

In the Court of Appeals for
State of Mississippi

COPY

John Paul Wallace

Appellant

vs

No. 2007-CP-0766-COA

State of Mississippi

FILED

DEC 13 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Appellee



Reply Brief for Appellant

Comes Now, the appellant, pro se, by his own hand, with
his reply to the issues presented in the Appellee's brief.

Respectfully Submitted,

John Paul Wallace [redacted]

S.C.R.C.F.

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Cited Authority

Federal Cases

Alabama v. Shelton	535 U.S. 654, 667 (2002)	2
Gagnon v. Scarpelli	411 U.S. 778, 36 L. Ed. 2d. 656 (1973)	2
Moore v. Johnson	194 F.3d. 586, 610 (5 th Cir. 1999)	5
Pavel v. Hollins	261 F.3d. 210 (2 nd Cir. 2001)	4
Strickland v. Washington	466 U.S. 668, 104 S. Ct. 2052 (1984)	5
U.S. v. Allen	157 F.3d. 661 (9 th Cir. 1998)	1

State Cases

Beasley v. State	795 So.2d. 539 (Miss 2001)	3
Riely v. State	562 So.2d. 1206, 1209 (Miss 1990)	1
Williams v. State	669 So.2d. 44 (Miss 1996)	3

Miss. Code Ann.

99-39-5

(1972)

Reply Argument

The initial observations of the appellee in his brief are vaguely legitimate, however the laws are extremely precise. It is true that Miss Code Annotated 99-39-5 (1)(g)(i)(e) sets forth a three (3) year time limit for filing post-conviction complaints, fortunately this same code also sets the exceptions in the time limits for filing... "excepted from this three-year statute of limitations... are those cases in which the prisoner claims that... his probation, has been unlawfully revoked." Can it be anymore clear? The appellant has claimed that... "his probation has been unlawfully revoked"... by declaring an error affecting fundamental constitutional rights. The right to effective assistance of counsel. U.S. v. Allen 157 F.3d. 661 (9th Circuit)... recognizing constitutional right to effective assistance of counsel at a probation revocation hearing... "The appellee argues that... "there is no automatic right to counsel at hearings for the revocation of probation." (Brief for Appellee @ 7). Instead, ... "only when a case is complex or otherwise difficult to develop." Appellee cites Riely v. State 562 So.2d. 1206, 1209 (Miss 1990), But some 12 years later the United States Supreme Court announced loud and clear... "The 6th Amendment does not permit activation of suspended sentence upon violation of

probation terms when state has not provided counsel to indigent offender ... The right to counsel applies to activation of suspended sentence because the prison term imposed is for the actual offense and not the probation violation ...," Alabama v. Shelton 535 U.S. 654, 667 (2002). In Gagnon v. Scarpelli 411 U.S. 778, 36 L.Ed.2d. 656 @ 1764 (1973) ... "counsel should be provided in cases where ... the probationer makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty, or (ii) ... there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or difficult to develop or present..."

The appellant was not appointed counsel, but retained counsel at his own expense. The Circuit Court granted retained counsel's pre-hearing motions, therefore allowing retained counsel to defend the appellant in the revocation hearing. This allowance, enacted the constitutional protections of effective assistance of counsel. The record also supports the Circuit Court's decision to allow counsel because there exists nowhere in the record that denies counsel to the appellant.

The Appellant does not understand how the appellee could allege that the appellant "filed a direct appeal masquerading as a motion for post-conviction relief... (Brief for Appellee @ 9) This honorable court has stated that post conviction proceedings are for the purpose of bringing to the trial courts attention, facts not known at the time of judgement and the proper remedy for the allegedly improper revocation of probation and suspended sentence was for defendant to bring a claim under the Uniform Post-Conviction Collateral Relief Act. Williams v. State 669 So.2d. 44 (miss 1996) and Beasley v. State 795 So.2d. 539 (miss 2001)

The appellant fully understands that this court will not disturb the trial courts factual findings unless they are found to be "clearly erroneous" or "manifestly wrong".

The facts Judge Terry relied on to revoke the appellants probation were "clearly erroneous". Here is why.

- 1.) According to the record (pg. 56) Judge Terry relied on the results of the first and second positive drug test to revoke probation. It is true that the appellant confessed to the first positive test. The appellant testified that he used marijuana on Feb. 25, 2002 (before being placed on probation) The appellant

remained on Probation with another chance.

