the prisoner must follow in order for the suspension period to continue. These conditions serve as the terms of 'probation' 721 So. 2d at 146." *Id.* in *Tunstall*, (P13). The Supreme Court in *Tunstall* also cited *Wilson v. State*, 735 So. 2d 290, Miss 1999, where the court held that: "If the sentencing proceedings sufficiently conveyed reasonably specific conditions of behavior required, we will find an implied 'period of probation' for the maximum of period allowed by law such that a suspended sentence under those conditions is deemed to be accompanied by a period of probation as required by the statute." The Court then held: "Tunstall's probation arises from the 'judicial act of the trial judge in setting a condition upon his suspended sentence.' Under *Wilson*, that admonition was valid and sufficient for a maximum probationary period of 5 years." *Id.* in *Tunstall*, (P10.) The Court concluded "Although the word 'probation' per-se, does not appear in the record, nonetheless, *Tunstall* was in fact placed on probation in the manner required by M.C.A. 47-7-33." see (P11, and P16.)

Therefore, evidenced by the afore shown language and course of procedure used in the trial court's judgement, it would be a direct contradiction of the Supreme Court's decision in Tunstall (citing Wilson and Goss) for this Court not to find that the Appellant, as Tunstall was, in fact placed on probation in the manner required by M.C.A. section 47-7-33 by "the judicial act of the trial judge setting conditions upon his suspended sentence" and thereby this Court should find that said sentence is in violation of Goudy's constitutional rights to due process of law in that the trial court erroneously indicated that the sentence was pursuant to section 47-7-34 and that Goudy had been placed on 4 years P.R.S. Also, in light of the afore shown fact that Goudy was placed on probation in the manner required by section 47-7-33 by "the judicial act of the trial judge setting conditions upon his suspended sentence" this Court should find that the trial court failed to establish a statutorily authorized term of P.R.S. and that thereby the Order Revoking Post Release Supervision is improper and without authority in violation of Goudy's constitutional rights to due process of law and a legal sentence.

Furthermore, the trial court erroneously indicated that Goudy's sentence was proper under the Supreme Court's decisions in Johnson v State, 925 So. 2d 86, Miss. 2006 And in Sweat v State, 912 So. 2d 458, Miss. 2005 (8-45-47) in that:

In the Case of Sweat (supra); the defendant was sentenced to 20 years in the custody of the M.D.O.C with 12 years suspended and 5 years of p.r.s. Id at (p1.); Goudy would ask this Court to compare Sweat's sentence to his: 30 years with 27 years and 10 months suspended on 4 years p.r.s.

In Sweat, on writ of Certiorari, 912 so. 2d 458, the Supreme Court held "Here, it is clear that the trial court sentenced Sweat under section 47-7-34. Therefore we modify the trial court's sentence so that following his 8 years of incarceration, Sweat will be released to 12 years of p.r.s. but that he is required to report to M.D.O.C. officials for only 5 years and the remaining 7 years will be 'un-supervised p.r.s.'" Id at (p6.)

In the Case of Johnson, 925 so. 2d 86, Miss. 2006; the defendant was sentenced to 15 years, with 8 years suspended and served by way of p.r.s. pursuant to the provisions of section 47-7-34, with 5 of the 8 years to be served under the supervision of the M.D.O.C. and was held to be a legal sentence.

Therefore, under the Supreme Court decisions in Sweat and Johnson, Goudy would argue that a term of p.r.s., is of itself, a suspended sentence for a prior convicted felon who is not eligible for a sentence suspended upon specific terms and conditions; and thereby, as admitted by the trial court, Goudy would have had to have been sentenced to a term of 27 years and 10 months of p.r.s for his sentence to comply with the abovesaid rulings. (R-47)

As herein shown, "if a sentence is suspended upon specific term and conditions, the defendant is placed on probation in the manner required by section 47-7-33." *Tunstall (supra)* The trial court erroneously indicates that "The sentence is clear that Goudy was sentenced to thirty years, that he was to serve two years and two months as incarceration and that the remainder would be on p.r.s." (R-47); in that as herein shown (see page 6), Goudy was sentenced to 30 years with 27 years and 10 months suspended upon specific terms and conditions, and was to be placed on 4 years p.r.s. upon release from the term of incarceration. (R-21-23) In light of this Court's earlier ruling that "state statute 47-7-34 contains no language permitting the suspension of a sentence" *Johnson v. State*, 924 So. 2d 527, Miss. Ct. App. 2004, Id. at (p8.) and the fact section 47-7-34 specifically states "Failure to abide by the terms and conditions shall be grounds to terminate the term of p.r.s." and thereby "Circuit Court judges (only) have the authority to revoke all or any part of the term of p.r.s. and return an offender to the custody of the M.D.C. pursuant to state statute 47-7-37 (Rev. 2004)" *Rucker v. State*, 909 So. 2d 137, Miss. Ct. App. 2005, Id. at LHN-37; Goudy would argue that if the trial court had any authority at all, that the trial court "had the authority to revoke all or any part of the 4 year term of p.r.s." *Rucker (supra)*.

