IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID J. FIELDS
a/k/a DAVID JARROD FIELDS — APPELLANT

VS. — NO. 2008-KA-01073-COA

STATE OF MISSISSIPPI — APPELLEE

MOTION TO DISMISS APPEAL
OR IN THE ALTERNATIVE,
BRIEF FOR APPELLEE

THE STATE DOES NOT REQUEST ORAL ARGUMENT.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CHARLES W. MARIS, JR.
ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 1867

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

MOTION TO DISMISS 3

BRIEF FOR APPELLEE 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 6

PROPOSITION I 7

THE LOWER COURT DID NOT COMMIT ERROR IN FINDING THAT §41-29-150 DOES NOT AUTHORIZE EXPUNGEMENT OF A CONVICTING UNDER §41-29-313.

PROPOSITION II 8

THE LOWER COURT PROPERLY REJECTED FIELDS' ALTERNATIVE ARGUMENT.

CONCLUSION 10

CERTIFICATE OF SERVICE 11

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID J. FIELDS
a/k/a DAVID JARROD FIELDS — APPELLANT

VS. — NO. 2008-KA-01073-COA

STATE OF MISSISSIPPI — APPELLEE

MOTION TO DISMISS APPEAL
OR IN THE ALTERNATIVE,
BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

David J. Fields, a/k/a David Jarrod Fields ["Fields"] filed in the Circuit Court of DeSoto County a "Petition for Expungement of Record," in which he asked the lower court "to expunge his record of the conviction on the charge of possession of precursor dated June 26, 2002." (C.P. 66) A hearing was held on the petition (Tr. 13-21) Honorable Robert P. Chamberlin, Jr., Circuit Court Judge, presiding, after which the court denied said pettition, finding that the it lacked jurisdiction to expunge Fields' records under the statute Fields cited. (C.P. 70) Fields thereafter filed a "Motion for Reconsideration and/or to Amend Judgment." (C.P. 72-74) The lower court also denied that motion. (C.P. 77) Fields next filed his notice of appeal, which states, in pertinent part, as follows: "BY THIS NOTICE David J. Fields appeals to

the Supreme Court of Mississippi from the Order entered in this case on February 27, 2008, and the denial of the Motion for Reconsideration entered June 4, 2008." (C.P. 78)

Further Procedural History

Fields and an accomplice were charged by indictment filed on December 6, 2001, with the crime of "wilfully, unlawfully and feloniously, knowingly and intentionally possess[ing], purchas[ing], possess[ing], transfer[ring] or distribut[ing] over two hundred fifty (250) doses of pseudoephedrine or ephedrine, knowing or under circumstances where one reasonably should know, that the pseudoephedrine or ephedrine w[ould] be used to unlawfully manufacture a controlled substance in direct violation of Section 41-29-313. . . ." (C.P. 8) On June 26, 2002, Fields filed a sworn "Petition to Enter Plea of Guilty" in the Circuit Court of DeSoto County. (C.P.52-57) Both in the petition and at the hearing held on that petition on that same day, Fields expressed his desire to enter a guilty plea. Both in the petition and at the hearing Fields acknowledged his understanding of the rights he would waive by entering a plea of guilty and demonstrated that such a plea would be made voluntarily and with full awareness of the facts. (C.P. 53-57; Tr. 4-9) The prosecutor stated the following factual basis for the crime charged:

> Your Honor, if this matter were to go to trial, the State would be prepared to prove that on or about the 19th day of July in the year 2001, this Defendant, David Fields, along with a defendant, Tina Boyd, did possess 250 dosage units -- over 250 dosage units of pseudoephedrine or ephedrine knowing or having – under circumstances where they should have known that it would be used to unlawfully manufacture a controlled substance. The facts would show that Horn Lake Police Department had information that a male white and a female white were going around to different businesses purchasing ephedrine. They had a vehicle description.

> They located the vehicle. They initiated a traffic stop. At that time, Mr. Fields was a passenger in the car. Ms. Boyd was asked to step out of the car. They were asked if anything illegal was in there. Both of them said no. Mr. Fields was acting nervous. He in fact gave a statement to officers that there had been some ephedrine that he had taken out of the boxes that were seen in the back seat. He had put it in a bag and hidden it in Southaven. He was going to show them where it was. Upon further questioning, he had a bulge in the front pocket area of his pants. He was asked about that. He pulled that out, and he had ephedrine in that bag, as well. All these events occurred in DeSoto County, and therefore, within the jurisdiction of this Court.
>
> (Tr. 7-8)

The lower court then asked Fields if he disagreed with anything the prosecutor had said, and Fields replied, "No, sir." (Tr. 8) Thereafter, the lower court accepted Fields' plea and imposed the sentence recommended by the prosecutor. (C.P. 61-63; Tr. 9-10)

Substantive Facts

The facts are not at issue on this putative appeal. The factual basis for the plea, as stated *supra*, need not be restated here.

