

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDWARD D. FLOWERS

APPELLANT

FILED

VS.

SEP 14 2007

NO. 2006-CP-1844

**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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EDWARD D. FLOWERS

APPELLANT

vs.

CAUSE No. 2006-CP-01844-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal from an Order of the Circuit Court of Washington County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

STATEMENT OF FACTS

The prisoner entered a plea of guilty to the felony of armed robbery on 29 July 1999. He was convicted and sentenced upon his plea. (R. Vol. 1, pp. 33 - 49). Following the practice of many of the penitents in the Mississippi Department of Corrections, he then filed a motion in post - conviction relief concerning his plea; relief on that motion was denied. The action of the Circuit Court in denying relief was affirmed by this Court. *Flowers v. State*, 805 So.2d 654 (Miss. Ct. App. 2002).

In 2004, the prisoner again pestered the Circuit Court with a successive motion in post - conviction relief. (R. Vol. 1, pp. 3 - 9). Relief on that motion was denied on 14 October 2004, the Circuit Court being of the view that any such filing had to be with the Supreme Court. (R.

Vol. 1, pg. 10). The record does not indicate what, if anything, transpired with respect to that successive motion.

On 30 November 2005, the prisoner filed yet another successive motion in the Circuit Court, alleging some five grounds for relief. (R. Vol. 1, pp. 13 - 27). The Circuit Court denied relief on this motion on 11 October 2006. (R. Vol. 1, pp. 30 - 32a).

In the Order denying relief, the court addressed the prisoner's grounds on their merits. It did not deny relief on account of the successive writ bar and on account of the expiration of the statute of limitations. Why it did not do so must, we suppose, remain a mystery. On the other hand, the record does not show that the State was requested to file a response the prisoner's motion, or that it ever did so. The prisoner then filed a notice of appeal on 27 October 2006. (R. Vol. 1, pg. 51).

STATEMENT OF ISSUES

DID THE CIRCUIT COURT PROPERLY DENY RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT PROPERLY DENIED RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

ARGUMENT

THAT THE CIRCUIT COURT PROPERLY DENIED RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF

A Circuit Court may deny relief on a motion in post - conviction relief where the motion and papers attached to it clearly show that the prisoner is entitled to no relief. Miss. Code Ann. Section 99-39-11(2) (Rev. 2007). Here, the court was clearly correct in denying relief on the prisoner's motion.

As we have noted above in the “Statement of Facts”, the prisoner sought post - conviction relief some five years ago. Relief was denied, and this Court affirmed the Circuit Court’s action in this regard. That final judgment acts as a bar to a second and successive motions, subject to certain, limited exceptions. Miss. Code Ann. Section 99-39-23(6) (Rev. 2007). A review of the prisoner’s pleadings in the Circuit Court and here demonstrate that he has not alleged any of those exceptions. This being so, the Circuit Court could have and should have denied relief on this ground.

The Circuit further could have denied relief on the ground that the prisoner’s November, 2005 filing was time - barred. Miss. Code Ann. Section 99-39-5(2) (Rev. 2007). Again, the prisoner has pleaded no exception to the application of the statute of limitations or the successive writ bar. The prisoner’s November, 2005 filing was barred. *King v. State*, 943 So.2d 743 (Miss. Ct. App. 2006).

We will further assert *res judicata* and collateral estoppel as to the claims raised by the prisoner in his pleadings. Each of the claims now raised could and should have been raised in the first post - conviction relief filing.

That the Circuit Court did not apply these bars to the prisoner’s motion is a fact of no consequence. The first opportunity the State has had in asserting them as defenses has been in this Court. We do not think that a court’s decision in a case, acting on its own and without notice to the State, may operate as a waiver of defenses the State would have. The State has had no opportunity until this appeal to assert Her defenses.

As the Court is aware, a response to these post - conviction motions is not required as a matter of course. Answers are required only where the Circuit Court has not dismissed a motion under Section 99-39-11(2). Miss. Code Ann. Section 99-39-11(3) (Rev. 2007). Consequently,

many, if not a majority, of these filings in the Circuit Courts are never answered by the State, there being no need to do so. The State, then, has not waived such defenses it may have to a motion that has been dismissed under Section 99-39-11(2), there never having been need previously to raise them. In any event, it would be an extraordinary thing to find it held that a Circuit Court, acting under Section 99-39-11(2), somehow or another waived defenses that could be raised by the State. That would be an intolerable state of affairs. It would not be a sound reading of the post - conviction relief statutes. Given the procedural posture of this case, the State has raised Her defenses at the first opportunity to do so.

In view of the foregoing, we do not think it necessary to address the prisoner's arguments here. They were not properly before the Circuit Court to begin with; thus, they are not properly here. If, however, this Court should view the matter differently, we adopt the analysis of the Circuit Court concerning the prisoner's claims here. (R. Vol. 1, pp. 30 - 32a). There is no merit in the prisoner's complaints.

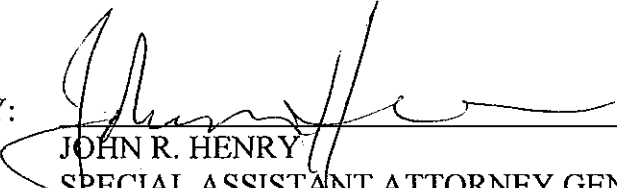
CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's successive motion in post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

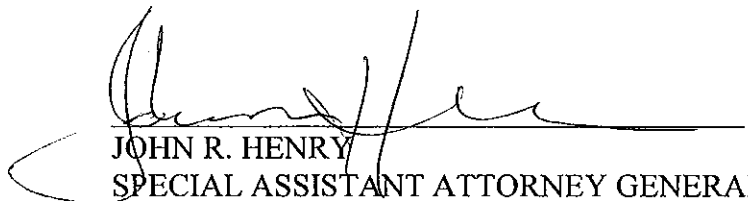
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of September, 2007.


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