

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEON FELIX, JR.

APPELLANT

VS.

NO. 2010-CP-0750-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Following revocation of his suspended sentence, Leon Felix, Jr. filed a petition for post-conviction relief; the Circuit Court of Warren County summarily denied the petition. Aggrieved, Felix appealed raising the following issues.

STATEMENT OF THE ISSUES

- I. Whether the circuit court erred by revoking Felix's suspended sentence.
- II. Whether the circuit court erred in dismissing Felix's post-conviction relief motion without an evidentiary hearing.
- III. Whether it was a violation of Felix's due process rights to fail to afford him a preliminary and final revocation hearing.

STATEMENT OF THE FACTS

On April 29, 2008, Leon Felix, Jr. plead guilty to statutory rape. (CP Supp. Vol. 1 filed on 8/26/10, p.4-9). On May 30, 2008, the Circuit Court of Warren County, Judge Isadore Patrick presiding, sentenced Felix to ten (10) years in the custody of the Mississippi Department of

Corrections, with ten (10) years suspended, three (3) years supervised probation and payment of a fine and costs. (CP Supp. Vol. 1 filed on 8/26/10, p.10; TR Supp. Vol. 1 filed 11/12/10 Vol. 1 at p.23, 24). On June 3, 2008, the Vicksburg Police arrested Felix for possession of cocaine; subsequently the Mississippi Department of Corrections filed a petition for revocation of his suspended sentence. (CP Supp. Vol.1 at 16; TR Supp.Vol. 1 filed 11/12/10 at p. 3). After hearing sworn testimony in support of the petition to revoke, the trial court found sufficient evidence that Felix violated his probation. (CP Vol.2 at 15; TR Supp. Vol 1 filed on 11/12/10 at p. 5-16). Judge Patrick revoked the suspended sentence for Statutory Rape and sentenced Felix to ten (10) years in the custody of the MDOC with eight (8) years to serve, and five (5) years on post release supervision. (CP Supp. Vol. 2 at 15; TR Supp. Vol.1, filed 11/12/10 at p. 16).

On April 12, 2010, Felix filed a Petition for Post Conviction Collateral Relief claiming the court wrongfully revoked his probation and asking for reinstatement of his original sentence.(CP Vol. 1 p. 4). The Circuit Court of Warren County denied the petition on the grounds that it failed to state an actionable claim upon which relief could be granted. (CP Vol. 1 p. 24). Aggrieved Felix appealed. (CP Vol. 1 p. 25).

SUMMARY OF THE ARGUMENT

The claims made by Felix are without merit. Accordingly, the judgment entered in the lower court summarily denying Felix's motion for post-conviction collateral relief should be forthwith affirmed. It is not necessary that a defendant be convicted of crimes charged to suffer revocation of his probation. *Younger v. State*, 749 So.2d 219(¶ 12) (Miss.Ct.App.1999) (citing *Berdin v. State*, 648 So.2d 73, 79 (Miss.1994)). Probation may be revoked upon a showing that the defendant "more likely than not" violated the terms of probation. *Id.* At his revocation hearing, the Warren County Circuit

Court heard testimony that, more likely than not, Felix possessed cocaine.

Felix was not entitled to an evidentiary hearing on his motion for post conviction collateral relief. Felix was accorded the minimum due process requirements to which he was entitled at his revocation hearing.

ARGUMENT

STANDARD OF REVIEW

This Court's standard of review for the denial of a motion for post-conviction relief is well established. We will not alter the findings of the circuit court unless they are clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150(¶ 3) (Miss.Ct.App.2002). Questions of law are reviewed de novo. *Brown v. State*, 731 So.2d 595, 598(¶ 6) (Miss.1999).

PROPOSITION I. The circuit court properly revoked Felix's suspended sentence.

Felix contends that his suspended sentence was illegally revoked and his probation should be reinstated because the June 3, 2008 cocaine charge against him was remanded to the file. Felix cites *Moore v. State* 556 So.2d 1059 (Miss. 1990) arguing that the State must offer actual proof that he committed a crime and violated the terms and condition of his probation in order to revoke his probation. Felix contends the mere fact that he was arrested, and charged with a crime does not suffice. This assertion of error must fail. It is not necessary that a defendant be convicted of crimes charged to suffer revocation of his probation. *Younger v. State*, 749 So.2d 219(¶ 12) (Miss.Ct.App.1999) (citing *Berdin v. State*, 648 So.2d 73, 79 (Miss.1994)).

