IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEPHEN E. SEAL — APPELLANT

VS. — NO. 2008-KA-1424-COA

STATE OF MISSISSIPPI — APPELLEE

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

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the denial of a Motion for Reduction of Sentence filed by Stephen E. Seal in the Circuit Court of Sunflower County, Mississippi.

On March 6, 2006 Stephen E. Seal shot and killed Laurie Thomas and her unborn child. The Sunflower County Grand Jury indicted Seal for one count of murder and one count of manslaughter. (RE 104). After granting Seal four continuances and the State one, the court set the case for trial for January 8, 2008. (CP Vol. 1, 146-47). On the day of the trial, Seal filed a petition to enter an open guilty plea to two counts of manslaughter by culpable negligence under Miss. Code Ann. § 97-3-47. (CP Vol. 2, p. 214-18). On January 9, 2008, during the circuit court's Judge Carey-McCray accepted Seal's guilty pleas and, after hearing sworn testimony and argument of counsel, sentenced him to two concurrent twenty year sentences. (CP Vol. 2, p. 219-220).

Within two days the trial judge reconsidered her sentence and determined she should have suspended some of the time she imposed in sentencing. On January 14, 2009, Judge Carey-McCray

held a telephonic conference wherein the judge discussed the sentencing issue with counsel. (TR Vol.3, p. 97-100). Pursuant to the ruling in *Leverette v. State*, 812 So.2d 241 (Miss.App. 2002), Judge Carey-McCray determined she was precluded from modifying the sentence because it was imposed during the court's vacation and not during a term. On January 22, 2008, Seal filed a Motion for Reduction of Sentence. (CP 2, p 223-24) Judge Carey-McCray denied the motion by an order dated June 30, 2009 and filed with the clerk of the court on July 15, 2008. (CP Vol. 2, p. 242).

On August 7, 2008, Seal filed a motion to recast his Motion for Reduction of Sentence as a filing under the Mississippi Post-Conviction Collateral Relief Act and for the judge to reconsider her ruling. (CP Vol. 2, p. 242). On August 14, 2008, Seal filed his notice of appeal of the final judgement entered on the plea on January 9, 2008, and the order denying his Motion for Reduction of Sentence dated June 30, 2009 and filed July 14, 2008. (CP Vol. 2, p. 268-69). By order dated October 2, 2008, and filed with the clerk of the court on October 31, 2008, Judge Carey-McCray refused to consider the original motion as a post-conviction collateral relief motion. (CP Vol. 2, p. 274-276).

PROPOSITIONS

I. This Court lacks jurisdiction to hear this appeal and it should be dismissed.
II. The motion for reduction of sentence fails in form and lacks merit.

SUMMARY OF THE ARGUMENT

This attempted appeal should be dismissed. The circuit court did not have the authority to entertain Seal's motion for reduction of sentence. Hence, the dismissal of Seal's motion to reduce sentence was not an appealable order, and this Court lacks jurisdiction to consider.

Seal's motion for reduction of sentence does not comply with the pleading requirements of Miss.Code Ann. section 99-39-9(1) and (3) (Rev.2007). Also, Seal's motion does not qualify for relief under the Post-Conviction Collateral Relief Act and therefore the circuit court correctly dismissed the motion.

ARGUMENT

I. This Court lacks jurisdiction to hear this appeal and it should be dismissed.

Seal is asking this Court to consider the trial court's denial of his Motion for Reduction of Sentence an appealable order. (Appellate's brief p. 13). The dismissal of a motion to reduce a sentence is not an appealable order; thus, this appeal should be dismissed. *Williams v. State*, 5 So.3d 1190 (Miss.Ct.App.2009). There 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. *Id.* at 1191 quoted in *Fleming v. State*, 553 So.2d 505, 506 (Miss.1989), quoted in *Smith v. State*, 742 So.2d 1188, 1189 (Miss. App.1999). Because Seal was not directly appealing his conviction, and the motion from which he is appealing was not proceeding under the Post-Conviction Collateral Relief Act, this appeal is not properly before the Court. In the absence of statutory authorization, this appeal should be dismissed.

In *Leverette v. State*, 812 So.2d241, (Miss.Ct.App.2002), the defendant plead guilty during the regular term of court but was sentenced during the vacation period. Leverette filed a motion for reduction of sentence, which the circuit court denied. This Court held the circuit court did not have jurisdiction to entertain the motion and held the motion procedurally improper.

> However, outside of the regular term, a circuit court may only act if granted authority by statute; any act undertaken that is not authorized by statute is a nullity. *Hyde Constr. Co. v. Highway Materials Co.*, 248 Miss. 564, 574, 159 So.2d 170, 174 (1963).
>
> A circuit court judge has by statute the jurisdiction to hear a criminal matter in vacation in the same manner as the judge would in a regular term and may enter "judgments, orders and decrees" if the matter was "pending" and "triable at the preceding term." Miss.Code Ann. § 11-1-16(1)(Rev.1991). The "judgments, orders, and decrees" entered by a circuit court judge in vacation have the same "force and effect" as they would if entered during a regular term of court. Id. Specifically

