

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2010-CP-00027-COA**

**LUTTREAL D. ALLEN**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT: 12/01/2009  
TRIAL JUDGE: HON. W. ASHLEY HINES  
COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: LUTTREAL D. ALLEN (PRO SE)  
ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: W. GLENN WATTS  
SCOTT STUART  
NATURE OF THE CASE: CIVIL - POST-CONVICTION RELIEF  
TRIAL COURT DISPOSITION: MOTION FOR POST-CONVICTION RELIEF  
DENIED  
DISPOSITION: REVERSED AND RENDERED - 02/15/2011  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**BEFORE KING, C.J., ROBERTS AND CARLTON, JJ.**

**CARLTON, J., FOR THE COURT:**

¶1. Luttreal Allen appeals the denial of his request for post-conviction relief by the Washington County Circuit Court. On May 23, 2005, the circuit court sentenced Allen to three-years of post-release supervision for possession of marijuana with intent to distribute.<sup>1</sup> In April 2008, the circuit court extended that post-release supervision, which was previously

---

<sup>1</sup> Allen pled guilty to possession of marijuana with intent to distribute under Mississippi Code Annotated section 41-29-139(b)(3) (Rev. 2009), which carries a maximum penalty of three years' imprisonment or a maximum fine of \$3,000, or both.

imposed in May 2005, by an additional year because Allen had failed to comply with the conditions of that supervision. If Allen would have complied with the post-release-supervision conditions, the extended post-release-supervision period would have expired on May 23, 2009.

¶2. However, on July 1, 2008, law enforcement arrested Allen for possession of cocaine. On June 8, 2009, the circuit court held that Allen had violated the conditions of his post-release supervision, which had been imposed in May 2005, because of his cocaine arrest and his failure to report and pay fees. The circuit court then revoked the 2005 post-release supervision and ordered Allen to serve three years in the custody of the Mississippi Department of Corrections (MDOC). Allen filed a motion to vacate the revocation order, which the circuit court denied.

¶3. Upon review of the circuit court's denial of Allen's motion for post-conviction relief, we acknowledge that Mississippi Code Annotated section 47-7-34 (Rev. 2004) prohibits an individual from receiving a sentence of post-release supervision that exceeds the maximum penalty allowed for the crime. Thus, we find the circuit court lacked jurisdiction to extend Allen's term of post-release supervision beyond the three-year maximum authorized by statute for his offense. Accordingly, the circuit court lacked the authority to revoke Allen's sentence of post-release supervision during the fourth unauthorized year of post-release supervision. Therefore, we reverse the revocation of Allen's post-release supervision, and we set forth below a more detailed recitation of the facts and analysis addressing the issues in this case.

## **FACTS**

¶4. On May 23, 2005, Allen entered a guilty plea to one count of “possession of marijuana with intent less than 1 oz.” in the Washington County Circuit Court. Allen received a three-year sentence, with all three years suspended with three years to serve on post-release supervision. Section 41-29-139(b)(3) authorizes a maximum sentence of three years for possession of less than 30 grams of marijuana with intent to sell. On April 22, 2008, the circuit court extended Allen’s three-year post-release-supervision period for one year, until May 23, 2009, due to Allen’s failure to comply with the conditions of his supervision. Specifically, the circuit court cited Allen’s failure to pay court-ordered assessments and supervision fees as the reasons for the extension of post-release supervision.

¶5. The record reflects that on July 1, 2008, during his fourth year of post-release supervision, Allen was arrested for possession of cocaine, a new offense, and he pled guilty to the new offense on June 3, 2009. For the new offense, Allen received a four-year sentence, with two years suspended.<sup>2</sup> With respect to his post-release supervision for his earlier offense in May 2005, the circuit court issued a warrant in February 2009 for Allen’s arrest for failing to obey laws, based on his arrest for cocaine possession; absconding the supervision of the MDOC; failing to pay supervision fees; and failing to pay court-ordered fees and assessments. According to the order revoking Allen’s post-release supervision, Allen failed to report to MDOC officials for more than one-hundred-and-twenty days, and he failed to provide the MDOC with his current address.

