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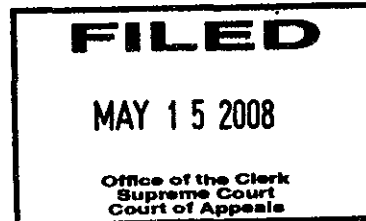
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KELLY MANN

APPELLANT

VS.

NO. 2007-CP-1231



STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. Mann's Motion for Post Conviction Relief based on his plea of guilty to the crimes of robbery and murder is time-barred by virtue of the three year statute of limitations set forth in Section 99-39-5(2) of the Mississippi Code Annotated, as amended, and was therefore properly dismissed by the trial court.
- II. Mann's Motion for Post Conviction Relief does not conform to Section 99-39-9 of the Mississippi Code Annotated, as amended, and was therefore properly dismissed by the trial court.
- III. Mann's Motion for Post Conviction Collateral Relief is barred as successive writ pursuant to Section 99-39-23(6).
- IV. Mann was not subjected to double jeopardy due to his convictions for murder and armed robbery due to his pleas of guilty to those crimes.
- V. Mann was not entitled to court appointed counsel for the hearing on the Motion for Post Conviction Collateral Relief.
- VI. To the extent that Mann challenges the indictment setting out the charge of capital murder of Bernard Sanders with the underlying felony of the robbery of W.A. Stokes, said indictment was sufficient to provide Mann with due process and notice of the crimes with which he was charged.
- VIII. Mann's argument that he has relied on a contractual agreement and is entitled to specific performance is without merit and should be dismissed.

STATEMENT OF THE CASE

Mann was charged with capital murder of Bernard Sanders while in the commission of the crime of robbery. The indictment stated that "Truman Brantley, Jr. And Kelly Mann . . . did willfully, unlawfully, feloniously, and without authority of law, and of their malice aforethought, kill and murder Bernard Sanders, a human being, while they, the said Truman Brantley, Jr., and Kelly Mann, were then and there engaged in the commission of the crime of robbery contrary to and in violation with of Section 97-3-19(2)(c) Miss. Code Ann. (1972), as amended."

On August 4, 1993, Truman Brantley, Jr., pled guilty to the crime of robbery. Brantley also waived indictment for the crime of grand larceny and the crime of kidnapping. Brantley ten entered a plea of guilty to the crimes of grand larceny and kidnapping. The D.A. made a recommendation to that Brantley receive two forty year sentences to the penitentiary, to run together at the same time, plus an additional five years, for a total of forty-five years. Pursuant to a plea bargain, Brantley agreed to give testimony in the capitol murder case of State of Mississippi v. Kelly Mann.

The facts of the case were as follows:

"[t]hat Bernard Sanders in his car had with him Mr. W. H. Stokes, and they picked up also Kelly and . . . Truman Brantley, Jr., and after riding around for some time, Defendant Brantley became aware through Kelly Mann that Mr. Stokes had a good bit of money with him, having just cashed a check, and Kelly Mann borrowed a shotgun from Mr. Brantley and got out of the car and summonsed Bernard Sanders to the back of the car where he shot him, in order to be able to rob Mr. Stokes. Mr. Brantley then drove himself and Mr. Mann with Mr. Stokes away from the scene, and while this was going on, Kelly Mann then at gunpoint got Mr. Stokes' money. Mr. Brantley disposed of the car in Scott County

with Mr. Stokes, and then at a later time, or during that same time period, Kelly Mann and Mr. Brantley divided up the money.

On August 9, 1993, Kelly Mann filed his Petition to Plead Guilty to murder and armed robbery in the Circuit Court of Lee County, Mississippi. Mann testified before the trial court that he understood that he was pleading guilty to the crimes of murder and robbery. Mann testified that he understood that he was pleading guilty to murder, which is less than capital murder. Mann testified that he understood that the only penalty for murder is life imprisonment in the penitentiary. He testified that he understood that he was waiving his constitutional right against self-incrimination, his right to trial by jury and his right to appeal a resulting conviction. Mann stated that he was pleading guilty to both crimes of murder and robbery, "Because I am guilty."

Mann testified that his attorney had not told him to plead guilty, that he was satisfied with his attorney's representation and that he believed his attorney was competent and able to represent him at trial.

The State made a recommendation that for the crime of murder, Mann serve a life term in the Mississippi State Penitentiary and that for the crime of robbery, that he serve a forty year sentence to run consecutive to the life sentence. Mann testified that he understood the D.A.'s recommendation that he serve life imprisonment plus forty years for the crime of robbery and that he understood that he must serve ten years for the crime of robbery before he could be eligible for parole. Mann testified that he still wanted to plead guilty.

The trial court accepted Mann's plea of guilty to the crimes of murder and robbery and found Mann's plea to be free and voluntary. The trial court specifically held that Mann understood his constitutional rights, and that knowing those rights, he voluntarily and knowingly

waived them.

