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SUPREME COURT  
COURT OF APPEALS**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**Kurt D. Middleton, Appellant,**

vs.

Cause No. 2009CP0977 COA

**The State of Mississippi, Appellee**

**Brief on Behalf of the Appellant**

Oral argument not requested

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

Kurt D. Middleton, Appellant,

vs.

Cause No. 2009-CP-0977-COA

The State of Mississippi, Appellee

**Rebuttal Brief on Behalf of Appellant**

**Statement of the case**

Appellant, Middleton appeals his conviction as a Habitual offender by the De Soto County Circuit Court, Mississippi.

**Statement of Facts**

For purposes of this brief, Appellant will agree with the states statement of facts in part.

In the states statement of facts they are mistaken about one of the felony convictions the Circuit Court used to convict me as a habitual criminal. In the felony conviction, Case no. 86CF 1072 Wisconsin, Dated 11-30-84, Middleton was sentenced to probation and had not been revoked as in **HEWLETT**. In **HEWLETT** he was sentenced to 3 years in case no. H-8392 see: certified copy of judgement of conviction enclosed as exhibit 1.

## **STATEMENT OF ISSUES**

1. Did the Trial Court Error in Sentencing Middleton as a Habitual Criminal?

## **Summary of Argument**

1. The Trial Court did error in using a felony conviction which does NOT conform to Miss Code 99-19-81 or the USCS Const. Art. V1, C1.2 #24.

## **ARGUMENT**

All arguments in Appellants original motion hold firm. The only new argument has to do with Middleton's prior conviction, where he was placed on probation, see: ( R. Vol 1 pp. 17) Judgement of Conv. Case no. 86CF1072. This and the other conviction ( R. Vol 1 pp. 16) Judgement of Conv. Case no. 85CF1060, 86CF747. Were Wisconsin convictions and because of this they are to be construed as they are by Wisconsin laws. Because of this, Middleton wishes to argue that the conviction, case no. 86CF1072 is NOT in fact a sentence as Mississippi law sees it. If this conviction is not a sentence pursuant to the laws of Wisconsin then it will not be able to be used in finding Middleton a Habitual Criminal.

In the States argument it states, "We adopt here the Circuit Court's reasoning in its Order denying relief on the prisoner's motion. The prisoner may not have served time on one of his convictions, but he was sentenced to serve a term of five years. This made the conviction a useable one. *HEWLETT v. STATE*, 607 So.2d 1097, 1105 (MISS. 1992). It is the fact of having been sentence to a term of a year or more imprisonment that makes a prior conviction

eligible for sentencing under Section 99-19-81, not whether such a period of time was actually served.” As in *Hewlett*, he was sentenced to serve 3 years in prison because he had in fact had his probation revoked. See: exhibit 1. *Hewlett’s* judgement of conviction case no. 8392.

I wish to argue that Middleton’s conviction, ( R. Vol 1. pp 17) was not a sentence at all and because it is NOT a sentence does not fall in the scope of the Miss. Code 99-19-81. As in *Testa vs. Katt* and the USCS Cons. Art VI C1.2 #24. State court is obligated to enforce valid penal law of United States. *Testa vs. Katt (1947) 330 US 386, 91 L Ed 967, 67 S Ct 810, 172 ALR 225.*

See also: *State of Wisconsin vs. Gereaux 114 Wis 2d 110, 338 N.W. 2d 118, 1983 Wisc. App., Prue vs. State 63 Wis. 2d 109, 216 N.W. 2d 43; (1974).* The terms “probation” and “sentence,” according to *Prue*, are different concepts. The Wisconsin Supreme Court noted that a sentence is generally defined as the “judgement of a court by which the court imposes the punishment or penalty provided by the statute for the offense....” *Id.* At 115-16, 216 N.W. 2d at 46. Probation is not a sentence; it is an alternative to a sentence. *Id.* At 114, 216 N.W. 2d at 45. Furthermore, “sentence” is a legal term and must be given its legal meaning in sec. 973.09(1)(a), Stats., as required by the Wisconsin Supreme Court in *Prue*. *Id.* at 116, 216 N.W. 2d at 46. We hold that the term “sentence” is a legal term that does not include the term “probation.”

