

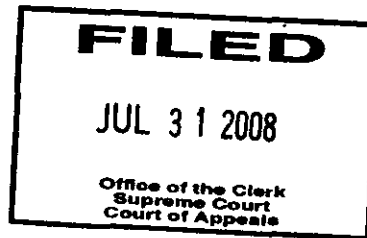
COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LADENNIS GRAHAM

APPELLANT

VS.



NO. 2007-CP-1576-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is an appeal from summary denial of post-conviction relief sought in the wake of a guilty plea to cocaine possession.

On July 25, 2006, only four (4) weeks after his plea of guilty on March 28, 2006, to cocaine possession, LADENNIS GRAHAM violated his house arrest. He now claims in a post-conviction environment his suspended sentence was illegal because he wasn't eligible for the house arrest program.

Our initial response to this claim, as well as to Graham's other arguments, is provided by Justice Robertson in **Reynolds v. State**, 521 So.2d 914, 917 (Miss. 1988):

"Horse feathers!" 521 So.2d at 917.

STATEMENT OF FACTS

At the time of his guilty plea, LaDennis Graham was a 27 year old adult with a high school education and a year of college. (C.P. at 4)

Following his voluntary plea of guilty to cocaine possession, appellant was sentenced to sixteen (16) years in the custody of the MDOC with fifteen (15) of those years suspended conditioned upon his successful completion of twelve (12) months of intensive supervision a/k/a house arrest.

Graham was indicted on December 13, 2005, for possession of 11.59 grams of cocaine with the intent to transfer that substance to others. (C.P. at 28) During a plea-qualification hearing conducted on the 28th day of March, 2006, Graham entered a plea of guilty “. . . to the crime of possession of cocaine, 11.59 grams.” (R. 3)

Judge Landrum accepted the benevolent recommendation of the State and sentenced Graham “. . . to serve a term of 16 years with the Mississippi Department of Corrections with 15 of those suspended conditioned upon his successful completion of 12 months House Arrest and four years Post Relief Supervision and the Circuit Court’s Community Service Program.” (R. 3; C.P. at 29-31)

It did not take long for Graham to violate the terms and conditions of his house arrest. Four (4) months following his plea of guilty, Graham was arrested for violating house arrest. (C.P. at 35)

We assume that Graham is now serving his 16 years with the MDOC.

On July 27, 2007, Graham filed a motion for post-conviction relief to vacate and set aside his conviction via guilty plea and sentence. (C.P. at 3-27) He claimed his sentence was illegal, his indictment defective, his plea involuntary, and his lawyer ineffective.

Judge Landrum, in a four (4) page order, summarily denied relief on the grounds it had no jurisdiction to hear Graham’s claims and grant him any relief. *See* appellee’s exhibit A, attached. Citing **Babbitt v. State**, 755 So.2d 406, 409 (Miss. 2000), Judge Landrum found as a fact and concluded as a matter of law that while Graham was on house arrest, “full and complete jurisdiction” in relation to a violation of the Intensive Supervision Program (ISP) or House Arrest, was in the MDOC, and Graham’s remedy was to utilize the “offender grievance procedure” established by the

MDOC. (C.P. at 36)

Graham, proceeding *pro se*, seeks vacation of his guilty plea and suspended sentence on the grounds, *inter alia*, (1) he received an illegal sentence; (2) his indictment not only mis-recited the statute section and subsection number but also failed to set forth the judicial district in which he was illegally sentenced; (3) the trial judge failed, as a consequence of Graham's guilty plea, to advise Graham of his right to appeal his sentence; (4) Graham's plea was involuntary, and (5) his lady lawyer rendered ineffective assistance during his guilty plea. (Brief for Appellant at 4-6)

We respectfully submit Judge Landrum was correct in finding the court did not have jurisdiction.

In any event, Graham's claims were manifestly without merit as well.

