

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2013-CP-00915-COA

DOUGLAS DAVIS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 05/01/2013
TRIAL JUDGE: HON. JAMES T. KITCHENS JR.
COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: DOUGLAS DAVIS (PRO SE)
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: BILLY L. GORE
NATURE OF THE CASE: POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION: MOTION FOR POST-CONVICTION RELIEF
DISMISSED
DISPOSITION: AFFIRMED: 06/24/2014
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE IRVING, P.J., ROBERTS AND FAIR, JJ.

FAIR, J., FOR THE COURT:

¶1. This appeal follows the Oktibbeha County Circuit Court's summary dismissal of Douglas Davis's motion for post-conviction relief (PCR). Davis was originally sentenced to serve two years in the custody of the Mississippi Department of Corrections (MDOC) followed by five years of post-release supervision. The court subsequently revoked Davis's post-release supervision. Davis now raises the following issues: (1) the circuit court had no authority to revoke his post-release supervision for conduct that occurred while he was on earned-release supervision (ERS), and (2) his counsel was ineffective at the revocation

hearing for failing to disclose he was on ERS before post-release supervision. We agree that the circuit court could not revoke Davis's post-release supervision for misconduct that occurred while he was on ERS, but the court did have authority to revoke Davis's post-release supervision based on an incident that occurred after he was placed on post-release supervision. Therefore, we affirm the judgment of the circuit court.

FACTS

¶2. On April 29, 2009, Davis appeared before the Oktibbeha County Circuit Court and pled guilty to uttering forgery. The court accepted Davis's guilty plea and sentenced him to two years in the custody of the MDOC, followed by five years of post-release supervision. The court ordered Davis's sentence to run consecutively to a previous sentence he was currently serving. Davis was also ordered to pay \$1235.75 in restitution to the victim, along with court costs and a \$200 fine.

¶3. On November 3, 2011, Davis was reclassified by the MDOC and placed on ERS. He was released from MDOC custody and placed on post-release supervision on August 27, 2012. On September 11, 2012, the State filed a petition to revoke Davis's post-release supervision. The petition stated the following: (1) Davis owed \$440 in supervision fees to the MDOC; (2) Davis tested positive for marijuana use on February 7, 2012, and June 14, 2012, and admitted use on September 5, 2012; and (3) Davis owed \$1,743.29 to the Oktibbeha County Circuit Court.

¶4. The court held a revocation hearing on October 22, 2012. Davis's counsel stated that Davis admitted to using marijuana on the three dates listed in the petition. Davis's counsel

also stated that Davis did not have a steady job. The circuit judge revoked Davis's post-release supervision and ordered him to serve five years.

¶5. In his PCR motion, Davis alleged that he was illegally revoked from post-release supervision since he was released early from the prison but was still under ERS at the time he was revoked. The circuit court dismissed Davis's motion, stating that Mississippi Code Annotated section 47-7-34 (Rev. 2011) provides that a "defendant shall be placed under post-release supervision upon release from the term of incarceration." The judge further concluded that Davis's post-release supervision began as soon as he was released from confinement, regardless of his early release.

STANDARD OF REVIEW

¶6. The circuit court may summarily dismiss a PCR motion without an evidentiary hearing "[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief." Miss. Code Ann. § 99-39-11(2) (Supp. 2013). To succeed on appeal, the movant must: (1) make a substantial showing of the denial of a state or federal right and (2) show that the claim is procedurally alive. *Young v. State*, 731 So. 2d 1120, 1122 (¶9) (Miss. 1999).

¶7. When reviewing the dismissal of a PCR motion, an appellate court "will not disturb the trial court's factual findings unless they are found to be clearly erroneous." *Callins v. State*, 975 So. 2d 219, 222 (¶8) (Miss. 2008). Our review of the summary dismissal of a PCR motion, a question of law, is de novo. *Young*, 731 So. 2d at 1122 (¶9).

DISCUSSION

1. Revocation of Post-Release Supervision

¶8. Davis claims that the circuit court erred when it revoked his post-release supervision. Further, he argues that the circuit court had no authority to revoke his post-release supervision for conduct that occurred while he was on ERS.

¶9. Davis erroneously stated in his PCR motion that his sentence was revoked while he was on ERS. The record shows that Davis was released on post-release supervision on August 27, 2012. His sentence was not revoked until October 22, 2012. However, an issue remains as to whether the circuit court had authority to revoke Davis's post-release supervision based on conduct that occurred while he was on ERS.