¶6. On June 8, 2009, after a revocation hearing pertaining to the post-release supervision

---

<sup>2</sup> The order from the Washington County Circuit Court sentencing Allen to four years in the custody of the MDOC for possession of cocaine, with two years suspended, did not appear from the record. These facts are based on statements found in the parties’ briefs.

imposed in May 2005, the circuit court found that Allen had violated the post-release supervision initially imposed in May 2005, which the circuit court had previously extended for a fourth year with an expiration date of November 2009. The circuit court then revoked the post-release supervision, ordering Allen to serve a term of three years in the custody of the MDOC, with the term to run consecutively to Allen's sentence for possession of cocaine. On November 17, 2009, Allen filed a motion to vacate the revocation order, which the circuit court subsequently denied. Allen now appeals, arguing that the circuit court improperly extended his post-release supervision. Allen also asserts that he completed his sentence of post-release supervision prior to his arrest for possession of cocaine; therefore, the circuit court lacked jurisdiction to revoke the completed supervision sentence.

#### **STANDARD OF REVIEW**

¶7. This Court applies an abuse-of-discretion standard of review for the denial of post-conviction relief. *Brown v. State*, 872 So. 2d 96, 98 (¶8) (Miss. Ct. App. 2004). In addition, we note that “[t]he findings of the trial court must be clearly erroneous in order to overturn a lower court’s denial of a post-conviction relief motion.” *Id.* at 98-99 (¶8).

#### **DISCUSSION**

¶8. Allen argues that the circuit court revoked his post-release supervision after the expiration of his three-year term for his post-release-supervision sentence. He also argues that the circuit court lacked the statutory authority to modify or alter the terms of his post-release supervision. Allen claims that the statutory authority granted for post-release supervision differs from that granted for imposing probation on a felon and that the circuit court applied the wrong statutory guidance when extending his post-release supervision.

¶9. Under Mississippi Code Annotated section 47-7-34, the circuit court may not impose a sentence of post-release supervision for a term greater than the maximum sentence allowed for the crime. Allen pled guilty to possession of less than thirty grams of marijuana with intent to distribute, in violation of Mississippi Code Annotated section 41-29-139(b)(3). Possession of marijuana under section 41-29-139(b)(3) carries a maximum sentence of three years' imprisonment and a maximum fine of \$3,000. The circuit court, therefore, lacked the authority to extend Allen's post-release supervision for an additional fourth year because the additional year caused Allen's sentence to exceed the maximum three-year sentence allowed by law. *Johnson v. State*, 925 So. 2d 86, 101 (¶27) (Miss. 2006).

¶10. Because the circuit court lacked jurisdiction to extend Allen's sentence of post-release supervision to a term beyond the maximum sentence authorized by law for the crime, Allen's post-release supervision expired in May 2008, prior to the circuit court's revocation of his suspended sentence in June 2009.<sup>3</sup> Therefore, we find the circuit court lacked authority for the revocation of Allen's post-release supervision, and the court erred in denying Allen's motion for post-conviction relief. We reverse the denial of Allen's motion for post-conviction relief and set aside the revocation of his post-release supervision. We note that this opinion applies to only Allen's conviction and sentence imposed in May 2005 for possession of marijuana with intent to sell styled as Washington County Circuit Court cause number 2005-026, the revocation of which constitutes the heart of this review.

---

<sup>3</sup> Allen's post-release supervision also expired before the warrant was issued for violating the terms of his May 2005 post-release-supervision sentence. The post-release supervision expired in May 2008.

**¶11. THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT DENYING THE MOTION FOR POST-CONVICTION RELIEF IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.**

**KING, C.J., LEE AND MYERS, P.JJ., GRIFFIS, BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION.**

**IRVING, J., DISSENTING:**

¶12. With respect, I must dissent from the majority opinion, which reverses and renders the Washington County Circuit Court's judgment denying Luttrell D. Allen's motion to vacate the order revoking his post-release supervision. In my judgment, the majority has misinterpreted the effect of Allen's initial sentencing order, thereby leading to the erroneous finding that the circuit court was without jurisdiction to revoke Allen's post-release supervision. For the reasons that I will explain below, I would affirm the order of the circuit court revoking Allen's post-release supervision and sentencing him to serve three years in the custody of the Mississippi Department of Corrections.

