

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RAMONZ PAYNE

V

CAUSE NO. 2008-TS-01243-COA

STATE OF MISSISSIPPI

REBUTTAL BRIEF OF APPELLANT

Appealed from the Circuit Court of Lauderdale County, Mississippi

Denial of Post Conviction Relief

DOCKET NO. 08-CV-0596

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### **SUMMARY OF THE REBUTTAL ARGUMENT**

The State has wholly failed to address the issues presented by summarizing the contention as without merit and barred. Yet the facts and the law are in sync and the appellant position is strong and irrefutable.

The appellant chooses to address the contentions of the State by asserting forth the basis that the review by this Court is de novo.

Secondly the appellant in response to Proposition One of the appellee's brief replies that there is a substantial error in the Circuit Court's review and that the proposition expounded by the appellant are properly before the Court.

Third, the appellant, in response to Proposition Three contends that all other propositions which revolve around the standard of proof in a revocation hearing are with merit and that Loisel v State, 995 So. 2d. 850 (Miss., App. 2008) does not overrule the law as cited by the appellant.

Fourth, the appellant in response to Proposition Four assert that the error regarding evidentiary submission of the drug test constituted plain error of constitutional proportion and is directly before the court.

Fifth, the appellant in response to Proposition Five asserts that the analysis of Mississippi Code Annotated 99-35-13 as precluding the use of nolle prosequi as a leverage tool when due process has been denied the accused is prohibited by law.

In summation and by way of prayer, the appellant respectfully submits that the appellate Court will reinstate the suspended sentence or in the alternative remand to the lower court the Post Conviction Petition with specific directives that petitioner be accorded complete due process rights by law.

### **ARGUMENT**

#### **THE TRIAL COURT FAILED TO REVIEW THE POST CONVICTION PURSUANT TO LAW THEREBY RESULTING IN A DE NOVO REVIEW OF THE PETITION.**

The appellee contends that no error has been shown in the Circuit Court's Dismissal of the Claims Presented in the Petition and no other issues are properly before the Court.

The appellant contends that the order of the Circuit Court clearly delineates the facts upon which the Court relied in denying the petition for post conviction relief. The Court took specific steps to set forth the basis of its decision which referenced only past facts not presented to the Court.

The Court in reviewing and setting forth the basis of its decision only addressed the issue as presented during the revocation hearing and the subsequent nolle prosequi. The petitioner was entitled to have the full scope of his post conviction reviewed and addressed in the order. A patented response that all documents have been reviewed does not connote that the basis of the appellant's contention, specifically as it relates to new evidence has been

addressed. It is cursory examination of the petition that disallows the law and makes it a mere shell. Consequently issues such as balance of power between executive, legislative and judiciary become blurred when either branch gives little or no value to the acts of either – through disallowance or by ignoring the tenet of the law.

The appellee asserts that the patented statement that the Court has reviewed the “full examination of the Petition, together with all the files, records, transcripts and correspondence pursuant...” suffices for a review is without a substantial basis.

The appellee asserts that even if the case were reviewed de novo, the circumstance would profit Payne nothing because he failed to make a cursory showing that the affidavits constituted newly discovered evidence. More specifically the appellee writes, “

Specifically, a petitioner seeking relief on the grounds of newly discovered through due diligence before the proceeding. E. g. Bell v State, 2 So. 3d. 747, 750 (Miss. App. 2009). Payne’s petition fails even to allege this fact. ( C. P. 16-17) It follows that the court clearly was correct in rejecting this ground for relief. “

Yet the appellee in making this point also substantiates the very basis that the Court failed to comport with the law. The Court does not reject the petition on any grounds relative to the newly discovered evidence. The Court makes no finding of fact or law regarding this matter. Both the appellant and appellee can only assume the basis of the denial and this is not the standard of law for which a review of the petition must be grounded. As the Court’s order is silent on this issue, the only recourse is for the appellate court to review de novo issue.

The appellant contends that the affidavits are self-defining and point specifically to information obtained and the dates obtained. If there were any sub-terrain issues regarding the dates and times the evidence was obtained this should have been the issue of an evidentiary hearing, An assumption by the Court coupled with a failure to assert the assumed finding is insufficient and does not comport to judicial analysis which is govern by statute.

