

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RAMONZ PAYNE

APPELLANT

VS.

NO. 2008-CA-1243

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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RAMONZ PAYNE

APPELLANT

VERSUS

NO. 2008-CA-1243-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Ramonz Payne has perfected an appeal from the dismissal by the Circuit Court of Lauderdale County of his petition for post-conviction relief. In its order dismissing the petition, the court set out the procedural history of this case as follows:

✓ On February 1, 2001, the Movant entered a guilty plea to the offense of sale of cocaine in this Court ... and was sentenced to serve thirty (30) years in the custody of the Mississippi Department of Corrections, with twenty-eight (28) years suspended upon completion of five (5) years of supervised probation.

✓ On August 23, 2004, the Movant entered into an Agreed Order of Revocation for violating the terms of his suspended sentence by possession of cocaine on or about October 3, 2003 and was sentenced by this Court to serve twenty-five (25) years in the custody of the Mississippi Department of Corrections, with one (1) year to serve, twenty-four (24) years suspended and five (5) years of post release supervision.

✓ On November 7, 2006, Movant was indicted by the Lauderdale County Grand Jury ... for the offense of sale of cocaine within 1500 feet of a church, which occurred on August 15, 2006.

On June 7, 2007, this Court, upon hearing of that State's Petition of Revocation, entered an Order of Revocation of Post Release Supervision ... finding that the Movant had violated the conditions of his Post Release Supervision by committing the offense of sale of cocaine on August 15, 2006, and sentenced the Movant to serve the remaining term of his twenty-four (24) year sentence with credit for 297 days time served from August 15, 2006 to June 7, 2007.

On February 19, 2008, the Court, to best serve justice and judicial economy, entered an order of Nolle Prosequi in Cause No. 721-06 dismissing the charge of sale of cocaine within 1500 feet of a church due to the twenty-four (24) year sentence Defendant received in Cause No. 263-00.

The Movant has now filed a Petition for Post Conviction Collateral Relief alleging that the revocation of his post release supervision was based upon the charge of the sale of cocaine within 1500 feet of a church and because that charge was ultimately Nolle Prosequi that no grounds for the revocation exist. Further, the Movant alleges that the State's failure to prosecute the charge in Cause No. 721-06 should be construed as an acquittal of the charge.

The court went on to find that the petition lacked merit and dismissed it. This appeal followed.

SUMMARY OF THE ARGUMENT

First, the state contends no error has been shown in the circuit court's dismissal of the claims presented in the petition. No other issues are properly before the court at this time.

Additionally, the state argues that Payne is not entitled to a *de novo* review of the court's ruling. There is nothing to rebut the court's declaration that it had fully reviewed the petition. Furthermore, Payne's second proposition is procedurally barred and substantively without merit for the reasons more fully set out below.

Moreover, Payne's third, fourth and fifth propositions are essentially a composite of his claims that the state was obligated to prosecute the offense used as the basis of the revocation, that a charge which does not result in conviction cannot be used to support revocation, and that the order of nolle prosequi required his release. The circuit court fully addressed and appropriately denied these with correct citation of controlling case law.

Payne's seventh proposition is also procedurally barred. In the alternative, the state submits the introduction of the laboratory report without the testimony of the laboratory technician could not have harmed Payne's case under the circumstances presented here.

Finally, Payne's reliance on MISS.CODE ANN. § 99-35-13 (1972) (as amended) is unavailing. That statute provides for the remittance of fines and forfeitures after an order of nolle prosequi has been entered. It has no application here.

PROPOSITION ONE:

**NO ERROR HAS BEEN SHOWN IN THE CIRCUIT COURT'S
DISMISSAL OF THE CLAIMS PRESENTED IN THE
PETITION, AND NO OTHER ISSUES ARE
ARE PROPERLY BEFORE THIS COURT**

At the outset, the state submits the petition for post-conviction collateral relief raised the following claims, and only these claims:

1. That the defendant was required to be released from custody after the charge which caused the revocation of the suspended sentence ended in dismissal, acquittal, or any other fashion other than finding or a plea of guilty on the merits.
2. That the state was obligated to prosecute the charge when the state had used it as a basis for revocation.
3. That newly discovered evidence required the granting of relief.
4. A suggestion that the court had imposed the wrong burden of proof.