MOTION TO DISMISS APPEAL

The State first contends that this putative appeal is not lawful since it is not authorized by statute. The pertinent question is therefore, whence comes the authority for this appeal? The right to appeal is exclusively a statutory right. In other words, appeals are a creature of statute, and consequently, only such appeals that are authorized by statute are allowed. ***Beckwith v. State***, 615 So.2d 1134,

1142 (Miss.1992).[1] Furthermore, it is manifest that not every order is appealable For example, In the case of ***Fleming v. State***, 553 So. 2d 505 (Miss.1989), Fleming had requested copies of transcripts in the lower court. When that court denied his request, Fleming "appealed." In dismissing the appeal, the Supreme Court stated, in part, as follows:

> [T]here are two primary ways in which a criminal defendant may challenge a trial court proceeding: (1) a direct appeal from a conviction, or (2) a proceeding under the Post Conviction Relief Act. An appeal is a matter of statutory right and not based on any inherent common law or constitutional right.
>
> 553 So.2d at 506.

Because Fleming was not appealing a conviction and was not proceeding under the Post-Conviction Collateral Relief Act, the Supreme Court, as stated, dismissed his appeal for lack of jurisdiction. *Cf.*: ***Beckwith v. State***, 615 So.2d at 1142-43.

In a similar way, Fields is not appealing, and could not appeal, a judgment of conviction because his is a "case where the defendant enter[ed] a plea of guilty." Section 99-35-101, Miss. Code Ann. (1972). Furthermore, he is not proceeding under the Mississippi Uniform Post-Conviction Collateral Relief Act, Sections 99-39-1, *et seq.*, since that Act would not afford Fields the relief he sought in his motion.

In an analogous situation, involving the attempted appeal of an order revoking probation, the Supreme Court has held as follows:

> This Court is reluctant to dismiss a proceeding

---

[1]"In sum, throughout our State's jurisprudence, we adhered to the same principles governing a right of appeal as the United States Supreme Court, namely: there was no Constitutional or common law right of appeal in either civil or criminal cases and any right thereasto had to be given by Legislative enactment."

> because one seeks the wrong remedy; and a mere misnomer of the procedure should ordinarily not result in a dismissal; ***however, the attempt to appeal an unappealable order is a total departure from the orderly administration of justice and cannot and should not be approved***.
>
> [Emphasis added]

Pipkin v. State, 292 So.2d 181, 182 (Miss.1974). Consequently, in the case of ***Martin v. State***, 556 So.2d 357, 358 (Miss.1990), the Supreme Court stated, in part, as follows:

> Martin sought reconsideration by the lower court [of its order revoking probation], but none was forthcoming and Martin filed a direct appeal to this Court. The State filed a Motion to Dismiss Appeal, on the ground that an order revoking probation is not directly appealable. This Court granted the Motion on March 29, 1989, "without prejudice for Martin to institute post-conviction relief action under Miss. Code Ann. § 99-39-5(1)(g) (Cum.Supp.1988)."

Accord: ***Griffin v. State***, 382 So.2d 289, 290 (Miss.1980); ***Ray v. State***, 229 So.2d 579, 581 (Miss.1969).

This Court, too, has addressed the issue of appealability, in the case of ***Smith v. State***, 742 So.2d 1188 (Miss.1999), holding that an order denying a motion to modify a restitution payment schedule is not an appealable order, and dismissing said putative appeal.

The State is aware that the Supreme Court has occasionally addressed cases involving the denial of expungement requests, but notes that the issue of jurisdiction was apparently never raised in said cases.

Accordingly, since no authority exists for an appeal from an order denying a request for expungement of criminal records, this Court lacked jurisdiction to hear

this attempted appeal, and it should accordingly be dismissed. Should this Court decide not to dismiss this appeal, the State also responds on the merits, as follows.

BRIEF FOR APPELLEE

SUMMARY OF THE ARGUMENT

Fields first argues that he has met all the requirements for expungement as set forth in §41-29-150, Miss. Code Ann. (1972), as amended. The flaw in the argument, as found by the lower court, is that §41-29-150 has no application to the offense to which Fields pleaded guilty.

Fields next makes the rather bizarre argument that he pleaded guilty only to the crime of "possession of precursors," and he "should not be denied the State's error in accepting his plea to "simple possession of precusors." Brief for Appellant at p. 7. What this sounds like is an attack on the knowing or intelligent nature of Fields' guilty plea. If so, such an argument would be barred for several reasons. First. Fields has never filed a motion for post-conviction relief. Second, any such motion is long past due. Third, since Fields is not now in custody, any such motion would not be proper. Fourth, the only remedy if such a claim were found to be meritorious would be a vacation of the plea and sentence, with the case being re-set for trial. And fifth and finally, the claim is simply factually wrong.

PROPOSITION I.

THE LOWER COURT DID NOT COMMIT ERROR IN FINDING THAT §41-29-150 DOES NOT AUTHORIZE EXPUNGEMENT OF A CONVICTING UNDER §41-29-313.

Without waiving or compromising the foregoing contention that this Court lacks jurisdiction even to consider this matter, the State also contends, *arguendo*, that Fields' putative appeal also lacks merit.

