

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

NO. 2008-CP-01252-COA

BOBBY BURKS, JR.

APPELLANT

V.

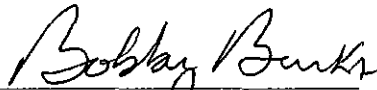
STATE OF MISSISSIPPI

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COURT OF APPEALS

APPELLEE

BRIEF FOR APPELLANT

BY:


Bobby Burks, Jr., #21722
MCCF
503 Main Street
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ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Bobby Burks, Jr., certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Bobby Burks, Jr., Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Stephen Simpson, Circuit Court Judge.
4. Honorable Beth McFayden, Assistant District Attorney.

Respectfully Submitted,

BY:

Bobby Burks, Jr., #21722
MCCF
503 Main Street
Columbia, Ms 39429

Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-01252-COA

BOBBY BURKS, JR.

APPELLANT

V

STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF ISSUES

ISSUE ONE

Whether trial court erred in failing to reconsider sentence imposed upon revocation where sentence was not imposed within requirements of law.

ISSUE TWO:

Whether trial court improperly revoked suspended sentence where court initially sentenced Appellant to time served and where such sentence would remove jurisdiction or authority to subsequently revoke sentence or to require Appellant to report to supervision officer.

Johnson v. State, 925 So.2d 86 (Miss. 2006).

ISSUE THREE:

Whether post release supervision sentence was null and void where there was no period of sentence to be served prior to commencement of post release supervision. Sweat v. State, 912 So.2d 458, 460 (Miss. 2005)

ISSUE FOUR:

Whether petition to revoke probation was invalid where it was made upon insufficient and incorrect claims.

ISSUE FIVE

The trial court failed to file a complete record of the trial court proceedings after Appellant clearly designated a complete record in his designation of record on appeal and sought by motion to this court that the record be supplemented with a complete record.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the Marion County Correctional Facility in Columbia, Mississippi, in service of the prison term imposed. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition of sentence by trial court..

STATEMENT OF CASE

Bobby Burks, Jr. was indicted on February 24, 2000, in the Circuit Court of the First Judicial District of Harrison County, Mississippi for the offense of possession with intent to transfer or distribute a controlled substance. (R. 28)

Appellant, while represented by Honorable Felicia Burkes, entered a plea of guilty to such charge. Pursuant to such plea, and through an agreement made with the prosecution, Appellant was sentenced to time served. Additionally, the court imposed a second tier to the sentence that Appellant be sentenced to twenty (20) years and five (5) years of post release supervision per Miss. Code Ann 47-7-34.

The court subsequently entered an order revoking the suspended sentence and imposing twenty (20) years where court legally, and in accord with law, had no authority or jurisdiction to revoke a sentence which had initially been imposed as "time served in an institution under the control and supervision of the Department of Corrections. The revocation proceedings conducted in this case is therefore illegal.

STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v State, 728 So.2d 565, 567 (Miss. 1999).

In the instant case, well-settled law dictates that the trial court's decision was clearly erroneous since the trial court failed to fully address all substantial and meritorious claims made by Burks in the motion, i.e., the record clearly demonstrates that Appellant Burks suffered constitutional violations where the trial court imposed a sentence of time served (Supp. R. 21). The trial court never addressed this most critical claim which, proven by the record, invalidates the post release supervision which the court subsequently imposed and which was later revoked. The trial court should have allowed Flowers an evidentiary hearing on the claims before summarily dismissing the motion.

SUMMARY OF ARGUMENT

The revocation proceedings conducted in this case was illegal where trial court was without lawful authority to conduct such proceedings since court had initially sentenced Appellant to time served which made any post release supervision null and void.

ARGUMENT

ISSUE ONE

Whether trial court erred in failing to reconsider sentence imposed upon revocation where sentence was not imposed within requirements of law.

The trial court imposed the sentence upon Appellant, at the time of his plea and sentencing for possession of a controlled substance with intent, as follows:

Thereupon the defendant was placed at the Bar of the Court for sentence and was asked by the Court if he had anything to say why the judgment should not be pronounced and no sufficient cause to the contrary was shown or appeared to the Court.