The appellant's position is clear that the lower court failed to review the petition for post conviction relief and summarily reviewed its past findings.

**THE APPELLANT'S POSITION THAT THE AGREED REVOCATION ORDER CONSTITUTED A CONTRACT FOR WHICH THE APPELLANT WAS ENTITLED TO THE APPLICATION OF ALL STATUTORY AND CONSTITUTIONAL RIGHTS AFFORDED AN ACCUSED, AS WELL AS RIGHTS PROTECTED AND ENUNCIATED IN GAGNON V SCARPELLI, 411 US 778 (1973) AND MORRISSEY V BREWER, 408 US. 471 PROPERLY ADDRESSES THE ERROR OF THE CIRCUIT COURTS REVIEW DURING THE REVOCATION HEARING THEREBY REFUTING THE APPELLEES'CONTENTION THAT THE ISSUES ARE NOT PRESENTLY BEFORE THE COURT AND THAT SAID ISSUES ARE BARRED.**

The appellee contends that the argument made by the appellant is procedurally barred in that the issues were not raised in the Motion for Post Conviction Relief filed by the appellant.

The appellant contends that issues as set forth in the appellants brief specifically address the only reveal the underlying basis for the post conviction relief argument in the post conviction petition as follows:

At Paragraph VIII

“That Movant has been denied due process of law where the law clearly required that Movant be released when the charges which caused the revocation of the suspended sentence ended in dismissal, acquittal, or in any fashion other than a finding or a plea of guilty on the merits.

At Paragraph VIII B

The State of Mississippi was obligated to prosecute the criminal charges where the State had used such charges to revoke the suspended sentence of movant.

The appellee is attempting to limit the argument of the appellant based upon a fictitious review of the petition. The petition was never properly reviewed and no evidentiary or other hearing was held by Court to ascertain the logic of the appellant in asserting his legal argument. To the contrary, the Court was fully apprised that the appellant was making a legal argument regarding the denial of due process. The fact that the appellant couches the argument in contractual terms to more fully delineate the basis for the argument is not germane to the full scope of the argument of due process violation.

The appellant simply makes the argument as is referenced in his post conviction motion that he has been denied due process of law as governed by his contract as well as the current constitutional rulings of the Court, as it relates specifically to rights under revocation.

**PAYNE’S THIRD, FOURTH AND FIFTH PROPOSITIONS HAVE MERIT IN THAT MISSISSIPPI JUDICIAL PRECEDENT REGARDING REVOCATION PROCEDURES DOES NOT DENY THE APPLICATION OF THE PROTECTIONS AFFORDED UNDER THE CONSTITUTION TO THE ACCUSED.**



The appellee summarily sets forth the proposition that the State was not duty bound to prosecute the offenses used as the basis of the revocation; that a charge which does not result in conviction cannot be used to support a revocation, and that the order of nolle prosequi required his release. In supporting this argument the Appellee cites Loisel v State, 995 So. 2d. 850, 853 (Miss App 2008).

Yet the Appellee fails to properly review the Supreme Court rulings and apply it to the matter before the Court. In Loisel, the State violated Loisel because he failed to complete his commitment at the Restitution Center. There was never an issue of the commission of a new crime in Loisel but rather a failure to complete a requirement. The language of Loisel's agreement tracked the requirement.

A conviction may not be necessary to a revocation of probation wherein there is no requirement per the agreement. Yet the standard wherein an individual is charged with a violation of the terms of his probation "by committing an offense against the laws of the State or of any other State or of the United States of America" comport review under the standard "beyond a reasonable doubt" of that particular offense.

Yet assuming for argument sake that the appellant was subjected to a lesser burden of proof, Moore v Ruth, 556 So. 2d. 1059, 1062 (MS., 1990) also stands for the proposition that an acquittal by its very nature questions the authenticity of a revocation – wherein there may be actual proof of the innocence of the accused.