In *Brown v. State*, 864 So.2d 1058, 1060(¶ 9) (Miss.Ct.App.2004), this Court held that “[w]here the State seeks to revoke one's probation based upon an allegation of criminal activity, it must show proof of an actual conviction, or that a crime has been committed and that it is more likely

than not that the probationer committed the offense.” The Mississippi Supreme court has held that a conviction is not necessary for revocation of probation; probation may be revoked upon a showing that the defendant “more likely than not” violated the terms of probation. *Metcalf v. State*, 904 So.2d 1222, 1225(¶ 10)(Miss.Ct.App.2004) (citing *Wallace v. State*, 607 So.2d 1184, 1189-90 (Miss.1992)). In *Alexander v. State*, 667 So.2d 1, 3-4 (Miss.1995), Alexander argued that his parole was unlawfully revoked due to the fact that the county court ultimately dismissed the charges which originally resulted in the justice court conviction. The supreme court found that Alexander's responses during the parole revocation hearing supported the violation of his parole agreement; and, thus, it held that “the complete record of the parole revocation hearing supports the notion that the revocation was proper.” *Alexander v. State*, 667 So.2d 1, 4 (Miss.1995). Accord *Scott v. State*, 24 So.3d 1039 (Miss.App.,2010).

In the case at hand, the revocation order states the circuit judge considered evidence showing that Felix more likely than not committed the offense for which he was arrested. *Metcalf*, 904 So.2d at 1225(¶ 10). (CP Supp. Vol. 1 filed on 8/26/10 at p.15). At the revocation hearing, the court heard evidence from MDOC Probation Officer Laquanta Wright who testified that she notified Felix at his sentencing for Statutory Rape that he should come into her office immediately after registering as a sex offender. (TR Supp. Vol. 2 filed 8/26/10 at p. 15). Felix testified that he registered as a sex offender but had not met with Wright prior to being arrested on drug charges. According to Felix he got to the probation office and the line was so long. (TR Supp. Vol. 2 filed 8/26/10 at p.15-16). Vicksburg Police Officer Dave McCloud testified to the facts surrounding Felix's arrest for possession of the cocaine and the subsequent testing of the cocaine at the Mississippi Crime Lab. (TR Supp. Vol.2 filed 8/26/10, p.7-12).

Felix contends that he never met with his probation officer and was never informed of the conditions of his probation so his probation cannot be revoked. According to Felix, "The trial court never orally informed Petitioner of any terms, or conditions of his probation, there is no record of such..."(Appellant's brief p. 8).

The State submits that even though Felix never met with his probation officer, he knew that possession of cocaine was against the law and that being arrested for possession of cocaine would result in revocation of his probation. At his initial sentencing hearing on May 30, 2008, the trial judge, after suspending his ten year sentence and ordering three years probation, addressed Felix's future use of drugs while on probation.

COURT: Now, you made a stupid mistake and this allows you to go on with your life but you got to pay a severe penalty of being a sex offender and register for one in whatever county or whatever state you go to for the rest of your life.

Now, if you come up hot on marijuana, to any drugs while you are in Atlanta, . . . they are going to test you over there when your probation get moved over there. If you come up hot that is a violation. You understand?

FELIX: Yes, sir.

COURT: You've done marijuana in the past, haven't you? You better not do it any more while you are on this three year . . .

....

COURT: Well, you are looking at some prison time if go out and do some stupid stuff and using marijuana while you are out on my probation. You understand? They are going to lock you up and tell me and ship you back her for a hearing. So whatever you do, you get you a job and stay straight. Now, I do this, this suspended sentence because of your age and because of the mercy that this family that this family has shown that they didn't want you to do any prison time for this. You understand that?

FELIX: Yes, sir.

....

COURT: Yes, you get with the MDOC before you leave here today.

(TR Supp.Vol. 1 filed 11/12/10 at p.25-27).