2) It is true that 44 days later, a second urine sample, allegedly taken from the appellant, was again found to be positive for THC, marijuana. Appellant has raised serious questions about the authenticity of the sample after an investigation of the petition to revoke probation, chain of custody, MDUC policy, and matter of law. This information was readily available to the defense counsel at the clerk's office and is easily obtainable. "Physical evidence should be a focal point of defense counsel's pre-hearing investigation and analysis of the matter." Pavel v. Hollins 261 F.3d. 210 @ 224 (2nd Cir. 2001)

3) It should be noted that a positive test 44 days after a previous positive test is allowed by the MDUC policy (Brief for Appellant, Ex. A pg. 14). This fact was not before the Judge at time of Judgement

4) The fact that the probation officer drafted the petition to revoke probation, alleging a positive drug test, on May 5, 2002 (Records pg. 30 B), when the sample was tested on May 6, 2002 (Records pg. 30 C), was not before the Judge at time of judgement.

5) The fact that the chain of Custody was in violation of the MDOC policy (Records pg. 30D), and the laws of this state, was not before the judge at time of judgement.

All of these facts would have been presented had counsel simply done an ~~and~~ reasonable investigation of facts surrounding the case. "The court agreed that the 6th Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions, and informed legal choices can be made only after investigations of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight." ~~and~~ Strickland v. Washington 466 U.S. 688, 104 S.Ct. 2052 @ 680 (1984) "A strategic decision is a decision, that is expected to yield some benefit or avoid some harm" Moore v. Johnson 194 F.3d, 586, 610 @ 615 (5th Cir. 1999). It could not have been "strategic" to not investigate readily available facts, nor could it have been strategic not to call an expert witness when the bulk of defense counsel's position was from a scientific point of view.

There appears to be a misconception about the expert opinion the appellant used for his post-conviction and on appeal. (Brief for Appellee @ 4). Mr. Robert F. Conley is not an "impaired driving consultant", but rather a "drug recognition expert". (Attached Appellant Exhibit A). Impaired Driving Consultant Group is a "corporation dedicated to providing detailed analysis of impaired driving cases for courtroom presentation" (Attached Appellant Exhibit A @ 3).

Conclusion

The appellant was not time barred because he claims his probation was revoked unlawfully. The Appellant was denied effective assistance of counsel at the revocation hearing. Judge Terry relied upon distorted facts in reaching his decision to revoke probation and in denying appellants motion for post-conviction.

Respectfully Submitted

John Paul Wallace
Appellant

Curriculum Vitae

Robert F. Conley

Drug Recognition Expert Instructor

Impaired Driving Consultant Group
Nashville, Tennessee

Last update: July, 2005

Pg 1-A
(Appellants Exhibit A)

Robert F. Conley
Drug Recognition Expert Instructor

Impaired Driving Consultant Group
209 Chandler's Pass Court
Hermitage, Tennessee 37076
(615) 485-1262

Robert Conley served as a police officer with the Metro-Nashville Police Department from November 1996 to July 2005. Prior to this he served as a patrol officer with the Norman Police Department in Norman, Oklahoma. While serving with the Norman Police Department he completed the Norman Police Department Training Academy and subsequent Field Training Program in 1993. Since the completion of his initial training Conley was assigned to the Patrol Division. Conley was assigned to both Patrol Shift II and Patrol Shift III. Since appointment to the Metro-Nashville Police Department, Conley has completed the Metro-Nashville Police Academy, Field Training Program and Supervisory Management classes.

Officer Conley was an active patrol officer. While serving with the Norman Police Department, Officer Conley was the leading enforcement officer for Driving Under the Influence offenses for three consecutive years. Officer Conley continued to actively enforce DUI offences while serving in Nashville. Officer Conley has studied in this field to help his enforcement capabilities. Officer Conley attended a Standardized Field Sobriety Testing class, sponsored by the Oklahoma Council on Law Enforcement Education and Training and the National Highway Traffic Safety Administration, in December 1992. Since that time Officer Conley has made over 1400 arrests for Driving Under the Influence. Officer Conley was selected to attend the National Highway Transportation Safety Administration Standardized Field Sobriety Testing Instructor class in December 1995 and is now certified nationally to instruct the NHTSA Standardized Field Sobriety curriculum.

