

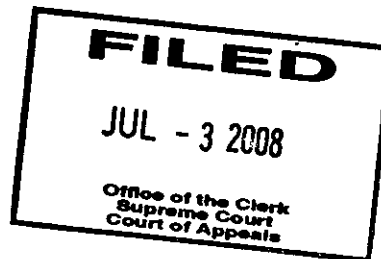
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERESA SCHWEND

APPELLANT

VS.



NO. 2007-KA-2039

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The Trial Court correctly denied Schwend's Petition for Post Conviction Relief since Schwend is not entitled to credit for time served for the time she was released from incarceration under supervision

STATEMENT OF THE CASE

In January of 2001, Schwend was indicted in CR2001-75RD for grand larceny. On March 21, 2001, Schwend entered a plea of guilty to CR2001-75RD and the Court sentenced Schwend to four (4) years with one (1) year to serve in the custody of the Mississippi Department of Correction followed by three (3) years of post-release supervision. Schwend was given ninety eight (98) days jail credit. In December of 2002, Schwend was indicted in CR2002-932RD for taking possession of a motor vehicle. On January 6, 2003, the State filed a petition to adjudicate Schwend guilty in CR2000-188RD and a petition to revoke Schwend's post-release supervision in CR2001-75RD. After a hearing on February 19, 2003, Court adjudicated Schwend guilty in CR 2000-188RD and sentenced Schwend to five (5) years with one (1) year to serve in MDOC followed by four (4) years of post-release supervision. The Court also revoked

one year of Schwende's post-release supervision in CR2001-75RD with the revoked time being consecutive to Schwend's sentence in CR2000-188RD. On May 7, 2003, Schwend entered a plea of guilty pursuant to *North Carolina v. Alford* in CR2002-932RD and the Court sentenced Schwend to one (1) day to serve in MDOC followed by four (4) years of post-release supervision with the sentence in CR2002-932RD concurrent to the sentences in CR2000-188RD and CR2001-75RD. Schwend was given credit for one day jail time.

On November 6, 2006, the trial court held a probation officer's revocation hearing, after which the Court revoked the four (4) years of Schwend's post-release supervision in CR2002-932RD. Schwend was given thirty-two (32) days jail credit.

On September 13, 2007, Schwend filed Petition for Post-Conviction Relief asserting that the Trial Court's revocation of her four year sentence imposed in Cause Number CR2002-932CD resulted in an illegal and improper sentence and that her right to due process was violated. On October 23, 2007, the Trial Court entered an order denying Schwend's Petition for Post-Conviction Relief. The instant appeal ensued.

SUMMARY OF THE ARGUMENT

The Trial Court correctly denied Schwend's Petition for Post Conviction Relief since Schwend is not entitled to credit for time served for the time she was released from incarceration under supervision. Schwend is not entitled to credit for time served for the period of time when she was not incarcerated. Where a petitioner is under "post-release supervision" as opposed to probation, for purposes of dealing with the issue of revocation and the proper allowance for time served, the procedures are governed just as those for supervised probation. *Johnson v. State*, 802 So.2d 110 (Miss.Ct.App. 2001). The courts are empowered to revoke any or all of a defendant's probation or any part or all of the suspended sentence if, during the period of probation, it is

found that the defendant violated the conditions of his probation/suspended sentence. This assignment of error is without merit and the Trial Court's denial of post-conviction relief should be upheld.

ARGUMENT

I. The Trial Court correctly denied Schwend's Petition for Post Conviction Relief since Schwend is not entitled to credit for time served for the time she was released from incarceration under supervision.

Miss. Code Ann. § 47-7-34 provides in subsection (1):

When a court imposes a sentence upon a conviction for any felony committed after June 30, 1995, the court, in addition to any other punishment imposed if the other punishment includes a term of incarceration in a state or local correctional facility, may impose a term of post-release supervision. However, the total number of years of incarceration plus the total number of years of post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed. The defendant shall be placed under post-release supervision upon release from incarceration. The period of supervision shall be established by the court.

By the plain meaning of the term "post-release supervision" and the above statute, Schwend's post-release supervision could not begin until she was released for MDOC which was September 21, 2004. Schwend is not entitled to credit for time spend while of post-release supervision.

