

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BOBBY VARNADO, JR.

APPELLANT

VS.

NO. 2009-CP-0264-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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AS TO BOBBY VARNADO, A/K/A BOBBY VARNADO, JR.:
COUNT I: CONVICTION OF CONSPIRACY TO COMMIT THE
CRIMES OF KIDNAPPING, SEXUAL BATTERY (TWO COUNTS)
AND RAPE (TWO COUNTS) AND SENTENCE OF THREE (3)
YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT
OF CORRECTIONS AFFIRMED. COUNT IV: CONVICTION OF
SEXUAL BATTERY OF GIRL B AND SENTENCE OF SIXTEEN
(16) YEARS IN THE CUSTODY OF THE MISSISSIPPI
DEPARTMENT OF CORRECTIONS AFFIRMED. COUNT V:
CONVICTION OF SEXUAL BATTERY OF GIRL A AND
SENTENCE OF SIXTEEN (16) YEARS IN THE CUSTODY OF THE
MISSISSIPPI DEPARTMENT OF CORRECTIONS AFFIRMED.
COUNT VI: CONVICTION OF RAPE OF GIRL B AND SENTENCE

County and sentenced as follows:

Petitioner, Bobby Varnado was convicted in the Circuit Court of Lincoln

STATEMENT OF THE CASE

BRIEF FOR THE APPELLEE

APPELLEE

STATE OF MISSISSIPPI

NO. 2009-CF-0264-COA

VS.

APPELLANT

BOBBY VARNADO, JR.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OF SIXTEEN (16) YEARS IN THE CUSTODY OF THE MISSISSIPPI
DEPARTMENT OF CORRECTIONS AFFIRMED. COUNT VII:
CONVICTION OF RAPE OF GIRL A AND SENTENCE OF SIXTEEN
(16) YEARS IN THE CUSTODY OF THE MISSISSIPPI
DEPARTMENT OF CORRECTIONS AFFIRMED. THE LAST EIGHT
(8) YEARS TO BE SERVED ON POST RELEASE SUPERVISION.
APPELLANT SHALL PAY FINE OF \$1,000.00 TO THE VICTIMS
COMPENSATION FUND AND PAY ALL COURT COSTS.
SENTENCE IN ALL COUNTS TO RUN CONCURRENTLY.
APPELLANT IS GIVEN CREDIT FOR JAIL TIME SERVED.

Simmons, [Wells & Varnado] v. State, 722 So.2d 666, 675 (Miss. 1998)

Approximately 9 years later defendant filed a for post-conviction relief with
the Circuit Court of Lincoln County. (Dec. 6, 2007, c.p. 4-24). The trial court in
extensive findings of fact and conclusions of law denied the petition. (C.p. 61-63 &
64-65), in January 2009.
It is from that (those) denials of post-conviction relief that defendant now
appeals to this reviewing court.

STATEMENT OF FACTS

The facts from the published opinion of this defendant's direct appeal

were:

¶ 2. According to the testimony of two young girls, Girl A and Girl B FN1, aged 11 and 13 respectively at the time of the incident, the three Appellants forced the girls to perform oral sex and then vaginally raped them on January 21, 1996.

Simmons, [Wells & Varnardo] v. State, 722 So.2d 666, 675 (Miss. 1998)

Defendant got a sentence with, essentially half of the sentence suspended. That suspended sentence of 8 years was to be served under the supervision of the Mississippi Department of Corrections. Mississippi statutes only allow for post-release supervision of up to 5 years.

Claiming that discrepancy between his sentence order and the statutory provision defendant asserts he is serving an illegal sentence.

SUMMARY OF THE ARGUMENT

Issue I.

DEFENDANT'S SENTENCE IS NOT AN 'ILLEGAL' SENTENCE.

Under *Miss. Code Ann.* § 47-7-24(3), Mississippi Department of Corrections has the responsibility of monitoring the convicted defendant for the first five years after which the court assumes that responsibility for the remainder of the term of post-release supervision (the remaining three for a total of eight, *sub judice*). This is not an illegal sentence and defendant was not and is not now entitled to any relief.

Issue II.

DEFENDANT IS PROCEDURALLY BARRED, AS THE TRIAL COURT MAY NOT HAVE HAD JURISDICTION.

Defendant Varnado's convictions and sentences were affirmed on direct appeal; therefore, defendant Varnado was required to obtain permission from the supreme court before filing a motion for post-conviction relief. Since it would appear from this appellate record that defendant Varnado did not seek leave before filing his motion for post-conviction relief with the trial court, the trial court lacked jurisdiction to hear the post-conviction motion. Likewise, this reviewing appellate court is also without jurisdiction to review this matter

ARGUMENT Issue I.

DEFENDANT'S SENTENCE IS NOT AN 'ILLEGAL' SENTENCE.

The State has summarized its response to the main issues raised in defendant's brief. First, the State will address the issues relating to the supposed 'illegal' sentence in contravention to *Miss. Code Ann.* § 47-7-24(3). The State will then address the procedural bar to review.

Defendant got a sentence with, essentially half of the sentence(s) suspended. That suspended sentences of 8 years were to be served under the supervision of the Mississippi Department of Corrections. Mississippi statute only allows for post-release supervision of up to 5 years. *Miss. Code Ann.* § 47-7-24(3).

Claiming that discrepancy between his sentence order and the statutory provision – defendant asserts he is serving an illegal sentence.

