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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DOUGLAS RICARDO MOODY — APPELLANT

VS. — NO. 2007-CP-1639

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-CP-1639**

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PROCEDURAL HISTORY:

On February 9, 2005, Douglas Ricardo Moody, "Moody" pled guilty to attempted armed robbery before the Circuit Court of Harrison County, the Honorable Steve Simpson presiding. Moody was sentenced to serve a fifteen year suspended sentence and placed on five years of probation, pending good behavior as stated in his Probation Order. C.P. 23-25.

On March 10, 2006, a "Petition To Revoke" was filed to revoke Moody's probation. This was based upon an alleged violation of the terms of his probation. C.P. 27-28. On May 22, 2006, a hearing was held on that motion. R. 1-15. The trial court found that Moody had violated the terms of his probation and revoked Moody's probation. C.P. 29.

On January 10, 2007, Moody filed a pro se petition seeking to have his probation reinstated. The trial court in an Order denied relief. C.P. 31-40; 56-57. Moody filed notice of appeal to the Mississippi Supreme Court. C.P. 58.

ISSUE ON APPEAL

I.

DID THE TRIAL COURT CORRECTLY DENY MOODY'S MOTION FOR REINSTATEMENT OF HIS PROBATION?

II.

DID MOODY RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE FACTS

On May 7, 2001, Moody along with others was indicted for attempted armed robbery of Kelly Sullivan and April Jones on or about June 21, 2000. C.P. 22-23.

On February 9, 2005, Moody pled guilty to attempted armed robbery before the Circuit Court of Harrison County, the Honorable Steve Simpson presiding. Moody was represented by counsel, Mr. Jim Davis. C.P. 23-26. Moody was given a fifteen year suspended sentence for time served and placed on five years of post release supervision. C.P. 23. An additional charge was passed to the files. C.P. 23. The terms of Moody's probation included (a) "commit no offense against the laws of this state"and (o) defendant "can not possess any type of weapon." C.P. 25.

On May 22, 2006, a "Petition To Revoke Probation" was filed with notice to Moody. C.P. 29-30. A hearing was held on that Petition. After hearing testimony from Captain John Carrubba, with the Long Beach Police Department, Richard J. Smith representing Moody and Moody himself, the trial court found that Moody had violated the terms of his probation. R. 1-14. Moody's probation was revoked. Moody was sentenced to serve his fifteen year suspended sentence. R. 14; C.P. 29.

On January 10, 2007, Moody filed a pro se "Motion To Reinstate" his post release supervision. C.P. 31-35. The trial court denied that motion finding no merit to Moody's claims. C.P. 56-57. From that denial of post conviction relief, Moody filed notice of appeal to the Mississippi State Supreme Court. C.P. 58-59.

SUMMARY OF THE ARGUMENT

1. The record reflects that after a hearing on a Petition To Revoke Moody's probation, the trial court found sufficient evidence for finding he violated the terms of his probation. C.P. 29; R. 14. The record from that hearing reflects that testimony from Captain John Carrubba was sufficient for determining that Moody had a handgun in his possession. This was on the day he was arrested for disorderly conduct for which he plead no contest in Long Beach municipal court. R. 1-15.

The record contains not only Carrubba's testimony, but also Carubba's police report which included the corroborating statement of Mr. Alex Schepens. C.P. 48. Schepens identified Moody as having a handgun in his possession. Schepens also showed investigators the location where he saw Moody hid his gun. It was located and matched the description given by Schepens and another eye witness. At he hearing, Moody had no witnesses to corroborate his testimony that he allegedly did not have a gun in his possession. R. 11.

In addition, the record from the guilty plea hearing indicates, as admitted by Moody and his counsel, that he had pled no contest to misdemeanor charges for "simple assault" and "disorderly conduct." He did so to avoid being possibly tried on related felony charges. R. 4; 9.

2. The record reflects neither "deficient performance" nor "prejudice" to Moody's defense to the allegations that he violated the terms of his probation. R. 1-14. Moody was granted a hearing. While he denied having a hand gun, he had no witnesses who were present when the offense occurred, viz. his mother, brother and Mr. Alex Schepens. R. 11.