Schwend argues that since she was released from MDOC on September 21, 2004, and the trial court did not revoke her post-release supervision until November 6, 2006, that she did not have four years to serve upon revocation.¹ In other words, Schwend believes that she is entitled to credit for time served for the period of time from September 21, 2004 until November 6, 2006

¹Schwend correctly notes that even though her one day time to serve was imposed concurrently with her sentences in CR2000-188RD and CR2001-75-RD, her post release supervision did not begin until her release on September 21, 2004.

when she was out on post-release supervision. (Appellant's Brief, p. 5) However, Schwend is not entitled to credit for time served for the period of time when she was not incarcerated. Where a petitioner was under "post-release supervision" as opposed to probation, for purposes of dealing with the issue of revocation and the proper allowance for time served, the procedures are governed just as those for supervised probation. *Johnson v. State*, 802 So.2d 110 (Miss.Ct.App. 2001). Miss. Code Anno. § 47-7-37 states:

Thereupon, or upon an arrest by warrant as herein provided, the court, in term time or vacation, shall cause the probationer to be brought before it and may continue or revoke all or any part of the probation of the suspension of sentence and may cause the sentence imposed to be executed or may imposed any part of the sentence which might have been imposed at the time of the conviction.

In *Johnson v. State*, 802 So.2d 110 (Miss.Ct.App. 2001), Johnson received a sentence of five years with one year serve and four years suspended with three years post release supervision. While Johnson was on probation a petition for revocation was filed and Johnson confessed that he had breached some of the conditions of his probation. He was returned to the Mississippi Department of Corrections to serve the four year sentence that had previously been suspended. The Mississippi Court of Appeals held that Johnson was not entitled to have the fifteen months he served on post-release supervision deducted from the four year suspended sentence that was reinstated by the trial judge. The court held that the reinstated four year suspended sentence did not exceed the five year maximum sentence the three years of post-release supervision was not an additional period to be added to his the aforementioned years, but was simply the time Johnson would be under post release supervision. The Court held that the sentence imposed did not exceed the five year maximum sentence for the felony of a third offense of driving under the influence or violate the language of Miss. Code Ann. § 47-7-34.

In *Wilson v. State*, 735 So.2d 290 (Miss. 1999), Wilson argued that the trial court erred when it reimposed his eight (8) year suspended sentence. Wilson was released from Parchman on March 19, 1993, after serving two concurrent years. On March 26, 1996, the State of Mississippi petitioned the Circuit Court of Panola County to revoke Wilson's armed robbery suspended sentence after he was charged with grand larceny and possession of a firearm by a convicted felon. The Court revoked Wilson's suspended sentence following a hearing on August 9, 1996, and reinstated Wilson's eight year armed robbery sentence. Wilson's sentence was imposed three years, four months and twenty one days after he was discharged on March 19, 1993. The courts are empowered to revoke any or all of a defendant's probation or any part or all of the suspended sentence if, during the period of probation, it is found that the defendant violated the conditions of his probation/suspended sentence.

The sentence of one day to serve plus four years supervised probation does not exceed the statutory maximum for the crime to which Schwend pled guilty, and the total period of incarcerated time upon revocation does not exceed the statutory maximum for the crime to which Schwend pled guilty. Therefore, the trial court correctly sentenced Schwend to four years upon revocation of her supervised probation for failure to attend alcohol and drug treatment and failure to pay supervision and court costs. Schwend is not entitled to credit for time served for the time she was released from incarceration under supervision.

Based on the foregoing, there is no merit to this assignment of error.

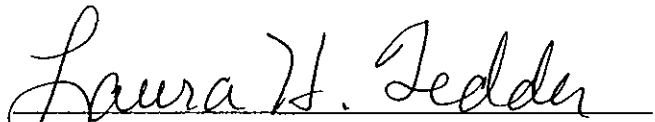
CONCLUSION

Schwend's assignment of error is without merit and the Trial Court's denial of post-conviction relief should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

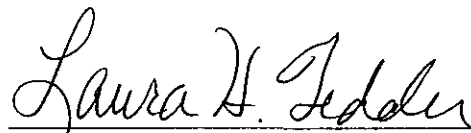
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 3rd day of July, 2008.



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