Fields argues that he is entitled to expungement of his criminal records under the provisions of 41-29-150(d)(2), Miss. Code Ann. (1972), as amended. which states the pertinent requisites for entitlement to expungement as follows:

> Upon the dismissal of such person and discharge of proceedings against him under paragraph (1) of this subsection, or with respect to a person who has been convicted and adjudged guilty of an offense under subsection (c) or (d) of section 41-29-139, or for possession of narcotics, stimulants, depressants, hallucinogens, marihuana, other controlled substances or paraphernalia under prior laws of this state . . .

Fields specifically contends that he is entitled to expungement under this statute because he is "a person who has been convicted and adjudged guilty . . . for possession of . . . stimulants . . . under prior laws of this state. . . ." By its very terms, §41-29-150(d)(2) does not include someone like Fields, whose conviction was under §41-29-313. Such a conviction is not for "possession of . . . stimulants . . . under prior laws of this state. . . ." Rather, Fields' conviction is for the "wilfully, unlawfully and feloniously, knowingly and intentionally possess[ing], purchas[ing], possess[ing], transfer[ring] or distribut[ing] over two hundred fifty (250) doses of pseudoephedrine or ephedrine, knowing or under circumstances where one reasonably should know, that the pseudoephedrine or ephedrine w[ould] be used

to unlawfully manufacture a controlled substance in direct violation of Section 41-29-313. . . ." (C.P. 8) Furthermore, Fields' conviction was plainly not for possession of stimulants "under prior laws of this State." Expungement of the records of such a crime, as the lower court found, is plainly not authorized by §41-29-150. *Cf.*: ***Mauney v. State ex rel. Moore***, 707 So.2d 1093, 1096 (Miss.1998) ("None of the Mississippi statutes allowing for expungement of a case record apply to Mauney's conviction for sale of amphetamines.")

The State contends that the lower court's ruling is correct and should be affirmed.

PROPOSITION II.

THE LOWER COURT PROPERLY REJECTED FIELDS' ALTERNATIVE ARGUMENT.

In his alternative argument, Fields apparently argues that he pleaded guilty only to simple possession of precursors, rather than to the charge as laid in his indictment. Brief for Appellant at pp. 10-11. He states that he should not be "denied the expungement on grounds of his plea to M.C.A. 41-29-313, as the State clearly accepted his plea of guilty to simple 'possession of precursors.'" Brief for Appellant at p. 11. The connection between the statutory authority to expunge criminal records and the knowing and voluntary nature of a guilty plea is not readily apparent. If Fields' desire is to contest the knowing or intelligent nature of his plea, he must file a motion for post-conviction relief, which he has not done. He will face several hurdles should he do so, however, not the least of which are the statute of limitations under §99-39-5(2), and the fact that he is no longer in custody as

required by §99-39-5(1). In addition, Fields has not asked for – and surely does not want – the only remedy for a finding that his plea was not intelligently or knowingly made, *viz.*, vacation of the plea and sentence and trial on the indictment. Finally, it seems plain that though the phrase "possession of precursors' was used at various points in the prior proceedings, it was used only as a shorthand reference to the actual crime charged in the indictment. Indeed, mere possession of the drug is not a crime else all sinus-sufferers would be in prison. As shown *supra*, the prosecutor detailed the evidence that would be placed before a jury if the case were to go to trial. That rendition included specific statements regarding Fields' knowledge or imputed knowledge of the future use of the drugs he possessed. Fields indicated that he did not disagree with the prosecutor's statements. (Tr. 7-8)

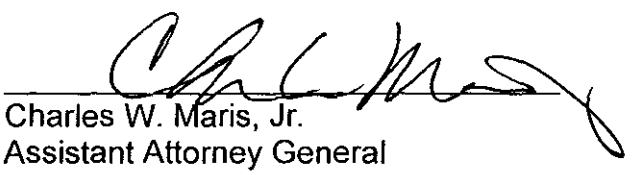
Accordingly, the lower court did not commit error in rejecting Fields' alternative argument as a ground to excuse the lack of authority for expungement. That ruling should be affirmed.

CONCLUSION

The State respectfully contends that there is no authority for this putative appeal and that it should therefore be dismissed. Alternatively, the State contends that the lower court's ruling denying expungement was correct and should be affirmed.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: 

Charles W. Maris, Jr.
Assistant Attorney General
Miss. Abr No. 1867

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Charles W. Maris, Jr., 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 **MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE, BRIEF FOR APPELLEE** to the following:

Honorable Robert P. Chamberlin, Jr.
Circuit Court Judge
Post Office Box 280
Hernando, Mississippi 38632

Honorable John W. Champion
District Attorney
365 Losher Street, Ste. 210
Hernando, Mississippi 38632

Mary Lynn Damaré, Esq.
Attorney At Law
291 Losher Street
Hernando, Mississippi 38632

This the 16th day of January, 2009.

Charles W. Maris, Jr.
Assistant Attorney General

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680