

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EUGENE A. LOISEL, III

APPELLANT

VS.

FILED
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SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-1807-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 Harrison County, Stephen B. Simpson, Circuit Judge, presiding. (Appellee's exhibit A, attached)

STATEMENT OF FACTS

On October 3, 2005, Eugene Loisel, a twenty-one (21) year-old Caucasian male with a 9th grade education (C.P. at 84-85), entered a voluntary plea of guilty to robbery less than capital in Harrison County. (C.P. at 84-87) Loisel told the plea-qualification judge, Kosta Vlahos, he was on drugs at the time he snatched a ladies purses outside a Winn-Dixie store in Long Beach. (C.P. at 83, 85)

Following his plea-qualification hearing before Judge Vlahos, during which Loisel was represented by counsel, Loisel was “. . . sentenced to Ten (10) Years suspend Eight (8) Years leaving Two (2) years to serve followed by three (3) Years Post Release Supervision, fine, court cost, restitution.” (C.P. at 88)

A provision in the sentencing order stated, *inter alia*, that upon Loisel's release he shall, *inter alia*,

“ . . . be committed to the Department of Corrections Restitution-Correctional Center, Pascagoula, until such time all costs of court are paid, or until appropriate officials of the Department of Corrections have determined that commitment to said institution will no longer benefit society or this defendant. [U]pon successful completion of this commitment this Court will be notified in writing of said release and the defendant will be transferred to regular probation to complete his sentence.” (C.P. at 90)

It is undisputed that successful completion of his commitment to the restitution center was a condition of Loisel's probation. Loisel subsequently violated the conditions of his probation by receiving two (2) RVR's (rule violation reports) shortly after arriving at the restitution center. (R. 3-4; Brief of Appellant at 2-3)

Loisel admits in his brief, and the record strongly suggests, that one of the violations was Loisel's presence in an unauthorized area, i.e., his bed, while the other was refusing to obey a correctional officer. (R. 3-4; C.P. at 15)

While claiming he didn't do so voluntarily and knowingly, Loisel states in his appellate brief he signed a paper waiving a preliminary revocation hearing, (Brief of Appellant at 4)

His probation was subsequently revoked following a brief but final revocation hearing conducted before Judge Vlahos on October 9, 2006. (R. 1-6; C.P. at 82, 92) Loisel was sentenced to serve seven (7) years and given credit for time already served. (C.P. at 82, 92)

Loisel also states in his appellate brief that “[a]t the time of defendant's revocation hearing, and hearing on motion to reconsider, [the] defendant was on mind altering medications for his pain and mental state of mind of depression, and making him very extremely nervous to where he felt as if he [would] pass out, which made the defendant extremely uncomfortable with or without counsel

present.” (Brief of Appellant at 6)

Loisel’s physical, mental, and emotional condition has not been fully developed in the record; rather, these observations are largely a product of statements found in appellant’s brief-on-the-merits.

On November 7, 2006, Loisel fulfilled the final requirement of the Administrative Remedy Program when an administrator found that Loisel had failed to provide enough evidence to support his claim. (C.P. at 79)

A motion to reconsider revocation of probation and the reinstatement of seven (7) of the initially suspended eight (8) years imposed by Judge Vlahos was heard on November 20, 2006. (R. 7-12) Loisel was represented at this hearing by Lisa D. Collums, *pro bono* counsel, who interceded in Loisel’s behalf and pleaded for a reduced sentence.

Ms. Collums also represented Loisel during his guilty plea as reflected by his petition to enter plea of guilty. (C.P. at 84-87)

In her argument before Judge Vlahos, Ms. Collums admitted that placing Loisel on a top bunk “... led to some of his issues over at the Restitution Center.” (R. 9) She conceded that Loisel had some minor violations that “would have justified some punishment.” (R. 9) She argued, however, that the full amount of the remainder of the sentence was excessive. (R. 9)

Moreover, she explained why Loisel had practically stood silent during his probation revocation hearing:

“Mr. Loisel tells me that he had some things that he would have liked to have told the court, but he was extremely nervous that day here on his own and did not present them or did not speak up and say them. (R. 9-10) * * * And it was only when he went to the Restitution Center that he had some of these issues that went on at that time.” (R. 9-10)

At the conclusion of this hearing, Judge Vlahos denied the motion for reconsideration stating:

“I will overrule the motion. I could have given him eight years but I gave him seven.” (R. 11; C.P. at 93)

Feeling aggrieved, Loisel, on April 23, 2007, filed a motion for post-conviction collateral relief claiming, *inter alia*, he was not afforded an opportunity to be heard or to prepare a defense.

