

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**DWIGHT LOTT****APPELLANT****VS.****NO. 2015-CP-00242-COA****STATE OF MISSISSIPPI****APPELLEE****BRIEF FOR THE APPELLEE****APPELLEE DOES NOT REQUEST ORAL ARGUMENT****JIM HOOD, ATTORNEY GENERAL**

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DWIGHT LOTT

APPELLANT

VS.

NO. 2015-CP-00242-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶ 2. Lott committed murder in Pearl River County and was sentenced in 1988 to life in the custody of the MDOC. Lott appealed, and his conviction was affirmed in 1992. *Lott v. State*, 597 So.2d 627, 631 (Miss.1992). In 2000, Lott was paroled.

¶ 3. On July 6, 2010, Lott was arrested in Marion County for the offenses of attempted sexual battery and child molestation. Lott was indicted on these charges in May 2011. On October 12, 2011, the Parole Board revoked Lott's parole. In May 2012, Lott's Marion County charges were dismissed by the State due to the failure of the victim to cooperate in the prosecution of the matter.

¶ 4. Lott filed a PCR motion in the Greene County Circuit Court on October 15, 2012, alleging that he had been denied a parole hearing and other rights set out in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). It is unclear on this record whether Lott is correct in this contention. The circuit court treated the filing as a PCR motion and denied it on January 29, 2013. Lott now appeals the circuit court's judgment.

Lott v. State, 135 So.3d 229, 229-30 (Miss. Ct. App. 2014).

In the above cited opinion the Court held:

¶ 7. Furthermore, an exception to the statute, applicable here, provides that where a conviction has been appealed to the Mississippi Supreme Court and affirmed, the motion must be first presented to the supreme court for authorization to proceed in the trial court. Miss. Code Ann. § 99–39–7; Nelson, 116 So.3d at 174–75 (¶ 9). Because Lott's conviction was affirmed on direct appeal, he was required to obtain permission from the supreme court to file his PCR motion. His failure to do so means that the circuit court lacked jurisdiction to consider his PCR motion, as do we. Accordingly, we dismiss Lott's appeal for lack of jurisdiction.

Lott v. State, 135 So. 3d 229, 230 (Miss. Ct. App. 2014) (decided Mar. 18, 2014).

Petitioner Lott then filed an Application for Leave to Proceed in the Trial Court with the Mississippi Supreme Court (Docket No. 2014-M-00477). The Court issued an order on the 18th of June, 2014. (Order, cp. 153-154). In that order the Court found that “Petitioner must file any post-conviction proceedings dealing with his Pearl River County murder conviction in Pearl River County Circuit Court.” The Court then dismissed the Application for Leave to Proceed in the Trial Court as improperly filed. (Order, c.p. 153-154).

On August 11, 2014, petitioner Lott filed a Motion for Post-conviction Collateral Relief in the Circuit Court of Pearl River County. (c.p. 3-24).

Subsequently, the trial court issued an order dismissing the motion. (Order Dismissing, filed August 31, 2015, first page is to be found in the Clerk’s Papers at page 140, with the second page of the order appearing in the Clerk’s Papers at page 159).

It is from that order of dismissal that it would appear petitioner Lott timely noticed this instant appeal. (Notice of appeal, Sept. 29, 2015, c.p. 160).

STATEMENT OF FACTS

While the facts and procedural history above are the facts relevant to this appeal, the facts of the murder, to which Lott plead guilty, are put forth and may be found in the appellate challenge to his guilty plea. *Lott v. State*, 135 So.3d 229, 229 (Miss. Ct. App. 2014). Although petitioner Lott is challenging revocation of his parole from a Pearl River County murder conviction and sentence, it would appear he has perhaps 6 additional sentences that may be affecting his parole eligibility. (MDOC Inmate ID Number 39044). *Cowart v. State*, 178 So.3d 651, 655 (FN1)(Miss. 2015), reh'g denied (Dec. 10, 2015) (Court has taken judicial notice of Department of Corrections web pages.)

SUMMARY OF THE ARGUMENT

Issue I.

Lott's Parole revocation was lawful.

Issue II.

There was probable cause that Lott violated his Parole.

Petitioner Lott's revocation was based upon the probable cause determination of a grand jury when he was indicted while on parole. Arrest and incarceration is allowed by statute *Miss. Code Ann.* § 47-7-27.

Issue III.

The petitioner is procedurally barred from complaining that he did not have a preliminary revocation. Error, if any, is harmless.