Therefore, for said offense and on said plea of guilty it is ORDERED that the defendant be and he is hereby sentenced to serve a term of **TWENTY (20) YEARS SUSPENDED FOR TIME SERVED** in an institution under the control and supervision of the Department of Corrections.

Provided however, it having been made known to the court that the defendant has been heretofore convicted of a felony, and the ends of justice and the best interest of the public and the defendant will be best served, the Court hereby suspends the execution of the above sentence for a period of **FIVE (5) YEARS POST RELEASE SUPERVISION** per Miss. Code Sec. 47-7-34 Annotated and the defendant is hereby placed under the supervision of the Mississippi Department of Corrections, until the court in term time, or the Judge on vacation, shall alter, extend, terminate or direct the enforcement of the above sentence, and the suspension of said sentence is based upon the following conditions: (R. 8-9)

Here the trial court clearly failed to follow the law in imposing such a sentence. Sweat v. State, 912 So.2d 458 (Miss. 2005).

In Sweat, supra, 912 So.2d at 460, the court stated:

Here, it is clear that the trial court sentenced Sweat under §47-7-34. Therefore, we modify the trial Court's sentence so that following his eight years of incarceration, Sweat will

be released to twelve years of post-release supervision but that he is required to report to MDOC officials for only five years and the remaining seven years will be “unsupervised” post release supervision.

In the instant case the trial court’s sentence fail to comply with the decision rendered in Sweat as well as the requirements of Miss. Code Ann. §47-7-34. The sentence is there null and void and should be considered as a waiver of the Court’s jurisdiction to supervise Appellant or enforce terms of such an illegal sentence. Appellant sought, on more than one attempt, by asserting to the court that Appellant had fulfilled the requirements of the Court order in regards to the fine. Since the fine was all which Appellant was able to recognize under the sentencing order where such order imposed the sentence as time served. Appellant was not present at the revocation hearing and therefore had no opportunity to defend himself or provide any facts or evidence on his behalf.

ISSUE TWO

Whether trial court improperly revoked suspended sentence where court initially sentenced Appellant to time served and where such sentence would legally remove jurisdiction or authority to subsequently revoke sentence, or to require Appellant to report to supervision officer, Johnson v. State, 925 So.2d 86 (Miss. 2006), and whether Appellant was justified in failing to report under such belief and circumstances.

The trial court initially imposed the sentence as being time served. (Supp. R., pp. 21) The trial court made the pronunciation of sentence in open court.

Mr. Burks, 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.

Under the law the trial court should not have had the authority to revoke a 20 year sentence or post release supervision which was imposed as time served. At the most, the court could have revoke only the 5 years of post release supervision. Time served clearly confirms that all time has been served in regards to the 20 years. The only authority the court could have possibly had, under term of the sentence, would have been to revoke the 5 years post release supervision. The only exception to the time served would have been if Appellant had a second charge which he did not.

This court should find that under the decision rendered in Johnson v. State, 925 So.2d 86 (Miss. 2006) and Sweat v. State, 912 So.2d 458, 460 (Miss. 2005), the trial court was without jurisdiction to revoke a 20 year post release supervision term which the Court had previously reduced to time served from the date of sentence. (Supp. R. pp. 21)

Moreover, Appellant's failure to report to the probation officer was clearly based upon the language of the sentencing order which caused Appellant to believe he had been actually sentenced to time served. Under these circumstances Appellant should not have been punished and revoked because he did not report. The trial court should have taken the language of the sentencing order into account. Appellant's probation should not have been revoked unless it can be determined that Appellant acted without reasonable belief that he was within the language of the sentencing order. The post conviction court never address this very critical claim (R. pp. 17-18) but endowed upon making Appellant be a probation violator due to statements made by Appellant at the revocation hearing where he was unrepresented by counsel.

Appellant would urge this court to reverse and render this case on the basis of the record clearly showing that Appellant was initially sentenced to time served and that any revocation which followed was made in regards to a post release supervision which was null and void.

ISSUE THREE

Whether post release supervision sentence was null and void where there was no period of sentence to be served prior to commencement of post release supervision. Sweat v. State, 912 So.2d 458, 460 (Miss. 2005).

