

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FILED

STEVEN SHELTON

MAY 21 2007

APPELLANT

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

VS.

NO. 2006-CP-2128 consolidated with 2006-CP-2134

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STATEMENT OF ISSUES	4
SUMMARY OF ARGUMENT	4
ARGUMENT	4
1. THAT THE CIRCUIT COURT CORRECTLY DENIED RELIEF ON THE PRISONER'S NOVEMBER 2006 MOTION FOR AN OUT-OF-TIME APPEAL	4
2. THAT ASSUMING FOR ARGUMENT THAT THE CIRCUIT COURT'S ACTION IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF IS BEFORE THE COURT, THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THAT MOTION	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

STATE CASES

Melton v. State, 930 So.2d 452 (Miss. Ct. App. 2006)	6
Walker v. State, 861 So.2d 354 (Miss. Ct. App. 2003)	7

STATE STATUTES

Miss. Code Ann. Section 99-39-5(2) (Supp. 2006)	7
Miss. Code Ann. Section 99-39-9 (Supp. 2006)	6

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEVEN SHELTON

APPELLANT

vs.

CAUSE No. 2006-CP-02128-COA

THE STATE OF MISSISSIPPI

APPELLEE

CONSOLIDATED WITH

STEVEN RAY SHELTON

APPELLANT

vs.

CAUSE No. 2006-CP-02134-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is a consolidated appeal from Orders by the Circuit Court of Rankin County, Mississippi denying post-conviction relief. The prisoner entered guilty pleas as to two, separate indictments; he filed in post - conviction relief as to both of them. His appeals from denial of post -conviction relief as to both motions were consolidated by this Court.

STATEMENT OF FACTS

As to Cause Number 2006-CP-02128-COA, the facts are as follow. The prisoner entered a guilty plea on 4 October 2002 to an indictment that charged him with having sold a controlled substance. He was convicted upon his plea, and he was sentenced to serve a term of imprisonment of thirty years in the custody of the Mississippi Department of Corrections. This sentence was to be served concurrently with the sentence imposed in Cause Number 2006-CP-02134-COA, and both were to be served concurrently with a federal sentence imposed upon the prisoner on account of his federal conviction for possession of a firearm by a convicted felon. After the prisoner served twelve years on his Mississippi convictions, he was to be released on post-release supervision for a period of five years. There were fines, costs and assessments also imposed. (R. Vol. 1, pp. 42 - 53).

The prisoner then filed a motion in post - conviction relief on 21 October 2005. (R. Vol. 1, pp. 7; 105). In this motion, the prisoner alleged that his plea of guilty was not a knowing and intelligent act; that the Circuit Court was without authority to impose the sentence meted out to the prisoner; that there was a breach of the plea agreement by the State; and that the prisoner's arrest and consent to search were contrary to law. (R. Vol. 1, pg. 8).

The Circuit Court denied relief on the prisoner's motion without an evidentiary hearing on 24 October 2005, finding that the prisoner's filing was time - barred. (R. Vol. 1, pp. 60 - 61).

The prisoner then filed a motion styled as a motion for an out - of - time appeal, this on 8 November 2005. Relief on this motion was denied on account of the fact that time had not expired on the filing of a notice of appeal. (R. Vol. 1, pp. 62 - 68).

On 25 October 2006 and 6 November 2006, the prisoner filed a motion for an out - of - time appeal. On 22 November 2006, the Circuit Court denied relief on this motion, finding that

it was not timely filed. (R. Vol. 1, pp. 70 - 111).

A notice of appeal from this Order was filed on 13 December 2006. (R. Vol. 1, pg. 70 - 111).

As to Cause Number 2006-CP-02134-COA, the facts concerning that conviction and sentence are the same, except for the fact that it concerned a separate offense of sale of a controlled substance. (R. Vol. 1, pp. 39 - 50).