The appellant has set out in detail the analysis for its position that a higher standard of review should have been accorded Mr. Payne and at the very least that the Court should have reviewed more discerning the actions by the District Attorney to nolle prosequi the charges.

In the Appellee's brief, the State's written findings are (a) "the trial court's disposition of the petition was well supported by the controlling case law. But, Appellant would rebut this finding as the case law cited by the Trial Court, *Moore v State*, ; **Berdin v State**, 648 S. 2d. 73(MS .1994); **McClinton v State**, 799 So. 2d. 123 (2001); *Younger v State*, 749 So 2d 219 (Miss Ct. app. 1999); **Moore v Ruth**, 556 So. 2d. 1059; **Murphy v Lawhon**, 213 Miss 513 (1952) and **Wallace v State**, 607 So. 2d. 1184, 1190(1992) references totally different facts and application of the law wherein there appellant has in its brief distinguished these rulings.

These cases are particularly applicable wherein the appellant presents newly discovered evidence which raises considerable doubt as to whether the petitioner actually committed the crime as alleged. The fact that the lower court did not even mention the newly submitted evidence in the backdrop of analyzing these cases further substantiates the fact that the Trial Court did not review the petition according to law. The reference to these cases by the Trial Court without a review of the affidavit does not provide to the appellant even the lower standard of review.

**THE APPELLANT WAS DENIED DUE PROCESS OF LAW WHICH CONSTITUTES PLAIN ERROR WHEN THE APPELLANT WAS DISALLOWED FROM CONFRONTATION OF THE LAB TECHNICIAN UPON SUBMISSION OF THE LAB REPORT.**

The appellee contends that Payne is stopped from raising this issue regarding the testimony of the lab technician because it was not raised in the petition is without support. The appellant clearly raised the claim of denial of due process.

The argument by the appellee that the evidence could not have harmed the defendant's case because " Mr. Payne contends he did not sell drugs" fails to take into consideration the right of the Mr. Payne to full due process which includes the right to examine the evidence and cross examine the witness. The rationale by the appellee is not grounded in fact but more importantly it denies the constitutional guarantees afforded the appellant. The appellee's argument should fail as the appellant is entitled to confrontation through cross examination, Payton v State, 845. So. 2d. 713 (Miss. Ct. App. 2003).

**APPELLANT'S ARGUMENT IS THAT THE ACTION OF THE STATE TO NOLLE PROSSQUI THE CHARGES, AFTER PAYNE HAD MADE A DEMAND FOR A SPEEDY TRIAL, MANDATED THAT THE LOWER COURT DENY THE REQUEST AND/OR REINSTATE THE APPELLANT TO SUPERVISED PROBATION IS BASED UPON THE UNDERLYING PURPOSE BEHIND MS CODE ANNOTATED 99-35-13 TO PLACE THE DEFENDATN IN THE SAME POSITION AS IF THERE HAD NEVER BEEN A CHARGE.**

The appellant maintains that MS Code Annotated 99-35-13 in the backdrop of a speedy trial request and the utilization of said charges to revoke an individual without due process of law mandates that the appellant be restored to his initial position. The language of the MS

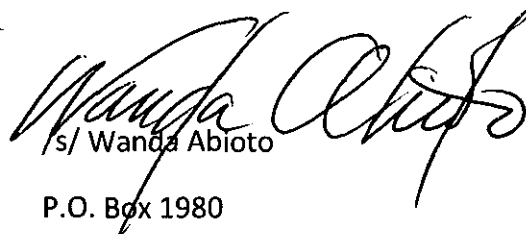
Code Annotated 99-35-13 specifically sets forth issues regarding fines /forfeiture and remittance; however the substance and purpose of the law provides guidance as to the purpose behind the statute.

Appellee's arguments are unsupported. This is a case of first instance wherein the State should be held to its agreement; be held to the high standard of constitutional law and not mistake its prosecutorial arm as the judiciary.

### **CONCLUSION**

The Appellee has not cited any support for its argument and fails to make arguments which comport with the arguments raised by the appellant. Accordingly the appellants request for reinstatement to supervised probation or in the alternative a remand to the lower court for an evidentiary hearing should be accorded.

Dated: June 30, 2009



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