IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WELDON FOXWORTH — RESPONDENT/APPELLANT

VS. — NO. 2008-KP-1373-SCT

STATE OF MISSISSIPPI — MOVANT/APPELLEE

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

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WELDON FOXWORTH	**RESPONDENT/APPELLANT**
VERSUS	**NO. 2008-KP-01373-SCT**
STATE OF MISSISSIPPI	**MOVANT/APPELLEE**

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

COMES NOW movant/appellee, State of Mississippi, through counsel, and respectfully moves this Court for an order dismissing, without prejudice, the present appeal filed *pro se* by Weldon Foxworth in the above styled and numbered cause.

Foxworth's appeal should be dismissed due to a lack of appellate jurisdiction. Foxworth entered a guilty plea following a trial by jury at which the jury found him guilty. (C.P. at 50-52, 62) The order from which Foxworth seeks to appeal simply does not exist.

Dismissal should be without prejudice to Foxworth to file his motion for post-conviction relief in the trial court.

BRIEF FOR THE APPELLEE
IN SUPPORT OF MOTION TO DISMISS APPEAL
OR, IN THE ALTERNATIVE,
BRIEF FOR THE APPELLEE ON THE MERITS

WELDON FOXWORTH is a 27-year-old African American male and prior convicted felon. He is a former resident of Brookhaven who completed twelve (12) years of high school. (C.P. at 55, 63) Foxworth wants to withdraw his guilty plea entered in the wake of his conviction following trial by jury.

Weldon Foxworth has filed his post-conviction papers in the wrong court.

Foxworth was indicted together with a co-defendant on February 2, 2007, for the possession of marijuana with intent (count one), possession of cocaine with intent while in possession of a firearm (count two), conspiracy to possess a controlled substance with the intent to distribute (count three), and possession of a firearm as a convicted felon (count four). (C.P. at 7-12)

On August 14, 2007, following a trial by jury, Foxworth was convicted of both possession of cocaine and marijuana with intent to distribute to others as well as conspiracy to possess and distribute. (C.P. at 50-52)

On August 21, 2007, prior to sentencing and final judgment, Foxworth executed a Petition to Enter Plea of Guilty and entered that very day guilty pleas to reduced charges of simple possession of marijuana and cocaine.

Foxworth appealed.

His notice of appeal which contains the language "Motion to Vacate and Withdraw [Guilty] Plea", states, *inter alia,* he is aggrieved " . . . by the order of this Court entered on August 14, 2007 . . ." (C.P. at 64) *See also* Foxworth's Designation of Records which designated "[t]he order entered the 14[th] day of August." (C.P. at 77)

We have looked high and low as well as far and wide for that order. We can't find it. Judge Pickard's sentencing order was entered on August 21, 2007. (C.P. at 62) To make a long story quite short, an order entered by the trial court on August 14, 2007, simply does not exist.

Following his trial by jury and guilty verdicts returned on August 14, 2007, Foxworth, his court-appointed lawyer, and the State cut a deal whereby Foxworth, a week later on August 21, 2007, entered a plea of guilty to simple possession of marijuana and cocaine. The State agreed to drop the intent to distribute allegations as well as the double enhancement sentencing provisions, and Foxworth received a

much more favorable sentence in the wake of his voluntary plea(s). (R. 188-99; C.P. at 62)

Following a plea-qualification hearing conducted on August 21st, Lamar Pickard, circuit judge, presiding, Foxworth, under the trustworthiness of the official oath, entered his plea(s) of guilty to simple possession of both marijuana and cocaine.

Judge Pickard thereafter sentenced Foxworth to serve two (2) thirty (30) year sentences in the custody of the MDOC to run concurrently:

> THE COURT: So we have brought that way down, but what I'll do, I'll sentence you to serve 30 years on each of the two counts that you pled guilty to and I'll allow them to run concurrently, giving you one 30 year sentence to serve. That will be the sentence of the court. I'll remand you to the custody of the Mississippi Department of Corrections. (R. 199)

Foxworth, who freely and voluntarily admitted his guilt of the crimes charged, thanked the judge for his benevolence. (R. 199)

Things changed.

On January 23, 2009, Foxworth filed in the Supreme Court a dossier of papers styled "Motion for Post-Conviction Collateral Relief."