¶10. The circuit judge stated in his order that "post-release supervision starts immediately upon release from confinement whether a defendant is released early or not." However, this Court recently held to the contrary in *Sobrado v. State*, 2012-CP-00484-COA, 2014 WL 605675, at *3 (¶5) (Miss. Ct. App. Feb. 18, 2014), holding that an inmate on ERS is under exclusive jurisdiction of the MDOC and therefore cannot simultaneously be on post-release supervision. This Court further explained that "[a] circuit court cannot revoke a term of post-release supervision for conduct that occurred while a prisoner is an inmate in the MDOC's legal custody." *Id.* at *4 (¶18) (citing *Jones v. State*, 97 So. 3d 1254, 1258 (¶11) (Miss. Ct. App. 2012)). Davis was an inmate in the custody of the MDOC until he was discharged from his two-year initial sentence. He remained under the MDOC's sole jurisdiction when he was released early from incarceration and placed on ERS. *See* Miss. Code Ann. § 47-5-138(6) (Rev. 2011). Therefore, the court had no authority to revoke

Davis's post-release supervision based on misconduct that occurred during ERS.

¶11. The record shows that Davis was released on ERS on November 3, 2011. Davis tested positive for marijuana on February 7, 2012, and June 14, 2012. On August 27, 2012, Davis was discharged from the legal custody of the MDOC and placed on post-release supervision. At the revocation hearing, Davis admitted to using marijuana on September 5, 2012. The circuit court has the sole authority to revoke an offender's post-release supervision for misconduct that occurs when an offender is on post-release supervision. *See* Miss. Code Ann. § 47-7-34 (Rev. 2011). Undoubtedly, the court had authority to revoke Davis's post-release supervision based on the admitted use of marijuana on September 5, 2012, alone. Therefore, this issue is without merit.

2. Ineffective Assistance of Counsel

¶12. Davis argues that his counsel at the revocation hearing was ineffective because he failed to disclose that Davis was on ERS during some of his violations. Specifically, Davis argues this disclosure would have resulted in a different outcome.

¶13. To establish ineffective assistance of counsel, Davis must show: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must assess the totality of the circumstances in determining whether counsel's assistance was effective. *Wiley v. State*, 750 So. 2d 1193, 1199 (¶11) (Miss. 1999). And there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability

that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

¶14. At the revocation hearing, Davis’s counsel announced to the circuit court that Davis admitted using marijuana on the three dates cited in the petition to revoke Davis’s post-release supervision. The admission was one of the circuit judge’s reasons for revoking Davis’s post-release supervision. Davis argues that his counsel was deficient in failing to disclose that two of the incidents occurred while he was on ERS. However, the incident that occurred during Davis’s post-release supervision was enough to have his sentence revoked. And Davis has not shown that, but for the alleged error, the outcome of the hearing would have been any different. This issue is also without merit.

¶15. THE JUDGMENT OF THE OKTIBBEHA COUNTY CIRCUIT COURT DISMISSING THE MOTION FOR POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO OKTIBBEHA COUNTY.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL AND JAMES, JJ., CONCUR. CARLTON, J., CONCURS IN PART AND IN THE RESULT WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY JAMES, J.

CARLTON, J., CONCURRING IN PART AND IN RESULT:

¶16. I concur in result and in part with the opinion of the majority. I concur with the majority that the circuit court possessed authority to revoke Davis's post-release supervision based upon an incident occurring after he was placed on post-release supervision.¹ This

¹ This separate opinion includes no comment as to the application of the 2014 amendments of Mississippi’s sentencing statutes as set forth in House Bill 585, section 54, since they were not in effect during the time periods relevant to this case. House Bill 585

finding by the Court resolves the issue on appeal in this case.

¶17. I respectfully submit however that the majority’s further comment that post-release supervision cannot be revoked for an incident occurring while on ERS to be overly broad and also unnecessary to the disposition of the case before us. As previously stated, the circuit court herein revoked Davis’s post-release supervision due to misconduct that occurred after Davis was placed on post-release supervision, and no “incident” occurring while on ERS is at issue before us in this case.

¶18. I respectfully submit that the majority’s opinion over broad in finding that the circuit court possessed no jurisdiction for “incidents” occurring while the defendant was on ERS, since jurisdiction of the circuit court depends on whether the “incident” at issue constituted felonious criminal misconduct that violated the terms and conditions of the suspension or post-release supervision. The conditions of a sentence suspended by the circuit court would not include mere technical violations of the ERS-program rules that fail to constitute felonious misconduct in violation of stated conditions. If a defendant engaged in criminal, felonious misconduct while on ERS that violates the previously imposed conditions of his suspension, then the sentencing circuit court would certainly possess jurisdiction to revoke

section 54, to be codified in chapter 7 of title 47 of the Mississippi Code, gives the MDOC authority to impose graduated sanctions as an alternative to judicial modification or revocation, as provided in Mississippi Code Annotated sections 47-7-24 (Rev. 2011) and 47-7-37 (Rev. 2011). In this bill, the Legislature also provides that the Act takes effect from and after July 1, 2014.

the suspended sentence for commission of such felonious conduct.² If the misconduct simply constitutes a mere violation of the MDOC's ERS program, and not a felony offense violating the previously imposed conditions of suspension, then I agree that such a technical rule violation falls within the province of the MDOC to determine.