SUMMARY OF ARGUMENT

The circuit judge, Billy Joe Landrum, citing and relying upon **Babbitt v. State**, *supra*, 755 So.2d 406 (Miss. 2000), dismissed Graham's motion summarily on the ground it "... does not have jurisdiction over a House Arrest/ISP revocation to the full time custody of MDOC ..." (C.P. at 37; appellee's exhibit A, attached)

Here and now Graham invites this Court to reverse the trial judge's summary dismissal and grant him an evidentiary hearing. (Brief for Appellant at 20)

The trial court had no jurisdiction to hear Graham's claims and grant post-conviction relief.

But even if it did, those claims were frivolous and manifestly without merit.

ARGUMENT

GRAHAM'S MOTION WAS PROPERLY DISMISSED SUMMARILY FOR WANT OF JURISDICTION.

EVEN IF IT WAS NOT, GRAHAM'S MOTION FOR POST- CONVICTION RELIEF GROUNDED UPON AN ALLEGEDLY ILLEGAL SENTENCE, A DEFECTIVE INDICTMENT, AN INVOLUNTARY PLEA AND INEFFECTIVE COUNSEL WAS MANIFESTLY WITHOUT MERIT.

Judge Landrum, relying upon the case of **Babbitt v. State**, *supra*, 755 So.2d 406 (Miss. 2000), summarily dismissed Graham's motion for post-conviction relief on the ground the court had no jurisdiction to hear Graham's claims or grant him post-conviction relief. Graham's appellate brief is devoid of any attempt to distinguish **Babbitt** or to challenge in any form the trial court's decision declining jurisdiction. Therefore, we respectfully submit Graham, by his silence, has confessed the issue, and, accordingly, the trial judge was eminently correct in summarily dismissing, for want of jurisdiction, Graham's motion for post-conviction relief.

Assuming otherwise, Graham's claims were frivolous and manifestly without merit as well.

Advice as to Right to Appeal Sentence. Graham claims the trial judge erred in failing to advise him of his right to appeal his sentence to the Supreme Court. (Brief for Appellant at 5)

The record reflects that Judge Landrum, in plain and ordinary English, told Graham during the plea-qualification hearing "[i]f you were convicted of any matter, you'd have a right to appeal that conviction and any sentence handed down by the court to the State Supreme Court for their determination as to whether or not you received a fair and impartial trial." (R. 6)

Accepting as true Graham's position that Judge Landrum did not so advise Graham, the following language from the recent decision of **Elliott v. State**, No. 2006-CP-02157 decided May 20, 2008-COA, (¶10), slip opinion at 4 [Not Yet Reported], controls the posture of Graham's complaint.

While it is true that a defendant may appeal the sentence resulting from a plea of guilty independently of the plea itself, there is no corresponding requirement that the circuit court notify the defendant of that right during the plea process.

Defective Indictment. Graham argues his indictment was fatally defective because of a misrecital of the section number and because it failed to set forth the judicial district in which he was illegally sentenced. (Brief for Appellant at 4)

We are not impressed. Both Graham's indictment as well as his sentencing order contain, again in plain and ordinary English, the following words: "Second Judicial District" of Jones County. (C.P. at 28, 29-32)

Any misrecital with respect to the statutory section number - §41-29-142 as opposed to §41-29-139 - was neither objected to nor fatal.

In **Westmoreland v. State**, 246 So.2d 487, 492 (Miss. 1971), citing 42 C.J.S. Indictments and Information § 138 (1944), we find the following language:

As a general rule, a misrecital of the statute does not void the indictment where the facts stated constitute an offense under any statute, especially where the objection is raised after plea of guilty. The misrecital may be rejected as surplusage, at least where the conclusion is generally as "contrary to the statute in such case made and provided." * * *

See also **White v. State**, 169 Miss. 332, 338, 153 So. 387, 388 (1934) [Indictment not defective because it contained an incorrect citation of a statute alleged to have been violated.]

Graham was charged with possession of cocaine with intent, a crime by virtue of Miss.Code Ann. §41-29-139. He entered a plea of guilty to simple possession. Graham's sentencing order reflects he entered a plea of guilty in violation of Miss.Code Ann. §41-29-139.

Reference in the indictment to §41-29-142 was, at best, surplusage.