There were no affidavits with his Petition from either his probation revocation hearing counsel, Mr. Richard J. Smith or Mr. Schepens, an eye witness to his possession of a handgun in the instant cause. C.P. 46-51. Therefore, Moody did not meet his burden of proof for showing ineffective assistance of counsel.

In addition, the record indicates that Mr. Smith testified that Moody had agreed to plead guilty to misdemeanor charges. This was to avoid facing an additional felony charge for possession of a firearm by a previously convicted felon. R. 4; 9. The terms of Moody's probation included both (a) "violate no laws," not distinguishing between felonies and misdemeanors and (o) "not possess any type of weapon." C.P. 24-25.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT THE TRIAL COURT CORRECTLY DENIED MOODY'S MOTION TO REINSTATE PROBATION.

The appellant believes that the trial court incorrectly denied his motion to reinstate his probation. In his motion to reinstate probation, Moody asserted that it was never shown that he actually possessed a handgun or that he had violated any of the other terms of his probation. He also alleges that it was possible that the hand gun found related to his case could have been that of one of the witness against him, Mr. Schepens. Appellant's brief page 1-5; and Post Conviction Relief petition, C.P. 31-36.

To the contrary, the record from the guilty plea hearing, indicated that Officer Carruba testified that Mr. Schepens told him that the he saw Moody hiding a gun. This was the same handgun Moody had in his possession. He used it to threaten Mr. Schepens.. Schepens showed investigators where he observed Moody hiding the gun. This was under some leaves near a fence. This occurred after law enforcement arrived in the area searching for Moody.

A ".22 caliber revolver" was found there. C.P. 46. It matched the description given by both Mr. Schepens and a witness at the domestic disturbance call for which police had been recently called for assistance.

As Captain Carruba with the Long Beach police department testified

> Captain Carruba; Mr. Moody had originally denied having a handgun. When we separated the two, the driver of the vehicle (Mr. Schepens) said **that, you know, he (Moody) told us that he had walked away from the vehicle with the gun toward Railroad Street and saw a Long Beach police car approach. At that time he hid the gun under some leaves along the fence line. The driver of the car showed us where that spot was. And officer that was with me just kicked some leaves aside, and the gun was there. The gun in question matched the description given to us by both the driver and one of the individuals that was at the house when the**

altercation took place. C.P. 4. (Emphasis by Appellee).

A "Long Beach Police Department Narrative" offense report document was filed in the instant cause. C.P. 48. It contained Captain J. Carrubba's investigative offense report. It corroborated Carrubba's testimony about the same incident about which Schepens had testified at the revocation hearing. R. 4; C.P. 48. It was recorded on December 25, 2005, the same day Moody was charged with violating the terms of his probation..

Mr. Schepens told Officer Carrubba that Moody have a handgun in his possession. He used it against him. Moody "pointed it at his head" as well as "threatened" him with it. C.P. 48. The handgun recovered by officers, a .22 revolver, fit the description provided by Schepens.

> Schepens said the Moody had the weapon in his possession when he got into Schepens' car at on near 115 N. Long Ave. Schepens also said the Moody at one time pointed the gun at his (Schepens') head and threatened to shot him. ...When officers removed the weapon from the leaves, Schepens identified it as the one which Moody had been carrying at the time of his original contact with him. C.P. 48.

In addition, Mr. Richard J. Smith, Moody's counsel, admitted that Moody had pled no contest on the domestic disturbance charge. This was the reason law enforcement were looking for him. Smith also indicated that Moody agreed to this course of action. He did so to avoid possibly receiving another felony conviction.

> Mr. Smith: **Judge, when we had entered a no contest plea in city court, it was with the concurrence of the defendant that we were trying not to get another felony charge, the unlawful possession of a firearm by a convicted felon.** C.P. 9. (Emphasis by Appellee)

When the trial court heard Moody's testimony about allegedly not having a hand gun in his possession, he asked him if he had any witnesses to corroborate him. Moody admitted he did not.

> Court: **All these people who could say you never had a gun aren't here, are they, Mr. Moody?**

> Moody. **I called everybody and let them know I had to go to court, because I remember calling Mr. Simon and asking him was I going to court for sure today.** R. 11. (Emphasis by Appellee).