Any error in failing to have a 'preliminary' revocation hearing is harmless as initial incarceration was based upon the probable cause of the indictment.

Issue IV.

The ruling of the trial court is presumed to be correct.

While the record does not clearly show the facts supporting the revocation, the State would ask this reviewing Court to affirm the trial court's dismissal based upon the presumption of correctness. Alternatively, and without conceding error, remand for an evidentiary hearing pursuant to this Court's holding in *Elkins*.

¶ 3. On appeal, this Court remanded to the circuit court for an evidentiary hearing to determine what evidence the Mississippi Parole Board relied upon in revoking Elkins's parole.

Elkins v. State, 188 So.3d 613, 615 (Miss. Ct. App. 2016) (after remand of *Elkins v. State*, 116 So. 3d 185, 187 (Miss. Ct. App. 2013)).

ARGUMENT

Issue I.

Lott's Parole revocation was lawful.

Issue II.

There was probable cause that Lott violated his Parole.

In petitioner's first two allegations of error he presents the issue as his parole being wrongly revoked. There is no doubt the parole board had the statutory authority to revoke his parole based upon the probable cause finding of the indictment and capias.

The indictment and capias were legally sufficient as 'probable cause' to arrest and incarcerate parolee Lott.

¶ 11. Wheeler's claim that his parole officer unlawfully placed a hold on him while he awaited trial in Lincoln County also lacks merit since section 47-7-27 authorizes the parole board to issue warrants for the return of any paroled offender upon a showing of probable cause, and the section further provides that the offender, pending hearing, shall remain incarcerated. See *Williams v. Castilla*, 585 So.2d 761, 764 (Miss.1991) (citing *Moore v. Ruth*, 556 So.2d 1059, 1061-62 (Miss.1990), in explaining that parole board is not required to await trial of the defendant on the principal charge before initiating revocation proceedings).

Wheeler v. State, 164 So.3d 501, 505 (Miss. Ct. App. 2015).

The real issue is whether the revocation is legally sufficient even after the indictment which was the basis for the revocation of his parole was nolle prossed.

Issue III.

The petitioner is procedurally barred from complaining that he did not have a preliminary revocation. Error, if any, is harmless.

Petitioner repeatedly, and often, claims that he was not given nor did he waive his preliminary hearing to which he was entitled. The reason he did not have a 'preliminary hearing'

is that the probable cause had been determined by his indictment. The record does indicate this with the Preliminary Revocation Hearing Report Disposition. (C.p 20).

¶ 13. Next, [][petitioner] argues he was denied the right to two separate revocation hearings. We first note that “a defendant is procedurally barred from arguing that he was denied the right to a preliminary hearing where the defendant failed to raise the issue at his formal revocation hearing.” *Presley*, 48 So.3d at 528 (¶ 9) (citation omitted). [][Petitioner] did not raise this issue at his formal revocation hearing, and therefore, this issue is waived. Notwithstanding the procedural bar, [][petitioner’s] argument is without merit. [][Petitioner] is correct that he was “entitled to both a preliminary and final revocation hearing” before his PRS was revoked. *Riely*, 562 So.2d at 1210. However, the failure to hold separate hearings is not necessarily reversible error. *Presley*, 48 So.3d at 530 (¶14). Rather, [][petitioner] must show that prejudice resulted from the failure to hold a separate preliminary hearing. See *id*. If no prejudice is found and a formal proceeding was held in compliance with Morrissey, then the failure to hold a preliminary hearing is harmless error. *Id*. . . .

Friday v. State, 141 So.3d 18, 22 (Miss. Ct. App. 2014), reh’g denied (June 24, 2014).

Any error in not having a preliminary revocation hearing would have been harmless if a formal revocation hearing was held. And this is where the record appears to be deficient. It would appear a final revocation hearing was had, as evidenced by the Parole Revocation of Oct 12, 2011. (C.p.21-22). However, it does not indicate what evidence was presented or on what basis the revocation was made final. In the second page of the trial court’s order dismissing the post-conviction motion, the trial court presumes the parole board had such evidence. (C.p.159). It would appear the trial court recognized the lesser standard of proof required for revocation of parole.

The trial court explicitly distinguished *Elkins v. State*, 116 So.3d 185, 187 (Miss. Ct. App. 2013) by finding that in *Elkins*, the charges were nolle prossed before the Parole Board considered the revocation, while in this petitioner’s (Lott) case parole was revoked and later the nolle pros was entered. (Order of trial court, c.p 159).