Loisel also argued in his motion that Judge Vlahos did not have jurisdiction to revoke his probation because the State failed to prove any legal basis for revocation. (C.P. at 13)

Finally, Loisel claimed that Judge Vlahos failed to state in writing the reasons for revoking his probation. All of this, according to Loisel, violated his procedural due process rights. (C.P. at 6)

Loisel complains on appeal the prosecution never proved he was guilty of the conduct that got him the RVR’s in the first place and the judge unlawfully re-sentenced him to seven (7) years.

Put another way, he laments he was improperly revoked to serve a full seven (7) years.

We have concluded, however, that Judge Simpson, who considered the motion for post-conviction relief together with the exhibits attached thereto, was eminently correct in denying post-conviction based upon facts stated in Loisel’s post-conviction papers.

In short, Judge Simpson did not err in affirming the revocation of Loisel’s probation and remanding him to the custody of the MDOC to serve seven (7) of the eight (8) years of his original sentence. **Deere v. State**, No. 2007-CP-00584-COA decided March 11, 2008 [Not Yet Reported], citing **Johnson v. State**, 925 So.2d 86 (¶11) (Miss. 2006).

SUMMARY OF ARGUMENT

Judge Simpson correctly ruled, in effect, that Loisel received all the due process Loisel was due. *See* Miss.Code Ann. §47-7-37 (Rev.2004); **Payton v. State**, 845 So.2d 713 (¶22) (Ct.App.Miss. 2003).

There is no automatic right to counsel at hearings for the revocation of probation. **Riely v. State**, 562 So.2d 1206, 1209 (Miss. 1990).

Loisel admitted to Judge Vlahos he received an RVR on August 20th for being in an unauthorized area. (R. 3) He denied he was disobedient to a female correctional officer (R. 3-4) but received an RVR anyway for disobeying a correctional officer's "direct order" to get out of his bed. (C.P. at 15; Brief of Appellant at 3)

In denying post-conviction relief, Judge Simpson found as a fact " . . . there was sufficient proof in the record to show that [Loisel] had in fact received the RVR's and was otherwise unsuited for the restitution center." (C.P. at 109) This finding was not clearly erroneous and provided an adequate basis for revocation of probation and reinstatement of seven (7) years of Loisel's suspended eight (8) year sentence.

Judge's Simpson ruling, we submit, was eminently correct.

"Mississippi law authorizes a trial judge to summarily dismiss a motion for post-conviction relief without the benefit of an evidentiary hearing '[i]f 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.' " **Buckhalter v. State**, 912 So.2d 159, 160 (¶6) (Ct.App.Miss. 2005).

"If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed." **Johnson v. State**, *supra*, 925 So.2d 86, 92 (Miss. 2006).

"Under Mississippi law, a trial court may only impose probation for a maximum of five (5) years. Miss.Code Ann. §47-7-37 (Supp.1999) . . . A suspension of a sentence does not automatically mean that the defendant will be on probation and under a duty to report to a probation officer. **It simply means that *part of his entire sentence* has been *postponed* pending the defendant's good behavior or such other conditions as the court may see fit to establish.**

Johnson v. State, *supra*, 925 So.2d at 93 quoting with approval the Justice Mills dissenting opinion in *Carter v. State*, 754 So.2d 1210-11 [emphasis ours.]

Here there was suspension as well as probation with conditions which Loisel failed to meet. The judge was entitled to “unpostpone,” if you please, “. . . *part* of [Loisel’s] entire sentence.” [emphasis ours]

Loisel’s motion for post-conviction relief was plainly or manifestly without merit.

We respectfully submit Judge Vlahos did not abuse his judicial discretion when he revoked Loisel’s probation and reinstated seven (7) years of his original eight (8) year sentence.

Loisel admits he signed a document waiving his right, if any, to a preliminary revocation hearing. (C.P. at 9; Brief of Appellant at 4) Loisel claims in his brief he was told that if he signed a waiver of his right to a preliminary or administrative hearing he would “get to see the judge quicker.” (Brief of Appellant at 4) This is not coercion; rather, it is simply a statement of fact. Waiving a preliminary hearing speeds up the process to a more formal final revocation hearing.

Moreover, contrary to Loisel’s position, Loisel was given an opportunity to be heard:

THE COURT: * * * Well you’re back here, what do you have to say. They don’t want you at the Restitution Center so what do you want to say? (R. 4)

Loisel also had an opportunity to summon the witnesses whose affidavits were attached to his motion for post-conviction relief.