Illegal Sentence. Graham contends his suspended sentence coupled with house arrest, i.e., the intensive supervision program, was illegal because one convicted under Miss.Code Ann. §41-29-139 “... shall not be placed in the program.” (Brief for Appellant at 8)

If this be so, there is still no error because “... there is no prejudice suffered when a defendant receives an illegally lenient sentence.” **Edwards v. State**, 839 So.2d 578, 580-81 (Ct.App.Miss. 2003).

The following language found in the recent case of **Watts v. State**, No. 2007-CP-00708-COA decided July 1, 2008, (¶10), slip opinion at 5 [Not Yet Reported], controls the posture of Graham’s complaint:

Because he suffered no injury or prejudice from receiving a lawful, yet lenient, sentence, he is not entitled to any relief. Even if Watts’s sentence were considered unlawful, it would not have prejudiced him. This Court has held that “[a] defendant should not be allowed to reap the benefits of an illegal sentence, which is lighter than what the legal sentence would have been, and then turn around and attack the legality of the illegal, lighter sentence when it serves his interest to do so.” *Brooks v. State*, 919 So.2d 179, 181 (¶7) (Miss.Ct.App. 2005) (quoting *Graves v. State*, 822 So.2d 1089, 1092 (¶11) (Ct.App.Miss. 2002)).

“Because the suspended sentence [coupled with house arrest] did not prejudice [Graham], he cannot now attack it.” **Watts v. State**, *supra*, (¶8) slip opinion at 4.

Graham also claims his suspended sentence was “unconstitutionally vague and amounts to an indeterminate term...” (Brief for Appellant at 7) There is nothing vague, indeterminate, or indefinite about a sentence of 16 years, 15 years suspended and 12 months on house arrest with 4 years supervised PRS. That sentence, no doubt, sounded pretty good to Graham at the time of his guilty plea.

Ineffective Assistance of Counsel.

Graham claims his trial lawyer was ineffective because of his failure to object to all of the above deficiencies. There were no deficiencies worthy of any objection. Therefore, Graham has failed to satisfy both the deficiency and prejudice prong of the **Strickland v. Washington** [citation omitted] standard.

“The rule regarding ineffective assistance of counsel in the context of a guilty plea is that when a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity.” **Davis v. State**, No. 2007-CP-00264-COA decided June 17, 2008, (¶7), slip opinion at 3 [Not Yet Reported] citing **Buck v. State**, 838 So.2d 256, 260 (¶12) (Miss. 2003).

“Beyond that he must show that those errors proximately resulted in his guilty plea and that but for counsel’s errors he would not have entered the plea.” *Id.* (citing **Reynolds v. State**, 521 So.2d 914, 918 (Miss. 1988). *See also* **Wallace v. State**, No.2007-CP-00766-COA decided May 27, 2008, (¶¶ 19-28), slip opinion at 6-9) [Not Yet Reported].

Needless to say, Graham has failed to do so here.

Involuntary Plea. Graham says his plea was not voluntarily and intelligently entered because Graham “. . . never clearly stated to the court that any such actions were committed while he knew such actions would violate the law.” (Brief for Appellant at 6)

“It is fundamental that all persons are presumed to know the law.” **McNeely v. State**, 277 So.2d 435, 437 (Miss. 1973). Graham is 27 years of age and has a high school education with one year of college. He told Judge Landrum he could both read and write and presumably he could understand the English language. (R.4) After the prosecutor recited its factual basis for the plea, counsel for the defense announced “[o]n behalf of Mr. Graham we would agree there’s a legal and

factual basis for his entering this plea; is that correct, Mr. Graham?"

THE DEFENDANT: Yes, ma'am. (R. 4)

* * * * *

THE COURT: Okay. You are standing before the Court at this time with your attorney. It's my understanding that you want to change your former plea of not guilty to a plea of guilty at this time. Is that what you want to do?

THE DEFENDANT: Yes, sir. (R. 5)

* * * * *

THE COURT: Do you feel like you've waived these rights voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you or threatened you in any way to get you to plead guilty in this matter?

THE DEFENDANT: No, sir.

THE COURT: Any thing you want to say?