Issue IV.

The ruling of the trial court is presumed to be correct.

Lastly, petitioner Lott asserts the trial court erred in not having an evidentiary hearing.

¶ 6. “It is elementary that a party seeking reversal of the judgment of a trial court must present this Court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved.” *Hansen v. State*, 592 So.2d 114, 127 (Miss.1991). Nelson’s brief raises several concerns regarding his conviction. The record which Nelson has provided to this Court does not provide evidence which supports his claims. **Instead, the only document in the record, which may be considered as evidence by this Court is the order denying post-conviction relief. That order is entitled to a presumption of correctness.** *Branch v. State*, 347 So.2d 957 (Miss.1977). Nelson provides nothing to overcome that presumption. In the absence of said evidence, this Court must affirm.

Nelson v. State, 919 So.2d 124, 126 (Miss. Ct. App. 2005) (emphasis added).

This attorney for the State would be remiss if it did not address this Court’s opinions on factually similar circumstances, to wit: *Elkins v. State*, 116 So.3d 185, 187 (Miss. Ct. App. 2013) and *Council v. Mississippi Dep’t of Corr.*, 51 So. 3d 256, 256 (Miss. Ct. App. 2011).

If the trial court’s presumption that the Parole Board had a final revocation hearing wherein it found that it was “more likely than not that the parolee violated the terms of his parole”, (Order, second page, c.p. 159) then this Court should affirm the denial of post-conviction relief by the trial court.

Alternatively, and without conceding error, if this Court holds that a nolle pros after a parole revocation requires the State to show facts supporting the validity of the revocation, then it would be appropriate for this Court to remand for the trial court to hold a hearing and for the petitioner to show that he was entitled to reinstatement of his parole.

¶ 8. Elkins argues that his parole should be reinstated because the charges stemming from both incidents of domestic violence (stabbing his father and pushing Beasley) were dropped. But even when a parolee is acquitted in a criminal proceeding, this

“does not per se preclude parole revocation predicated upon facts and circumstances giving rise to the criminal charge.” *Williams v. Castilla*, 585 So.2d 761, 764 (Miss. 1991).4567

¶ 9. In revoking parole, “before one released on parole may be returned to custody, it must be shown that he has violated the terms and conditions of parole.” *Moore v. State*, 587 So.2d 1193, 1196 (Miss.1991). “[A]n arrest alone is not sufficient to prove that the defendant committed the act which violated the parole.” Morris, 66 So.3d at 719–20 (¶ 17). “[W]hen there is an acquittal or dismissal of the underlying criminal charges, [before the accused's parole may be revoked], the State must offer actual proof that he committed an act violating the terms and conditions of his parole, and the mere fact that he was arrested and charged with [a crime] may hardly suffice.” *Elkins*, 116 So.3d at 188 (¶ 13). “The Board may not rely on the mere fact that the parolee has been charged with a felony.” *Williams*, 585 So.2d at 764. On review, it must be shown “that reasonable grounds existed for revocation of ... parole outside of the ... charge itself.” *Moore v. State*, 605 So.2d 794, 795 (Miss. 1992).

¶ 10. After this Court remanded, an evidentiary hearing was held, and Elkins was given “an opportunity to prove his claim that his parole had been unlawfully revoked.” Moore, 587 So.2d at 1196. “The burden was on [Elkins] to prove by a preponderance of the evidence that he was entitled to reinstatement of his parole.” *Id.*

Elkins v. State, 188 So. 3d 613, 615-16 (Miss. Ct. App. 2016)

While the record does not clearly show the facts supporting the revocation, the State would ask this reviewing Court to affirm the trial court’s dismissal based upon the presumption of correctness. Alternatively, and without conceding error, this reviewing court could remand for an evidentiary hearing pursuant to this Courts holding in *Elkins*.

¶ 3. On appeal, this Court remanded to the circuit court for an evidentiary hearing to determine what evidence the Mississippi Parole Board relied upon in revoking Elkins's parole.

Elkins v. State, 188 So.3d 613, 615 (Miss. Ct. App. 2016).

CONCLUSION

While the record does not clearly show the facts supporting the revocation, the State would ask this reviewing Court to affirm the trial court's dismissal based upon the presumption of correctness. Alternatively, and without conceding error, the Court could remand for an evidentiary hearing pursuant as noted in *Elkins v. State*, 188 So.3d 613 (¶3) (Miss. App. 2016).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JEFFREY A. KLINGFUSS, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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