Loisel, after receiving the benefit of an extraordinarily lenient sentence for robbery, could not, for some reason, cut the mustard at the restitution center and twice violated the rules. Judge Vlahos did not abuse his judicial discretion in finding that Loisel violated his probation. (R. 7-8)

Judge Simpson, in turn, correctly denied, summarily, post-conviction relief for the reasons stated in his order and opinion where he addressed each issue individually. (Appellee’s exhibit A,

attached)

During Loisel's motion to reconsider reinstatement of his seven (7) year sentence, lawyer Collums, a very capable attorney interceding *pro bono* in Loisel's behalf, made none - no, not one - of the arguments advanced by Loisel for the first time in his 77 page - including exhibits - motion for post-conviction relief. (C.P. at 5-82)

She never mentioned any assaults upon Loisel by correctional officers as alleged in a complaint attached as exhibit 3 to Loisel's motion for post-conviction relief. Indeed, all of this appears to have been handled administratively by the MDOC via its administrative remedy program. (C.P. at 79)

This observation simply detracts from the validity of his present complaints concerning, *inter alia*, his alleged disability, his altercation with a female correctional officer, the seriousness of the rule violations which he admits were lodged against him, a coerced waiver of a preliminary revocation hearing, and an alleged denial of procedural due process.

ARGUMENT

JUDGE SIMPSON'S DECISION DENYING POST-CONVICTION RELIEF WAS NOT CLEARLY ERRONEOUS. RATHER, THE MOTION WAS CORRECTLY DENIED SUMMARILY BECAUSE LOISEL'S CLAIMS WERE PLAINLY WITHOUT MERIT.

"In reviewing a trial court's decision to deny a petition for post conviction relief this Court will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous." **Kirksey v. State**, 728 So.2d 565, 567 (Miss. 1999) citing **State v. Tokman**, 564 So.2d 1339, 1341 (Miss. 1990).

However, if questions of law are raised, then the applicable standard of review is *de novo*. **Jackson v. State**, 965 So.2d 686 (Miss. 2007).

In the case at bar, application of neither standard is sufficient to derail the decision of the circuit judge to deny post-conviction relief.

Loisel seeks to pigeonhole his case into the requirements for probation revocation articulated in the case of **Berdin v. State**, 648 So.2d 73 (Miss. 1994). While the efforts of Loisel and his writ writer are commendable, the circuit judge was correct, for the reasons succinctly stated in his two (2) page order and opinion, in holding them all for naught.

Admittedly, the final hearing in conjunction with probation revocation was quite brief. Nevertheless, Loisel was present for his hearing, and there are sufficient facts supporting the revocation by Judge Vlahos who was clearly reading from the file when he questioned Loisel about his RVR's. (R. 3-4)

The truth of the matter is that Loisel couldn't abide by strict rules and was found to be unfit for the Restitution Center. We agree with Judge Simpson there is sufficient evidence in the record - and Loisel admits - he received two (2) RVR's.

Loisel also admits in his brief the RVR's were issued for being in an unauthorized place and for failing to obey a correctional officer. Even if minor infractions, Loisel failed to seriously contest them at his revocation hearing before Judge Vlahos although given an opportunity to do so. (R. 3-4)

It was not necessary for the probation "revocator" to prove beyond a reasonable doubt that Loisel violated the terms and conditions of his probation but only that it was "more likely than not" that he did so. **Younger v. State**, 749 So.2d 219 (¶12) (Ct.App.Miss. 1999), citing **Berdin v. State**, 648 So.2d 73, 79 (Miss. 1994), quoting from **Murphy v. Lawhon**, 213 Miss. 513, 517, 57 So.2d 154 (1952), and **Wallace v. State**, 607 So.2d 1184, 1189-90 (Miss. 1992).

The proverbial "bottom line" is that Loisel failed to successfully complete the program

provided by the Restitution Center. This was a violation of his probation and suspended sentence which required him to successfully complete his commitment to the Restitution Center.

Loisel failed to do so.

The trial court was entitled to remand Loisel to the custody of the MDOC to serve the balance of his sentence, i.e., eight (8) years. See **Johnson v. State**, *supra*, 925 So.2d 86 (Miss. 2006), which held that suspending a sentence and imposing probation are distinct events. Judge Vlahos only gave him seven (7) years. (R. 5-6)

“If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed.” **Johnson v. State**, *supra*, 925 So.2d 86, 92 (Miss. 2006).

“Under Mississippi law, a trial court may only impose probation for a maximum of five (5) years. Miss.Code Ann. §47-7-37 (Supp.1999) . . . A suspension of a sentence does not automatically mean that the defendant will be on probation and under a duty to report to a probation officer. **It simply means that *part of his entire sentence has been postponed pending the defendant’s good behavior or such other conditions as the court may see fit to establish.*** **Johnson v. State**, *supra*, 925 So.2d at 93 quoting with approval the Justice Mills dissenting opinion in *Carter v. State*, 754 So.2d 1210-11 [emphasis ours.]

Here there was suspension as well as probation with conditions which Loisel failed to meet. The judge was entitled to reinstate “ . . . *that part of [Loisel’s] entire sentence.*” [emphasis ours] He chose only to reinstate seven (7) years as opposed to eight (8) years.

