

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM RAY MAYO

APPELLANT

VS.

NO. 2010-CP-0691

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUE

THE TRIAL COURT'S DISMISSAL OF THE APPELLANT'S MOTION FOR POST CONVICTION COLLATERAL RELIEF WAS NOT CLEARLY ERRONEOUS AS THE APPELLANT'S SENTENCE WAS NOT ILLEGAL.

STATEMENT OF THE FACTS

The Appellant, William Ray Mayo, pleaded guilty to one count of gratification of lust in violation of Miss. Code Ann. §97-4-23(1) for rubbing the vaginal area of his four-year-old biological daughter. He was sentenced as follows:

(1) To serve a term of FIFTEEN (15) years in the custody of the Mississippi Department of Corrections in Cause Number 17,485 (CTII). PROVIDED HOWEVER, that pursuant to Section 47-7-33 OR Section 47-7-34 of the Mississippi Code of 1972, THE execution of the last FOUR (4) years of the sentence imposed herein is/are hereby stayed and that portion of the sentence is/are suspended AND the Defendant shall be released and placed on SUPERVISED PROBATION under the direct supervision of the Mississippi Department of Corrections on the terms, provisions and conditions prescribed elsewhere in this Order.

(2) To serve a term of FIVE (5) years on SUPERVISED PROBATION under the direct supervision of the Department of Corrections which shall commence upon the Defendant's release from the custody of the Mississippi Department of Corrections.

(Record p. 2 - 3).

On March 23, 2010, the Appellant filed a Motion for Post Conviction Collateral Relief alleging that his sentence was illegal. The trial court entered an order dismissing the Motion on March 29, 2010 finding that it appeared from the face of the motion that the Appellant was "not entitled to any relief." (Record p. 46). The Appellant now appeals that Order.

SUMMARY OF THE ARGUMENT

The trial court's dismissal of the Appellant's Motion for Post Conviction Collateral Relief was not clearly erroneous. The Appellant's claim that his sentence exceeded the statutory maximum was meritless. The Appellant's sentence of fifteen years with four years suspended and five years supervised probation did not exceed the statutory maximum as supervised probation is not subject to the "totality" of sentence concept found in Mississippi Code Annotated § 47-7-34.

ARGUMENT

The trial court's dismissal of a motion for post-conviction relief will not be reversed absent a finding that the trial court's ruling was clearly erroneous. *Fluker v. State*, 2 So.3d 717, 719 (Miss. Ct. App. 2008) (citing *Williams v. State*, 872 So.2d 711, 712 (Miss. Ct. App. 2004)).

THE TRIAL COURT'S DISMISSAL OF THE APPELLANT'S MOTION FOR POST CONVICTION COLLATERAL RELIEF WAS NOT CLEARLY ERRONEOUS AS THE APPELLANT'S SENTENCE WAS NOT ILLEGAL.

The Appellant argues that his Motion for Post Conviction Collateral Relief should not have been dismissed as his "sentence is illegal due to the fact that it exceeds the authorized maximum allowed by state law statute." (Appellant's Brief p. 4). The Appellant argues that his sentence is in

violation of Miss. Code Ann. §47-7-34(1) which states in pertinent part:

. . . the total number of years of incarceration plus the total number of years of post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed. . . .

The Appellant claims that his eleven years to serve plus his five years of supervised probation exceed the statutory maximum of fifteen years. However, §47-7-34(1) deals with post-release supervision not supervised probation. Section 47-7-34 post-release supervision “is different from § 47-7-33 probation in that it does not allow the combined terms to exceed the statutory maximum period of incarceration.” *Carter v. State*, 754 So.2d 1207, 1208 (Miss. 2000). “Probation under § 47-7-33 is a conditional term that is not a part of the prison sentence and is therefore not subject to the “totality” of sentence concept found in § 47-7-34.” *Id.* at 1209. Additionally, Miss. Code Ann. §47-7-37 states that “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.” Accordingly, the Appellant’s sentence does not exceed the statutory maximum and is therefore, a valid and legal sentence.

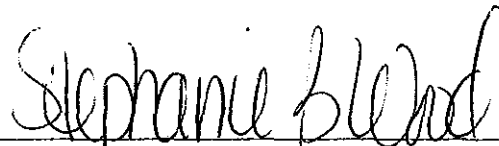
CONCLUSION

For the foregoing reasons the State of Mississippi respectfully requests that this Honorable Court affirm the trial court's dismissal of the Appellant's Motion for Post Conviction Collateral Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

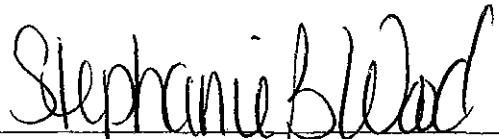
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 30th day of September, 2010.


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