

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL W. SCOTT

APPELLANT

VS.

NO. 2008-CP-1017

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL W. SCOTT

APPELLANT

vs.

CAUSE No. 2008-CP-01017

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Jackson County, Mississippi in which relief on the Appellant's motion in post - conviction relief was denied without an evidentiary hearing.

STATEMENT OF FACTS

The Appellant was convicted of felony malicious mischief on 9 August 2005. He was sentenced to five years on "non-adjudicated probation." In February, 2007, the Appellant was arrested for having left the scene of an accident and "DUI refusal." (R. Vol. 1, pp. 14 - 15).

By Order filed on 24 May 2007, the Circuit Court revoked the Appellant's probation, requiring the Appellant to serve his sentence. As grounds for the revocation, the court stated that the Appellant had failed to abide by the conditions of probation in that he had been arrested for "DUI refusal" and leaving the scene of an accident. (R. Vol. 1, pg. 16).

On 10 October 2007, the Appellant filed a motion in post - conviction relief, in which he challenged the propriety of the revocation. The Appellant asserted that his probation was improperly revoked because the Circuit Court relied on the fact of the arrest alone as the ground for revocation. (R. Vol. 1, pp. 1 - 10).

The Circuit Court denied relief on this motion by Order filed 19 October 2007. In that Order, the court found that the Appellant had been sentenced to “non-adjudicated probation,” that he violated the terms of such probation, and that he was revoked on account of that violation. It held that there was no showing that the revocation or sentence imposed thereon was improper. (R. Vol. 1, pg. 28).

The Appellant filed his notice of appeal on 18 July 2008. He stated that he was late in this filing because he had never received a copy of the order denying relief from the Circuit Clerk. (R. Vol. 1, pg. 23). A copy of that Order was sent to the Appellant on 16 June 2008. (R. Vol. 1, pg. 27).

STATEMENT OF ISSUES

DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION IN POST - CONVICTION RELIEF; THAT THIS HONORABLE COURT SHOULD REMAND THE INSTANT CAUSE IN THE EVENT THAT THIS COURT SHOULD FIND THE RECORD INSUFFICIENT TO DETERMINE WHETHER THE REVOCATION WAS PROPER

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION IN POST - CONVICTION RELIEF; THAT THIS HONORABLE COURT SHOULD REMAND THE INSTANT CAUSE IN THE EVENT THAT THIS COURT SHOULD FIND THE RECORD INSUFFICIENT TO DETERMINE WHETHER THE REVOCATION WAS PROPER

The Appellant, relying upon *Brown v. State*, 864 So.2d 1058 (Miss. Ct. App. 2004), asserts that the Circuit Court erred in revoking his probation because the Circuit Court did so solely on the fact of the Appellant's arrest.

It is true that in *Brown* this Court held that a revocation of probation may not be based on the mere fact that the probationer had been arrested while on probation. The Court held that a revocation based upon criminal conduct by the probationer while on probation must be based upon an actual conviction or upon evidence that a crime was committed and that it was more likely than not that the probationer committed the crime. *Brown*, at 1060.

The Order of revocation in the case at bar related that the Appellant violated the terms of probation in that he had been arrested for two offenses. The Order itself did not relate whether the court considered evidence to show that it was more likely than not that the Appellant committed those offenses, but the Appellant himself admits that there was a revocation hearing. (R. Vol. 1, pg. 2). In his brief in this Court, he admits that he was arrested for "DUI refusal" and leaving the scene of an accident. (Brief for the Appellant, at 2).

The fact that a revocation hearing was held should be sufficient to establish that the Circuit Court considered matters other than the mere fact of arrest. Had the court revoked or intended to revoke the Appellant's probation on nothing more than the fact of the Appellant's arrest, it would hardly have needed to go through the tedium of a hearing. While the record here does not show what was considered, this is certainly not a case in which it may be said that the

court considered nothing more than the fact of arrest. This being so, *Brown* is not on point in this appeal. The fact that the record does not contain a transcript of the revocation hearing is a fault to be laid at the Appellant's feet. It was he who had the duty of providing a record sufficient to support his claim of error. *Lyons v. State*, 881 So.2d 373 (Miss. Ct. App. 2004). Error may not be predicated upon a void in the record, where that void is due an appellant's failure to present a complete record.

Here, the Appellant attempts to show that he was acquitted of the "DUI refusal" and leaving the scene of an accident, and he has attached to his brief two documents which he represents to be orders of acquittal in the Municipal Court of Moss Point, Mississippi. (Brief for the Appellant at 2 - 3; 7 - 8). The prisoner did allege in his motion in post conviction relief that he had not been convicted of those offenses, but he did not allege that he had been acquitted of them. (R. Vol. 1, pg. 5). He has not alleged that he did not commit the crimes. He did not attempt to make the alleged Municipal Court orders a part of the record.

The Municipal Court orders are not a part of the record of this case and should be disregarded for that reason. So should the allegations of fact concerning the Appellant's arrest set out in his brief at page 3. *Mason v. State*, 440 So.2d 318 (Miss. 1983). Even if the Appellant had been acquitted of the charges of "DUI refusal" and leaving the scene of an accident, that fact would not invalidate the revocation of his probation. The language availed of by this Court, when describing the standard a Circuit Court should use when considering a revocation on the basis of criminal conduct, is whether it is more likely than not that the probationer committed the crime. That standard is the preponderance of the evidence standard. *Jones v. State ex rel Mississippi Department of Public Safety*, 607 So.2d 23, 29 (Miss. 1991). A Circuit Court could quite correctly find that a probationer more likely than not committed the crime charged against

him, even though the evidence of the probationer's guilt might later be found to be insufficient to reach the beyond - a - reasonable - doubt standard employed in a criminal trial. Thus, the fact of a subsequent acquittal does not in and of itself invalidate a revocation of probation. *Peacock v. State*, 963 So.2d 1180 (Miss. Ct. App. 2007).

In the event, though, that this Court should consider the record before it insufficient to determine this cause, notwithstanding the fact that it was the Appellant's duty to provide a record sufficient to support his claim, then we would ask the Court to remand the case to the Circuit Court of Jackson County so that the record may be expanded. *Creel v. State*, 944 So.2d 891, 895 (Miss. 2006).

We do note that the Appellant's notice of appeal was filed some nine months after the Order denying relief was filed. This was not a timely filing under Rule 4 MRAP. There is some indication that the Appellant may not have been sent a copy of the order in a timely fashion by the Circuit Clerk. However, so that it will not be said that we failed to notice the possible jurisdictional issue resulting from the untimely filing, we do point the matter out. This Honorable Court has duty to determine whether it possesses jurisdiction in an appeal on its own motion. *Pittman v. Pittman*, 3 So.3d 395, 399 (Miss. Ct. App. 2009).

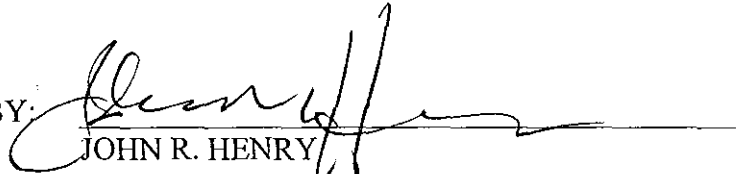
CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "John R. Henry", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, John R. Henry, 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 7th day of July, 2009.



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