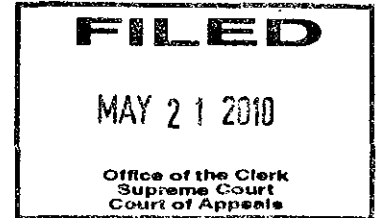


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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CP-0027-COA

LUTTREAL D. ALLEN
Appellant



VS.

STATE OF MISSISSIPPI
Appellee

REPLY BRIEF OF APPELLANT

APPELLANT DOES NOT REQUEST ORAL ARGUMENT

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Appellant pro se

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SUMMARY OF REPLY

The trial court cannot extend a post-release supervision sentence under the probation guidelines in section 47-7-37 if the defendant violates the terms of release, rather under section 47-7-34(2) the defendant must be committed to correctional facility.

The trial court arbitrarily extended the post-release sentence contrary to section 47-7-34, therein the court lacked jurisdiction to revoke after the original sentence had expired.

ARGUMENTS

I.

The State has conceded that Mr. Allen was "sentenced to serve three years of post-release supervision as if on probation". Appellee Brief (AB) at page 3. That Allen's post-release sentence was extended for one year. Then the State asserts that Allen was properly and timely revoked.

Allen argues that the lower court mistakenly applied probation guildlines to extended his post-release sentence contrary to statutory guildlines. It is true that Miss. Code Ann. §47-7-37 states that the probation period may at any time be extended or terminated by the court. However, "Post-Release Supervision, a legislative creation, is separate and distinct from Probation." Richardson v. State, 907 So.2d 404, 405 (P8) (Miss. App. 2005).

The Mississippi Supreme Court en banc on a petition for certiorari in Miller v. State, 875 So.2d 194 (2004), reversed. The Supreme Court found that the Court of Appeals had mistakenly used the terms Supervised Probation and Post-Release Supervision interchangeably. (P9). The Court held that "supervised probation and post-release supervision are totally different statutory creatures." (P10). See also Johnson v. State, 925 So.2d 86 HN7 (Miss. 2006)(en banc).

In the case at bar, the record clearly reflects that Allen was sentenced to "three (3) years Post-Release Supervision to be served as if on Supervised Probation". See "Order of

Modification of Post-Release Supervision, State's exhibit A.

Mr. Allen pleads that the lower court could not apply the statutory probation guildlines in Section 47-7-37 to his post release supervision. Thereby the extended post-release sentence was illicit as contrary to statutory guildlines. The mere fact that post-release supervision is to be served "as if on supervised probation" does not mean that the probation guildlines supersede the post-release guildlines in Section 47-7-34.

II.

The State admits that Allen was placed on three years of post-release supervision on May 24, 2005. AB at page 7. The State then remarkably pleads that Mr. Allen "has no affidavits or any other evidence in support of his allegation" that his post-release period had expired prior to the warrant issued on February 13, 2009. AB at page 5.

Allen asserts that logic must prevail because any one knows that from May 24, 2005 until February 13, 2009, is more than three (3) years. And, as shown above the post-release sentence could not lawfully be extended, thus the supervision period had indeed expired prior to the warrant. The trial courts revocation of Allen's sentence after it no longer had the authority to so act was a manifest miscarriage of justice. Simpson v. State, 785 So.2d 1121 (P8)(Miss. App. 2001).

III.

The State further asserts that Allen's post-release

supervision was extended for an additional year because of failure to "pay court-ordered assessments and supervision fees". See "Order of Modification of Post-Release Supervision, State's exhibit A.

For the sake of argument, assuming that Allen did violate the terms of his original post-release sentence then the lower court should have terminated the period of supervision and committed Allen to a correctional facility in accordance with the mandate in Miss. Code Ann. §47-7-34(2), rather than unlawfully extending the sentence.

The Mississippi Supreme Court has held "once a circuit or county court exercises its option to impose a definite sentence it cannot subsequently set that sentence aside and impose a greater sentence." Leonard v. State, 271 So.2d 445, 447 (Miss. 1973). Statute 47-7-34(1) mandated the lower court to impose a definite sentence of post-release supervision on Mr. Allen, stating that "[t]he period of supervision **shall** be established by the court". The sentencing discretion of the circuit court does not permit trial judges to act contrary to the legislature's intent by subsequently extending the sentence under Miss. Code Ann. §47-7-37, which only applies to supervised probation.

IV.

The State alleges that Allen's extended post-release supervision was revoked based on a warrant issued on February 13, 2009, for "absconding", that he was not living at the address listed with MDOC and had not reported to officials for

more than "one hundred and twenty days." AB at page 5-6.

Since Allen was sentenced to three (3) years on May 24, 2005, and the sentence could not be extended, the sentence should have expired on or about May 23, 2008. Thereby Allen had no legal obligation to change his address or report for a hundred and twenty (120) days prior to February 13, 2009. Moreover, when Allen committed the new crime on July 1, 2008, he was no longer under the jurisdiction of the post-release court.

The State's reliance upon Leech v. State, 994 So.2d 850 (Miss. App. 2008), is totally misplaced. Leech fled the State to Pennsylvania while still serving his sentence of probation. In this case. Allen reported the entire three years and only stopped reporting after the sentence was completed. Or at least Allen thought the sentence was completed because three years had passed, he was never informed by any one that his post release sentence was extended.

According to Statute 47-7-34(2) if Allen did violate the terms of his original post-release sentence, then he should have had a hearing "in the same manner as procedures for the revocation of probation". Thus Allen was entitled to due process of law prior to the post-release sentence being extended, the lower court could not arbitrarily extend the post-release sentence without a hearing.

CONCLUSION

The trial court could not extend the post-release sentence and thus did not have jurisdiction to revoke after the expiration of the original term set by the sentencing court. Therefore, the lower court's decision must be reversed with the sentence rendered.

RESPECTFULLY SUBMITTED,

Luttrell D. Allen

Luttrell D. Allen

Appellant pro se

CERTIFICATE OF SERVICE

I, Luttreal D. Allen, do hereby certify that I have caused a true and correct copy of the foregoing Brief to be mailed via the Inmate Legal Assistance Program to:

W. Glenn Watts
Special Asst. Atty. Gen.
at P.O. Box 220
Jackson, MS 39205-0220

THIS the 21 day of May, 2010.

Luttreal D. Allen
Luttreal D. Allen