The Supreme Court, Hallows, C. J., held that defendant was not serving a sentence and was not entitled to good time. Probation is alternative to sentence and fact that condition of confinement in county jail is similar to confinement of sentence under Huber Law does not make probation a sentence.

HALLOWS, Chief Justice,

[1] The statement in the judgement "with no good time given" was superfluous but did, perhaps, serve as a warning to the authorities that *Prue* was not entitled to good time under sec. 53.43, Stats., because he was on probation and not serving a sentence.

[5-8] Those receiving Huber Law privileges are serving a sentence. Probation is an alternative to a sentence; and the fact that a condition of confinement in the county jail is similar to the confinement of a sentence under the Huber Law does not make a probation a sentence. There are public policy considerations why a committing court should have a wide choice in dealing with a convicted person in regard to his punishment and rehabilitation. The trial court should have leeway if probation is to be an effective tool of rehabilitation. A trial court could grant good time as a condition of a probation if it desired; and under sec. 973.09(3), Stats., may change the terms of probation. We do not accept the argument that the common and usual meaning of "sentence" or "sentencing" in sec. 53.43 means confinement on probation.

The view that probation is not a sentence and that the imposition of incarceration as a condition of probation is likewise not a sentence has been generally accepted.

*See McCulley vs. State* (Mo. 1972), 486 S.W. 2d 419, 423; 38A Words and Phrases (perm. ed.) pp. 355, 356; *see also* *Ex parte Hays* (1953), 120 Cal. App.2d 308, 260 P.2d 1030; *In re Martin* (1947), 82 Cal. App.2d 16, 185 P.2d 645; **Petersen vs. Dunbar** (9<sup>th</sup> Cir. 1966), 355 F.2d 800; **Scarpelli vs. Gagnon** (E.D. Wis. 1970), 317 F. Supp. 72, 77; **People vs. Terven** (1970), 130 ILL.App.708, 264 N.E. 2d. 538; *In Re Williams' Petition* (1965), 145 Mont. 45, 399 P.2d 732; **State vs. Duitsman** (1970), 186 Neb. 39, 180 N.W.2d 685; **State vs. Wright** (1972), 202 N.W.2d 72 (Iowa); **McCulley vs. State**, *supra*, (an order placing a defendant on probation, even though it includes a condition of probation that defendant serve a period of detention in the county jail, is not a judgement and sentence); Com. Ex rel. **Lemon vs. Myers**, Com. Pl (1957), 56 Lanc.L.Rev. 65 and **State vs. Theisen** (1956), 165 Ohio St. 313, 135 N.E.2d 392, **Delaney vs. State** (Fla.1966), 190 So.2d 578, **People vs. Boucher** (Ill.App.1973), 295 N.E.2d 334 (an order placing a defendant on probation is not a sentence, but is in effect a suspension of the imposition of sentence).

So as this court can see the conviction used to establish Middleton a habitual criminal is not valid for use under Miss Code 99-19-81. Because it is not a sentence in the meaning of the use of Miss. Code Ann. 99-19-81 and the other arguments in Appellants prior briefs, Middleton respectfully requests this court find that the State Court should not have found Middleton a habitual offender..

### Conclusion

The Appellant submits that the state has failed to prove beyond a reasonable doubt that he is a habitual criminal. Therefore the Habitual offender portion of his sentence should be vacated and he should be re-sentenced without the 99-19-81 statute.

For the above and forgoing reasons, Appellant requests this Honorable court grant him requested relief.

This 22<sup>nd</sup> day of March, in the year of our lord 2010.

Respectfully,

A handwritten signature, possibly "JD", is enclosed within a hand-drawn circle.

**Certificate of Service**

I, Kurt D. Middleton, Petitioner, Pro Se, do hereby certify that on this date a true and correct copy of the "Brief for Appellant" was mailed to:

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Honorable Robert P. Chamberlin  
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C/O Ms. Kathy Gillis  
Clerk of Courts  
P.O. Box 249  
Jackson, MS 39208

Dated this 22<sup>nd</sup> day of, March, 2010.

Kurt D. Middleton  
Pro Se Petitioner





JOHN BARRETT  
Clerk of Circuit Court