¶19. I certainly agree that the MDOC possesses authority to operate and implement the MDOC intensive supervision program and its ERS program, as well as authority to determine violations of the rules of these programs by offenders. However, the MDOC's statutory authority to regulate its programs for offenders fails to divest the circuit court of its original jurisdiction to determine if the lawful conditions of a suspended sentence were breached by any felonious conduct of an offender. If a sentencing circuit court bases a suspended sentence, or post-release supervision, upon a condition of good behavior, a defendant thereafter breaches that condition by the commission of a crime.³ As acknowledged by our supreme court in *Fuller v. State*, 57 So. 6, 8 (Miss. 1912), the sentencing trial court possesses

² The circuit court would possess such jurisdiction until completion of the sentence originally imposed by the court.

³ Miss. Code Ann. § 47-7-34(b) (Rev. 2011) (period of post-release supervision shall be conducted in the same manner as a like period of supervised probation, including the requirement that the defendant abide by any terms and conditions as the court may establish; failure to abide by such terms and conditions shall be grounds to terminate the period of post-release supervision); Miss. Code Ann. § 47-7-35 (Rev. 2011) (permissible conditions of probation or post-release supervision); see *Pickett v. State*, 751 So. 2d 1031, 1032-33 (¶¶9-10) (Miss. 1999); *Crabb v. State*, 55 So. 2d 485, 485 (Miss. 1951) (In a habeas proceeding determining the validity of the revocation of the suspension of sentences, a petitioner's breach of a condition of good behavior upon the suspension of the sentences was not required to be shown beyond a reasonable doubt).

inherent power to suspend a sentence on the condition of good behavior — and that condition is violated by any subsequent criminal conduct by the defendant.⁴ *See also Johnson v. State*, 925 So. 2d 86, 103 (¶32) (Miss. 2006) (acknowledging authority of circuit and county courts to suspend convicted felon’s sentence).

¶20. The *Fuller* court found that our state constitution authorizes the circuit court’s inherent authority and jurisdiction. *Id.* Indeed, Article 6, Section 156 of the Mississippi Constitution establishes original jurisdiction in the circuit courts over all matters criminal and civil matters in this state not vested by the constitution in some other court. Mississippi Code Annotated section 47-7-29 (Rev. 2011) establishes the authority to prosecute a prisoner for felonies committed while on ERS, and in so doing, this statute acknowledges the circuit court’s jurisdiction to impose sentences on offenders for felonies committed while on ERS.⁵ Since statutes in *pari materia* are to be construed together, then logically the circuit court also possesses authority to revoke a suspended sentence for the commission of a felony while on ERS. *See generally Miss. Dep’t. of Transp. v. Allred*, 928 So. 2d 152, 155 (¶16) (Miss. 2006).

⁴ *Leonard v State*, 271 So. 2d 445, 447 (Miss. 1973) (during period of probation, power of court continues to vest in sentencing court to subsequently impose sentence if defendant violates conditions of probation); *see also* Miss. Att’y. Gen. Op., 2003-0113, 2003 WL 21003307, *McCormick* (Mar. 28, 2003) (circuit court possesses authority to impose conditions to a suspended sentence, including participation in community-service program).

⁵ *Pickett*, 751 So. 2d at 1032-33 (¶10) (The supreme court held that a defendant’s suspended sentence could be revoked even though he had not been placed on probation where that suspended sentence was conditioned upon the defendant’s good behavior, the defendant knew of that condition, and the defendant clearly violated that condition.).

¶21. The majority cites to Mississippi Code Annotated section 47-5-138(6) (Supp. 2013) for the asserted proposition that Davis remains under the MDOC's "sole" jurisdiction when released from incarceration and placed in the MDOC's ERS program. As stated, I certainly agree that section 47-5-138(6) gives the MDOC the authority to promulgate ERS rules and regulations, as well as the jurisdiction to operate the ERS program for offenders sentenced to MDOC custody. I also certainly agree that this statute gives the MDOC authority and jurisdiction to determine if an inmate violated the rules of the MDOC's ERS program, and the authority and jurisdiction to determine whether an inmate may be released early for his successful completion of the requirements of the MDOC's ERS program.⁶ However, this statute fails to divest the sentencing circuit court of its original jurisdiction and inherent