The reviewing Courts of this State have heard this said same argument before and found it wanting, to wit:

¶ 14. Ray claims that his sentence for sexual battery is an illegal sentence. He was sentenced to ten years, the first year to serve and the remaining nine years suspended conditioned upon his obedience to the terms of nine years of post-release supervision. Ray argues that the nine years of post-release supervision violates the maximum of five years of post-release supervision by the Mississippi Department of Corrections ("MDOC") that is allowed by statute. Mississippi Code Annotated section 47-7-34(3) (Rev. 2004) states that the "maximum amount of time that the Mississippi Department of Corrections may supervise an

offender on the post-release supervision program is five (5) years.”

¶ 15. However, the supreme court has made it clear that post-release supervision is not limited to five years. “While the statute unquestionably limits to five years the period of time that the MDOC may supervise an offender who is on post-release supervision, the clear language of the statute does not limit the total number of years of post-release supervision to five years.” *Miller v. State*, 875 So.2d 194, 199(¶ 10) (Miss.2004). The MDOC has the responsibility of monitoring the convicted defendant for the first five years after which the court assumes that responsibility for the remainder of the term of post-release supervision. *Johnson v. State*, 925 So.2d 86, 102(¶ 30) (Miss.2006). This period after the first five years is known as “unsupervised” or “non-reporting” post-release supervision. *Id.* The statute imposes a limit on the burden that a court may place on the MDOC to supervise a defendant. But, as the supreme court noted, “the court is not so limited concerning the burden it may place on itself by way of monitoring a defendant’s behavior while the defendant is serving a [term of] ‘non-reporting’ post-release supervision.” *Id.* Thus, Ray’s argument that his sentence was illegal is flawed because, while it is true that he will only be supervised by the MDOC for a maximum of five years, he remains under the supervision of the court for the portion of the sentence above that five years. We find that Ray’s sentence imposed by the circuit court is valid; thus, this issue has no merit.

Ray v. State, 976 So.2d 398 (Miss.App. 2008).

So, defendant has misconstrued the applicable statute, and is not entitled to any

additional relief.

Issue II.

DEFENDANT IS PROCEDURALLY BARRED, AS THE TRIAL COURT MAY NOT HAVE HAD JURISDICTION.

Defendant had his case heard on direct appeal and his convictions affirmed by

the Mississippi Supreme Court. *Simmons, [Wells & Varnado] v. State*, 722 So.2d 666 (Miss. 1998).

It is the position of the State, as best can be determined from this record on

appeal, that defendant did not petition the Mississippi Supreme Court for permission

to proceed in the trial court as required by *Miss. Code Ann.* § 99-39-7. The State

cannot find an order in this record allowing such a discretionary filing in the lower

court. Consequently, it would appear the trial court was without jurisdiction to rule

on the original petition.

Likewise, it would appear the Court of Appeals of the State of Mississippi

would also be without jurisdiction to rule on this attempted appeal.

As this Court has succinctly noticed and addressed:

¶ 5. Barnes's conviction and sentence were affirmed on direct appeal; therefore, Barnes was required to obtain permission from the supreme court before filing a motion for post-conviction relief. Since Barnes did not seek leave before filing his motion for post-conviction relief with the trial court, the trial court lacked jurisdiction to hear Barnes's motion. Likewise, this Court is also without jurisdiction to review this matter.

Barnes v. State, 2009 WL 2152340 (Miss.App. 2009).

While the trial court may have lacked jurisdiction to rule on the petition the

this attempted appeal.

If this Court finds lack of jurisdiction the State would ask this Court to dismiss

legal analysis and conclusion were correct.

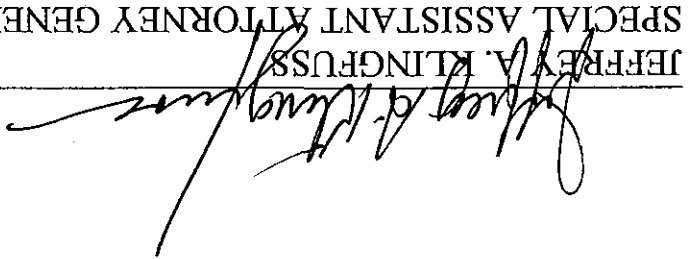
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief. Alternatively, the State would ask this reviewing Court to dismiss the appeal for lack of jurisdiction.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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:

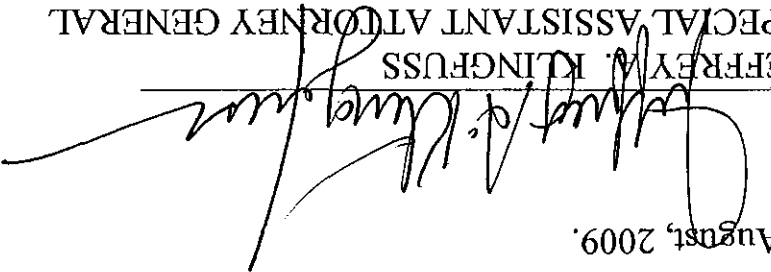
Honorable Michael M. Taylor
Circuit Court Judge
Post Office Drawer 1350
Brookhaven, MS 39602

Honorable Dewitt Bates, Jr.
District Attorney
284 East Bay Street
Magnolia, MS 39652

Bobby Varnado, Jr.
#03974

Delta Correctional Facility
3800 County Rd. 540
Greenwood, MS 38930

This the 31st day of August, 2009.


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