IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONIE HENDERSON — APPELLANT

VS. — NO. 2008-CP-1286-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2008-CP-1286-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On August 9, 2000, Anthonie Henderson, "Henderson" pled guilty to possession with intent to sell before a Panola County Circuit Court Judge Andrew Baker. Henderson's plea was accepted as freely and voluntarily entered. He was given a ten year suspended sentence in the custody of the Mississippi Department of Corrections. It was "consecutive" to a previously imposed sentence of three years. C.P. 38.

After a hearing with notice and representation on December 11, 2003, Henderson's suspended sentence was revoked. Two years of his sentence was reinstated. After another revocation hearing in February, 2006, all of his remaining suspended sentence was revoked. C.P. 39.

On June 30, 2008 , Henderson filed a Motion For Post Conviction relief, which was denied. C.P. 9-30; 38-40. From that denial of relief, he filed notice of appeal to the Supreme Court. C.P. 42.

ISSUES ON APPEAL

I.

DID HENDERSON RECEIVE EFFECTIVE COUNSEL?

II.

WAS HENDERSON PROPERLY REVOKED?

III.

WAS HENDERSON PROPERLY SENTENCED?

IV.

WAS HENDERSON'S PLEA VOLUNTARY AND INTELLIGENTLY ENTERED?

STATEMENT OF THE FACTS

On July 12, 2000, Henderson was indicted for possession of marijuana "more than one ounce" with intent to sell on or about October 2, 1999. This was under M. C. A. § 41-29-139(a). C.P. 80.

On August 9, 2000, Henderson pled guilty with counsel to possession of more than one ounce with intent to sell before Panola County Circuit Court Judge Andrew Baker . C.P. 38-40.

The trial court found after advising and questioning Henderson and his counsel, that his plea was voluntarily and intelligently entered. Henderson's plea was accepted as freely and voluntarily entered. He was given a ten year suspended sentence in the custody of the MDOC. However, this suspended sentence was consecutive to a previous three year sentence in CR 2000-96BP2 for possession of marijuana "less than one ounce" with intent to sell. C.P. 38-39.

After notice and a hearing with counsel in August, 2003, Henderson's suspended sentence was revoked. C.P. 33-37. It was revoked because there was evidence that Henderson had violated the terms of his probation. He had done so by committing a misdemeanor which was "possession of marijuana." Two years of his sentence was reinstated. After a second revocation hearing, all of Henderson's remaining suspended sentence was revoked. C.P. 39.

On May 13, 2008 , Henderson filed a "Motion For Post Conviction relief," which was denied. C.P. 9-28; 38-40. From that denial of relief, he filed notice of appeal to the Supreme Court. C.P. 42.

SUMMARY OF THE ARGUMENT

1. The record reflects that Henderson was provided counsel at the first of his two revocation hearings. He was not entitled to an attorney at either hearing. It is a matter for the trial court's discretion. There is a lack of evidence that the trial court abused its discretion in not providing an attorney for the second revocation hearing. C. P. 39. **Riely v. State** 562 So. 2d 1206, 1209 (Miss. 1990)

2. The record reflects that Henderson was properly revoked. He was revoked after a notice and a hearing. The notice identified the alleged violations such as "possession of marijuana" and "failure to obey a police officer." C.P. It is not necessary for a petitioner to have been found guilty of a felony, as claimed by Henderson. It is only necessary that he violate the terms of his probation. In the instant cause, Henderson was found to have been convicted of several, not just one, misdemeanor. **Grayson v. State** 648 So. 2d 1129, 1134 (Miss.1994). One of the terms of his probation was that he "not commit any crime." C.P. 39. A misdemeanor is a crime. Therefore, there was record evidence in support of his revocation.

3. The record reflects that Henderson was properly sentenced. The record reflects that Henderson was indicted for possession of "more than one ounce with intent to sell."C. P. 80. He pled guilty to this offense and was given a ten year suspended sentence. However, it was consecutive to prior three year sentence. C.P. 38. The ten year sentence was within the range provided for a conviction for possession of marijuana with intent to sell.

