

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOUG M. CARROLL

FILED

APPELLANT

VS.

NOV 08 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2006-CP-1406

STATE OF MISSISSIPPI

APPELLEE

MOTION TO DISMISS APPEAL
OR, IN THE ALTERNATIVE,
BRIEF FOR THE MOVANT/APPELLEE ON THE MERITS

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

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MOTION# 2007-3163

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOUG M. CARROLL

APPELLANT

VS.

NO. 2006-CP-1406

STATE OF MISSISSIPPI

APPELLEE

**Motion to Dismiss Appeal
or, in the Alternative,
Brief for the Movant/Appellee on the Merits**

Comes now, appellee, State of Mississippi, through counsel, and moves the Court for an order dismissing the attempted appeal in this cause for lack of jurisdiction, and would show:

1.

On June 20, 2006, in the Circuit Court of Union County, Honorable Andrew K. Howorth, presiding, defendant Carroll (in the midst of a jury trial on those charges) pled guilty to the crime of Armed Robbery. The next day defendant was sentenced to 45 years, 10 suspended, 35 to serve with five years post-release supervision and a fine of \$5,000. (Sentencing order C.p. 32-34).

2.

Over two months later, on September 6, 2006 defendant filed an apparently untimely Notice of Appeal. Pursuant to Rule 2(a)(1) of the Mississippi Rules of Appellate Procedure, Carroll's appeal should be dismissed for failure to timely file his appeal. *See Craft v. State*, 2007 WL 2840372, (¶12)(Miss.App. 2007), *citciting Penn v. State*, 909 So.2d 135, 136(¶ 6) (Miss.Ct.App.2005).

It would appear defendant was attempting to appeal a motion to dismiss for lack of speedy trial decided the day before (June 19, 2006) he petitioned the court, and pled, guilty. Regardless, his notice of appeal was filed well beyond the 30 days required by MRAP 4, and his appeal is procedurally barred. *See Lett v. State*, 2007 WL 2874828 (¶9)(Miss. 2007).

3.

The right to appeal to this Court is exclusively a statutory right. *Miss Code Ann.* § 99-35-101, specifically precludes an appeal "in any case where the defendant enters a plea of guilty." Such limitation is jurisdictional in nature.

4.

Since defendant pled guilty, and is attempting to appeal directly, this Court is without jurisdiction to hear this attempted appeal. Further it would appear that defendant's notice of appeal was untimely filed

Premises considered, the State of Mississippi moves the Court to enter an order dismissing the attempted appeal in this Cause.

Respectfully submitted,

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BRIEF IN SUPPORT OF
MOTION TO DISMISS APPEAL
AND ON THE MERITS

The right to appeal a judgment of conviction and sentence from the circuit court to this Court is exclusively a statutory right. *Fleming v. State*, 553 So. 2d 505 (Miss. 1989); *Bennett v. State*, 293 So. 2d 1 (Miss. 1974) and *State v. Ridinger*, 279 So. 2d 618 (Miss. 1973). Section 99-35-101, Miss. Code Ann. 1972, states:

Any person convicted of an offense in a circuit court may appeal to the Supreme Court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty. (emphasis added).

This Court lacks jurisdiction over an "appeal" that is not allowed by the statute. *Fleming v. State*, 553 So. 2d at 506.

¶ 4. Walters does not have a constitutional or common law right to appeal to this Court; instead, his ability to appeal is based entirely on statute. *Shanks v. State*, 906 So.2d 760(¶ 3) (Miss.Ct.App.2004). "There are two primary ways a criminal defendant may challenge a trial court proceeding: a direct appeal from conviction under Mississippi Code Annotated § 99-35-101 (Rev.2002) or a proceeding under the Post-Conviction Collateral Relief Act, Mississippi Code Annotated. § 99-39-1 to 99-39-29 (Rev.2000 & Supp.2004)." *Id.* The circuit clerk's docket sheet indicates that Walters pled guilty. As such, he is not entitled to direct review. Mississippi Code Annotated § 99-35-101 (Rev.2002).

Walters v. State, 933 So.2d 313 (Miss.App. 2006).

We urge the Court to apply the literal language of the statute by holding that there is no appeal from a judgment of conviction and sentence where the defendant enters a guilty plea. *Walters, supra*.

First defendant asserts the trial court could not accept his guilty plea and impose the

sentence imposed because he was a previously convicted felon and his sentence was illegal.

It is apparent from the transcript everyone was aware of those facts. However, the court imposed the sentence on record. The reviewing court of Mississippi have held:

¶ 6. In addition, even in situations where there may be a jurisdictional defect, this Court has jurisdiction to review an allegation of an illegal sentence. *Johnson v. State*, 925 So.2d 86, 88 n. 1 (Miss.2006); *Bennett v. State*, 865 So.2d 1158, 1159(¶ 2) (Miss.2004).

¶ 7. In the present case, Moore does not complain that he has suffered from a sentence that is greater than that authorized by statute. The supreme court has held that “there is no prejudice suffered when a defendant receives an illegally lenient sentence.” *Sweat v. State*, 912 So.2d 458, 461(¶ 9) (Miss.2005). In *Sweat*, the supreme court held that the “law which relieves defendants from the burden of an illegal sentence applies to situations where the defendant is forced to suffer a greater sentence rather than the luxury of a lesser sentence.” *Id.* Moore argues that the language of Section 47-5-1003 prohibited him from receiving the benefit of being placed in the Intensive Supervision Program. As such, any illegality of the sentence Moore received was to his benefit. The circuit court properly dismissed Moore's motion for post-conviction relief.

Moore v. State, WL 2177971 (Miss.App. 2007).

Even if this Court could overcome the jurisdiction bars of untimely filing and statutory bar of appealing from a plea of guilty, this issue is still without merit.

Further, defendant claims he was denied his right to a speedy trial. However, as the reviewing courts of this State hold:

¶ 11. Notwithstanding the procedural bar, Hardin's argument still fails. As stated above, ***a guilty plea waives the right to a speedy trial, whether that right is of constitutional or statutory origin.*** *Rowe v. State*, 735 So.2d 399, 400(¶ 3) (Miss.1999). Hardin pled guilty to the offense and thereby waived his right to a speedy trial. . . .

Hardin v. State, 2007 WL 2840353 (Miss.App. 2007)(emphasis added).

CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 **MOTION TO DISMISS APPEAL**

OR, IN THE ALTERNATIVE, BRIEF FOR THE MOVANT/APPELLEE ON THE MERITS to the following:

Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Sq., Ste. 201
Oxford, MS 38655

Honorable Ben Creekmore
District Attorney
Post Office Box 1478
Oxford, MS 38655

Doug M. Carroll, #L3714
MS. State Penitentiary
Unit 32 -A; A-Zone - A0230
Parchman, MS 38738

This the 8th day of November, 2007.



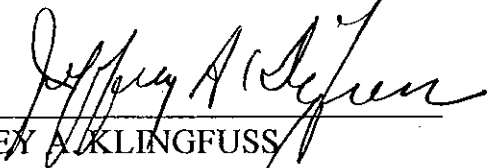
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Respectfully submitted,

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