

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARL DOUGLAS NECAISE

APPELLANT

VS.

NO. 2009-CP-1710

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF AUTHORITIES

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APPELLEE

This is an appeal from an order denying Carl Douglas Necaise's motion for post-conviction relief. The First Judicial District of the Circuit Court of Harrison County, Honorable Larry Bourgeois, Jr., presiding, denied Necaise's motion.

STATEMENT OF THE CASE

COURSE AND SCOPE OF THE CASE IN THE CIRCUIT COURT

The Circuit Court of Harrison County, First Judicial District, Honorable Stephen B. Simpson, presiding, accepted a plea of guilty from Carl Douglas Necaise to the charge of Touching a Child for Lustful Purposes and sentenced him to a term of twelve years, nine years suspended and three years to serve, and three years post-release supervision. R. Vol. 1/ 42-44.

The state brought an action to revoke Necaise's suspended sentence. The Court conducted a hearing in February 2007. The Court allowed Necaise to remain on the original terms of his probation. R. Vol. 1/ 57-58.

The Court waived Necaise's supervision fees due to his limited income. R. Vol. 1/ 46, 48.

The Court subsequently conducted another revocation hearing On November 5, 2003. R. Vol. 1/ 45-58.

The Court revoked Necaise's suspended sentence of nine years. The Court sentenced Necaise to nine years, suspended seven of those years, and placed Necaise on two years of house arrest. R. Vol. 1/ 58.

Necaise filed an action in the Circuit Court seeking post-conviction relief. R. Vol. 1/ 5-17.

The Court conducted a hearing and denied Necaise's motion for Post-Conviction Relief. R. Vol. 1/ 75-76.

Necaise filed a Notice of Appeal. R. Vol. 1/ 78-79.

STATEMENT OF THE FACTS

Facts of the Crime:

On August 12, 2000, Carl Douglas Necaise, then fifty-two (52) years of age, handled, touched, or rubbed the penis of A.C.F., a child then under the age of sixteen (16) years for lustful purposes. R. Vol. 1/ 31.

Facts of the Revocation:

The Court conducted a revocation hearing in February 2003, revoked Necaise's probation, and reinstated the same conditions leaving Necaise on the same terms and conditions as he was before the hearing was conducted. R. Vol. 1/ 57-58.

Subsequent to that time the Court suspended the requirement that Necaise pay supervision fees. R. Vol 1/ 46, 48.

On November 5, 2007 the Court conducted another revocation hearing . There was evidence that Necaise put over \$27,000.00 into slot machines at the Island View Casino and drank alcoholic

beverages while at the casino. R. Vol. 1/ 45-58

Necaise disputed the above facts. He claimed he did not play the amount of \$27,000.00, that it was “free play”, and claimed he was drinking a non-alcoholic beverage.

Mr. Dufrene, Necaise’s supervising officer for the Office of Probation, testified that he smelled an odor that smelled like an intoxicating odor coming from Necaise R. Vol. 1/ 49.

The Judge revoked the suspended sentence and re-sentenced Necaise to a term of the nine years remaining but suspended seven of those years and ordered that Necaise serve the remaining two years on house arrest. R. Vol. 1/ 58.

SUMMARY OF THE ARGUMENT

Necaise claims the written terms of his suspended sentence did not include a prohibition from being in a casino.

Necaise does not meet his burden of showing that the trial Judge was clearly erroneous in his ruling or that the trial Judge used the wrong legal standard when he denied post-conviction relief.

The evidence at the revocation hearing supported a finding that Necaise more likely than not violated the terms of his suspended sentence.

ARGUMENT

Necaise argues that he was not advised, and he did not understand, that he could not go into casinos as a term or condition of his suspended sentence and probation. He claims he did not understand “(B) Avoid injurious and vicious habits.”. Brief of Appellant, Page 1.

Necaise claims that all conditions for a suspended sentence must be in writing if the sentence is to be revoked. The casino prohibition is not in the written terms of his probation. Therefore, the Court did not have the authority to revoke his suspended sentence, and Necaise asks the Court to

reinstate his December 3, 2002 sentence, “. . . which will clear me of any and all probation from the M.D.O.C.” Brief of Appellant, Pages 3-4.

With all due respect, Necaise has not demonstrated that the trial court’s decision to deny post-conviction relief was clearly erroneous or that the trial court used the wrong legal standard. Necaise argued in his action for post-conviction relief that his right to due process was violated because he “. . . was never given notice of the condition used to revoke his P.R.S. which was not criminal.” R. Vol. 1/ 11.

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. *Smith v. State*, 806 So.2d 1148, 1150(¶ 3) (Miss.Ct.App.2002). However, where questions of law are raised, the proper standard of review is de novo. *Brown v. State*, 731 So.2d 595, 598(¶ 6) (Miss.1999). *Payne v. State*, 22 So.3d 367, 368 (Miss.App.2009).

Further probation may be revoked upon a showing that the defendant “more likely than not” violated the terms of probation. *Younger v. State*, 749 So.2d 219, 222 (Miss.App.1999).

There was evidence that Necaise persuaded the Court to waive his supervision fees due to his inability to pay, drank alcoholic beverages in a casino, and played \$27,000.00 in slot machines. Necaise disputed that he played that amount, claimed that it was free play and not that much, and claimed that he was drinking a non-alcoholic beverage.

The evidence supported a finding that Necaise, more likely than not, violated the terms and conditions of his suspended sentence. The terms included avoiding injurious and vicious habits, submitting to tests to determine the presence of alcoholic beverages, to avoid places of disreputable or harmful character, and to pay monies for supervision and other costs of court, fine and other costs. R. Vol. 1/ 43-44.

Mr. Dufrene's testimony about the odor of alcohol and the pictures taken at the casino of Necaise drinking what appeared to be an alcoholic beverage, *i.e.*, beer, combined to support a finding that Necaise failed to avoid injurious habits. Persuading the trial Judge to relieve Necaise of the duty to pay his fees by claiming to be unable to do so, and then going to a casino and playing some amount of money in slot machines claimed to be \$27,000.00 violated the terms of Necaise's suspended sentence.

With all due respect, Necaise has not demonstrated that the trial judge was clearly erroneous or used the wrong legal standard when he denied post-conviction relief.

CONCLUSION

The State asks the Court to affirm the decision of the Circuit Court of Harrison County.

RESPECTFULLY SUBMITTED

OFFICE OF THE ATTORNEY GENERAL

By: _____

SCOTT STUART

SPECIAL ASSISTANT ATTORNEY GENERAL

BAR NO. [REDACTED]

CERTIFICATE OF SERVICE

I, Scott Stuart, 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 Lawrence Paul Bourgeois, Jr.
Circuit Court Judge
P. O. Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
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Carl Douglas Necaie, #91508
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This the 6th day of July, 2010.



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