



FILED

COURT OF APPEALS OF THE STATE OF
MISSISSIPPI

JUN 11 2010
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SUPREME COURT
COURT OF APPEALS

Michael Gibson

Appellant

V.

No. 2009-CP-01966-COA

State of Mississippi

Appellee

Appeal Order Dismissing Motion for Post
Conviction Collateral Relief in the Circuit Court of
Jackson County

"Brief for Appellant"

Pro Se Appellant:

Mr. Michael Gibson

G.C.R.C.F.

154 Industrial Park Rd.

Lucedale, Ms. 39452

ORAL ARGUMENT REQUESTED

1. On February 2, 2006, Michael Gibson, appellant, pro se, was sentenced to a term of eight (8) years in the manner of four (4) years suspended; four (4) years to serve, with last three (3) years of said sentence served on Post Release Supervision: see FN1*: Hode v. Sanford 101 F.2d 290 (5th Cir 1939)

2. Appellant served one (1) year, and was released to three (3) years of Post Release Supervision as stated in Appellant's sentencing order pursuant to Section 47-3-34 based upon conditions (a)-(s), which in ending states: Failure of the defendant to comply with the terms and conditions of Post Release Supervision, shall be grounds for this court to terminate the period of Post Release Supervision and recommit the defendant to the correctional facility from which he was previously released for a period not to exceed the full term of Post release Supervision stated in this order:

See FN2*: Santobello v. New York, 404 U.S. 257; 92 S.ct 495 30L Ed 2d 427 (1971); Black v. Allison 431 U.S. 63, 97 S.ct 1621, 52 L.Ed 2d 136 (1976)

FN1*: See exhibit "B" from Motion for Post conviction Collateral Relief; Hode v. Sanford 101 F.2d 290 (5th Cir. 1939): illegal sentence and the word "with" being defined as concurrently state tried to force an illegal sentence upon, but stipulated wording in the order held.

FN2*: Courts has a responsibility to know what is stipulated in a plea agreements' written order. In this case the exact same judge; ADA handled the original and revocation sentence. Therefore, it should be no mistakes as claimed by the state to keep it's commitment on plea agreements requiring only specific performance of plea. The courts held that an unkept bargain that induced a guilty plea was grounds for relief

3. On August 31, 2007 an Order of revocation of Probation was entered due to the breaking of conditions A,N,O,P as stated/stipulated in Post Release Supervision pursuant to section 47-3-34 in sentencing order. In which, revoked Appellant to Remainder of Original sentence consecutive to BOI 2007-10,514; See exhibit "A" in Motion for Post conviction collateral Relief;

Cooter&Gell v. Hartmarx Corp. 496 U.S. 384 (1990); see FN3*

4. As general practice, a sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered and may be amended at any time during such session, provided a punishment already partly suffered be not increased. To increase the penalty is to subject the defendant to double punishment which is in violation to the Fifth Amendment to the Constitution (U.S. Const, Amend. V). a sentencing judge can recall a defendant and increase the original sentence if, and only if the defendant has not yet begun to serve his original sentenced time. Ethridge v. State, 800 So. 2d.1221; Leonard v. State,271 So. 2d 445,447 (Miss 1973).

FN3* Due to breach of plea agreement at revocation hearing is the sole cause that brings forth the Appellant's grievance. Plain error is clearly seen herein. This case shows an abuse of discretion by the court in not abiding by sated stipulation in plea agreement. The state is deliberately trying to back out of fulfilling agreement due because it's in favor of the Appellant at this stage. The state claims to have made a mistake, a mistake would be to write a.m. instead of p.m., or to misspell words, or to write ten instead of two. The facts state as input in the full complete phrase worded in plea agreement as to: " not to exceed the full term of Post Release Supervision stated in this order."

5. On September 25, 2007 attorney Robert Rudder submitted a Motion to Correct/Clarify revocation Order. This motion was denied on November 13, 2007; stating the court did not specifically order a limit on the amount of time which could be revoked and such language was apparently included in the Order by mistake and should be stricken. See FN 5* TEMPLE v. State, 671 So. 2d 58 (1996)

6. On August 17, 2009, Appellant submitted a Motion to Correct Clarify revocation Order (exhibit "D" of Motion for Post Conviction Collateral Relief). On August 25, 2009 an order dismissing Motion to correct/Clarify revocation Order was entered stating the motion is not well taken due to previous motion.

FN 5* The State reminds us of a rule that a written order controls in a conflict with an oral order.

7. On September 29, 2009 appellant submitted a Motion for Post Conviction Collateral Relief in which was filed October 5, 2009. On November 23, 2009 an order dismissing Motion for Post Conviction Collateral Relief stating that the claim of illegal sentence is without merit due to the fact that twice it's been before the court. See FN 7* Weaver v. State 785 So. 2d 108 (Miss 2001)

8. On December 9, 2009, Appellant submitted Notice of Appeal, which include: Designation of Record, Certificate of Compliance with Rule 11 (B) (1), Motion for leave to Proceed Informa Pauperis, Affidavit in Support of Motion for Leave to Proceed Informa Pauperis; Certificate of Service.

9. In determining plain error in this matter the "rule of lenity" applies, as defined: the judicial doctrine holding that a court in constructing an ambiguous criminal statute that sets out multiple or inconsistent punishments should resolve in the ambiguity in favor of the more lenient punishment. This is apparent in the Appellant's case of illegal sentence which amounts to plain error.

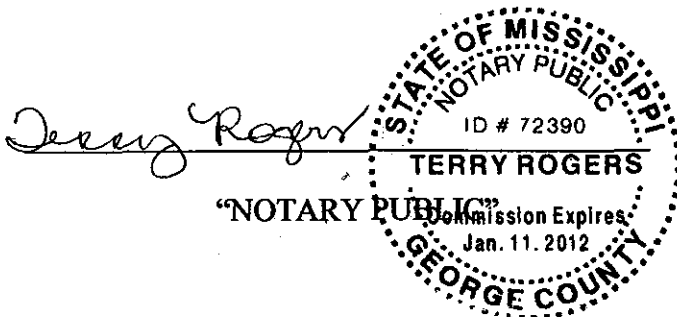
FN 7* Errors affecting constitutional rights, such as the right to a legal sentence, may be accepted from procedural bars, which would otherwise prevent their consideration

Where as also plea agreements are guided by contract law, and parties to the agreement should receive the benefit of their bargain. the interpretation of a plea bargain is held under high scrutiny being that defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by way of plea bargain. When reviewing breached plea agreements for plain error, courts must establish whether breach was so obvious and substantial that failure to notice and correct it affected the fairness, integrity, and public reputation of the judicial proceedings. Being that there is sufficient evidence of plain error due to the breach of plea agreement this warrants remanding petitioner's case for recommencing to specific performance of the plea agreement.

Respectfully Submitted,

Michael Gibson

Sworn To AND SUBSCRIBED BEFORE ME, This the 11 day of June, 2010



COMMISSION EXPIRES: 01/11/2012

CERTIFICATE OF SERVICE

This is to certify that I, Michael Gibson MDOC # 117982, have this day and date mailed, via United States mail, postage prepaid, a true and correct copy of my Brief for Appellant to the following to wit:


Betty W. Sephton, Clerk

Supreme Court of Ms.

P.O. Box 249

Jackson, Ms. 39205

This the 11 day of June, 2010



Michael Gibson 117982

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