

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2009-CP-01572

**MICHAEL COUNCIL
APPELLANT**

v.

**MISSISSIPPI DEPARTMENT OF CORRECTIONS
APPELLEE**

**On Appeal From the Circuit Court
of Forrest County, Mississippi**

BRIEF OF APPELLEE

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal:

1. Michael Council, Appellant
2. Hon. Robert B. Helfrich, Circuit Court Judge

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellee:

1. Jane Mapp, Special Assistant Attorney General, State of Mississippi
2. James Norris, Special Assistant Attorney General, State of Mississippi
3. Hon. Jim Hood, Attorney General, State of Mississippi
4. Hon. Jon Mark Weathers, District Attorney for the Twelfth Judicial District

By: Jane Mapp

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ISSUES

I. Whether the Appellant's Probation Was Illegally and Unlawfully Revoked.

II. Whether the Appellant Was Afforded His Right to Due Process?

III. Whether the Appellant's Petition for Writ of Habeas Corpus Was Appropriately Filed and Entitled to the Relief He Sought.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Michael Council was originally sentenced in 2004 in Forrest County Circuit Court Cause Number 03-432CR for the crime of Robbery to 15 years, with four (4) years to serve, 11 years suspended and five (5) years post-release supervision (PRS). (R. at 11). Council discharged the original four (4) years to serve and was released to PRS. He was subsequently arrested in Marion County, Mississippi along with another convicted felon, Jermaine Jackson, and charged with Delivery of a Controlled Substance to a Correctional Facility. As a result of this arrest and his association with Jackson, on or about April 25, 2007 Council's PRS was revoked by Judge Robert Helfrich and he was sentenced to served the 11 years previously suspended. (R. at 11). On or about October 15, 2008 an Order for Nolle Prose was entered in Marion County Circuit Court Cause Number K08-029H regarding the criminal charges against Council and Jermaine Jackson.¹ (R. at 12).

Subsequently, on or about July 9, 2009, Council filed a pleading in the Circuit Court of Forrest County, Mississippi entitled Petition for Writ of Habeas Corpus. (R. at 7), While Council did title his petition as one for a writ of habeas corpus he stated that he was filing the petition pursuant to Miss. Code Ann. § 99-39-5(1)(g) which lists the grounds for relief under the Mississippi Uniform Post-Conviction Collateral Relief Act. (R. at 7). Council argued in his petition that his PRS had been illegally and unlawfully revoked because the charges against him had been dismissed and because he did not know Jermaine Jackson was

¹There is an assumption that these were the charges which were used as the basis of Council's revocation, but there is no evidence as to whether other charges are still pending.

on Earned Release Supervision having only met him the day before their arrest. (R. at 7-8).

On or about July 20, 2009 Forrest County Circuit Court Judge Robert Helfrich entered an Order denying Council's Petition for Writ of Habeas Corpus. (R. at 13). The Court held as follows:

The Petitioner is currently in the custody of the Mississippi Department of Corrections serving a sentence in Forrest County Criminal File Number 03-432CR and this Court does not have jurisdiction over said inmate. Council's challenge to his prison sentence is this writ is simply in the nature of a motion for Post-Conviction Collateral Relief. Council's present claim must be filed in the trial court pursuant to Mississippi Code Ann. § 99-39-7 thus said writ is inappropriately filed. Pursuant to the Uniform Circuit and County Court Rules Rule 2.07A 6(c) it is clearly shown that said Petitioner is not entitled to any relief and his petition is, therefore, DENIED.

(R. at 13).

Feeling aggrieved, Council filed his Notice of Appeal to the Mississippi Supreme Court. (R. at 14). Council has been allowed to proceed *in forma pauperis* on his appeal of the circuit court's denial his Petition for Writ of Habeas Corpus. (R. at 35)..

SUMMARY OF THE ARGUMENT

While the lower court erred in finding that Council had not filed his petition for post-conviction relief in the trial court as required by Miss. Code Ann. § 99-39-7, Council failed to meet his burden of proving that his post-release supervision should be reinstated.