Also, Felix acknowledged in the petition to plead guilty to statutory rape that pleading guilty in the rape case would cause revocation of any probation or parole. (CP Supp.Vol. 1 filed 8/26/10 at

p. 3). At his revocation hearing, Officer Dave McCloud testified that after stopping the car Felix was driving, Felix was saying "I can't go back to jail. I can't go back to jail." (TR Supp.Vol. 1 filed 8/26/10 at p. 7; 8).

Felix knew that if he committed another crime and was arrested that his probation would be revoked; Felix didn't need to meet with the probation officer to tell him that if he broke the law his suspended sentence would be revoked. This issue is without merit.

PROPOSITION II. Felix was not entitled to an evidentiary hearing on his motion for post-conviction relief.

Next, Felix claims the circuit court erred when it failed to grant him an evidentiary hearing on his motion for post-conviction relief. "If the motion is not dismissed at a previous state of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require." Miss.Code Ann. § 99-39-19(1) (Rev.2007). A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge that the defendant is not entitled any relief. *Culbert v. State*, 800 So.2d 546, 550 (Miss.App.,2001), *Turner v. State*, 590 So.2d 871, 874 (Miss. 1991), Miss.Code Ann. § 99-39-11 (Supp. 1998). "When the trial court reviews a petition for post-conviction relief, the trial court has an obligation to review the 'original motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack' to determine whether the defendant has proven the merit of the allegations by a preponderance of the evidence." *Cross v. State*, 964 So.2d 535, 537 (¶ 8) (Miss.Ct.App.2007) (citing *Bilbo v. State*, 881 So.2d 966, 968 (¶ 7) (Miss.2004)).

In the case at hand, no further fact-finding was required, the transcript from the revocation hearing revealed that more likely than not Felix possessed cocaine and violated his probation. Therefore, the trial court properly revoked Felix's suspended sentence and properly denied the motion for post conviction relief without the benefit of an evidentiary hearing. The State respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or of vacating the order revoking Felix's probation.

PROPOSITION III. Felix was accorded the due process to which he was entitled in hearing to revoke his probation.

In his final assignment of error, Felix asserts that his due process rights were violated in the revocation of his post-release supervision because he was denied a preliminary and a final revocation hearing. (Appellant's brief p. 8).

"The minimum due process requirements applicable to probation revocation hearings were set forth by the United States Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) [superceded by statute], and were incorporated into Mississippi law through Miss.Code Ann. § 47-7-37 (Rev.2000)." *Morgan v. State*, 995 So.2d 787, 790 (Miss.App.,2008) (citing *Payton v. State*, 845 So.2d 713, 719(¶ 22) (Miss.Ct.App.2003)). These requirements are:

(1) written notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer finds good cause for not allowing such confrontation); (5) a neutral and detached hearing body or officer; and (6) a written statement by the fact finder as to the evidence relied on and reasons for revoking the probation.

Id.

The State submits that Felix was accorded the minimum due process requirements to which

he was entitled at his revocation hearing. Felix was given notice that he violated his probation and notice of the hearing to revoke his post-release supervision. A revocation hearing was held on June 27, 2008, at which Felix represented himself. (TR Supp. Vol. 2 filed 8/26/10). It was at this time that the evidence against him was presented, and he was given an opportunity to be heard. Felix was also given the opportunity to cross-examine the State's witnesses and call witnesses of his own. The hearing was presided over by a detached and neutral judge of the Circuit Court of Warren County. Further, after hearing the evidence, the trial judge issued an order revoking Felix's probation which stated that the judge heard sufficient testimony in support of the petition to revoke the probation. At this revocation hearing, Felix was afforded all due process rights to which he was entitled.

CONCLUSION

The claims made by Felix are without merit. A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge the defendant is not entitled any relief. *Culbert v. State*, 800 So.2d 546, 550 (Miss.App.,2001), *Turner v. State*, 590 So.2d 871, 874 (Miss. 1991), Miss.Code Ann. § 99-39-11 (Supp. 1998). No further fact-finding was required, and relief was properly denied without the benefit of an evidentiary hearing. The State respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or of vacating the order revoking Felix's probation. Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the order of the Circuit Court of Warren County denying Felix's motion for post-conviction relief and request to be re-instated to his original probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Lisa L. Blount, 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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