

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BOBBY BURKS, JR.

APPELLANT

VS.

NO. 2008-CP-1252-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the First Judicial District of Harrison County, Mississippi, and the summary denial of a *pro se* motion for post conviction relief filed by Bobby Burks, Jr. (CP 17).

On November 9, 2000, Burks entered a guilty plea to possession of a controlled substance with the intent to transfer or distribute.(Plea hearing at Tr 2-26). The trial court sentenced Burks to “twenty years suspended for time served” with five years post-release supervision and to pay a \$5,000 fine with all but \$1,000 suspended. (CP 29-32; Tr 20-21).

On June 14, 2004, after a hearing in which Burks was present, the court revoked his probation and imposed the original twenty (20) year sentence, with credit for time previously served. (CP. 33; Revocation hearing at Tr 29-35). On June 23, 2004, Burks filed a motion to reconsider which the court denied. Burks filed a second motion to reconsider which the court denied as a successive writ. (CP 12).

On June 15, 2006, Burks filed a *pro se* motion for post conviction collateral relief, being Circuit Court cause number A2401-2006-186. (CP 5-10). By order dated July 9, 2008, the court found that “an order was previously entered in his criminal cause number B2401-00-154 denying his Motion to Reconsider filed June 23, 2004. His motion for post conviction relief contains the same allegations as his previous motions to reconsider and is denied.” (CP 17-18). The trial court went on to address the issues raised in Burks’ motion ruling Burks failed to allege any cognizable relief under the post-conviction relief statute. (*Id*).

Aggrieved, Burks appealed and asked this Court to vacate the order of revocation and render his sentence served.

ISSUES

- Issue I: Whether the lower court erred in denying the post-conviction relief?
- Issue II: Whether the trial court erred in failing to reconsider the sentence imposed upon revocation where the sentence was not imposed within the requirements of law?
- Issue III: Whether the trial court improperly revoked the suspended sentence where the court initially sentenced Appellant to time served and where such sentence would legally remove jurisdiction or authority to subsequently revoke sentence or require Appellant to report to supervision officer?
- Issue No. IV: Whether the post release supervision was null and void because there was no term of incarceration prior to post release supervision?
- Issue V: Whether the petition to revoke probation was invalid where it was made upon insufficient and incorrect claims.?
- Issue VI: Whether the clerk of the court provided a complete record on appeal?

SUMMARY OF THE ARGUMENT

The State contends the lower court's denial of post-conviction relief should be affirmed as it was well-supported by the record. No other issues are properly before the court at this time.

Additionally, Burks failed to show the trial court erred in denying the relief requested. The term of incarceration in the circuit court's order of revocation is legal and does not exceed Burks' original sentence. The trial court was well within its discretion in revoking Burks' suspended sentence. The Harrison County Circuit Clerk submitted the complete record as designated by Burks.

ARGUMENT

When reviewing a lower court's decision to deny a petition for post-conviction relief, an appellate 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*. *Ruff v. State*, 910 So.2d 1160 (Miss.App., 2005).

ISSUE I: WHETHER THE LOWER COURT ERRED IN DENYING THE MOTION FOR POST-CONVICTION RELIEF?

No error has been shown in the lower court's denial of the claims presented in the motion, and no other issues are properly before this Court. At the outset, the State asserts the motion for post-conviction relief in the case *sub judice* raised the following issues, and only these issues:

1. That the trial court's sentence imposed at his revocation constituted cruel and unusual punishment.
2. That he was denied due process of law.
3. That he received ineffective assistance of counsel.

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

A review of the transcript reveals that Burkes was given ample opportunity to explain. He informed the Court that the people he had lived with "threw" him out shortly after he was placed on probation and so he went to Franklin County to live with his sick mother without informing his probation officer. Asked what he thought would happen as a result of his actions Burkes said he thought he would "go to jail." Burkes acknowledged that he was also wanted by the Lincoln County for failure to report after being placed on probation on four counts of "sale of cocaine." Asked if he had anything else to say Burkes asked for "mercy, another chance."