For the crime of murder, the trial court sentenced Mann to a sentence of life imprisonment in the custody of the Mississippi Department of Corrections. For the crime of robbery, the trial court sentence Mann to serve forty years in the custody of the Mississippi Department of Corrections, with the sentence to run consecutively to the Mann's life sentence for murder.

Thirteen years later, on August 3, 2006, Mann filed his Motion for Post Conviction Collateral Relief to Vacate and Set Aside Conviction and Sentence for the Crime of Robbery. (C.P. 4) Mann alleges that since he began serving his sentence for robbery on August 10, 2003, that his Petition, filed August 7, 2003 was within the three year statute of limitations contained in the Collateral Post Conviction Relief Statute.

On August 13, 2007, the State of Mississippi filed an Answer to Motion for Post - Conviction Collateral Relief. The Motion was set for hearing on August 20, 2007. On August 22, 2007 the trial court entered and Order sustaining the State's Motion to Dismiss finding that Mann failed to filed his motion within the time limitation set forth in Section 99-39-5(2) and further that his motion was barred pursuant to Section 99-39-23(6), Mississippi Code of 1972, as amended. The instant appeal ensued.

SUMMARY OF THE ARGUMENT

Mann's Motion for Post Conviction Relief based on his plea of guilty to the crimes of robbery and murder is time-barred by virtue of the three year statute of limitations set forth in Section 99-39-5(2) of the Mississippi Code Annotated, as amended. Mann pled guilty to the crimes of murder and robbery on August 9, 1993. He was sentenced to life imprisonment in the penitentiary for murder and for forty years in the penitentiary for the crime of robbery, to run consecutive to the sentence for murder. Mann filed his Motion for Post Conviction Relief as to his sentence of forty years resulting from his plea of guilty to the crime of robbery on August 3, 2006, almost 13 years after his conviction and sentence.

Mann's Motion for Post Conviction Relief does not conform to Section 99-39-9 of the Mississippi Code Annotated, as amended, and was therefore properly dismissed by the trial court. In order to be entitled to an evidentiary hearing on a post-conviction relief motion, the movant cannot rely upon mere allegations in the pleading; rather, he must demonstrate, through affidavits or otherwise, that factual evidence exists to prove the allegations. Miss.Code Ann. § 99-39-9(e) (Rev.2000). If such affidavits cannot be obtained, the movant must show, in detail, good cause for the failure. *Id.* When the only basis for relief is the uncorroborated assertion of the petitioner, the motion may be dismissed without a hearing in reliance on the provisions of Mississippi Code Annotated section 99-39-11. *State v. Santiago*, 773 So.2d 921, 923-24 (Miss.2000). Mann's Motion for Post Conviction Collateral Relief is barred as successive writ pursuant to Section 99-39-23(6).

Mann was not subjected to double jeopardy due to his convictions for murder and armed robbery due to his pleas of guilty to those crimes. Further, Mann was not entitled to court

appointed counsel for the hearing on the Motion for Post Conviction Collateral Relief. To the extent that Mann challenges the indictment setting out the charge of capital murder of Bernard Sanders with the underlying felony of the robbery of W.A. Stokes, said indictment was sufficient to provide Mann with due process and notice of the crimes with which he was charged

Mann's argument that he has relied on a contractual agreement and is entitled to specific performance is without merit and should be dismissed.

ARGUMENT

I. Mann's Motion for Post Conviction Relief based on his plea of guilty to the crimes of robbery and murder is time-barred by virtue of the three year statute of limitations set forth in Section 99-39-5(2) of the Mississippi Code Annotated, as amended.

We assert with great vigor that post-conviction relief claims based on involuntary guilty pleas are subject to the three year statute of limitations and the time bar. *Luckett v. State*, 582 So.2d 428 (Miss. 1991); *Wallace v. State*, 823 So.2d 580 (Ct.App.Miss. 2002). See also *Austin v. State*, 863 So.2d 59 (Ct. App. Miss. 2003), reh denied [Claim that defendant's guilty plea to rape was not knowing, intelligent and voluntary was the type of claim that fell squarely within the three-year statute of limitations governing post-conviction relief.]

Miss. Code Ann. § 99-39-5(2) identifies in plain, ordinary English, the time limitations for motions to vacate guilty please, judgments of conviction obtained by other than plea, and erroneous sentences filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. It reads as follows:

- (2) **A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal fro the judgment of conviction or sentence has expired or in the case of a guilty plea, within three years after entry of the judgment of conviction.** Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have

caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawful revoked.