The prisoner filed a motion in post - conviction relief against the conviction involved in that cause number on 21 October 2005. (R. Vol. 1, pg. 6). The grounds alleged in that motion did not include claims concerning the validity of the arrest and search but were otherwise substantially the same as in 2006-CP-02128-COA. This motion suffered the same fate as its companion motion. (R. Vol. 1, pp. 79 - 80).

On 8 November 2005, the prisoner filed a motion also styled as a motion for an out - of - time appeal. In that motion, he alleged that he had deposited his motion in post - conviction relief with prison authorities on 3 October 2005 and that it was returned to him by the Circuit Clerk on 4 October 2005 because it was incomplete. He then engaged in a long wail about how it was not his fault that he did not know that his motion was incomplete. (R. Vol. Pp. 57 - 59).

On 16 November 2005, The Circuit Court denied relief on this motion because the time to appeal had not expired. (R. Vol. 1, pg. 63).

On 6 November 2005, the prisoner filed another motion for an out - of - time appeal. This filing contained yet another whine about the prisoner's troubles in doing legal research in prison. His prayer for relief, though, was not that the motion for post - conviction relief be considered to have been timely filed. His prayer for relief was for an out - of - time appeal under Rule 4 MRAP. (R. Vol. 1, pp. 65 - 71).

Relief on this motion was denied by Order filed on 22 November 2006. Relief was denied because it was not timely filed. (R. Vol. 1, pp. 84 - 85).

The prisoner then managed to timely filed a notice of appeal as to his November, 2006 motion. (R. Vol. 1, pg. 86).

STATEMENT OF ISSUES

- 1. DID THE CIRCUIT COURT CORRECTLY DENY RELIEF ON THE PRISONER'S NOVEMBER 2006 MOTION FOR AN OUT - OF - TIME APPEAL?**
- 2. THAT ASSUMING FOR ARGUMENT THAT THE CIRCUIT COURT'S ACTION IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF IS BEFORE THE COURT, THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THAT MOTION**

SUMMARY OF ARGUMENT

- 1. THAT THE CIRCUIT COURT CORRECTLY DENIED RELIEF ON THE PRISONER'S NOVEMBER 2006 MOTION FOR AN OUT-OF-TIME APPEAL**
- 2. THAT ASSUMING FOR ARGUMENT THAT THE CIRCUIT COURT'S ACTION IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF IS BEFORE THE COURT, THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THAT MOTION**

ARGUMENT

- 1. THAT THE CIRCUIT COURT CORRECTLY DENIED RELIEF ON THE PRISONER'S NOVEMBER 2006 MOTION FOR AN OUT-OF-TIME APPEAL**

The prisoner presents four issues on this appeal. However, we question whether his four issues are before the Court.

What the prisoner has appealed is the Circuit Court's order denying him an out-of-time appeal. The issue -- and we submit the only issue-- before this Court is whether the Circuit Court erred in denying the out - of - time appeal.

Briefly restated, the facts are that the prisoner filed a motion styled as a motion for an out-

of-time appeal after the Circuit Court denied relief on the motion in post - conviction relief. The text of the motion, however, did not mention anything about an appeal. It was in effect a motion for rehearing. The Circuit Court correctly denied relief on the motion for an out - of - time appeal because the period permitted by law to file a notice of appeal had not expired. Almost a year later, the prisoner filed a second motion for an out - of - time appeal. It was this ruling that the appellant appealed.

Under Rule 4(h) MRAP, a trial court may reopen the time for taking an appeal if: (1) it finds that a party entitled to notice of entry of an order or judgment did not receive notice from the clerk within twenty - one days of entry of the judgment and (2) that no party would be prejudiced by reopening the time for taking an appeal. If these conditions are met, then the trial court may, upon motion filed within 180 days of entry of the judgment or order or within seven days of receipt of such notice, whichever is earlier, reopen the time to take an appeal for a period not exceeding fourteen days

In the case at bar, the prisoner certainly received timely notice of the court's disposition of his post - conviction relief motion. The prisoner erroneously filed a motion for an out - of - time appeal before the time under Rule 4(a) had expired. In other words, as to the November 2006 motion, the prisoner clearly did not meet the first condition of Rule 4(h).