After hearing testimony, the trial court found that there was grounds for revoking Moody's probation. This included the testimony of Captain Carrubba, as well as corroboration from the recorded statement of eye witness Mr. Alex Schepens. There was also Moody's admissions of having pled no contest in municipal court to "disorderly conduct" and "simple assault" related to the underlying domestic disturbance call. R. 4; 9.

As stated by Judge Simpson at the conclusion of the hearing:

> Based upon your conviction on the simple assault by threat, disorderly conduct, as well as the pending charges, based on the facts and circumstances contained within the police reports, as well as the written statements of Mr. Schepens, and the testimony of Captain Carruba, I find that you have violated the terms and conditions of your post release supervision. R. 14.

The trial court's Order stated that Moody's probation was revoked not because he was arrested. Rather it was revoked based upon testimony and evidence produced at a hearing. This evidence was sufficient for establishing that he had violated the terms of his probation. He had done so by admitting to "simple assault," and "disorderly conduct", as well as by evidence that he possessed a handgun and was admittedly a previously convicted felon.

As stated in the trial court's order this denial of relief was not based upon the fact that Moody had been arrested. Rather it was based upon evidence presented at a revocation hearing that he had violated the terms of his probation.

> A petition to revoke his probation was filed. On May 18, 2006, Moody entered a nolo contendere plea in city court to the charges of simple assault by threat and disorderly conduct. On May 22, 2006, Mr. Moody's probation was revoked and he was sentenced to the original sentence of fifteen (15) years in the custody of the Mississippi Department of Corrections. Moody has not presented in his motion any reason that this Court should reconsider revoking his post release supervision. **The revocation was not based solely on Moody's arrest but on the testimony and**

evidence presented at the hearing concerning the circumstances surrounding his arrest and the resolution of the charges. C.P. 58. (Emphasis by Appellee).

In **State v. Oliver**, 856 So.2d 328, *332 (¶ 9) (Miss. 2003), the Supreme Court found that a revocation hearing is "a finding of fact." The issue is whether it is "more likely than not" that the defendant violated the terms of his probation.

> ¶ 9. A revocation hearing requires proof showing a defendant more likely than not violated the terms of probation. **Wallace v. State**, 607 So.2d 1184, 1190 (Miss.1992). This decreased burden of proof also allows for relaxed rules of evidence and procedure. See **Williams v. State**, 409 So.2d 1331, 1332 (Miss.1982) ("It is a narrow inquiry; the process [of a revocation hearing] should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."). The sole determiner of fact is a judge. This Court has also held that "[a]n order revoking a suspension of sentence or revoking probation is not appealable." **Pipkin v. State**, 292 So.2d 181, 182 (Miss.1974). See also **Beasley v. State**, 795 So.2d 539, 540 (Miss.2001).

In **Staten v. State** 967 So.2d 678, *681 (¶8) (Miss. App. 2007), the Court found Staten's admission of guilt to several misdemeanors sufficient for showing that he had "more likely than not" violated the terms of his probation.

> ¶ 8. The issues relevant to Staten's probation revocation were neither complex nor difficult to present. As the State points out, the decision to revoke Staten's probation turned simply on whether or not he committed the violations of which he was accused.
> Staten admitted guilt to several misdemeanors before the petition to revoke his probation was filed and again at his revocation hearing. He argues that there were mitigating factors, but only as related to the domestic violence charge and his failure to pay his probation supervision fees and restitution. Those were, however, only two of the violations that caused the judge to revoke Staten's probation. Moreover, "[p]robation may be revoked upon a showing that a defendant 'more likely than not' violated the terms of probation." **Graham v. State**, 952 So.2d 1040, 1044(¶ 6) (Miss. Ct. App.2007) (citing **McClinton v. State**, 799 So.2d 123, 128(¶ 9) (Miss. Ct. App.2001)).

Moody's reliance upon **Brown v. State, infra**, is misplaced. As stated in that case, Brown's probation, unlike Moody's, was revoked simply because he had been arrested.

In **Brown v. State** 864 So.2d 1058, *1060 (Miss. App. 2004), the Court found that there had been no showing that Brown more likely than not violated the terms of his probation. Rather the court had relied upon the fact that he had been merely arrested.

