

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LUTTREAL D. ALLEN

APPELLANT

VS.

NO. 2010-CP-0027-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On May 24, 2005, Luttrell D. Allen, "Allen" pled guilty to possession of marijuana with intent to distribute before the Circuit Court of Washington County, the Honorable Ashley Hines presiding. C.P. 17. His guilty plea was accepted as freely and voluntarily entered. Allen was sentenced to serve a three year sentence with the sentence suspended, and three years of post release supervision in the custody of the Mississippi Department of Corrections. C.P. 8.

On April 22, 2008, Allen's three year post release supervision period was extended for one year, or until May 23, 2009. See motion to supplement record, and copy of "Order of Modification."

On June 8, 2009, Allen was given a revocation hearing. Allen was found to have violated the terms of his post release supervision. C.P. 08. Allen was found to have "absconded" from MDOC, failed to pay court ordered assessments, and also for "failing to obey laws."

The record reflects that Allen had absconded from MDOC supervision when a subsequent

crime was committed. Allen had previously plead guilty to possession of cocaine and was given a four year with two years suspended sentence. He pled guilty to this new felony on June 3, 2009. R.E. "Exhibit A." The date of the subsequent felony was "July 1, 2008." Exhibit D, page 2 of 7.

Allen was therefore revoked and given his three year suspended sentence in MDOC with credit for time served awaiting his revocation hearing. C.P. 08.

On November 17, 2009, Allen filed a pro se "Ex-speediant Motion To Vacate Revocation Order", which was denied by the trial court. C.P. 2-7; 17

Mr. Allen filed a pro se notice of appeal. C.P. 27.

ISSUES ON APPEAL

I.

WAS ALLEN'S POST RELEASE SUPERVISION PROPERLY REVOKED?

STATEMENT OF THE FACTS

Mr. Allen was indicted by a Washington County Grand jury for possession of marijuana with intent to distribute.

On May 24, 2005, Luttrell D. Allen pled guilty to possession of marijuana with intent to distribute before the Circuit Court of Washington County, the Honorable Ashley Hines presiding. C.P. 17. His guilty plea was accepted and Allen was sentenced to serve three years of post release supervision as if on probation. On "April 22, 2008" Mr. Allen's post release supervision was extended for one year. See attached certified copy of said Order, and motion to include it in the record of this cause.

On February 13, 2009, a warrant was issued for Allen's arrest. This warrant indicated that Allen had violated the terms of his post release supervision. He had done so by "absconding" from any control by MDOC, and failing to pay court assessments. C.P. 17.

Allen was given a hearing on these charges. After the hearing, the trial court found that Allen had violated the terms of his post release supervision. He was found to have absconded, to have not paid assessments, and to have been charged with another drug felony for possession of cocaine.

Mr. Allen was revoked. Mr. Allen filed a pro se "Ex-spediant Motion To Vacate Revocation Order." C.P. 1-16. The trial court denied relief. C.P. 17-18.

Allen filed a pro se notice of appeal. C.P. 27.

SUMMARY OF THE ARGUMENT

1. The record reflects no merit to Allen's pro se claim of being improperly revoked. The record reflects that Allen's three year period of post release supervision was extended for one year. This was done prior to the expiration of his three years of supervision. C.P. 17-18. See attached certified copy of the trial court's Order of "April 22, 2008," extending for one year the period of post release supervision for Mr. Luttrell D. Allen. This extended the period of supervision was to "May 22, 2009."

Therefore, the issuing of a warrant for Allen's violation of the terms of his supervision on "February 13, 2009" was within the period of his supervision by MDOC. **Leech v. State**, 994 So.2d 850, 855 (¶21) (Miss. App. 2008). The record reflects Allen committed an additional felony on "July 1, 2008." Exhibit D, page 2-4 of 7. There is no claim that such a revocation occurred beyond the five year period fixed by M. C. A. Sect. 47-7-37.

