

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BENNIE STROUD, JR.

APPELLANT

VS.

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SUPREME COURT
COURT OF APPEALS

NO. 2006-CP-1908

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**BENNIE STROUD, JR., A/K/A
BENNIE STROUD**

APPELLANT

VERSUS

NO. 2006-CP-1908-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

On March 5, 1997, Bennie Stroud pleaded guilty in the Circuit Court of Jackson county to multiple felonies. (C.P.113) The following October 8, Stroud filed a petition for post-conviction, claiming his guilty plea was involuntary and that counsel had been ineffective. The circuit court denied the petition on October 30, 1997. An appeal was filed on January 20, 1998, and ultimately was dismissed by the Court of Appeals. *Stroud v. State*, 839 So.2d 610, 611 (Miss. App. 2003).

On February 6, 2002, Stroud again filed a motion for post-conviction relief, which the circuit court summarily denied as time-barred on April 28, 2006. Aggrieved by the judgment rendered against him, Stroud has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

There is no error in the circuit court's determination that Stroud's motion for post-conviction relief, filed on February 6, 2006, was barred by the applicable statute of limitations. The motion also was dismissible as a successive writ. Accordingly, the court properly denied the motion.

PROPOSITION:

STROUD'S MOTION WAS TIME-BARRED AND SUCCESSIVE; THE CIRCUIT COURT ACTED PROPERLY IN DENYING IT SUMMARILY

The circuit court denied Stroud's motion with the finding that it had been filed on February 6, 2006, some eight years and 11 months after Stroud's pleas of guilty, "outside the three-year limit as set forth in § 99-39-5 (2000)." (C.P.113) The court's order is not subject to reversal "absent a finding" that it "was clearly erroneous." *Taylor v. State*, 766 So.2d 830, 832 (Miss. App. 2000), citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss.1999). Accord, *Black v. State*, 963 So.2d 47, 48 (Miss. App. 2007).

The submits this finding clearly was correct. Attempting to attack a judgment entered in 1999, the motion at issue here, filed more than five years later, plainly was barred by the three-year statute of limitations. Stroud's motion also was subject to dismissal as a successive writ. MISS. CODE ANN. § 99-39-23(6) (1972) (as amended). *Black*, 963 So.2d at 49.

"In 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). Accord, *Powers v. State*, 945 So.2d 386, 395 (Miss. 2006). No error has been shown in the court's implicit finding that Stroud failed to sustain this burden.

Summary denial was the proper disposition of this time-barred and successive motion. The judgment entered below should be affirmed.

CONCLUSION

The state respectfully submits the circuit court properly denied Stroud's motion without a hearing. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

A handwritten signature in black ink, appearing to read "Deirdre McCrory", with a stylized flourish at the end.

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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 Kathy King Jackson
Circuit Court Judge
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Honorable Anthony Lawrence, III
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This the 25th day of October, 2007.

A handwritten signature in black ink, appearing to read 'Deirdre McCrory', is written over a horizontal line.

DEIRDRE MCCRORY
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