Henderson had also been previously charged with possession of less than one ounce. Henderson was therefore not entitled to be sentenced for simple possession as he claims in his appeal brief. C.P. 39-40. **Branch v. State** , 347 So. 2d 957, 958 (Miss. 1977)

4. The record reflects that Henderson was properly informed at his guilty plea hearing of the

sentence he would receive. He received that sentence, which was a suspended ten year sentence. The sentence he is currently serving is a result of his having his probation revoked not once, but twice.

There is no evidence indicating that Henderson was mislead as to his sentence. There was no basis for finding any "reliance" upon any representation made to him as to his sentence other than the ten year suspended sentence he received. **Smith v. State**, 636 So. 2d 1220, 1227 (Miss. 1994).

Therefore, he should not be heard to complain that his plea was involuntary because he was given an alleged unexpected sentence. C.P. 40.

ARGUMENT

PROPOSITION I

HENDERSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Henderson believes that he did not receive effective assistance of counsel. It was ineffective because Henderson thinks that he was entitled to have counsel at his revocation hearings. Motion page 9-29.

To the contrary, the record reflects that Henderson did have counsel for his first revocation hearing. The record reflects that this counsel was Mr. Azki Shah. C.P. 34.

In addition a petitioner is not entitled to an attorney at a revocation hearing. The appointment of counsel is left to the state's correctional personnel and the trial court's discretion. This discretion is based upon the complexity of the issues raised concerning the alleged violations of probation and parole.

In **Riely v. State** 562 So. 2d 1206, 1209 (Miss. 1990), the Court stated that representation at a revocation hearing was within the trial court's discretion.

> In sum, provision of representation at the first three hearings was neither requested nor necessitated in view of the facts and applicable law. Indeed, the case was not "complex or otherwise difficult to develop." And as noted, counsel was provided upon request by Riely prior to the fourth hearing and prior to his appeal to this Court. Therefore, this Court holds that Riely's allegation of error is devoid of merit.

The Appellee would submit that the record reflects that Henderson had counsel at the first of his two revocation hearings. The record reflects that he was given more than one notice, a personal letter as well as two separate revocation hearings. C.P. 82-88. He was not entitled to counsel at either his first or second hearing.

Henderson has yet to deny that he was convicted of "possession of marijuana" and "failure

to obey a police officer." Motion, page 9-29. In addition, there were other misdemeanors listed on both the original petition to revoke and the amended petition to revoke. C.P. 82-88. Among them were failure to pay assessments, possession of marijuana and open container in an automobile. C..P. 30-37.

In **Lindsay v. State**, 720 So. 2d 182, 184 (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant's affidavit.

> In examining applicable case law, it is further shown that Lindsay's claims are without merit. The only affidavits in the record that suggest appellant's counsel was deficient are those filed by Lindsay. This is not enough to prove ineffective assistance. In a case involving Post Conviction Relief, this Court has held, "that where a party offers only his affidavit, then his ineffective assistance for counsel clam is without merit." **Vielee v. State**, 653 So. 2d 920, 922 (Miss 1995) See also **Brooks v. State**, 573 So. 2d 1350 (Miss. 1990); **Smith v. State** , 490 So. 2d 860 (Miss. 1986).. Since that is all that the appellant offers, his claim of ineffective assistance must fail.

In the instant cause, there are no affidavits in support of any of Henderson's claims for relief. Therefore, there is a lack of evidence that the trial court abused its discretion under the facts of this case. This issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT HENDERSON WAS PROPERLY REVOKED.

Henderson believes that he was improperly revoked. He believes that since he was not shown to have been convicted of a felony that there was insufficient grounds for revoking his probation. Motion, page 9-25.

The record reflects that Henderson was properly revoked. It is not necessary for a petitioner to have been found guilty of a felony. It is only necessary that he violate the terms of his probation. In the instant cause, Henderson was found to have been convicted of several, not just one, misdemeanors. One of the terms of his probation was that he "not commit any crime." C.P. 39.

In **Grayson v. State** 648 So. 2d 1129, 1134 (Miss.1994), the Supreme Court pointed out that proof of the commission of a crime was sufficient for providing a basis for revocation.