ARGUMENT

PROPOSITION I

ALLEN'S REVOCATION WAS PROPER AND TIMELY.

Allen argues that his post release supervision was improperly revoked. It was improperly revoked because Allen alleges that it occurred after the expiration of his three year period for post release supervision. Allen also argues that the court lacked statutory authority to modify or alter the terms of his post release supervision, since he thinks the statutory authority granted for post release supervision differs from that granted for imposing probation on a felon. Appellant's brief page 1-8.

To the contrary, the record reflects that Allen was given a hearing on the alleged violations of the terms of his post release supervision. After the hearing, Allen's probation was revoked. C.P. 8. He was revoked for absconding , failing to report, pay court assessments, and for committing an additional crime for possession of cocaine which violated the drug laws of this state. Allen has yet to contest the trial court's finding that he violated the terms of his post release supervision.

While Allen claims in his pro se "Motion To Vacate Revocation" that his post release period had expired prior to his hearing, he has no affidavits or any other evidence in support of his allegations. Motion, page 4-16; appellant's brief page 1-8.

The record indicates that the trial court's order extended for one year Allen's three years of post release supervision. This was based upon "failure to pay court ordered assessments and supervision fees as directed." See State's exhibit A, certified copy of Court Order of "April 22, 2008."

During this one year extension period a warrant was issued for Allen's arrest for "absconding," for not living at the address listed with MDOC previously as well as for not paying court assessments. Allen had not reported to MDOC officials for more than "one hundred and

twenty days.” R. E. Exhibit A. This warrant for Allen’s arrest was issued on “February 13, 2009.” This was well within the extended one year period for his post release supervision.

A revocation hearing was held, and Allen was revoked for absconding, failure to pay fines, and for committing another felony by possessing cocaine for which he was pled guilty, and was sentenced to an additional two years. This was for possession of cocaine in Washington County cause number 2008-372 on “July 1, 2008.” See record excerpts Exhibit D, page 4 of 7.

As to Allen’s claims that he could not be revoked for violation of the terms of his post release supervision, M. C. A. Supp. 47-7-34(2) states as follows:

(2) The period of post release supervision shall be conducted in the same manner as a like period of supervised probation, including a requirement that the defendant shall abide by any terms and conditions as the court may establish. Failure to successfully abide by the terms and conditions shall be grounds to terminate the period of post release supervision and to recommit the defendant to the correctional facility from which he was previously released.(Emphasis by appellee).

Therefore, the appellee would submit, based upon the record cited, the trial court correctly denied relief. C.P. 17-18. These issues are lacking in merit.

PROPOSITION II

THE RECORD REFLECTS ALLEN WAS PROPERLY REVOKED.

Allen argues in his appeal brief that his three year post release supervision period had expired prior to his revocation. He believes that because of this alleged expiration, the court lacked jurisdiction to revoke him and place him in custody for his original three year sentence for possession of marijuana with intent to distribute conviction. Appeal brief page 1-7.

In his pro se "Motion To Vacate Revocation Order," Allen argued that the one year extension of this post release supervision was improper because done allegedly by a probationary officer, Mr. Edwards, and not the trial court. C.P. 1-8.

To the contrary, the record reflects as indicated by the attached Order of "April 22, 2008" that a court order was issued by the trial court of Washington County. That Order extended for an additional year his period of post release supervision, which would be until May 23, 2009.

While Allen had been placed on post release supervision on May 24, 2005 for three years this was extended for any additional year on "April 22, 2008." This was within the three year period of post release supervision. Therefore, the warrant for Allen's arrest on "February 13, 2009" was within the period assigned for Allen's behavior to be monitored by MDOC.