[emphasis added]

Mann pled guilty to the crimes of murder and robbery on August 9, 1993. On that same date, he was sentenced to life imprisonment in the penitentiary for murder and for forty years in the penitentiary for the crime of robbery, to run consecutive to the sentence for murder. Mann filed his Motion for Post Conviction Relief as to his sentence of forty years resulting from his plea of guilty to the crime of robbery on August 3, 2006, almost 13 years after his conviction and sentence for robbery. Mann had three years from the date of entry of his conviction and sentence for the crime of robbery via guilty plea to file his petition for post-conviction relief. *Lockett v. State*, 656 So.2d 68, 71 (Miss. 1995); *Lockett v. State*, 656 So.2d 76, 78-79 (Miss. 1995); *Freelon v. State*, 569 So.2d 1168, 1169 (Miss. 1990); *Jackson v. State*, 506 So.2d 994, 995 (Miss. 1987); *Odum v. State*, 483 So.2d 343, 344 (Miss. 1986).

In the case of *Lockett v. State*, 582 So.2d 428, 430 (Miss. 1991), the Mississippi Supreme Court held that the issues of fatally defective indictments; double jeopardy; coerced, involuntary or unintelligent plea; and ineffective assistance of counsel were all time barred where they filed more than nine years subsequent to the entry of Lockett's guilty pleas. Thus, to the extent that Mann asserts claims of double jeopardy, ineffective assistance of counsel and involuntary and/or unintelligent plea, those claims are barred by the three year statute of limitations.

II. Mann's Motion for Post Conviction Relief does not conform to Section 99-39-9 of the Mississippi Code Annotated, as amended, and was therefore properly dismissed by the trial court.

Section 99-39-9(e) of the Mississippi Code Annotated of 1972, as amended, requires that

a Motion for Post Conviction Collateral relief shall include

[a] specific statement of facts which are not within the prisoner's knowledge . The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the prisoner has done to attempt to obtain the affidavits, records and documents, the production of which he asks the court to excuse.

Mann's Motion for Post Conviction Collateral Relief does not comply with the above mandatory requirements and was correctly dismissed by the trial court. While Mann did include a list of potential witnesses in his Motion to the trial court (CP 7), he did not include any affidavits of any witnesses or any documentary evidence to support his claims. He did not include any explanation of attempts to obtain affidavits or evidence as required by statute. Where as Motion for Post Conviction Relief is supported by nothing more than the Petitioner's bare assertions, the motion is properly dismissed by the trial court.

In order to be entitled to an evidentiary hearing on a post-conviction relief motion, the movant cannot rely upon mere allegations in the pleading; rather, he must demonstrate, through affidavits or otherwise, that factual evidence exists to prove the allegations. Miss.Code Ann. § 99-39-9(e) (Rev.2000). If such affidavits cannot be obtained, the movant must show, in detail, good cause for the failure. *Id.* When the only basis for relief is the uncorroborated assertion of the petitioner, the motion may be dismissed without a hearing in reliance on the provisions of Mississippi Code Annotated section 99-39-11. *State v. Santiago*, 773 So.2d 921, 923-24 (Miss.2000).

Shinall v. State, 832 So.2d 1291 (Miss.Ct.App. 2002).

III. Mann's Motion for Post Conviction Collateral Relief is barred as a successive writ pursuant to Section 99-39-23(6).

According to Mann's own testimony at the trial court hearing on his Motion for Post Conviction Collateral Relief, he has filed two previous Motions for Post Conviction Collateral Relief based on his conviction and sentence in this cause. Section 99-39-23(6) bars second or successive motions pursuant to the Post Conviction Collateral Relief Act. While Mann cites a case he deems to be an "intervening decision",

IV. Mann was not subjected to double jeopardy due to his convictions for murder and armed robbery due to his pleas of guilty to those crimes.

Mann clearly pled guilty to murder rather than capital murder as evidenced by the plea colloquy contained in the record as shown by the following excerpt:

- Q. Now, Kelly Mann, you are before the Court charged with the crime of capital murder, which it says that you did on a day in January kill and murder Bernard Sanders, while you were in the commission of the crime of robbery. That is a crime for which you could receive the death penalty. Do you understand that?
- A. Yes, Sir.
- Q. Do you understand that the crime for which you have entered a plea of guilty is less than capital murder?
- A. Yes, Sir.
- Q. Now, you are pleading guilty to the crime of murder. Do you understand that the crime of murder carries only one penalty and that is life imprisonment in the penitentiary?
- A. Yes, Sir.
- Q. Do you understand that for the crime of armed robbery that the jury is the only one that can fix life imprisonment for the crime of armed robbery, but the Court if the jury does not, can sentence you to a term of years less than your life expectancy and I can do that consecutive to your life sentence for the crime of murder?
- A. Yes, Sir.