In addition to this, the prisoner failed to meet the second condition of Rule 4(h) in that his November 2006 filing was well beyond the 180-day period.

In view of these considerations, we think it is completely clear that the Circuit Court committed no error in denying relief on the prisoner's motion for an out - of -time appeal. The instant appeal is not properly before the Court and should be dismissed for want of jurisdiction.

The prisoner, though, asserts that the Circuit Court should have somehow divined that the

first motion for an out - of - time appeal was intended or should have been treated as a notice of appeal. Given the fact that the text of the motion mentioned nothing about an appeal but was entirely in the nature of a motion for rehearing, we do not think the Circuit Court can be faulted for not treating it as a notice of appeal. In all events, though, that is not the question here. The prisoner is before the Court on the question of whether the November 2006 motion was properly denied. His notice of appeal did not operate as to the prior orders of the Circuit Court. Time in which to appeal those orders had long expired.

2. THAT ASSUMING FOR ARGUMENT THAT THE CIRCUIT COURT'S ACTION IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF IS BEFORE THE COURT, THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THAT MOTION

In the event that this Court should determine that the disposition of the prisoner's motion in post - conviction relief is properly before it, the Circuit Court was clearly correct in denying relief on the motion.

The prisoner was convicted and sentenced on 4 October 2002. By the prisoner's own admission, he did not deposit his motion in post - conviction relief with prison authorities until 3 October 2005. (Brief for the prisoner at 2). According to the prisoner, the Circuit Clerk returned the motion as "incomplete." The prisoner finally filed his motion with the Circuit Court on 21 October 2005.

Under the prison mailbox rule, a motion in post -conviction relief is considered filed on the date a prisoner gives his motion to prison authorities for mailing. *Melton v. State*, 930 So.2d 452 (Miss. Ct. App. 2006). However, this rule presumes that the motion so given to prison authorities meets the pleading requirements of the Uniform Post - Conviction Relief Act. Miss. Code Ann. Section 99-39-9 (Supp. 2006). While the record does not appear to establish the

reason or reasons the motion was returned to the prisoner, unfiled, it does not appear that he makes any claim that it was an error for it to have been so returned, rather than filed.

The prisoner's filing was thus time - barred under Miss. Code Ann. Section 99-39-5(2) (Supp. 2006), unless some exception provided therein existed in his favor. There were none.

In the prisoner's statement of issues (Brief for the prisoner at 1), the ineffective assistance of counsel claims are clearly not within any of the exceptions to the statute of limitations. As for the claims that the Circuit Court erred in denying his motions, these fit no exception either. On the other hand, the prisoner has wholly failed to establish that some intervening decision exists which would actually have adversely affected the outcome of his conviction or that some evidence exists not reasonably discoverable at the time of trial, that would have practically conclusively caused a different result at trial.

The prisoner was well aware of the three-year statute of limitations. Yet he waited until the last day to attempt to file his motion. This was a risk he took, in the event that the motion failed to comply with the requirements of post - conviction relief. He should not be heard here to complain that his untimely filing was somehow the fault of one thing or another, but not himself.

The appears to have raised several other issues in his failed post - conviction relief attempt. Since he does not appear to renew them here, they are abandoned. *Walker v. State*, 861 So.2d 354 (Miss. Ct. App. 2003). It is thus unnecessary to consider them.


CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion for an out - of - time appeal should be affirmed. In the event that this Court should find that the Order denying relief on the prisoner's motion in post - conviction relief is properly before the Court for review, that Order should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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:

Honorable Samac S. Richardson
Circuit Court Judge
P. O. Box 1885
Brandon, MS 39043

Honorable David Clark
District Attorney
P. O. Box 68
Brandon, MS 39043

Steven Shelton, #40281
Wilkinson County Correctional Facility
P. O. Box 1079
Woodville, MS 39669

This the 21st day of May, 2007.


JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680