ARGUMENT

I. Whether the Appellant's Probation Was Illegally and Unlawfully Revoked.

Council argues that his probation was unlawfully revoked by the trial court when the judge failed to conduct a hearing to determine whether it was more likely than not that he actually committed the new crime with which he had be charged or that he knowingly associated with a person who was on Earned Release Supervision (ERS). He maintains that the State provided no proof other than his arrest that he violated the conditions of his post-release supervision and had further evidence been required then it would have proved insufficient. To support his argument Council points to the evidence suggesting that the new charges were later nolle prossed.

"A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous." *Payne v. State*, 22 So.3d 367, 368 (Miss. Ct. App. 2009). Further, it is well settled law that when an offender's probation is revoked based on a new arrest, probation need not be reinstated simply because the new charges are dismissed if the evidence shows that it is more likely than not that the offender violated the terms of probation. *Hardin v. State*, 878 So.2d 111, 112 (Miss. Ct. App. 2004).

In his brief, Council argues that the trial court revoked his suspended sentence based only on his arrest and his association with an ERS offender without requiring the State to offer proof that is was more likely then not that he did in fact commit the crime and knew that Jermaine Jackson was on ERS. In his petition filed with the trial court Council admits

that a revocation hearing was in fact held yet he failed to insure that the transcript of that hearing a part of the record on appeal. Council had “the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal.” *Scott v. State*, 24 So.3d 1039, 1041 (Miss. Ct. App. 2010), *quoting Oakwood Homes Corp. V. Randall*, 824 So.2d 1292, 1293 (Miss. 2002). In the Order Revoking Post Release Supervision the trial court held that Council in fact violated two conditions of his post-release supervision: 1) commit no offense and 2) avoid injurious or vicious habits and persons and places of disreputable and harmful character. The order shows that the revocation of Council’s post-release supervision was not based merely on his arrest.

Council as the petitioner, had the burden of proving “by a preponderance of the evidence that he was entitled to reinstatement” of his post-release supervision. *Moore v. State*, 587 So.2d 1193, 1196 (Miss. 1991); *see* Mississippi Code Ann. § 99-39-23(7)(Supp. 2009). He has not met that burden and the lower court’s denial of post-conviction relief should be affirmed.

II. Whether the Appellant Was Afforded His Right to Due Process?

Council argues for the first time on appeal that he was not provided a preliminary hearing prior to his revocation, nor was he allowed the opportunity to call or cross examine witnesses, all in violation of his due process rights.

This issue was not raised in the trial court and Council is therefore procedurally barred from raising it for the first time on appeal. *Douglas v. Blackmon*, 759 So.2d 1217, 1220 (Miss. 2000); *Davis v. State*, 684 So.2d 643, 658 (Miss. 1996).

III. Whether the Appellant's Petition for Writ of Habeas Corpus Was Appropriately Filed and Entitled to the Relief He Sought.

Council argues that the lower court erred in finding that it did not have jurisdiction since he filed his petition in Forrest County Circuit Court which was the county of conviction.

It appears that the trial court did in fact err when it held that Council filed his petition in the wrong county. As Council's petition was in the nature of a post-conviction collateral relief motion proper venue was that of the trial court, specifically the Circuit Court of Forrest County, Mississippi. While the lower court may have improperly determined that Council's petition was filed in the wrong court, it did properly deny Council's petition pursuant to Uniform Circuit and County Court Rules, Rule 2.07A(6)(c) which states, "[i]f, from the showing made by the motion, it is manifest that the person on whose behalf it is presented is not entitled to any relief, the court can refuse to grant the writ and enter an appropriate order." As Council failed to meet his burden of proving that his post-release supervision should be reinstated the court did not err finding he was not entitled to relief and dismissing his petition. Alternatively, if the court finds that the record is insufficient to affirm the lower's courts decision, then the matter should be remanded to the trial court for consideration on the merits.

CONCLUSION

Based on the arguments of fact and law herein above, the dismissal of Appellant's petition by the lower court was appropriate and should be affirmed.

Respectfully submitted,

STATE OF MISSISSIPPI
DEFENDANT-APPELLEE

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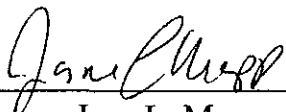
CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Brief of Appellee** in the above-styled and numbered cause to the following:

Hon. Robert Helfrich
Circuit Court Judge
P.O. Box 309
Hattiesburg, MS 39403

Michael Council, # 101087
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This, the 6th day of April, 2010.



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