THE DEFENDANT: No, sir. (R. 7).

Graham has failed to demonstrate, or to even allege, by a preponderance of the evidence his plea was not voluntarily and intelligently entered.

Miss.Code Ann. § 99-39-11 (Supp. 1999), reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

(3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does. He did. And he was.

The trial court had no jurisdiction. But even if it did, Graham's claims were manifestly without merit as well.

CONCLUSION

Not every motion for post-conviction relief filed in the trial court must be afforded an adversarial hearing. **Rodolfich v. State**, 858 So.2d 221 (Ct.App.Miss. 2003).

Put another way, the right to an evidentiary hearing is not guaranteed in every case. **Brister v. State**, 858 So.2d 181 (Ct.App.Miss. 2003).

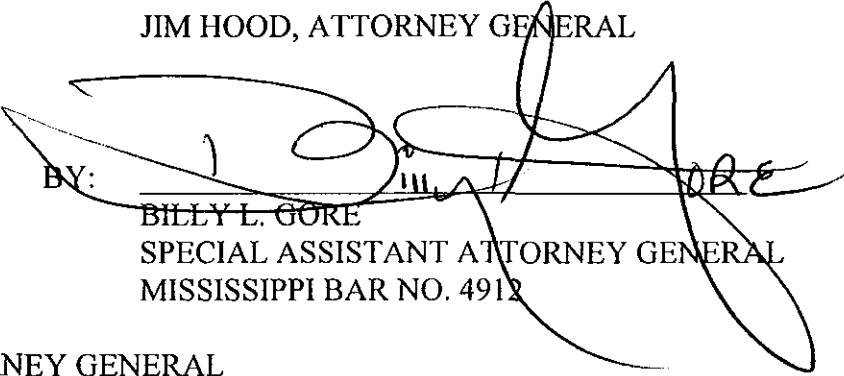
"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State**, 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal of Graham's motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

LADENNIS GRAHAM

VERSUS

ACTION NO.: 2007-83- CV7

STATE OF MISSISSIPPI

**ORDER DENYING MOTION FOR POST CONVICTION RELIEF
TO VACATE AND SET ASIDE CONVICTION AND SENTENCE**

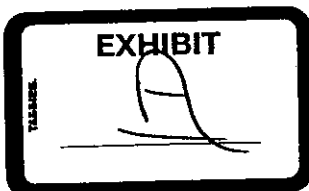
LaDennis Graham seeks relief from conviction in Jones County Circuit Court, Second Judicial District, No. 2005-233-KR2, and the Court having fully reviewed Graham's Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence, filed according to the statutes for Post-Conviction Relief and Exhibits attached thereto, the above mentioned court files and Plea Petitions, and being fully and maturely advised in the premises does find and adjudicate as follows, to-wit:

1.

This Court does not have jurisdiction over Movant and finds that according to *Babbitt v. State*, 755 So. 2d 406 (Miss. 2000) the Court cannot give Graham any relief from his plea and subsequent sentence to the indictment against him in No. 2005-233-KR2 for Possession of Cocaine.

2.

The merits of his motion entitle him to no relief and no hearing on same. In particular, he raises no argument, theory, alleged error or other rationale showing that he is entitled to relief. Movant argues that he was denied due process of law "where the



court failed to advise Graham of the right to appeal the sentence, which the court imposed, directly to the Supreme Court," and that the indictment under which he was charged, "failed to set forth the correct statute which the charge was based upon," and that "the indictment was faulty where it failed to set forth the judicial district in which the Petitioner was sentenced to an illegal sentence where the sentence imposed constituted an indeterminate sentence as to a definite sentence," and that he was denied his Sixth Amendment right to effective assistance of counsel. The Sentence Order entered on March 28, 2006, states in pertinent part that the defendant is:

sentenced to serve a sixteen (16) year sentence with the Mississippi Department of Corrections, with fifteen (15) years suspended on successful completion of twelve (12) months house arrest and four (4) years on supervised post-release supervision and successful completion of the Circuit Court Community Service Program.

3.