Mississippi Code Annotated § 47-7-37 provides

Any probationer who removes himself from the State of Mississippi without permission of the court placing him on probation, or the court to which jurisdiction has been transferred, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that one is on probation shall be considered as any part of the time that he shall be sentenced to serve.

At any time during the period of probation the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested.

Once a defendant violates his probation it is “well within the court’s power to revoke his probation or his suspended sentence and reinstate any or all of the original sentence.” *Brunson v. State*, 796 So.2d 284 (Miss.Ct.App. 2001). The fact that Burks claims that he did not understand that he would have to serve the remaining balance of his sentence does not entitle him to post-conviction relief. *Gates v. State*, 919 So.2d 170 (Miss.Ct.2005). Burks has failed to allege any cognizable relief under the post-conviction relief statute.
(CP 17-18).

As evidenced by the foregoing excerpt, the lower court’s disposition of the motion for post-conviction relief was well-supported by the record and case law. Moreover, no claims other than those presented by the motion are properly before this Court. See *Stringer v. State*, 279 So.2d 156 (Miss.1973); *Jones v. State*, 915 So.2d 511 (Miss.Ct.App.2005). Against this background, the State proceeds to address the issues presented in Burks’ brief.

ISSUE II: WHETHER THE TRIAL COURT ERRED IN FAILING TO RECONSIDER THE SENTENCE IMPOSED UPON REVOCATION WHERE THE SENTENCE WAS NOT IMPOSED WITHIN THE REQUIREMENTS OF LAW?

ISSUE III: WHETHER THE TRIAL COURT IMPROPERLY REVOKED THE SUSPENDED SENTENCE WHERE THE COURT INITIALLY SENTENCED APPELLANT TO TIME SERVED AND WHERE SUCH SENTENCE WOULD LEGALLY REMOVE JURISDICTION OR AUTHORITY TO SUBSEQUENTLY REVOKE SENTENCE OR REQUIRE APPELLANT TO REPORT TO SUPERVISION OFFICER?

Burks contends the sentence imposed at his revocation is null and void because it fails to comply with Miss. Code Ann. § 47-7-34 and the decision in *Sweat v. State*, 912 So.2d 458 (Miss.2005). He also argues the lower court no longer had authority to revoke his suspended sentence because he was originally sentenced to twenty (20) years time served. Burks goes on to state he “was not present at the revocation hearing and therefore had no opportunity to defend

himself or provide any facts or evidence on his behalf.” (Appellee’s brief at 8). The official transcript of Burks’ revocation hearing on June 14, 2004, would indicate Burks was indeed present and afforded an opportunity to present his case. (Revocation hearing at Tr 29-35).

These issues were not presented to the lower court in the motion being appealed. The lower court did not have an opportunity to address them in the motion, and they should not be litigated for the first time on appeal. Incorporating the authorities cited under Issue I of this brief, the State submits these issues are procedurally barred and should be denied summarily. Procedural bar aside, the State, addressing the issues together, submits the court’s sentence imposed when it revoked Burks’ probation did not violate Miss. Code Ann. § 47-7-37 (Rev.2004) or *Sweat v. State*. The term of incarceration in the order of revocation does not exceed Burks’ original sentence. Also, Burks’ original sentence was valid.

The circuit court was well within its discretion in revoking Burks’ suspended sentence pursuant to Miss. Code Ann. § 47-7-37 (Rev.2004). In *Artis v. State*, 643 So.2d 533, 537 (Miss.1994), the Supreme Court interpreted Section 47-7-37 as follows:

We find pursuant to the foregoing Code sections that the normal course of procedure, when the court exercises its authority to suspend the execution of a portion of a defendant's sentence, is as follows: (1) impose a sentence; (2) determine what portion is to be suspended; (3) impose a period of probation (up to five years); and, (4) specify the terms and conditions upon which the probation/suspended sentence is contingent. Then, any time during the period of probation (i.e., within five years from the end of the time served portion of the sentence), if upon hearing it is determined that the probationer violated any of the specified conditions of his probation, the court has the authority to revoke any part or all of the probation or any part or all of the suspended sentence, as if the decision to suspend the sentence and place the defendant on probation had never been made.

