

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HOLLEY JONES

APPELLANT

VS.

NO. 2009-CP-1943-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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PROCEDURAL HISTORY:

On April 9, 1999, Holley Jones, "Jones" pled guilty to armed robbery before the Circuit Court of Washington County, the Honorable Ashley Hines presiding. Jones was sentenced to serve a ten year sentence. The execution of the sentence was suspended. Jones was given five years of probation under the provisions of the "Regimented Inmate Discipline Program." C.P. 30.

In response to Jones' motion for post conviction relief, the trial court vacated Jones sentence requiring completion of the RID program. The rest of the original order remained in effect. See motion in a separate certified copy of "Order Granting Post Conviction Relief" attached to this brief. On the same day, April 5, 2001, "an amended sentencing order" was entered. That order placed Jones on supervised probation for five years or until the Court "shall alter, terminate or direct the execution of the sentence." C.P. 31; R.E. Exhibit B. This was under the provisions of M. C. A. Sect 47-7-47.

On April 3, 2006, Jones was revoked from probation. This was for failure to report, failure to pay court ordered assessments, as well as for committing another felony by allegedly selling

marijuana on more than one occasion. C.P. 32.

Jones filed a pro se motion for post conviction relief, which was denied. C.P. 1-29; 35. From that denial of relief, he filed an appeal to the Mississippi Supreme Court. C.P. 86. The motion was based upon an appeal from the denial of a Rule 60(b) "MRCP" motion. C.P. 86.

ISSUES ON APPEAL

I.

**WAS JONES PROPERLY SENTENCED AND REVOKED
UNDER THE EARNED PROBATION STATUTE, M. C. A. Sect.
47-7-7?**

II.

WAS JONES' MOTION BARRED AS A SUCCESSIVE WRIT?

STATEMENT OF FACTS

On April 9, 1999, Holley Jones plead guilty with counsel to armed robbery before the Circuit Court of Washington County, the Honorable Ashley Hines presiding. C.P. 30. Jones was sentenced to serve a ten year sentence. However, the execution of sentence was suspended. As stated in the Court's Order: "The execution of said sentence is (was) suspended." C.P. 30. Jones was given five years of probation under the provisions of the "Regimented Inmate Discipline Program." C.P. 30. This was under the provisions of M. C. A. Sect 47-7-47, "Earned Probation program, restitution to crime victim."

In April 5, 2001, an "amended sentencing order" was entered. C.P. 31. It was granted at the same time another order was entered which removed Jones from the original completion of the RID program requirement. This removal from RID requirement was at Jones' request. The amended order placed Jones on supervised probation for five years or until the Court should alter, terminate or direct the execution of the sentence. C.P. 31 ; R.E. Exhibit B. See certified copy by Washington County Circuit Clerk, MS. Leola B. Jordan of the trial court's order entitled, "Order Granting Motion For Post Conviction Relief," attached to this brief in a separate "Motion for Judicial Notice of Adjudicative Facts."

On April 3, 2006, Jones was revoked from probation for failure to report, failure to pay court ordered assessments, as well as for committing another felony by selling marijuana on more than one occasion. C.P. 32.

Jones filed a pro se motion for post conviction relief. The motion was a request for copies of documents related to his guilty plea. The trial court denied relief. C.P. 1-6. This was in February 09, 2009.

In August 17, 2009, Jones filed an alleged Rule 60(b) motion under "the MRCP" with the trial

court. C.P. 13-34. In that motion, Jones claimed that his probation had expired prior to his being revoked. C.P. 24.

The trial court denied relief, finding that there was no basis for relief under Rule 60(b). C.P. 84.

From that denial of relief, Jones filed a pro se appeal to the Mississippi Supreme Court. C.P. 86.

SUMMARY OF THE ARGUMENT

1. The record reflects support for the trial court's denying Jones' pro se motion for post conviction relief. C.P. 84. The record reflects that Jones did not receive an illegal sentence. Jones was placed on probation on April 5, 2001. C.P. 31. This was also when, at his request, the trial court vacated the completion of the completion of the RID program requirement. This was in a separate Order, which the appellee has attached, along with it's request for the court to take judicial notice of said simultaneous and conforming order.

The record reflects that Jones did not comply with the terms of his probation. C.P. 32. Jones failed to report to his probation officer, pay assigned fees, and was charged, more than once, with sale of marijuana. The charge for sale came in February 14, 2006. C.P. 32. The record reflects that this was within the five year period for probation.

The record reflects that after Jones was revoked for violating the terms of his probation, the trial court executed his original ten year suspended sentence. He was properly given eight years to serve. C.P. 32; Exhibit E. The time served on his sentence did not count for time under probationary conditions. **Carter v. State**, 754 So. 2d 582 (¶4) (Miss. 2005).

2. The record also reflects that Jones' motion for relief under rule 60 was a successive writ. C.P. 35; M.C.A. Sec. 99-39-23(6).

PROPOSITION I

THE RECORD REFLECTS JONES' SENTENCE WAS PROPERLY IMPOSED IN THE INSTANT CAUSE.

In Jones' pro se "motion for post conviction relief," he argued that his probation was revoked. He believed that it had allegedly expired and therefore the court did not have jurisdiction to sentence him to the eight year sentence he is currently serving. C.P. 24. In his appeal from the trial court's denial of relief, Jones argues that the trial court "lacked jurisdiction" to revoke his probation because "his sentence had expired." Appellant's pro se brief with unnumbered pages.