Therefore, as herein shown, the trial court knew that Goudy had a prior felony conviction and that he was thereby not eligible for a suspended sentence and probation (a sentence suspended on specific terms and conditions); and thereby elected to exercise the normal course of procedure set out in section 47-7-33 to place Goudy on a suspended sentence and probation; but because of the prior felony conviction, improperly and without statutory authority, the Judge indicated that Goudy had been placed on P.R.S. Now, after being made aware of the illegal and improper sentence, with all due respect, the trial court wants to argue what was intended. In the case of Temple v State, 671 So. 2d 58, Miss. 1996, the Supreme Court held that "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. Org. v Myers, 223 Miss 856, 79 So. 2d 277, 278, Miss 1955, citing V. Griffin's Miss. Chancery Practice. Also see Banks v Banks, 511 So. 2d 933, 934-35, Miss. 1987. Based on these cases, we hold that in order for a sentence to be valid, a judgement must be entered as of record. This marks formal evidence of a judgement's rendition which is necessary for its execution or appeal." Id. at 59. Here, in Goudy's case, the sentence contained in the Order of Conviction (R-47) signed by the judge necessary for its execution is not valid. These aforementioned actions committed by the trial court clearly violate the concept of fundamental fairness which is the foundation of our U.S. constitution.

Issue Two

whether Goudy's counsel was deficient for advising him to enter a plea of guilty without first obtaining a ruling on the pending motions for a constitutional speedy trial violation in which, if had been competently pursued, there was a "reasonable probability" that Goudy could have been relieved of all criminal jeopardy, and would not have entered a plea of guilty.

Argument

The trial court erroneously indicated that Goudy had knowingly waived his constitutional right to a speedy trial in that, as admitted by the trial court, Goudy still had several pending motions (R. 41), which could have relieved him of all criminal jeopardy if said motions had been competently pursued and thereby Goudy could argue that his attorney deficiently and incompetently advised him to plead guilty.

Goudy would bring to this Court's attention, as the record shows and as admitted by the trial court, the following chronology of the proceedings prior to his entering a plea of guilty.

January 17, 2003: Goudy was arrested and charged with tenor of controlled substance (R-27)

February 3, 2004: Goudy's first attorney filed a motion to dismiss on speedy trial grounds; before Goudy was ever indicted. (R-41)

March 8, 2004: Goudy is indicted on said charge (R-27); 14 months after arrest

March 31, 2004: Goudy's second attorney filed various request and motions including a demand for a speedy trial

July 8, 2004: Goudy waived arraignment (R-27)

September 27, 2004: Goudy was granted a continuance of the trial date for the purpose of filing more motions (R-41); trial date was set to February 7, 2005

October 1, 2004: Goudy's attorney filed another motion to dismiss based on a speedy trial violation. (R-41)

November 23, 2004: Goudy filed yet another motion to dismiss for a speedy trial violation, pro-se. (R-41)

February 7, 2005: No record of what occurred with regards to this trial date, as admitted by the trial court (R-41)

February 14, 2005: Goudy's attorney filed an Addendum Time Line related to the motions to dismiss (R-41)

"A delay of more than 8 months from arrest to trial is preemp-
tively prejudicial under constitutional considerations" *Deukens*
v. State, 607 So. 2d 1137, 1138-39, Miss 1992 and *Smith v. State*, 550
So. 2d 406, 408, Miss 1989; cited in *McVeay v. State*, 754 So. 2d 486,
Miss. Ct. App. 1999. The trial court erroneously indicated that the
does not pertain to Goudy's case. Furthermore, in light of
the trial court's claim that "Goudy at no point claims that
he would not have pled guilty but for his attorney's alleged
actions" (CE-43); surely this Court can understand that Goudy
would not have entered a guilty plea if his attorney had
competently obtained a ruling on said motions for dis-
missal for violation of his constitutional right to a
speedy trial and thereby relieved him of all criminal
jeopardy. The trial court admits that "the record is clear
that Goudy was well aware of his speedy trial rights and
the pending motions at the time he entered his plea," and
thereby Goudy would argue that his attorney erroneously
advised him to plead guilty, without first obtaining a ruling
on said motions to dismiss and "but for" this erroneous
advice, Goudy would not have entered a plea of guilty.