The court denied these claims with the following findings and conclusions, which are fully supported by the law and the facts:

The Movant's Petition is without merit. Before a defendant's probation or suspended sentence can be revoked, the Court must find that the defendant violated the conditions of his or her probation. Moore v. State, 585 So.2d 738, 739 (Miss.1991). While an arrest or indictment is not alone grounds for revocation or post release supervision, the Court has to only find that it is more likely than not that the accused committed an offense that violates the conditions of his or her probation. Moore v. Ruth, 556 So.2d 1059, 1052 (Miss.1990), Berdin v. State, 648 So.2d 73, 79 (Miss.1994). Certainly a felony conviction is grounds for revocation of probation. Bobkoskie v. State, 495, 497, 500 (Miss.1980). **However, a conviction of the indicted criminal act is not required for the circumstances of that offense to be the basis of a revocation.** McCleinton v. State, 799 So.2d 123, 127 (Miss.Ct.App.2001.), citing Younger v. State, 749 So.2d 219 (Miss.Ct.App.1999). **The State is not required to prove beyond a reasonable doubt that the accused**

committed the criminal act to revoke probation, as in a criminal prosecution. Murphy v. Lawhon, 57 So.2d 154, 157 (Miss.1952). The fact that the particular criminal act alleged is ultimately disposed of by the court in some manner other than a guilty plea or conviction does not preclude the use of the surrounding circumstances as the basis to revoke probation. McClinton, 799 So.2d at 127. Further, the court is not required to postpone the revocation proceeding until the new charge has been disposed of. Wallace v. State, 607 So.2d 1184, 1190 (Miss.1992), citing Moore v. Ruth, 556 So.2d at 1061.

After conducting the revocation hearing, in which the Movant was represented by counsel, and having considered all the facts presented by the State and by the Movant, the Court did find that there was substantial evidence that the Movant violated the terms of his post release supervision. Murphy, 57 So.2d at 157. **The State was not required to prove, nor was the Court required to find the Movant guilty of the offense beyond a reasonable doubt. Id., at 157-58.** The decision to grant the State's Motion to Nolle Prosequi the charge in an effort to promote judicial economy is irrelevant as to the revocation. The revocation of the post release supervision was based upon the facts and circumstances surrounding the charge, and was sufficient to support the Court's finding that the Movant, on August 15, 2006, **more likely than not**, did commit the offense of sale of cocaine within 1500 feet of a church. Forshee v. State, 853 So.2d 136, 140 (Miss.Ct.App.2003), Younger, 749 So.2d at 222. The burden of proof for the revocation was met, and based upon the facts presented the revocation of Movant's post conviction release supervision was appropriate.

(emphasis added) (C.P.35-37)

As shown by the foregoing excerpt, the court's disposition of the petition was well-supported by the controlling case law. Moreover, no claims other than those presented by the petition are properly before this Court at this juncture. *Rivers v. State*, 807 So.2d 1280, 1281 (Miss.App.2002); *Patterson v. State*, 594 So.2d 606, 609 (Miss.1992); *Gardner v. State*, 531 So.2d 805, 808-09 (Miss.1988). Against this backdrop, the state proceeds to address the argument's presented in Payne's brief.

PROPOSITION TWO:

**PAYNE IS NOT ENTITLED TO *DE NOVO* REVIEW OF
THE COURT'S DISMISSAL OF HIS PETITION¹**

Payne initially contends that he is entitled to *de novo* review of the judgment because the court "failed to fully review the grounds for relief."² Specifically, Payne attacks the court's alleged failure to consider the affidavits purporting to show newly discovered evidence. Citing MISS.CODE ANN. § 99-39-11 (1972) (as amended), Payne argues that the court is required by law to examine all of the files, records, transcripts and correspondence relating to the judgment under attack, and that the court's arguable failure to do so constitutes an error of law which must be reviewed *de novo*.

The state disputes this conclusion. The first paragraph of the court's order states as follows, in pertinent part:

This Court having made a full examination of the Petition, together with all the files, records, transcripts and correspondence pursuant to § 99-39-11 ... is of the opinion that the Movant's Petition is not well-taken and that the Petition should be and hereby is dismissed...

(C.P.34)

There is nothing to rebut the court's solemn proclamation that it had examined the petition, which included the affidavits. The state is aware of no authority, and Payne has cited none, which

¹This proposition addresses Propositions One and Six of the appellant's brief.

²"When reviewing a lower court's decision to deny a petition for post [-] conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised the applicable standard of review is *de novo*." *Lambert v. State*, 941 So.2d 804, 807 [(¶ 14)] (Miss.2006)

would require the court, after having made such a pronouncement, to address specifically the contents of the affidavits. Because the court clearly complied with § 99-39-11, there has been no showing that the court committed an arguable error of law which would require *de novo* review.