⁶ I also agree that courts are statutorily prohibited from requiring the completion of the intensive supervision program as a condition of probation or post-release supervision. If an inmate violates a condition of the intensive supervision program, like the ERS program, then the MDOC possesses jurisdiction to determine whether a violation of the rules of that MDOC program occurred. Again, the MDOC operates the ERS program and determines if an offender violates the rules of that program. However, if an offender violates the conditions of that program by criminal misconduct, where that misconduct violates not only the rules of that MDOC program but also violates Mississippi criminal statutes and breaches a condition of a previously suspended sentence, or post-release supervision, then I submit that the sentencing trial court retains and possesses inherent authority to revoke its previously suspended sentence. The sentencing trial court possesses th (Rev. 2011) is inherent authority until completion of the sentence. *See* Miss. Code Ann. § 47-5-1003 (prohibits requirement of completion of intensive supervision program as condition of probation or post-release supervision); *compare Leonard v State*, 271 So. 2d 445, 447 (Miss. 1973) (during period of probation, power of court continues to vest in sentencing court to subsequently impose sentence if defendant violates conditions of probation); *Crabb*, 55 So. 2d at 485 (breach of condition of good behavior not required to be shown beyond reasonable doubt); *Fuller*, 57 So. at 6 (court possesses inherent power to suspend sentence on condition of good behavior that is violated by subsequent criminal conduct).

constitutional authority to revoke a previously suspended sentence, or post-release supervision, due to a breach of conditions of the suspension, such as commission of criminal felonious misconduct.⁷

¶22. With respect to divestiture of jurisdiction, our supreme court’s precedent holds that existing jurisdiction is not to be inferred as having been withdrawn where the constitutional or legislative pronouncement of the withdrawal of jurisdiction is not clear and unambiguous. *See Fuller*, 57 So. at 8. We should therefore not infer that jurisdiction has been withdrawn in this case, or abdicate judicial powers and duties, since no constitutional or legislative pronouncement of such withdrawal exists to divest the circuit court of its original jurisdiction, at the relevant times applicable to this case. *Id.* (“The Legislature cannot authorize courts to abdicate their own powers and duties[.]”).⁸

¶23. The court in *Arant v. Hubbard*, 824 So. 2d 611, 614 (¶12) (Miss. 2002) (citation omitted), explained that the “the language of an act designed to divest a court of its jurisdiction must express the intent with such clearness as to leave no room for doubt.” The *Arant* court then found that the statute at issue in that case failed to clearly and unambiguously provide that jurisdiction was to be divested from the circuit court. Therefore the *Arant* court calculated that the act at issue established concurrent, not exclusive,

⁷ See Miss. Code Ann. § 47-7-33 (Rev. 2011); *Evans v. State*, 846 So. 2d 301, 303 (¶6) (Miss. Ct. App. 2003); *Reaves v. State*, 749 So. 2d 295, 296-97 (¶¶6-7) (Miss. Ct. App. 1999).

⁸ As noted, this separate opinion does not address or comment upon the 2014 amendment to sentencing statutes that will take effect July 1, 2014.

jurisdiction by also vesting the justice court with that jurisdiction. *Id.* at 615 (¶¶13-14). The Texas Criminal Court of Appeals cited *Fuller* in its discussion of *Snodgrass v. State*, 150 S.W. 162, 166, 178 (Tex. Crim. App. 1912), explaining that judicial construction cannot affect the supreme law embodied in our constitution and “constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another.”

¶24. I therefore respectfully submit that the majority opinion is overly broad and unnecessary in finding that a sentencing circuit court lacks jurisdiction in a criminal case to revoke a previously suspended sentence, or post-release supervision, for an “incident” on ERS.⁹ Since the jurisdiction issue involves consideration of whether the incident committed constituted a mere violation of the MDOC’s technical rules, or whether the misconduct constituted a felony violating the previously imposed conditions of the suspension. Again, the MDOC certainly possesses statutory authority to determine whether a violation of the ERS program’s rules and regulations occurred, but the MDOC’s authority over its programs fails to divest the circuit court of its jurisdiction.¹⁰ Section 156 of the Mississippi

⁹ See Miss. Const. art. 6, § 156 (providing that a circuit court possesses original jurisdiction in all criminal matters in this state not vested in some other court).

¹⁰ Once the defendant is placed on probation, he is, according to section 47-7-33, under the supervision of the MDOC, and violation of the probationary conditions does not remove the defendant from that supervision; rather, the defendant remains under the MDOC’s supervision until further action is taken by the court, such as revocation of probation and imposition of the suspended sentence or continuance of the probation. Miss. Att’y Gen. Op., 1989-503246, 1989 WL 503246, *Black* (June 19, 1989).

Constitution establishes original jurisdiction in criminal matters with the circuit court, and nothing in section 47-5-138 divests the circuit court of its jurisdiction. Accordingly, I concur in part and in result with the decision of the majority.

JAMES, J., JOINS THIS OPINION IN PART.