> relevant here, a criminal defendant may during vacation appear before a circuit court judge, be arraigned, and be sentenced. Miss.Code Ann. § 99-15-25(1) (Rev.2000). The court is granted the authority to impose sentence as the judge would have in the regular term. *Id.*
>
> The Supreme Court has previously attempted to map the relative power of circuit courts in term time and in vacation, and found that "the task of making an accurate survey of the limit of the circuit court's authority remains difficult, and the boundary elusive." *Griffin v. State*, 565 So.2d 545, 548 (Miss.1990). While the circuit court judge had the authority to enter a judgment and sentence during vacation, we have been unable to find any statutory authority or court precedent that grants to a trial court the explicit or implied power to alter, amend, or vacate a sentence imposed during vacation. We find that the result that is most consistent with case law such as *Russell* is that once the sentence is pronounced in vacation, there is no right to amend. To grant inherent power to amend a sentence pronounced in vacation is too open-ended, creating in some counties with only two terms of court per year what could be an almost six-month window to alter a sentence. It is evident from decisions such as *Russell* that the Supreme Court has found that some judges too readily have sought to exercise authority over altering sentences. It would be inconsistent with this clearly limited authority during the few weeks of term-time to grant months-worth of authority during vacation.

Leverette, 812 So2d at 246.

In the case *sub judice*, the circuit court properly found that it had no jurisdiction to reduce Seal's sentence imposed during vacation. Therefore, the lack of jurisdiction in the circuit court signifies lack of jurisdiction in this Court. The state maintains that this appeal should be dismissed.

II. The motion for reduction of sentence fails in form and lacks merit.

In the alternative of dismissing the appeal, the State argues there is no basis for relief on the motion to reconsider Seal's sentence. In his second assignment of error, Seal basically asks this Court to recast his Motion for Reduction of Sentence as a request for post-conviction collateral relief for the sake of judicial economy and to remand his case for resentencing.

The only motion before this Court on appeal is Seal's motion signed by defense counsel and dated January 22, 2008. Seal's motion does not comply with the pleading requirements of Miss.Code Ann. section 99-39-9(1) and (3) (Rev.2007). There was no sworn affidavit or sworn pleading by the

prisoner, no sworn affidavits from witnesses, no separate statement of facts which are within the prisoner's personal knowledge, or separate statement of facts which the prisoner asserted but did not himself have knowledge of and how they could be proven. Pursuant to Miss.Code Ann. section 99-39-9(4) (Rev.2007), the circuit court judge could have refused to hear this motion because of its noncompliance with the post-conviction collateral relief statutes. *Carr v. State*, 881 So.2d 261 (Miss.App.,2003).

While refusing to hear a motion not in compliance with the statute is discretionary with the judge, Seal would also not succeed on the merits of his argument for post-conviction relief. According to Seal, *Dickerson v. State*, 731 So.2d 1082 (Miss.1998) "...clearly indicates that the Post-Conviction Collateral Relief Act gives a trial court the jurisdiction to correct the problem facing the trial judge below."(Appellant's brief, p.16). Seal's reliance on *Dickerson* is misplaced. He seizes upon language contained in Dickerson wherein the Supreme Court opined that Dickerson was free to pursue post-conviction provisions. However, simply because Dickerson is free to proceed under the post conviction statutes does not mean he is entitled to relief.

Under most circumstances, circuit courts do not have jurisdiction to resentence convicted felons. *Creel v. State*, 944 So.2d 891, 894 (Miss. 2006). In *Creel,* the Supreme Court stated

> However, the Legislature created an exception to this general rule when it enacted the Uniform Mississippi Post-Conviction Collateral Relief Act, Miss.Code Ann. §§ 99-39-1 to 27 (Supp.2005). *Dickerson*, 731 So.2d at 1084 ("The only statutory authority to resentence [a convicted felon] is the Post Conviction Relief Act. This act establishes the criteria which must be present before the court acquires jurisdiction to consider resentencing a criminal."). Section 99-39-5(1) provides for nine different claims for relief under the Act:
> (a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;
> (b) That the trial court was without jurisdiction to impose [the] sentence;
> (c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;
> (d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(f) That his plea was made involuntarily;
(g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;
(h) That he is entitled to an out-of-time appeal; or
(i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

Creel at 895.

Seal's motion for reduction of sentence does not raise any claim under the Post-Conviction Collateral Relief Act. Restricting the time within which a court can reconsider a sentence rendered in vacation does not make a sentence unconstitutional, as argued by Seal. So even if this Court were to recast the motion as a request for post-conviction collateral relief it fails on the merits.

There was no evidence of wrongdoing by the trial court in sentencing Seal. His sentence was within the statutory guidelines; within the jurisdiction of the court; not unconstitutional; and not subject to collateral attack under Miss.Code Ann. § 99-39-5(1) (Rev.2007). Sentencing is generally within the trial court's discretion and will not be disturbed on appeal if the sentence is within the statute's terms. *Edge v. State*, 945 So.2d 1004, 1008(¶ 15) (Miss.Ct.App.2007) (citing *Davis v. State*, 724 So.2d 342, 344(¶ 7) (Miss.1998)). This issue is without merit.

CONCLUSION

The trial court did not err in finding it lacked jurisdiction to entertain the motion to reconsider sentence and even if it did have jurisdiction, the motion lacked merit. Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to dismiss Seal's appeal, or in the alternative, to affirm the order of the Circuit Court of Sunflower County denying Stephen's Seal's Motion for Reduction of Sentence.

Respectfully submitted,

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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:

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This the 14th day of October, 2009.

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