Burks failed to report and to pay his fine and court costs as directed in his original sentence. (CP 17). At the revocation hearing the court stated “Paragraph 2 of this petition states that you

violated your probation by absconding your supervision by failing to report. Judge Whitfield also ordered that you have weekly drug screens for six months. You last reported in January of 2001, which was about less than sixty days after your release. . . .” (Revocation hearing at Tr 30). The court had jurisdiction and ample grounds to revoke Burks’ suspended sentence. This issue lacks merit.

ISSUE NO. IV: WHETHER THE POST RELEASE SUPERVISION WAS NULL AND VOID BECAUSE THERE WAS NO TERM OF INCARCERATION PRIOR TO POST RELEASE SUPERVISION?

Burks contends the post release supervision sentence was null and void because the trial court suspended his entire twenty (20) year sentence. Obviously Burks has a memory lapse of the 157 days he served in the Harrison County Jail prior to the revocation hearing. According to Burks under the decisions in *Sweat v. State*, 912 So.2d 458,(Miss.2005) and *Johnson v. State*, 925 So.2d 86, 101 (Miss.2006), the trial court could not suspend his entire sentence but was required to impose a term of incarceration prior to a term of post-release supervision. The State contends that is exactly what the trial court did.

The State would first argue this claim was not presented in the motion for post-conviction relief being appealed. The lower court did not have an opportunity to address it, so it should not be litigated for the first time on appeal. Incorporating the authorities cited under Proposition I of this brief, the State submits this issue is procedurally barred and should be denied summarily.

Procedural bar aside, the State submits that at his plea and sentencing hearing on November 9, 2000, the trial court ruled:

Mr. Burkes, the Court hereby sentences you to a term of incarceration of twenty years on this charge. The court will suspend that for time served at this time. The court is going to place you on five years of reporting post-release supervision. For the first six months you’ll be drug tested once a week.

There will be a \$5,000 fine. I’ll suspend four of that with \$1,000 to be paid.

(Sentencing hearing at Tr 21). The written order reads “[t]o serve a term of Twenty (20) years suspended for time served...” CP 29.

The June 14, 2004 order of revocation filed with the clerk on June 17, 2004, states “It is adjudged that the defendant be and he is hereby sentenced to serve Twenty (20) Years in the custody of the Mississippi Department of Corrections. The Defendant is to receive credit for time served.” (CP 11).

In the post-conviction relief case of *Branch v. State*, 996 So.2d 829, 831 (Miss.App.,2008), this court took judicial notice of Branch’s discharge certificate which was included with his brief but not included as part of the record from the circuit court. “As the discharge certificate merely confirms Branch's assertions in his motion for post-conviction relief, we take judicial notice of the information contained therein.”

The State would ask this Court under M.R.E. 201 to take judicial notice of the information contained in the Mississippi Department of Corrections Sentence Computation Record, a copy of which is attached hereto as Exhibit “A” and the confirmation of time served completed by the Harrison County Sheriff’s Office, which is attached hereto as Exhibit “B.” As reflected in the attached records, MDOC gave Burks credit for serving a total of 157 days pre-trial, per the revocation order. He was credited with serving 124 days pre-trial from July 9, 2000 to November 10, 2000, the date of his guilty plea and sentencing; and 33 days from May 12, 2004 to June 14, 2004, the date of his revocation hearing. This assignment of error, in addition to being barred, totally lacks merit.

ISSUE V: WHETHER THE PETITION TO REVOKE PROBATION WAS INVALID WHERE IT WAS MADE UPON INSUFFICIENT AND INCORRECT CLAIMS.?

