

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SCOTT LEAVITT

APPELLANT

FILED

VS.

JUN 01 2007

NO. 2006-CP-1654

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The case at bar involves an appeal taken from the Circuit Court of Marshall County, which summarily denied Scott Leavitt's Motion for Post-Conviction Collateral Relief on the ground that it was barred by the applicable statute of limitations. (C.P.97) Aggrieved by the judgment entered against him, Leavitt has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

No error has been shown in the circuit court's summary denial of Leavitt's motion.

PROPOSITION:

**NO ERROR HAS BEEN SHOWN IN THE CIRCUIT COURT'S
DENIAL OF LEAVITT'S MOTION FOR POST-
CONVICTION COLLATERAL RELIEF**

On May 6, 2006, Scott Leavitt filed in the Circuit Court of Marshall County a Motion for Post-Conviction Collateral Relief. (C.P.1) On August 23, 2006, the circuit court denied that motion with the following order:

This cause is before the Court by virtue of the filing by Petitioner of certain documents with the Court, entitled Motion for Post-Conviction Collateral Relief.

After reviewing the documents filed by the Petitioner, as well as the court file in this case, and considering all matters in a light most favorable to the Petitioner, it appears to the Court that the Petitioner is requesting relief that is time barred. The Court is of the opinion that the Petitioner is not entitled to the requested relief. Accordingly, the relief requested is hereby DENIED.

The Clerk is hereby directed to forward a copy of this Order to the Petitioner.

(C.P.97)

Leavitt alleges that the judgment under attack was rendered on May 30, 2003, and that his motion for post-conviction collateral relief accordingly was timely filed. However, nothing in the record documents this allegation.

The court's judgment comes before this Court cloaked with the presumption of correctness. "Our law presumes that the judgment of the trial court is correct, and the appellant has the burden of demonstrating some reversible error to this Court." *Buice v. State*, 751 So.2d 1171, 1173 (Miss. App.1999) (upholding denial of motion for post-conviction relief), citing *Pierre v. State*, 607 So.2d 43, 48 (Miss.1992). Likewise, the appellant, the "party seeking reversal of the judgment of a trial court[,] must present this Court with an adequate record to show that reversible error has been committed." *Crawford v. State*, 716 So.2d 1028, 1040 (Miss.1998). "The result of appellant's failure to present a full record here is that the "presumption of correctness stands un rebutted." *McKnight v. State*, 738 So.2d 312, 316 (Miss. App.1999), quoting *Smith v. State*, 572 So.2d 847, 849 (Miss.1990). See also *Jones v. State*, 878 So.2d 254, 256 (Miss. App.

2004) (argument rejected where appellant failed to "include in the appellate record any documentary support" therefor).

Concomitantly, the state submits that "[i]n a petition for post-conviction relief, the petitioner carries the burden of proving that his claim is not procedurally barred," *Massey v. State*, 843 So.2d 74 (Miss. App. 2003). By failing to include documentation of the date of the judgment under attack, Leavitt clearly has failed to sustain this burden.

The court's order denying relief states affirmatively that the court reviewed the court file and determined that Leavitt's motion was barred by the applicable statute of limitations. There is nothing in this record to refute that ruling, which is presumed to be correct. Accordingly, the judgment entered below should be affirmed.

CONCLUSION

The state respectfully submits that no error has been shown in the circuit court's denial of Leavitt's motion for post-conviction collateral relief. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Sq., Suite 201
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Honorable Ben Creekmore
District Attorney
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Scott Leavitt, #L5916
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This the 1st day of June, 2007.


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