In any case, even if the issue were reviewed *de novo*, the circumstance would profit Payne nothing because he failed to make a cursory showing that the affidavits constituted newly discovered evidence within the legal meaning of the term. Specifically, a petitioner seeking relief on the ground of newly discovered evidence must show that such evidence could not have been discovered through due diligence before the proceeding.³ E.g., *Bell v. State*, 2 So.3d 747, 750 (Miss.App.2009). Payne's petition fails even to allege this fact. (C.P.16-17) It follows that the court clearly was correct in rejecting this ground for relief.

For these reasons, Payne's first and sixth propositions should be denied.

³Of course, the proponent also must show that the evidence "would likely produce a different result" and "that it is not merely cumulative, or impeaching." *Jones v. State*, 897 So.2d 195, 197 (Miss.App.2004). We need not reach these points because Payne so clearly failed to make the threshold showing. § 99-39-23(6) (Supp.2003).

PROPOSITION THREE:

**PAYNE'S SECOND PROPOSITION IS PROCEDURALLY
BARRED AND SUBSTANTIVELY WITHOUT MERIT**

Payne asserts additionally that the Agreed Order of Revocation in Cause No. 263-00 was a contract between the state and the defendant, and that the revocation constituted a breach of that contract. This claim was not presented in the petition. The circuit court did not have an opportunity to address it, and it should not be litigated for the first time on appeal. Incorporating the authorities cited under Proposition One of this brief, the state respectfully submits this proposition is procedurally barred and should be denied summarily.

Solely for the sake of argument, the state submits it fails to ascertain how the revocation could constitute a breach of the alleged contract. The Agreed Order of Revocation states that in pertinent part that "Post-release supervision is a privilege. It is not a right. It may be revoked for the slightest violation of this order." It goes on to state as a condition that the "Defendant shall hereafter commit no offense against the laws of this State or of any other State of the United States of America ... " (C.P.56-57) The document does *not* state that the prosecution would be required to prove the violation beyond a reasonable doubt. Nothing in the document precludes the establishment of the fact of a violation under the terms of the controlling state law, i.e., that it was "more likely than not" that it occurred.

For these reasons, Payne's second proposition should be rejected.

PROPOSITION THREE:

**PAYNE'S THIRD, FOURTH AND FIFTH
PROPOSITIONS LACK MERIT**

The state submits Payne's third, fourth and fifth propositions are essentially an amalgam of his claims that the state was bound to prosecute the offense used as the basis of the revocation, that a charge which does not result in conviction cannot be used to support revocation, and that the order of nolle prosequi required his release. These contentions were fully addressed and appropriately denied with correct citation of controlling case law. See also *Loisel v. State*, 995 So.2d 850, 853 (Miss.App.2008). No purpose would be served by repeating that analysis at this juncture. Payne's arguments on these points are clearly without merit.

Furthermore, the court clearly imposed the correct burden of proof that the defendant "more likely than not" committed the offense in question. See *Loisel*, 995 So.2d at 853. The state was not required to prove the violation by clear and convincing evidence.

Finally, Payne argues for the first time on appeal that he was denied due process in the revocation procedure. This contention was not presented below and is barred. In any case, the defendant received a full-blown revocation hearing. "He was represented by counsel and given an opportunity to be heard, to present evidence, and to examine witnesses." *Loisel*, 995 So.2d at 852. He cannot begin to show that he was denied due process.

For these reasons, Payne's third, fourth and fifth propositions should be denied.

PROPOSITION FOUR:

PAYNE'S SEVENTH PROPOSITION IS PROCEDURALLY BARRED

Payne next contends that the circuit court committed plain error in allowing the state to introduce the laboratory report without the testimony of the laboratory technician. Again, the state is constrained to point out that this issue was not raised in the petition and is therefore barred.

In the alternative, solely for the sake of argument, the state submits this evidence could not have harmed the defendant's case. As counsel for the defendant asserted when this report was tendered, "Our position is that Mr. Payne didn't sell the drugs." (T.34) Therefore, whether the substance was contraband was not at issue.

For these reasons, Payne's seventh proposition should be denied.

PROPOSITION FIVE:

PAYNE'S RELIANCE ON MISS. CODE ANN. § 99-35-13
IS UNAVAILING

Payne finally cites MISS.CODE ANN. § 99-35-13 (1972) (as amended), for the proposition that the order of nolle prosequi entitles him to be placed back in his original position, i.e., released from custody. The state counters that that statute provides for the remittance of fines and forfeitures after an acquittal or an order of nolle prosequi. It has no bearing on the issues presented by this case. Payne's eight proposition should be rejected.

CONCLUSION

The state respectfully submits that the propositions presented by Payne have no merit.
Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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