The Movant was arrested on or about July 25, 2006, during the execution of a search warrant on his brother's house by the Laurel Police Department. During said execution, numerous guns and illegal narcotics were recovered. As such, he violated house arrest and was taken to the Jones County Jail. The heart of Graham's argument is that he believes the sentence imposed by the court was illegal in that he was not eligible for the house arrest program.

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This issue is controlled by *Babbitt v. State*, 755 So. 2d 406 (Miss. 2000) where the Court held as follows:

Instead of moving for post-conviction relief Babbitt should have followed the "offender grievance procedure" established by the MDOC in its standard operating procedure manual at 20.08.01 in order to have himself placed back in the ISP. It is not necessary to list the specific steps of the grievance procedure but merely to establish that there is such a policy in effect to deal with cases such as this.

Like the Babbitt case, this Court has no jurisdiction to hear this case under the post-conviction relief act. While Graham was on house arrest, he was in the jurisdiction of MDOC, and his remedy was to file under the offender grievance procedure and appeal MDOC's decision to remove him from house arrest/ISP. This Court is unaware of whether or not Graham pursued these avenues available to him, however, failure to appeal within thirty (30) days to the circuit court from the completion of that process bars further review. Miss. Code Ann. §47-5-807. Graham has not provided this Court with a certificate of completion from MDOC authorizing him to go forward in an appeal from MDOC's decision, therefore, the Court can only assume that he is barred from same.

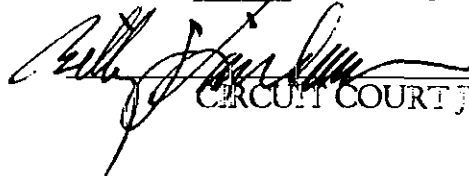
5.

In conclusion, the Circuit Court has no jurisdiction. Movant should have filed an action to seek an administrative remedy.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence filed by LaDennis Graham, pursuant to the Uniform Post Conviction Relief Act is hereby dismissed (1) for lack of any showing that the Movant is entitled to any relief whatsoever, in particular, the Court does not have jurisdiction over a House Arrest/ISP revocation to the full time custody of MDOC and (2) that Movant is not entitled to an evidentiary hearing and that request is hereby denied.

The Clerk of the Court is ordered to mail a copy of this Order to the Movant at his last mailing address shown of record. All costs herein are assessed to Jones County.

SO ORDERED AND ADJUDGED this the 20th day of August, 2007.


CIRCUIT COURT JUDGE

MIN 149 93

CERTIFICATE OF SERVICE

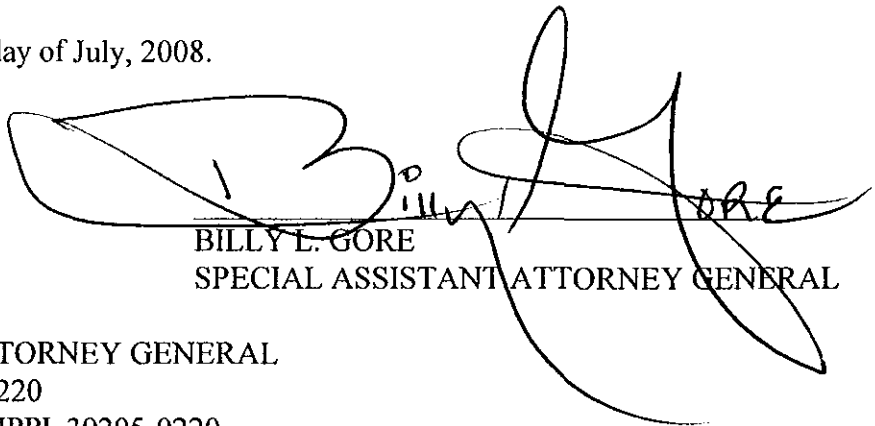
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Bily Joe Landrum
Circuit Court Judge, District 18
Post Office Box 685
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Honorable Anthony Buckley
District Attorney, District 18
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Laurel, MS 39441

Ladennis Graham, #119026
Pearl River County Jail
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This the 31st day of July, 2008.



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