February 15, 2005: Goudy, after being told by his attorney
that the trial court would not rule on the motions to
dismiss, entered a plea of guilty to said charges; 25 months
after being arrested.

In the case of *Berry v. State*, 728 So. 2d 568, 569 (p.3.), Miss 1999; *Berry* had a pending motion to dismiss based upon a violation of her constitutional right to a speedy trial which (as in *Goudy's* case) the record showed that the motion to dismiss had not been ruled on. The State argued that "it is the responsibility of the movant to obtain a ruling from the court on motions filed by him and failure to do so constitutes a waiver of same." *Martin v. State*, 354 So. 2d 1114, 1119, Miss 1978. The State also argued "failure to obtain ruling on motion in limine results in procedural bar." *Holley v. State*, 671 So. 2d 32, 36, Miss 1996. The State Supreme Court held that "the right to a speedy trial is a fundamental constitutional right, and a defendant may only waive her speedy trial rights by a knowing and intelligent waiver" *Id.* at (p.3.), *Berry* (Supra).

The Supreme Court in *Berry* (Supra) then ruled: "The right to a speedy trial is subject to a knowing and intelligent waiver." *Vickery v. State*, 535 So. 2d 1371, at 1377, Miss 1988. "This Court will indulge every reasonable presumption against the waiver of a constitutional right" *Id.*, quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 812, 81 L. Ed. 1177, 1180, (1937). Even when a defendant fails to assert his right to a speedy trial he does not permanently waive this right" *Vickery* 535 So. 2d at 1377, *Id.* in *Jenkins v. State*, 607 So. 2d 1137, 1140, Miss 1992; cited in *Berry* (Supra) at [HN-2], (p.3.).

The Supreme Court in *Berry* (supra) then ruled that "Berry did not waive her right to a speedy trial. The trial court erred in failing to enter a ruling in the record on Berry's motion to dismiss. As a result, we must remand this case to the circuit court for further proceedings on this matter." *Id.* at 569, (p.3.) in *Berry* (supra).

Therefore, as the record before this Honorable Court reflects and as admitted by the trial court, Goudy (as in *Berry*) had pending motions to dismiss that the trial court had not ruled on and thereby, based on the Supreme Court decision in *Berry*, this Court should find that the trial court erred by not ruling on said motions.

Also, as demonstrated in Goudy's original post conviction relief pleading (R-10 thru 14), based upon this Court's decision in *MSUeny v State*, 754 So.2d 486, Miss. Ct. App. 1999, citing *Nelson v Hargett*, 989 F.2d 847 (5th Cir. 1993) and *Peoples v Stanley*, 266 Ill. App. 3d, 641 N.E.2d 1224, 1227, 204, Ill. Dec. 605, (Ill. App. Ct. 1994); this Court should find that Goudy's attorney deficiently and incompetently advised him to enter a plea of guilty, without first obtaining a ruling on the motions to dismiss for a speedy trial violation in which there was a "reasonable probability" that Goudy could have been relieved of all criminal jeopardy; an act of incompetence on the attorney's part that worked to Goudy's substantial prejudice.

Conclusion

In light of the herein shown statutory law and constitutional right violations, the Appellant would ask this Honorable Court to remand this case to the Circuit Court of Harrison County for proceedings consistent with the opinion of this Court as justice so requires pursuant to the laws of Mississippi; and as required by our United States Constitution.

Respectfully Submitted this the 22 day of February, 2008.
Samuel L. Goudy
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Certificate of Service

I, Samuel L. Goudy, the undersigned pro-se Appellant, do hereby certify that I have this day mailed via U.S. mail, postage pre-paid, a true and correct copy of this my "Opening Brief for Appellant" to the following:

Hon. Jim Hood

State Attorney General

P.O. Box 220

Jackson, Ms 39205-0220

This 22 day of February, 2008

~~Samuel L. Goudy~~

Samuel L. Goudy, # 39765

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