The trial court's order denying relief stated as follows:

On May 24, 2005, Luttrell D. Allen was permitted to enter a plea of guilty to the charge of possession of marijuana with intent in Washington County cause number 2005-026. For that crime, Allen was sentenced to three years of post release supervision to be served as if on supervised probation under the direction of the Mississippi department of corrections. **On April 22, 2008, Allen's post release supervision status was extended for an additional period of one year from the scheduled discharge date of May 22, 2008.** On February 13, 2009, a warrant was issued for Allen. According to the warrant and accompanying affidavit, Allen absconded the supervision of the MDOC, failed to pay supervision fees, and failed to pay court ordered fees and assessments. On June 8, 2009, a revocation hearing was held before this court. After due consideration of the evidence presented at said

hearing, the court found that Allen had violated the terms of his post release supervision by absconding supervision, failing to pay court ordered fees and assessments, and failing to obey the law. This Court ordered Allen to serve a term of three years in the custody of MDOC, with said term to run consecutive to all time to be served in Washington county cause number 2008-0372. On November 17, 2009, Allen filed the present motion. **In his motion, allen claims the period of time he was placed post release supervision expired prior to his revocation hearing and therefore the court did not have jurisdiction to revoke his post release supervision. Since a warrant was issued for Allen prior to the end of the time period he was placed on post release supervision, Allen was eligible to have his post release supervision revoked and the entire length of his original sentence imposed. Accordingly, his court finds no merit to Allen's claims and finds that his motion shall be denied.** C.P. 17-18. (Emphasis by appellee).

Allen's reliance upon **Ellis v. State**, 748 So. 2d 130 (Miss. 1999), is misplaced. In *Ellis* the issue was whether revocation occurred within the five year maximum period for probation or post release supervision under M.C. A. Sect. 47-7-37. No was there any indication in *Ellis* that his period of post release supervision was extended for an additional year.

In **Leech v. State**, 994 So.2d 850, 855 (¶21) (Miss. App. 2008), the Court found that Leech's probation was not improperly revoked where there was evidence that he had "absconded" from the jurisdiction, and was only apprehended at a much latter date.

¶21. In light of the facts contained in the record, we must conclude that the State acted on the petition within a reasonable amount of time. From the record before this Court on appeal, we only know that Leech fled the jurisdiction to Pennsylvania upon his release from the Lowndes County Jail in 1990, and he remained there until he returned to Lowndes County, shortly before he was served with the revocation petition and arrested in May 2006. At the revocation hearing, Leech admitted that he violated the terms of his probation, and he moved to Pennsylvania. Further, Leech stated that he wished to waive a hearing in the matter. To hold on these facts that Leech's probation was unlawfully revoked due to the State's failure to act on the petition within a reasonable time would allow a probationer to avoid revocation by fleeing the jurisdiction (a further violation of probation) and successfully eluding the authorities until his or her probationary period has long since expired. Under the rational of the **Jackson** decision, "[s]uch reasoning would be absurd and is not the law." **Jackson**, 483 So.2d at 1356.

In addition, the record reflects that Allen pled guilty to having cocaine in his possession on

or about “July 1, 2008.” See “Exhibit D” in record excerpts, page 2 of 7. In his “Petition to Enter a Guilty Plea” to this new felony Allen acknowledged that he had committed this felony on the date in question. Exhibit D page 4 of 7.

Charge: Possession of Cocaine. “I committed the crime alleged in the indictment.”

This additional narcotics felony was clearly an acknowledgment by Allen of not abiding by the terms of his supervised release, in addition to his having previously absconded and not having paid court ordered assessments.

The appellee would submit that the record supports the trial court in finding that Allen violated the terms of his post release supervision, and was therefore properly and timely revoked prior to the expiration of his period of court ordered supervision.

There is no merit to Allen’s claims for relief.

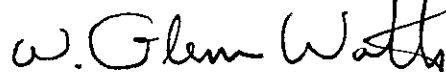
CONCLUSION

The trial court's denial of Allen's motion should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "W. Glenn Watts", written over a horizontal line.

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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:

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This the 19th day of May, 2010.



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