The record reflects that contrary to Jones contention, there was record support for the trial court's order denying relief in the instant cause. In short, the appellee would submit that the record reflects that Jones' five year probationary period had not expired when he was revoked.

While the record contains numerous court orders, the appellee would submit that one crucial order was discovered missing. That Order was entered on April 5, 2002, the same day the "Amended Sentencing Order" was entered. C.P. 31. The two orders were explicitly connected to each other by language, reference to judicial action, orders and time.

In the trial court's Order "Granting Motion for Post Conviction relief," it stated as follows:

It is therefore ordered that the portion of Holley Jones' sentence requiring him to successfully compete (sic) the regimented inmate discipline program be and the same is hereby vacated and that the MDOC release Holley Jones (now housed as inmate number R8361, MDOC Unit 29, E building, Parchman, MS 38738) from incarceration. The remaining portions of the Court's order entered in this cause on the 9th of April, 1999, shall remain in full force and effect. **The Court will enter an amended sentencing order to conform Holley Jones' sentencing order to this order. Holley Jones shall report to the Mississippi Department of Corrections to begin serving a term of probation of five years.** (Emphasis by appellee).

The trial court's Order of August 24, 2009 denying relief which is in the record stated as follows:

This Court has recently learned that Holley Jones has a pending motion for post conviction collateral relief in this cause. Therefore, the court finds that its July 24, 2009 Order dismissing this cause shall be vacated. On or about July 1, 2009, Mr. Jones filed a motion for post conviction collateral relief and is barred by M. C. A. 99-39-23(6). It is therefore ordered that this Court's Order entered on July 24, 2009 dismissing this cause of action shall be and is hereby vacated. It is further, Ordered that Holley Jones' motion for post conviction relief to correct sentence shall be and is hereby denied and this cause shall be hereby dismissed. C.P. 35.

The trial court's Order of November 16, 2009 stated as follows:

On August 24, 2009 this Court entered an Order denying Mr. Jones motion for post conviction relief to correct sentence and dismissing this cause. That order became the law of the case upon entry. Mr. Jones is seeking to have that order vacated pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. **The Court has reviewed the motion filed by Mr. Jones and it does not appeal to fall within the narrow confines of Rule 60. The only avenue of relief open to Mr. Jones would be to appeal this cause to the Mississippi Supreme Court.** C.P. 84.

In **Yates v. State**, 916 So.2d 577, 582 (Miss. App. 2005), the court relied upon **Carter v. State**, 754 So. 2d 1208 (¶4) (Miss. 2005). Carter made it clear that time on probation could not be considered as part of the time an inmate is sentenced to serve.

19. In Mississippi, probation is not equivalent with time to serve: "No part of the time that one is on probation shall be considered as any part of the time that he shall be sentenced to serve." Miss. Code Ann. § 47-7-37 (Rev. 2004). If Yates had been sentenced to post-release supervision, that time would count as part of his sentence and would work toward meeting the statutory maximum. **Carter v. State**, 754 So.2d 1207, 1208 (¶ 4) (Miss.2000). Probation, however, can be imposed without counting toward the statutory maximum: "a probationary period does not equal time served." Id. at 1209(¶ 7).

The appellee would submit that the record, including the "Order Granting Motion For Post Conviction Relief," indicates that Jones was revoked on "April 3, 2006." C.P. 32. He was placed on probation as shown by "the Amended Sentencing Order" on April 5, 2001. C.P. 31.

The appellee would submit, based upon the record cited, that Jones was not revoked after his probation had expired.

Therefore, this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT JONES WAS BARRED FOR FILING SUCCESSIVE WRITS.

The record reflects that Jones filed successive writs in this cause. The record reflects that the trial court granted Jones' PCR motion. This was to remove him from having to complete the RID program at Parchman. In addition, the record contains two different motions for post conviction relief, including the motion under Rule 60 of "the MRCP." C.P. 36-58; and Attached Order granting Jones' Motion For Post Conviction Relief."

In **Maston v. State** , 750 So. 2d 1234, 1236 (Miss 1999), the trial court denied Maston's Motion for post conviction relief both for failure to file any supporting affidavits as well as for filing "a successive writ." As stated:

This Court has upheld the denial of successive applications where the petitioner has failed to demonstrate the existence of exception set forth in 99-39-27(9). See **Sneed v. State** , 722 So. 2d 1255 (Miss. 1998).

The motion for post conviction relief under rule 60 of MRCP would appear to "a successive writ" which is barred by M. C. A. Sect. 99-39-23(6) and 99-39-27(9).

Therefore, the appellee would submit that this issue of an illegal sentence is not only lacking in merit, it is also barred by the statute of limitations.

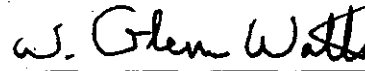
CONCLUSION

The trial court's Order denying relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



W. GLENN WATTS

SPECIAL ASSISTANT ATTORNEY GENERAL

MISSISSIPPI BAR NO 

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 W. Ashley Hines
Circuit Court Judge
Post Office Box 1315
Greenville, MS 38702

Honorable Dewayne Richardson
District Attorney
Post Office Box 426
Greenville, MS 38702

Holley Jones, #R8361
DCF
3800 County Rd. 540
Greenwood, MS 38930

This the 3rd day of March, 2010.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680