> Where the State seeks to revoke one's probation based upon an allegation of criminal activity, it must show proof of an actual conviction, or that a crime has been committed and that it is more likely than not that the probationer committed the offense. **McClinton v. State**, 799 So.2d 123, 127 (¶ 9) (Miss. Ct. App.2001); **Younger v. State**, 749 So.2d 219, 221-222 (¶ 10) (Miss. Ct. App.1999). Even a cursory reading of the trial court's order shows that standard was not met.

The record cited above indicates that the trial court had credible corroborated evidence in support of his finding that Moody had violated the terms of his probation. He had violated subsection (o) of the enumerated terms of his probation. which stated that: "A defendant cannot possess any type of weapon." C.P. 40. In addition, he and his counsel admitted to the trial court that Moody had pled no contest to other charges. These charges related to a domestic disturbance incident. This plea was entered in the municipal court in Long Beach, Mississippi. This included misdemeanors for "simple assault" and "disorderly conduct." R. 4; 9. Subsection (a) of the terms of Moody's probation was "commit no offense against the laws of this state." C.P. 24. Therefore, the Appellee would submit that there was sufficient evidence for finding that Moody violated the terms of his probation.

This issue is therefore lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT MOODY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Moody argues that he was denied effective assistance of counsel. He was denied effective assistance because his counsel had advised him to plead no contest to misdemeanor charges in municipal court. Moody states that had he known that his probation would be revoked for doing so, he would not have pled no contest to the charges. Appellant's brief page 1-5.

For Moody to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Moody must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Moody. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Moody must show that there is a reasonable probability that but for the errors of his counsel, the sentence of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**,, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the errors of, his counsel, the result of the revocation hearing would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Mr. Russell Smith erred in representing Moody at his revocation hearing.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Moody bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986).

While Moody included affidavits from his mother and brother with his motion, neither witness was an eye witness to the offense testified to by Officer Carruba. C.P. 54-55. This eye witness information came from Mr. Alex Schepens. It was he who informed Carrubba that not only did Moody possess a handgun but that he "threatened" him with it. C.P. 48. This would constitute a separate felony in addition to substantiating the violation of terms of his probation on the domestic disturbance charge which also allegedly involved using a gun to threaten and menace a member of Moody's own family.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

Additionally, there is a further requirement which Johnston must hurdle, prejudice.

> Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

In his Motion, Moody alleged that he would not have pled no contest on simple assault and disorderly conduct charges had he known that this would cause his probation to be provoked. C.P. 33. He thinks this indicated that he did not receive effective assistance of counsel. However, the trial court's order finding Moody violated the terms of his probation indicated that the testimony of Officer Carruba and the police report taken from Mr. Schepens, a witness, was sufficient for showing a violation of the terms of Moody's probation. C.P. 58.

Therefore, even if Moody had not pled no contest to domestic disturbance charges , there still would have been sufficient grounds for finding that he had violated the terms of his probation. In addition, Mr. Smith testified that he advised Moody to pled guilty to misdemeanor charges to avoid the possibility of receiving an additional felony charge. He also testified that Moody agreed to do so to avoid an additional felony. R. 4 ; 9. An additional felony charge carried the possibility of an additional sentence that would have been added to the years Moody would be required to serve in prison.

Moody can not fault his counsel for his assistance in avoiding an additional felony

conviction. An additional felony would be a violation of (a) of the terms of Moody's probation, which was "commit no offense against the laws of this or any state of the U.S." C.P. 24. It was possible that a felony charge would result in Moody's having an additional sentence to serve added to the time left on his original armed robbery charge prior to his being eligible for release.

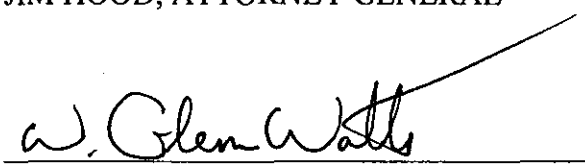
The Appellee would submit that this issue was also lacking in merit.

CONCLUSION

The trial court's Order denying relief on Moody's Petition To Reinstate Probation should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

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