¶13. On May 23, 2005, pursuant to a plea agreement between Allen and the State, Allen pleaded guilty to possession of less than one ounce of marijuana with intent to sell, transfer, or distribute. The circuit court sentenced Allen as follows:

for said crime of possession of Marihuana with [i]ntent [l]ess than 1 oz[,] the defendant Luttrell D. Allen, shall be sentenced to three (3) years [p]ost-[r]elease [s]upervision to be served as if on [s]upervised [p]robation under the direction of the Mississippi Department of Corrections Probation and Parole Office. . . . The Defendant shall comply with all conditions required by the laws of the State of Mississippi for [p]robation as well as the following . . . .

¶14. It is noteworthy that the circuit court did not sentence Allen to a period of incarceration, which is a requirement for post-release supervision. Miss. Code Ann. § 47-7-

34(1) (Rev. 2004).<sup>4</sup> In his petition to enter a plea of guilty, Allen stated that he had not been convicted of a prior felony in Mississippi and had not been on probation or parole. Therefore, Allen was eligible to receive a suspended sentence and be placed on probation, not post-release supervision. I would interpret the use of the phrase “post-release supervision” in the sentencing order as a scrivener’s error since Allen was not sentenced to a period of incarceration. It seems clear to me that the intent of the circuit court was to suspend Allen’s sentence of three years and place him on probation rather than post-release supervision.

¶15. In the order revoking Allen’s post-release supervision, the circuit court stated:

That by order dated May 23, 2005, said defendant was sentenced to serve a term of three (3) years in [the] custody of the Mississippi Department of Corrections, and the Court, pending the defendant’s good behavior[,] placed the defendant on [p]ost-[r]elease [s]upervision for a period of three (3) years.

Again, it is clear from the passage quoted above from the revocation order that while the circuit court used the phrase “post-release supervision,” it really meant probation. A circuit court may sentence a defendant to a term of incarceration but suspend the execution of the

---

<sup>4</sup> This section reads as follows:

When a court imposes a sentence upon a conviction for any felony committed after June 30, 1995, the court, *in addition to any other punishment imposed if the other punishment includes a term of incarceration in a state or local correctional facility, may impose a term of post-release supervision.* However, 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 defendant shall be placed under post-release supervision upon release from the term of incarceration. The period of supervision shall be established by the court.

(Emphasis added).

sentence and place the defendant on probation, provided that the defendant meets certain requirements as set forth and contained in Mississippi Code Annotated section 47-7-33(1) (Rev. 2004), which reads as follows:

When it appears to the satisfaction of any circuit court or county court in the State of Mississippi, having original jurisdiction over criminal actions, or to the judge thereof, that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, *such court, in term time or in vacation, shall have the power*, after conviction or a plea of guilty, except in a case where a death sentence or life imprisonment is the maximum penalty which may be imposed or where the defendant has been convicted of a felony on a previous occasion in any court or courts of the United States and of any state or territories thereof, *to suspend the imposition or execution of sentence, and place the defendant on probation as herein provided*, except that the court shall not suspend the execution of a sentence of imprisonment after the defendant shall have begun to serve such sentence. In placing any defendant on probation, the court, or judge, shall direct that such defendant be under the supervision of the Department of Corrections.

(Emphasis added).

¶16. As stated, according to Allen’s petition to enter a plea of guilty, he had not been convicted of a felony in this state. The record does not inform us whether he had been convicted of a felony in any other state. My assumption is that he had not, thereby making him eligible for a suspended sentence and probation. If he was eligible for probation during the initial sentencing, as it appears he was, then the circuit court certainly had the authority and jurisdiction to extend his probationary period for an additional year after he was found to have violated the terms of his initial probation for failing to pay court-ordered assessments and supervision fees.<sup>5</sup> It necessarily follows that when he violated his probation during the

---

<sup>5</sup> Mississippi Code Annotated section 47-7-37 (Supp. 2010) provides: “The period of probation *shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation*. Such period with any extension thereof shall not exceed five (5)



fourth year, or during the extended year, of probation by being in possession of cocaine, the circuit court possessed the jurisdiction to revoke his probation and sentence him to the original three-year term of incarceration.

¶17. For the reasons presented, I dissent. I would affirm the judgment of the circuit court.

---

years . . . .” (Emphasis added).