This claim was not presented in the motion for post-conviction relief being appealed. The

lower court did not have an opportunity to address it, so it should not be litigated for the first time on appeal. Incorporating the authorities cited under Proposition I of this brief, the State submits this issue is procedurally barred and should be denied summarily.

Burks alleges the Petition to Revoke Probation incorrectly stated that he owed the court \$2,300.00. (Appellee's brief 10). Burks contends the sentencing order did not assess any costs but only a \$1,000.00 fine. Procedural bar aside, the State submits that the subject order specifically directs Burks to pay court costs and \$100.00 to the Crime Victims Compensation Fund. (CP 30).

Burks also alleges that the petition to revoke his probation is null and void because it seeks to revoke an illegal probation. Burks reasons that because he is a convicted felon and the court is prohibited from sentencing him to a term of probation under Miss. Code Ann. § 47-7-33(1), his original sentence can not exist under law. (Appellee's brief 10). Even though Burks argues he cannot be sentenced to probation, he asks the Court to vacate the revocation and reinstate the probation.

Procedural bar aside, the State submits Burks was sentenced to five years post release supervision which is permissible under Miss. Code Ann. § 47-7-34. "Post-release supervision" is an alternative to probation designed specifically for felons. *Gaston v. State*, 2002, 817 So.2d 613 (Miss.App.2002). This issue lacks merit.

ISSUE VI: WHETHER THE CLERK OF THE COURT PROVIDED A COMPLETE RECORD ON APPEAL?

In his final assignment of error, Burks complains that the record provided by the Harrison County Circuit Clerk was not complete and asks that his sentence be reversed and remanded. The case *sub judice* is an appeal of the order entered in Cause No. A2401-06-186 on July 9, 2008. (CP 19). Burks' Designation of Record filed in Cause No. A2401-06-186 specifies "All clerk papers,

to include, the post-conviction relief petition, and all attachments filed in this action.” That is exactly what the Circuit Clerk of Harrison County submitted in the record to this Court. CP 5-13.

Burks asserts the Motion for Post Conviction Relief filed on December 14, 2007, and attached as Exhibit “A” to his brief, is the correct motion that should be included in the record to be considered by this Court on appeal. The motion that Burks is referencing was filed in Cause No. A2401-07-451 not in Cause No. A2401-06-186. Therefore, it was not necessary for the clerk to provide copies of the motion filed in A2401-07-451, as it was not designated as part of the official record in this cause. The State would submit that the record submitted by the clerk complies with the ruling in *Doss v. State*, 956 So.2d 1100 (Miss.App.2007). This allegation of error is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this Court to affirm the judgment of the Circuit Court of Harrison County denying post-conviction relief to Bobby Burks.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



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Mississippi Department of Corrections
Sentence Computation Record

Offender: BURKS, BOBBY JR 21722

Housing: SOUTH MISSISSIPPI SATELLITE FACILITY, PIKE SF

Computation Date: 07/02/2009 18:13

Computation Reason: MET Posting

Date Printed: 07/02/2009 09:57

Sentences:

DATE	CAUSE/COUNT	OFFENSE	COMMITTED	COUNTY	SERVE	HOUSE	PROBATION HAS	DEFERRED	OVERRIDE	CONCURRENT	CONSECUTIVE
06/14/04	B2401-2000-154/1	3589:POSS OF CNTLD SUBST WITH INTENT	10/05/99	Harrison	20Y		N				

☐ First Time Offender

Pre Trial/Pre Sentence Jail Time:

FROM	TO	DAYS
05/12/04	06/14/04	33
07/09/00	11/10/00	124

Total Jail Time: 157

Override:

Computation Details:

