

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2003-KP-00487-COA

JOHNNY LEE JOHNSON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 2/21/2003
TRIAL JUDGE: HON. R. I. PRICHARD, III
COURT FROM WHICH APPEALED: JEFFERSON DAVIS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: JOHNNY JOHNSON (PRO SE)
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: SCOTT STUART
DISTRICT ATTORNEY: CLAIBORNE MCDONALD
NATURE OF THE CASE: CRIMINAL - FELONY
TRIAL COURT DISPOSITION: CONVICTED OF SALE OF A SCHEDULE II
CONTROLLED SUBSTANCE, SENTENCED TO
SERVE 15 YEARS IN THE CUSTODY OF THE
MDOC, WITH 7 YEARS TO SERVE AND 8
YEARS SUSPENDED UNDER POST-RELEASE
SUPERVISION; SENTENCE TO RUN
CONSECUTIVELY TO THE SENTENCE
DEFENDANT NOW SERVING
DISPOSITION: AFFIRMED IN PART; REVERSED AND
REMANDED IN PART - 06/22/2004
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED:

BEFORE SOUTHWICK, P.J., IRVING AND GRIFFIS, JJ.

SOUTHWICK, P.J., FOR THE COURT:

¶1. A Jefferson Davis County jury convicted Johnny Johnson of selling cocaine. On appeal, he claims that the imposition of a consecutive sentence on the eve of his completing a sentence on another crime was

vindictive, harsh, and disproportionate; and that he was denied due process of law. The only error that we find is on the suspension of part of Johnson's sentence. Under the statute relied upon for sentencing, there cannot be a suspension. Also, a specific term of post-release supervision must be set. We reverse and remand for a new sentence to be entered.

FACTS

¶2. In 1999, Johnny Johnson was arrested for the sale of 0.1 gram of cocaine to an agent and an informant working with the Mississippi Bureau of Narcotics. He was indicted in July 2000. Trial was held in February 2003. By the time of trial, Johnson was serving a sentence for a different conviction. He had been convicted in March 2000, for a sale of controlled substances and sentenced to fifteen years, four to serve and eleven years suspended. The sentencing order said that the suspension was subject to the rules for post-release supervision.

¶3. At trial for the present conviction, Johnson was sentenced to fifteen years imprisonment, eight years to be suspended subject to Johnson's post-release supervision. This sentence was consecutive to the sentence that Johnson was already serving. Johnson appeals.

DISCUSSION

1. Vindictive, harsh sentence

¶4. The trial judge has broad discretion in sentencing an offender. *Davis v. State*, 724 So. 2d 342, 344 (Miss. 1998). The decision of the trial judge will not be disturbed as long as it does not exceed the maximum statutory period. *Stromas v. State*, 618 So. 2d 116, 122 (Miss. 1993). Here, the applicable statute provides for a maximum of thirty years imprisonment and a maximum million dollar fine. Miss. Code Ann. § 41-29-139(b)(1) (Supp. 2001). During the sentencing hearing, the judge reviewed Johnson's prior criminal record and entered orders of *nolle prosequi* on two other charges of sale of a controlled

substance. Johnson was sentenced to a term of fifteen years, with seven years to serve and eight years suspended. This sentence was well within the statutory range and was not excessive. Later we will note an error regarding the suspension.

2. *Consecutive sentence*

¶5. Johnson claims that the imposition of a consecutive sentence on the eve of completion of his initial sentence constitutes a denial of due process. The argument is that the imposition of sentence deprived him of earned release, or "good time" credits. The management of rehabilitation falls within the authority of the Mississippi Department of Corrections. *Lattimore v. Sparkman*, 858 So. 2d 936, 938 (Miss. Ct. App. 2003). The sentence in this case would not affect such credits.

3. *Disproportionate sentence and improper suspension*

¶6. Johnson claims that his sentence is disproportionate when aggregated with his prior sentence. The statutory sentencing limits were not exceeded. Proportionality analysis is not invoked simply when a trial judge gives an arguably lengthy sentence. Eighth Amendment review is necessary only if a sentence is "grossly disproportional" to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991), applied in *Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996). Perhaps grossness is in the eye of the beholder, but we see no excessiveness here so as to require further evaluation.

¶7. Johnson was sentenced to fifteen years, with eight years "suspended pursuant and in conformity with the Post-Release Supervision set out and authorized in Section 47-7-34" of the Mississippi Code. Johnson argues that this sentence is illegal because previously convicted felons may not receive suspended sentences. The referenced statute states this:

(1) 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.

Miss. Code Ann. § 47-7-34 (Supp. 2003).

¶8. This statute permits the giving of post-release supervision to a prior felon. *Gaston v. State*, 817 So. 2d 613, 619 (Miss. Ct. App. 2002). It contains no language permitting the suspension of a sentence; a different statute prohibits sentence suspension for prior felons. Miss. Code Ann. § 47-7-33 (1) (Rev. 2000); *Hunt v. State*, 2003-CP-00177-COA (¶¶ 6-7) (Miss. Ct. App. May 25, 2004); *see also* (¶¶ 19-21) (Southwick, P.J., concurring). A section 47-7-34 sentence requires "a specific term of incarceration, no suspended sentence or 'probation,' and a specific term of post-release supervision of up to five years after incarceration, provided that the total of the two terms does not exceed the maximum sentence for the crime." *Id.* at (¶30). Post-release supervision might be seen as a merger of the purposes of suspension and probation, since the term of supervision must come out of the unserved portion of the maximum prison term for the offense.

¶9. The trial judge in this case could give Johnson a seven year sentence, followed by a period of not more than five years on post-release supervision. Since the length of time on post-release supervision is discretionary and no length is stated here, we reverse and remand so that a proper sentence can be entered. After a sentence is reversed, the entire range of sentencing discretion reopens for the trial court, though a more punitive sentence may not be given if it is a penalty for having appealed from the judgment. *Bush v. State*, 667 So.2d 26, 28 (Miss. 1996).

¶10. **THE JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON DAVIS COUNTY OF CONVICTION OF SALE OF COCAINE IS AFFIRMED; THE SENTENCE IS REVERSED AND REMANDED FOR A NEW SENTENCE TO BE IMPOSED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO JEFFERSON DAVIS COUNTY.**

**KING, C.J., BRIDGES, P.J., THOMAS, LEE, IRVING, MYERS, CHANDLER AND
GRIFFIS, JJ., CONCUR.**