In support of his motion Foxworth attached a "Brief and Summary of Arguments in Support of Motion." Foxworth raised a host of issues related to his jury trial such as, for example, the failure of the State to prove the elements of possession. All of this, of course, is for naught because Foxworth, prior to sentencing and final judgment, got a "real meal deal" when he entered a plea of guilty to lesser included offenses of simple possession.

Foxworth was told during the plea-qualification hearing he could not appeal his guilty plea. We quote:

> THE COURT: Do you understand that you would have the right to appeal the decision of this court and the jury and so forth by pleading guilty. **Mr. Foxworth, I want you to understand you're giving up your right to**

appeal this case. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that's what you want to do?

THE DEFENDANT: Yes, sir. (R. 190-91) [emphasis ours]

By virtue of Miss.Code Ann. §99-35-101, Foxworth cannot appeal his guilty plea or the sentence imposed in its wake. We quote:

> Any person convicted of an offense in a circuit court may appeal to the Supreme Court. However, where the defendant enters a plea of guilty and is sentenced, then no appeal from the circuit court to the Supreme Court shall be allowed.

If Foxworth desires to assail the validity of his guilty plea, he must file his motion for post-conviction relief in the trial court, not this Court which does not have jurisdiction of the subject matter.

Moreover, Foxworth cannot appeal his conviction following trial by jury because his plea of guilty prior to sentencing and final judgment rendered the jury trial moot and all for naught.

We summarize.

First, this appeal should be dismissed for want of appellate jurisdiction. Save for cases where a prisoner's conviction and sentence have been appealed to the Supreme Court and there affirmed or the appeal dismissed, original civil jurisdiction for post-conviction matters lies exclusively in the trial court. *See* Miss.Code Ann. §99-39-7.

Second, no appeal will lie from a guilty plea.

Third, there can be no appeal of Foxworth's conviction following trial by jury because his subsequent plea of guilty rendered the trial moot and all for naught.

Foxworth states in his appellate brief he bases his "motion to withdraw [guilty] plea" on no fewer that eleven (11) individual state and federal constitutional grounds. (Point VII of motion at pp. 1-2) A

majority of these grounds relate to the jury trial and not Foxworth's guilty plea. For example, Foxworth assails the integrity of his indictment and the weight of the evidence used to convict him. He also claims he has new evidence, argues he was denied his right to a speedy trial, and laments he was subjected to double jeopardy, *et cetera, et cetera.* (Foxworth's motion at p. 2)

Foxworth and his writ writer also argue the trial court forced him into a plea bargain after the jury found him guilty. Foxworth appears to suggest that but for his allegedly illegal conviction following trial by jury he would have never cut a deal with the prosecution for reduced charges, dismissal of counts 3 and 4, and a milder sentence and would not have thereafter pled guilty to lesser included offenses.

Our response to any such suggestion is, once again, provided by Justice Robertson in **Reynolds v. State,** 521 So.2d 914, 917 (Miss. 1988).

"Horse feathers"! 521 So.2d at 917.

To the extent Foxworth's motion and appellate arguments are in the nature of a direct appeal flowing in the wake of a guilty plea, we say again, such will not lie. *See* Miss.Code Ann. §99-35-101 which is worth re-quoting here:

> Any person convicted of an offense in a circuit court may appeal to the Supreme Court. However, where the defendant enters a plea of guilty and is sentenced, then no appeal from the circuit court to the Supreme Court shall be allowed.

Foxworth's appeal should be dismissed without prejudice to Foxworth to properly pursue his post-conviction claims, if any at all, within the context of our post-conviction relief statutes and rules of appellate procedure.

CONCLUSION

Foxworth's appeal should be dismissed by this Court for want of appellate jurisdiction. His appellate brief filed here as a motion for post-conviction collateral relief targets his conviction following trial by jury

and perhaps his guilty plea(s).

No direct appeal will lie from his trial by jury because Foxworth subsequently entered a plea of guilty to the reduced charges.

And, by virtue of Miss.Code Ann. §99-35-101 no appeal will lie where, as here ". . . the defendant enters a plea of guilty and is sentenced." If Foxworth desires to attack his guilty plea(s), his remedy is not a direct appeal or a motion for post-conviction relief filed in this Court; rather, the remedy is a motion for PCR filed pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §99-39-1.

Dismissal of Foxworth's appeal should be without prejudice to Foxworth to file his motion for post-conviction collateral relief as an original civil action in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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 **MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, BRIEF FOR THE APPELLEE ON THE MERITS** to the following:

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This the 4TH day of MARCH, 2009.

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