DATE	DESCRIPTION	HOUSE ARREST	PAROLE	ERS	TENTATIVE	MAX
Sentence begin = 06/14/04 - 157D jail time = 01/09/04						
06/14/04	B2401-2000-154/1 3589:POSS OF CNTLD SUBST WITH INTENT 20Y [15% of 20Y-157D = 2Y 341D]			01/07/09	01/28/21	01/04/24
02/04/05	Met-Maintenance 10/12/04 to 01/12/05 : 30D [Tentative -30D] [ERS -30D] [Parole -30D] GROUND MAINTENANCE			12/08/08	12/29/20	12/05/23
05/19/05	Met-Maintenance 01/12/05 to 03/12/05 : 20D [Tentative -20D] [ERS -20D] [Parole -20D] GROUND MAINTENANCE			11/18/08	12/09/20	11/15/23
08/09/05	Met-Maintenance 03/12/05 to 06/12/05 : 30D [Tentative -30D] [ERS -30D] [Parole -30D]			10/19/08	11/09/20	10/16/23
10/31/05	Met-Maintenance 06/13/05 to 09/12/05 : 30D [Tentative -30D] [ERS -30D] [Parole -30D]			09/19/08	10/10/20	09/16/23
01/17/06	Met-Maintenance 09/12/05 to 12/12/05 : 30D [Tentative -30D] [ERS -30D] [Parole -30D]			08/20/08	09/10/20	08/17/23
08/21/06	Met-Abe/GED 04/01/06 to 05/31/06 : 20D [Tentative -20D] [ERS -20D] [Parole -20D]			07/31/08	08/21/20	07/28/23
11/21/06	Met-Abe/GED 08/07/06 to 11/07/06 : 20D [Tentative -20D] [ERS -20D] [Parole -20D] 10 days N.E. due to exceeds 180 day max.			07/11/08	08/01/20	07/08/23
07/02/09	Met-Satellite 06/18/09 to 06/30/09 : 4D [Tentative -4D] [ERS -4D] SATELLITE WORK PROGRAM			07/11/08	07/28/20	07/04/23

Summary:

	Begin Date	House Arrest Date	Parole Date	ERS Date	Tentative Discharge	Max Discharge	End Date
Calculated:	01/09/2004		07/11/2008	07/28/2020	07/04/2023	01/04/2024	

Override:

Total Term To Serve: 20Y	Total Earned Time: 2Y 341D	Earned Time Lost: 0D	Total MET Earned: 184D	Total Trusty Time Earned: 0D
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Comments:

Approval:

Approved By:

SC

Date Approved: 7/2/2009

EXHIBIT

A

tabbles



STATE OF MISSISSIPPI
DEPARTMENT OF CORRECTIONS
CHRISTOPHER B. EPFS
COMMISSIONER

Ref: 6/24/03

DATE: June 25, 2004

TO: HARRISON County Sheriff's Office

FROM: Records

RE: JAIL TIME

INMATE: BOBBY BURKS, JR.
CAUSE NO. B2401-2000-154
CRIME: POSS OF C/S w/INT
COMMITTED: N/A

We have a sentencing order on the above offender. JAIL TIME IS NEEDED FROM THE DATE THE CRIME WAS COMMITTED UNTIL THE PRESENT DATE.

It is imperative that we have this information immediately in order to compute the time and determine when the offender will be eligible for various programs. Please fax us back today at 601-973-3879 or 601-973-3883 with any jail time that this offender served in your jail on this charge prior to receiving this conviction. IF WE HAVE PREVIOUSLY REQUESTED THIS PRETRIAL JAIL TIME AND IF YOU HAVE SENT IT, WE ASK THAT YOU IGNORE THIS LETTER. We appreciate all of your help and consideration. Thank you.

Date Started

Date Released

10-5-99
7-9-00
5-12-04

10-5-99
11-10-00
Present

Social Security No. 587 232 876 Date of Birth 4/23/72 Race B Sex M

Is this offender currently in your jail? YES NO

YOUR SIGNATURE

DATE

Received Time Jun 28 3

EXHIBIT

B

MISSISSIPPI 39202
359-5624

CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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:

Honorable Lawrence Paul Bourgeois, Jr.
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
Post Office Box 1180
Gulfport, MS 39502

Bobby Burks, #21722
MCCF
503 Main Street
Columbia, MS 39492

This the 17th day of July, 2009.



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