IN THE COURT OF APPEALS OF MISSISSIPPI

KHRISTOFFER MANDELL HEARRON — PETITIONER

versus — CAUSE NO. 2009-CP-00366-COA

STATE OF MISSISSIPPI — RESPONDENTS

REPLY BRIEF

Comes now, Khristoffer Mandell Hearron the petitioner in pro-se, and files this above mentioned petition in this Honorable Court, and would show the following to-wit;

The state (brief, page 9.) contend the petitioner's claim is res adjudicata.

In Miss. Code Ann. 47-5-801 to 47-5-807 (1999) authorizes MDOC to adopt its administrative review procedures and creates a statutory scheme of due process. And, in Section 47-5-807 expressly provides for the right of judicial review as follows: "Any offender who is aggrieved by an adverse decision rendered pursuant to any administrative review procedure under Sections 47-5-801 through 47-5-807 may, within thirty (30) days after receipt of the agency's final decision, seek judicial review of the decision."

The Court of Appeals has recently interpreted section 47-5-801 to hold that the administrative review procedures are the sole means to review decisions of the classification committee. Morris v. State, 767 So.2d255, 261 (Miss. Ct. App 2000).

And, in Hearron v. MDOC, 22So,3d 1238 (Miss Ct. App. 2009) petitioner was indeed aggrieved by MDOC decision involving and administrative remedy request, because he was only contesting the calculation of MDOC, concerning time served, more than what he should have served, in which post conviction relief does not afford.

In Gable v. State, 2005, 2005 WL 1683663, the court held post-conviction relief petition was not proper means for defendant whose probation was revoked to calculate and receive credit for five months he served awaiting his trial, where defendant must first send such requests to MDOC.

Therefore, the state contention is off scope. Because petitioner first exhausted administrative remedies pursuant to Gable. And he was not seeking post-conviction relief, but only administrative relief. And the legislature clearly intended to confer upon "any offender the right to seek judicial review of decisions" Green v. Weller, 32 Miss. 650,678 (1856).

Also, Rodriquez v. State, 2003, 839 So. 2d 561 the court held that where a convict was not, required to seek administrative remedies for the revocation of his probation before petitioning for post-conviction relief, administrative panel could do nothing to remedy challenge to revocation of probation, as only a court has power to continue or revoke probation and, by specifically listing unlawfully revoking parole as a ground for post-conviction relief, relief statute excepted such a complaint from administrative procedures.

During petitioner 1990 revocation petitioner, he did not have an opportunity to be heard in person and to present witnesses and documentary evidence, he did not have the opportunity to confront and cross-examine adverse witnesses. No specifically finds of good cause given for not allowing this confrontation by the court.

Moreover, the party's present at this so-call revocation hearing, were petitioner Circuit court of Warren County Judge Frank G. Voller District Attorney James "Buck" Penley. No stenographic notes/transcripts, witnesses, no detail discussion concerning the conditions of probation violations.

The right to counsel at Probation and Parole Board hearings, in complex or difficult to develop claims, and when, after being informed of his right to request counsel, the accused makes such a request, based on a timely and colorable claim. Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed 2d 656 (1973).

In order to help understand the details of the unlawful probation revocation issue, a brief chronology of events is instructive:

1. Petitioner was not allowed to be heard in person, nor was he allowed to present witnesses, documentary evidence, no opportunity to confront and cross-examine adverse witnesses.

2. No counsel appointed after petitioner request for counsel in this difficult and complex hearing, where he did not violate conditions of probation.

3. No stenographic notes/ transcripts of the revocation.

4. Petitioner was re-sentence to 3 years without being given credit for time served in the R.I.D., during revocation hearing, according to sentencing order.

The trial court did not entertain petitioners probation being revoke unlawful or that he was not given credit for time served claims in post conviction. And the state failed to admit that his probation claim was unlawful revoked or that he was not given credit for time served.

Also, the state has not submitted anything in the record that would disprove or discount petitioner's claims, there are no affidavits from witnesses regarding the 1990 revocation, no affidavits or records from the courts, what so ever.

The record provided to the court is insufficient to determine whether petitioner was denied proper revocation procedure in this case.