The previous decisions rendered in regards to post release supervision requires that the court imposed a sentence to be served with a period of post release supervision to follow. Sweat v. State, 912 So.2d 458, 460 (Miss. 2005); Johnson v. State, 925 So.2d 86, 101 (Miss. 2006).

In the instant case the trial court did not impose a portion of the sentence to be served and, in fact, did suspend the complete sentence. This court should find that the trial court erred in failing to reconsider the revocation of the post release supervision, which was conducted in Appellant's absence, and entering a violation of the 20 years which was initially imposed as time served. At most, the Court was only empowered to violate Appellant for the 5 years post release supervision. Appellant would urge that this case be reversed and rendered.

ISSUE FOUR

Whether petition to revoke probation was invalid where it was made upon insufficient and incorrect claims.

The Petition to Revoke Probation, filed by the Probation Officer on May 13, 2004, stated that "He owes the Court \$2,350.00." This is an incorrect assessment by the Probation Officer. The Court's Order imposing sentence, which is found as to this motion, clearly outlines that petitioner owed the Court \$1,000.00. The sentencing Order do not assess any other costs. The petition should have been made void by making such an incorrect assessment.

Additionally, the Petition to revoke Probation should also be made void where it seeks to revoke a probation. In sentencing petitioner. the Court found that petitioner had been previously

convicted of a felony. The law therefore prohibited petitioner from being sentenced to term of probation. Miss. Code Ann. §47-7-33.¹ The petition filed by the probation officer should have been found as null and void where it sought to revoke a term of release which did not exist and could not have existed under the law. This Court should so find and grant the relief of vacation of the revocation and reinstatement of the term of release which was effective at the time of the filing of the petition to revoke probation.

ISSUE FIVE

The trial court failed to file a complete record of the trial court proceedings after Appellant clearly designated a complete record in his designation of record on appeal and sought by motion to this court that the record be supplemented with a complete record.

That Appellant filed a designation of those portion of the record which should be included with this appeal. (R. pp. 20) Appellant asked that the Court include “the post conviction relief petition”. The trial court stated in its order denying the PCR that petitioner had filed post conviction relief motion but the court never included this motion in the record. Instead, the Court placed the initial handwritten motion in the record. Appellant has attached, as Appendix “A” to this brief, a copy of the initial page of the correct PCR filed with the trial court on December 14, 2007. Not only did the trial court not rule upon this motion but the Court never allowed the

¹ (1) When it appears to the satisfaction of any circuit court or county court in the State of Mississippi, having original jurisdiction over criminal actions, or to the judge thereof, that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, such court, in term time or in vacation, shall have the power, after conviction or a plea of guilty, except in a case where a death sentence or life imprisonment is the maximum penalty which may be imposed or where the defendant has been convicted of a felony on a previous occasion in any court or courts of the United States and of any state or territories thereof, to suspend the imposition or execution of sentence, and place the defendant on probation as herein provided, except that the court shall not suspend the execution of a sentence of imprisonment after the defendant shall have begun to serve such sentence. In placing any defendant on probation, the court, or judge, shall direct that such defendant be under the supervision of the department of corrections.

Miss. Code Ann. §47-7-33(1)

motion to be included in the record on appeal even after this Court issued instructions that the record be supplemented with guilty plea proceedings. This Court January 21, 2009, Order reserved the right to supplement the record with additional documents as needed for this appeal.

Appellant would assert to this Court that it is the responsibility of the Appellant to make the record contain those documents which supports the claims raised. Puckett v. Stuckey, 633 So.2d 978, 982 (Miss. 1993).

In Puckett, the Supreme Court held that:

Inexplicably, the MDOC visitation policy was not made a part of the record in the circuit court. A purported copy is included in appellee's brief but may not be considered in the present posture of the case. We have stated on many occasions that each case must be decided by the facts shown in the record, not assertions in the brief. Facts asserted to exist must and ought to be definitely proved and placed before us by a record certified by law, otherwise, we cannot know them. *Britt v. State*, , 1379 (Miss. 1988).