> At a probation hearing, a violation of the probation conditions may be shown by establishing a criminal conviction or by actual proof of the commission of a crime apart from the conviction. When the state does not prove that the defendant was convicted of a crime which would be a basis for revocation, it must present actual proof that the defendant engaged in such criminal conduct. **State v. Esprinal,** 488 So. 2d 228, 229 (La.1986).

In the instant cause, "the state put on proof that Henderson was convicted of several misdemeanors." C.P. 39. In Henderson's motion for post conviction relief, he complains that he was not convicted of any felony, but rather convicted of different "infractions" for which he paid fines. C.P. 9-14.

The record reflects that those infractions were numerous misdemeanors, such as were listed on the amended petition to revoke. C.P. 33. This included "possession of marijuana and failure to obey a police officer in Batesville." This was November 2, 2005. It also included "possession of marijuana in a motor vehicle" and open container in an automobile on June 28, 2006. C. P. 33; 84.

One of the conditions for probation was that Henderson "not commit any crime."C.P. 39. Since there was evidence that Henderson was convicted of possession of marijuana and failure to obey a police officer in Batesville of November 2, 2005, there was sufficient evidence in support of the trial court's revoking of Henderson's probation.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION III

THE RECORD REFLECTS THAT HENDERSON WAS PROPERLY SENTENCED.

The record reflects that Henderson was properly sentenced. The record reflects that Henderson was indicted for "possession of more than one ounce of marijuana with intent to sell." C.P. 80. He pled guilty to this offense and was given suspended ten year sentence. C.P. 38. This is within the range provided for a conviction for this crime. M.C. A. § 41-29-139(a).

The current sentence Henderson is serving is the result of his having been revoked for violating the terms of his probation more than once. C.P. 38-39.

Henderson was also charged with possession of less than one ounce. Henderson was not therefore entitled to be sentenced for simple possession as he claims in his appeal brief. C.P. 39-40. Rather he was properly sentenced to ten years which was suspended. This is within the range of up to thirty years for possession of marijuana with intent to sell.

In **Branch v. State** , 347 So. 2d 957, 958 (Miss. 1977), this Court state that '[t]here is a presumption that the judgment of the trial court is correct." The burden is on the Appellant to demonstrate some reversible error to this court.

Therefore, there is a lack of record evidence for finding that Henderson was improperly sentenced.

This issue is lacking in merit.

PROPOSITION IV

THE RECORD REFLECTS THAT PLEA WAS INTELLIGENTLY ENTERED AND HENDERSON WAS PROPERLY SENTENCED.

Henderson argues that his plea was not voluntarily entered because he did not get the sentence he was supposedly promised at his guilty plea hearing. Motion, page 9-29.

To the contrary, the record reflects that Henderson was given the sentence he was told he would receive by the trial court. C.P. 40.

> Also his allegation that his plea was involuntary because he did not get the sentence he was promised has no merit. He got exactly what he alleges he was told when he was originally sentenced. C.P. 40.

In **Smith v. State**, 636 So. 2d 1220, 1227 (Miss. 1994), this Court relied upon **Myers v. State**, 583 So. 2d 174, 177 (Miss. 1991) (quoting from **Sanders v. State**, 440 So. 2d 278 at 287)(Miss 1983)in its decision. In **Myers**, the "mere expectation" of a lesser sentence is contrasted with a "reliance" upon a "firm representation" of a lesser sentence. The Court found that Smith's plea was valid even though he had not been informed of the minimum sentence he could receive. In that case, as in the instant cause, Smith was pleading guilty based upon a plea agreement with the state and knew what the recommended sentence for armed robbery would be.

The appellee would submit that there is a lack of record evidence for holding that Henderson was ever given any basis for any reliance upon a sentence other than the ten year suspended sentence which is what he received.

This issue is also lacking in merit.

CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 Andrew C. Baker
Circuit Court Judge
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Honorable John W. Champion
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Anthonie Henderson, # K3787
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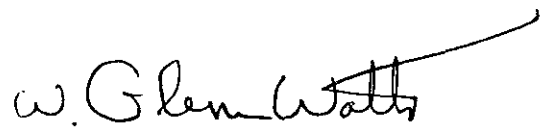
This the 19th day of September, 2008.



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