Petitioner claim, is an exception to procedural bars, where there is a question that a party's fundamental rights have been violated, and the right to be free from an illegal sentence has been found to be free from an illegal sentence, has been found to be fundamental. Sneed v. State, 722 So. 2d 1255, Ivy v. State, 731 So. 2d 601, 603 (Miss 1999).

Where an imposed sentence, is otherwise barred, an unenforceable sentence is never the less plain error, and capable of being addressed Stevenson v. State, 674 So. 2d 501,505 (Miss. 1996).

Petitioner assertions that he was wrongfully punished, the second time around, do have merit, since re-sentencing in matters concerning revocation probations or suspended sentences speak to the re-sentencing, of a defendant to a great punishment than he originally received create a double jeopardy issue.

The petitioner should have been appointed counsel to develop mitigating evidence that was difficult to understand for a nineteen (19) years old, high school drop out, that was certified as an adult at the age of seventeen (17) years old, at which time he was first charged in this case in question.

In Leonard v. State, 271 So. 2d 445, 447 (Miss. 1973) the court held that once a circuit or county clerk exercises it option to impose a definite sentence, it cannot subsequently set that sentence aside and impose a great sentence, punishment for the same offense in violation of the Fifth Amendment to the Constitution

which provides that no person should be subject for the same offense to be twice put in jeopardy of life or limb." US CONST. amend V.

Trial judge is being allowed to make such an arbitrary decision, in the case in question.

And, trial court initially asked petitioner did he want the court to appoint court, and petitioner stated yes, but no counsel was provided.

Petitioner requested that the trial court afford him counsel a second time after the court stated that petitioner would not receive credit for time served, in the R.I.D. program. The trial court stated that he would appoint counsel after, the revocation hearing, and asked the district attorney did he object, he stated no.

It is petitioner contention that he did not commit any of the alleged violations of the conditions of his probation.

In Dillion v. State, 641 So.2d 1223, 1225 (Miss.1994) the court held that a proper course of action in cases in which an argument cannot be justified, it is to remand to the lower court for argumentation of the record.

Had he been allowed appointment of counsel he could have been able to contest the allegation that he was arrested inside The Open House night club and he would have been able to prove that he was told by counselor Sheila Lowe, whom is employed at Yazoo Mental Clinic, that he did not have to attend drug classes for marijuana use.

And, petitioner's probation officer Joe Johnston, stated that he would be entitled to appointment of counsel, and would be granted counsel since he request appointment of counsel.

The state has not submitted anything in the record that would disprove or discount petitioner's claim. There are no affidavits from witnesses regarding the 1991 revocation, no affidavits or records from the trial court arresting officers, or MDOC employees. The record provided to the Court is insufficient to determine whether petitioner was denied proper revocation procedure in this case. Therefore, the judgment of the Circuit Court should be reversed, and remand to

the circuit court for an evidentiary hearing to determine whether petitioner received proper revocation procedure in this case.

Further, petitioner contend a sentence cannot be increased for a defendant once he has already begun to serve his time, as in our case at bar is recognized as an established practice in the more recent case of United States v. DiFrancesco, 449 U.S. 117, 134 66 L.Ed. 2d 328, 101 S. Ct. 426 (1980).

A sentencing judge could recall a defendant and increase the original sentence if and only if he has not yet begun to serve his originally sentence time, expose the defendant to double jeopardy.

WHEREFORE, PREMISES CONSIDERED, Khristoffer Mandell Hearron, the petitioner pray that this conviction is set aside, and/or that an evidentiary hearing is granted, and any other relief, deem necessary.

CERTIFICATE

OF

SERVICE

I Khristoffer Mandell Hearron, the petitioner do hereby certify that a true and correct copy of this above mentioned petition has been forward via US Mail to the following: Hon. Frank G. Voller, Circuit Court Judge, P.O. Box 351, Vicksburg, MS. 39181-0351, Hon Richard Smith, District Attorney, P.O. Box 648, Vicksburg, MS. 39181, Special Assistant Attorney, Laura H. Tedder, P.O. Box 220, Jackson, MS. 39205-0220.

This is the 5 of May, 2010

Khristoffer M. Hearron

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