In the instant case, however, as the record demonstrates, Appellant designated all transcripts of the record and all clerks papers. This Court previously rendered an Order directing that the record be supplemented. While Appellant did not include a particular cause number in his designation, the designation all portions of the record, including the petition for post conviction relief filed, made clear that the PCR filed on December 14, 2007, should have been included since it was relevant to this appeal. The post conviction relief motion filed by Appellant contained Cause No. A2401-07-451. See Appendix "A", attached hereto. Moreover, this Court has previously stated in Doss v. State, 956 So.2d 1100 (Miss. App. 2007)

(fn 1) that:

None of the transcripts from the proceedings on the underlying robbery conviction were included in the record which is before this Court. Doss's "Designation of Records" designated "[a]ll clerks papers, trial transcripts and exhibits filed, taken or offered in this case" as being necessary to be included on appeal. Technically, this designation does

not include papers, transcripts, or exhibits which are part of the underlying criminal conviction, as a motion for post-conviction collateral relief is a separate civil action. Nevertheless, were we not affirming on grounds which are in no way dependent on these absent documents, we would order a supplemental record to include such documents.

The decision in Doss represented a similar designation of records which this Court indicated it would reverse and supplement the record on appeal were there not other claims which caused dismissal and which claims were not inclusive in the portions of the record missing. In the instant case, the crucial portions of the record are missing. The trial court actually never considered the PCR filed in this case but considered a handwritten PCR. This Court had previously dismissed these very claims in a subsequent appeal in Supreme Court No. 2006-CP-00711-COA. This Court dismissed these claims by an Order filed on May 10, 2007, without prejudice. The state indicated that relief should be first sought in the trial court pursuant to Walton v. State, 666 So.2d 752 (Miss. 1995) and Martin v. State, 556 So.2d 357 (Miss. 1990). The post conviction motion, which the trial court never considered, was properly before the Court. Appellant did all which was possible to make the record contain those portions which would support his claims on appeal. This Court have firmly held that the case will be reversed and remanded when this Court is presented with only one side of the argument to review, an insufficient record and a judgment that has no clear support from the record. IN RE J.D.W., 881 So.2d 929 (Miss.App. 2004).

CONCLUSION

Appellant Burks respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the decision rendered by the trial court and

render this case as having been a sentence illegally imposed after Appellant was sentenced to time served.

Respectfully submitted:

By: Bobby Burks
Bobby Burks, Jr., #21722
MCCF
503 South Main Street
Columbia, Ms 39429

CERTIFICATE OF SERVICE

This is to certify that I, Bobby Burks, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205; Honorable Lawrence P. Bourgeois, Jr., Circuit Court Judge, P. O. Drawer 1570, Gulfport, Ms 39502; Honorable Cono Caranna, District Attorney, P. O. Box 1180, Gulfport, Ms 39502.

This, the 18th day of May, 2009..

Bobby Burks
Bobby Burks, #21722
MCCF
503 South Main Street
Columbia, Ms 39429

Appellant

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

CIVIL ACTION NO. A2401-07-451

BOBBY BURKS

MOVANT/PETITIONER

VS.

DEC 14 2007

CRIMINAL CAUSE NO. CAUSE NO. B2401-2000-00154

GAYLE PARKER, CIRCUIT CLERK
By [Signature] DC

STATE OF MISSISSIPPI

RESPONDENT

MOTION FOR POST CONVICTION COLLATERAL RELIEF

COMES NOW Bobby Burks, hereinafter referred to as "movant or petitioner," by and through himself, and files this his Motion for Post-Conviction Relief to Vacate and Set Aside Sentence, pursuant to Miss. Code Ann. §99-39-1, et seq.; Miss. Code Ann. §99-39-7; Miss. Code Ann. §99-39-27.

I.

JURISDICTION

This Court has exclusive jurisdiction over the persons and the subject matter pursuant to Miss. Code Ann. §99-39-1 et seq. and Miss. Code Ann. §99-39-5 et seq. and further because petitioner was convicted on or about the 9th day of November, 2000, in the Circuit Court of Harrison County, Mississippi, First Judicial District, pursuant to a plea of guilty for the offense of possession of a controlled substance with intent to distribute. He was sentenced to time served. Additionally, the court imposed a second tier to the sentence that Appellant be sentenced to twenty (20) years and five (5) years of post release supervision per Miss. Code Ann 47-7-34. See Exhibit "B", attached hereto.

Appendix "A"