Officer Robert F. Conley
Drug Recognition Expert

Due to his noted efforts Officer Conley was selected by the Norman Police Department to attend the Drug Evaluation and Classification training beginning in April 1996. Officer Conley attended the 2-Day Pre-School and the formal 7 Day Classroom Training Session in April. He completed his certification requirements in July 1996 and obtained full certification as a Drug Recognition Expert in July 1996. Officer Conley is now Internationally Certified and recognized by the International Association of Chiefs of Police and the National Highway Traffic Safety Administration. Officer Conley is the only police officer in Tennessee to hold this certification. With this Drug Recognition Expert certification, Officer Conley is also internationally certified to instruct the National Highway Transportation Safety Administration's Drugs That Impair Driving curriculum. Officer Conley is the only Tennessee police officer certified to teach this course. Officer Conley received Tennessee POST certification as a Specialized Police Instructor in both Traffic and Narcotics in September 1997 and is now certified to teach in these specialized fields throughout the state of Tennessee. Officer Conley attended the DRE Instructor School held in Norman, Oklahoma in March 1998. Officer Conley completed his Instructor certification requirements in April 1998 and was certified by the IACP and NHTSA as a Drug Recognition Expert Instructor. Officer Conley holds Police Instructor Certifications in Georgia, North Carolina and Oklahoma. Officer Conley has also been named to the Tennessee District Attorney General's DUI Conference Faculty. Upon leaving law enforcement Conley established the Impaired Driving Consultant Group, a corporation dedicated to providing detailed analysis of impaired driving cases for courtroom presentation.

FORMAL EDUCATION

1985	Edmond Memorial High School
	High School Diploma
	Edmond, Oklahoma

Officer Robert F. Conley
Drug Recognition Expert

1991 Marshall University
Bachelor of Business Administration
Finance major
Huntington, West Virginia

1992 University Of Oklahoma College of Law
General studies
Norman, Oklahoma

SPECIALIZED TRAINING

02-95 Breathalyzer Operator
Oklahoma Department of Public Safety

03-95 Intoxilyzer Operator
Oklahoma Department of Public Safety

11-95 Calibre Press Street Survival Seminar
Caliber Press, Oklahoma County Sheriff's Office

12-95 Standardized Field Sobriety Testing
Instructor Class
NHTSA

Officer Robert F. Conley
Drug Recognition Expert

04-96	Drug Evaluation and Classification 2-Day Pre-School NHTSA-IACP
04-96	Drug Evaluation and Classification 7 Day Classroom Training NHTSA-IACP
04/07-96	Drug Evaluation and Classification Certification Training NHTSA-IACP
06-97	4 th Annual Alcohol and Drug Impaired Driving Conference Buffalo, New York
03-98	Drug Recognition Expert Instructor School NHTSA-IACP
06-98	Intoxilyzer/Intoximeter Operator Tennessee Bureau of Investigation
06-99	5th Annual Alcohol and Drug Impaired Driving Conference Minneapolis, Minnesota
06-01	7 th Annual Alcohol and Drug Impaired Driving Conference Long Beach, California

Officer Robert F. Conley
Drug Recognition Expert

06-05 10th Annual Alcohol and Drug Impaired Driving Conference
Phoenix, Arizona

CLASSES INSTRUCTED

02-96 Standardized Field Sobriety Testing
Durant, Oklahoma

02-96 Standardized Field Sobriety Testing
Tinker Air Force Base, Oklahoma

03-96 Standardized Field Sobriety Testing
Lead Instructor
Muskogee, Oklahoma

06-96 Standardized Field Sobriety Testing
Norman, Oklahoma

12-97 Standardized Field Sobriety Testing
Nashville, Tennessee

Officer Robert F. Conley
Drug Recognition Expert

04-98	Drug Recognition Expert 7 Day School Norman, Oklahoma
07-98	Drugs That Impair Driving Nashville, Tennessee
09-99	Drug Recognition Expert Pre School and 7 Day School Forsythe, Georgia
07-00	Drugs That Impair Driving Nashville, Tennessee
09-00	Drug Recognition Expert 7 Day School Forsythe, Georgia
10-01	Drug Recognition Expert Pre and 7 Day School Cary, North Carolina
03-02	Drug Recognition Expert 7 Day School Cary, North Carolina
03-03	Drug Recognition Expert 7 Day School Greenville, North Carolina

Officer Robert F. Conley
Drug Recognition Expert

DEC Presentations:

02-01	Tennessee General Assembly DUI Sub-committee
03-01	Tennessee General Assembly Legislative Sub-committee
03-03	Tennessee District Attorney General's DUI Conference Fall Creek Falls, Tennessee
05-03	Tennessee District Attorney General's DUI Conference Greeneville, Tennessee
08-03	Tennessee District Attorney General's DUI Conference Natchez Trace, Tennessee

Certificate of Service

I, John P. Wallace, Appellant, do hereby certify that I have this date mailed, a true and correct copy of the Reply Brief for Appellant to the following.

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This 13th day of December, 2007

John Paul Wallace
Appellant