IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEPHEN E. SEAL — APPELLANT

vs. — NO. 2008-KA-1424-COA

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF
AND
RESPONSE TO STATE'S MOTION TO DISMISS

RABUN JONES
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INTRODUCTION:

Seeking to have this summarily dismissed, the State asserts two propositions both of which lack merit. First, ignoring pertinent case law, the State contends that this court lacks jurisdiction over this appeal. Secondly, elevating form over substance the State claims that the appellant has failed to comply with the pleading requirements of the Mississippi Uniform Post-Conviction Collateral Relief Act (hereinafter the Act), §99-39-1 et seq of the Mississippi Code of 1972, as amended. Moreover, the State incorrectly opines that even had the appellant complied with the pleading requirements of the Act, his claim for relief should nevertheless fail because it is not encompassed in the permissible grounds for relief set forth in Mississippi Code Ann. §99-39-5(1). Contrary to these assertions, however, the motion to dismiss should be denied and this cause should be remanded for resentencing.

I: THIS COURT DOES HAVE JURISDICTION OVER THIS APPEAL

Relying on *Williams v. State*, 5 So. 3rd 1190 (Ms App. 2009), the State asserts as an iron clad rule that "a motion to reduce a sentence is not an appealable order...." However, numerous cases have in fact held that orders overruling motions seeking to shorten or otherwise modify sentences are, in fact, appealable. See, *Acker v. State*,

797 So. 2nd 966 (Ms 2001); *Norwood v State*, 846 So. 2nd 1048, 1052 (Ms App 2003); *Ducote v. State*, 970 So. 2nd 1309 (Ms App 2007).

As noted in Mr. Seal's original brief, despite the fact that no motion for a new trial or other relief was filed (which would have tolled the time for a direct appeal under Rule 4(e) of the Mississippi Rules of Appellant Procedure), this Court nevertheless has jurisdiction over the trial court's denial of Mr. Seal's Post Trial Motion which may be considered as a proceeding under the Act. *Norwood v. State*, 846 So. 2nd 1048, 1052 (Ms App. 2003); *Bobkoskie v. State,* 495 So. 2nd 497 (Ms 1986); *Wilson v. State*, 772 So. 2nd 1093 (Ms App 2000); *Ducote v. State*, 970 So 2nd 1309 (Ms App 2007).

II: DESPITE THE FACT THAT THE APPELLANT'S MOTION FOR REDUCTION OF SENTENCE IS NOT IN PROPER FORM FOR A PROCEEDING UNDER THE ACT, IT NEVERTHELESS STATES A CLAIM FOR RELIEF AND SHOULD BE GRANTED.

As noted in *Norwood v. State*, 846 So. 2nd 1048, 1052 (Ms App 2003) even though the defendant and the trial court have not considered a post trial motion as a proceeding under the Act, the appellate court may do so. *Norwood* further reflects that such will be done when in the interests of judicial economy. *Id.*

The record here contains all the information necessary for this Court to provide relief from the sentence imposed. Mr. Seal does not complain about any portion of the proceedings below which occurred up to and through the end of his sentencing hearing. His complaint lies in what transpired after sentencing as is reflected in the transcript of a Post Sentencing Hearing held on January 14, 2008. (RE 59-62). During that hearing the Court revealed that within a day or two of Mr. Seal's sentence, the Court of its own volition determined that Mr. Seal's sentence was too severe and that part of his

concurrent twenty year sentences should have been suspended. (RE 60). Due to the decision in *Leverette v. State*, 812 So. 2nd 241, however, the Court determined it was powerless to correct Mr. Seal's Sentencing Order (RE 61). The Court later in its order dated June 30, 2008 stated "(g)iven authority to do so, this Court would have amended the Defendant's sentence within two (2) days of its imposition to suspend part of the time imposed." (RE 71).

Contrary to the State's contention that Mr. Seal can be afforded no relief under the Act, several sections of Mississippi Code Ann. §99-39-5(1) could properly be applied to the case at bar. Mr. Seal has previously cited two of those grounds in his previous brief where he referred to subsections (a) and (i) of Mississippi Code Ann. §99-39-5(1). Subsection (e) of that section may also be applicable. That section provides as follows: "(t)hat exists evidence of material facts, not previously presented and heard, that requires vacation of the...sentence in the interest of justice." As noted in *Creel v. State*, 944 So. 2nd 891, 895 (Ms 2006), this section has been utilized to bring a sentence into compliance with the sentencing judge's intent. It is clear in the case at bar that Mr. Seal's concurrent twenty year sentences do not reflect the sentencing judge's true intent as to Mr. Seal's sentence

Accordingly, on the grounds asserted above and in Mr. Seal's original brief, this cause should be remanded for resentencing in accordance with the trial court's Post Sentencing Relovations set forth above.

This the 22nd day of October, 2009.

RABUN JONES, MSB # [redacted]

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CERTIFICATE OF SERVICE

I, Rabun Jones, do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing instrument to opposing counsel as follows, to-wit: Office of the Lisa L. Blount, Office of the Attorney General , Appeals Division, Post Office Box 220, Jackson, MS 39205-0220; Hon. Margaret Carey-McCray, Washington County Circuit Judge, Post Office Box 1775, Greenville, MS 38702-1775, Hon. Dewayne Richardson, Washington County District Attorney , Post Office Box 426, Greenville, MS 38702-0426.

This, the 2nd day of Oct, 2009.

RABUN JONES, MSB[redacted]