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]

Loisel's post-conviction claims were properly denied because they were manifestly without merit.

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

EUGENE A. LOISEL, III

PETITIONER

VERSUS

CASE NO. A2401-07-00140

STATE OF MISSISSIPPI

RESPONDENT

ORDER

THIS MATTER is before the Court on the *pro se* Motion for Post-Conviction Relief filed by the Eugene Loisel on April 23, 2007. The Court, having reviewed the Motion and exhibits attached thereto, finds and orders as follows:

Mr. Loisel entered a plea of guilty to robbery in cause number B2401-05-0537 on October 3, 2005. He was sentenced to a term of ten (10) years with eight (8) suspended and two (2) to serve followed by three (3) years of post-release supervision. As a condition of his post release supervision Mr. Loisel was to attend the restitution center. He entered the restitution center on August 16, 2006. On October 9, 2006, Mr. Loisel's probation was revoked for rule violations he received at the center. He was sentenced to seven (7) years and given credit for time served. A motion to reconsider the revocation of his probation was filed by counsel and was denied by order November 20, 2006.

Mr. Loisel maintains that he was deprived of his constitutional right to due process because "I was not afforded the opportunity to be heard, did not have the opportunity to prepare my defense, cross-examine witnesses or to present witnesses or documentry [sic] evidence on my own behalf." He further argues that although he admitted receiving the RVR's (rule violation reports) he never admitted that he was guilty of the violations and the Court failed to prove that

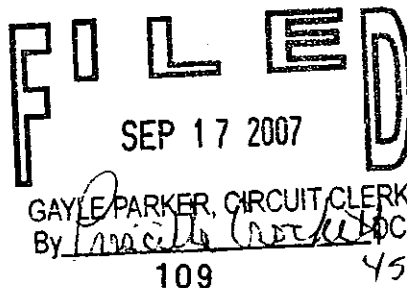
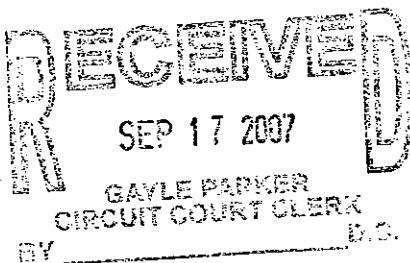


he was actually guilty. It is not necessary that a defendant be convicted of crimes charged [here the rules violations] to suffer revocation of his probation/post release supervision. "Probation may be revoked upon a showing that the defendant "more likely than not" violated the terms of probation." *Younger v. State*, 749 So.2d 219(¶ 12) (Miss.Ct.App.1999) (citing *Berdin v. State*, 648 So.2d 73, 79 (Miss.1994)). The evidence clearly met this standard. One of the terms and conditions of his probation was that he successfully complete the restitution center. He failed to do so. In addition there was sufficient proof in the record to show that he had in fact received the RVR's and was otherwise unsuited for the restitution center. Mr. Loisel complains that he was not informed of "the right to have the court appoint counsel at a combined revocation and sentencing hearing." A defendant has no state or federal right to counsel in post-conviction proceedings. *Nance v. State*, 766 So.2d 111, 114 (¶¶ 12) (Miss.2001). Mr. Loisel also states imposing his "suspended" sentence was wrong unless there was a conviction of a subsequent offense. He is wrong. Attendance at the restitution center was a condition of his post release supervision. Mr. Loisel was obligated to abide by the terms and conditions of his post release supervision, including the rules of the restitution center. His failure to do so caused his "suspended" sentence to be imposed. It is therefore,

ORDERED AND ADJUDGED that the Motion for Post Conviction Relief is denied.

SO ORDERED AND ADJUDGED, this the 16 day of Sept. 2007.


STEPHEN B. SIMPSON
CIRCUIT COURT JUDGE



CERTIFICATE OF SERVICE

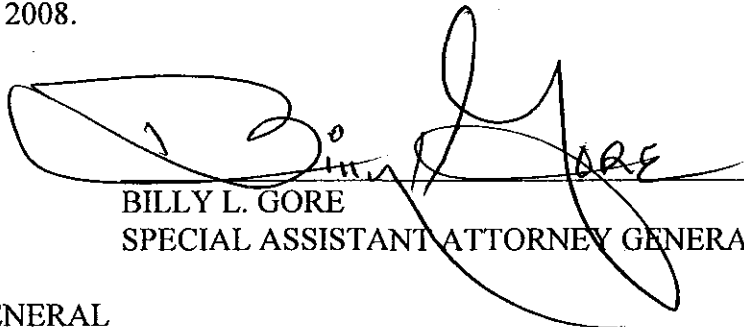
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 26th day of March, 2008.



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