(C.P. 78-79)

In *Brown v. State*, 731 So.2d 595 (Miss.1999), the Mississippi Supreme Court used the same definition and test for double jeopardy as used in the United States Supreme Court:

“It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *Id.* at 109 [*White v. State*, 702 So.2d 107] (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). The test for determining whether a defendant has been subjected to double jeopardy is the “same elements” test as set out in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), ... [A]n inquiry into whether each offense charged requires proof of an element not contained in the other. Where different elements are required by each offense “ ‘an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.’ ” *Id.*

Mann did not, as he asserts in his brief, plead guilty to the crime of capital murder with the underlying felony of robbery. As the record clearly reflects, Mann pled guilty to one count of murder and one count of armed robbery. The elements of murder and armed robbery are clearly distinct and Mann’s two convictions and sentences, with elements not in common to one another, and do not constitute double jeopardy. Further, as argued earlier, Mann’s argument that he has been subjected to double jeopardy barred pursuant to Sections 99-39-5(2) and 99-39-23(6) of the Mississippi Code Annotated.

V. Mann was not entitled to court appointed counsel for the hearing on the Motion for Post Conviction Collateral Relief.

Section 99-39-23(1) of the Post Conviction Collateral Relief Act provides that *if an evidentiary hearing is required*, the trial court *may* appoint counsel for a petitioner who qualifies

for the appointment of counsel under Section 99-15-15, Mississippi Code of 1972. Since Mann's Motion was dismissed as time-barred and barred as a successive writ, no evidentiary hearing was required and the Trial Court has without authority under the statute to appoint counsel for Mann. Further, even if an evidentiary hearing were held, Mann was not entitled to counsel, but the Trial Court could appoint counsel at its discretion. *Putnam v. State*, 877 So.2d 468 (Miss.Ct.App. 2003).

VI. To the extent that Mann challenges the indictment setting out the charge of capital murder of Bernard Sanders with the underlying felony of the robbery of W. A. Stokes, said indictment was sufficient to provide Mann with due process and notice of the crimes with which he was charged.

Section 99-19-5 (1) of the Mississippi Code Annotated of 1972, as amended, provides:

(1) On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.

Further, Section 97-3-19 provides that "[a]n indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to manslaughter."

Mann was indicted for the crime of capital murder, with the underlying crime of robbery. This indictment is sufficient to support Mann's convictions via plea for murder and armed robbery. The murder and armed robbery are lesser included offenses of the charge of capital murder contained in the indictment, which pursuant to the foregoing statutes served as sufficient notice of the inclusion of those lesser offenses.

The plea colloquy contains the following description of the underlying facts supporting the charges:

Your Honor, as to the admissible evidence against the Defendant, we would expect Mr. Wilson Rogers [sic] to testify that he was riding with Bernard Sanders, and that this Defendant and Truman Brantley, Jr. began to ride with them, and after traveling around the countryside, so to speak, they stopped the car on the pretense of having to get out to use the bathroom. That this Defendant then got out of the car with Truman Brantley, Jr.'s sawed off shotgun, went around the car and called Bernard Sanders back there, whereupon he shot him and killed him, and that Truman Brantley, Jr. then drove this Defendant and Mr. Roberts [sic] away, and at that time, Mr. Roberts [sic] was robbed of his money, which was split among this Defendant and Truman Brantley, Jr., and we would expect that Truman Brantley, Jr. Would corroborate Mr. Wilson Robert's [sic] testimony with his testimony.

C.P. 81.

Mann raised no objection to this description which is clearly encompassed in the crimes of murder and armed robbery, which are lesser included offenses of the crime of capitol murder with which he was charged.

VII. Mann's assertion that the three year statute of limitations contained in Section 99-39-5(2) is not uniformly applied to all litigants who file out-of-time Motions for Post Conviction Collateral Relief is without merit and should be dismissed.

First, this argument was never presented to the trial court, and a trial court cannot be held in error for an argument that was never presented to the trial court for consideration. In *Leverett v. State*, 197 So.2d 889, 890 (Miss.1967) (quoting *Collins v. State*, 173 Miss. 179, 180, 159 So. 865, 865 (1935)), the Court held the following:

The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This

court can only pass on the question after the trial court has done so.

Second, the time bar contained in Section 99-39-5(2) is routinely applied by trial courts and appellate courts of the state of Mississippi whenever its provisions are applicable and Mann presents no evidence to the contrary.

VIII. Mann's argument that he has relied on a contractual agreement and is entitled to specific performance is without merit and should be dismissed.

Mann claims that he has relied on some promise by his attorney. He cites to C.P. 14 of the record, Section VI., to assert that he made an agreement that the State has somehow breached. However, Mann acknowledges his guilt in the murder of Bernard Sanders in that section of the Petition to Plead Guilty. In Section III. of the same document, Mann acknowledges that he has been charged with armed robbery. His indictment for capitol murder includes the charge of robbery. At his plea hearing, Mann clearly acknowledges that he understands that he is pleading guilty to the crimes of murder and robbery. The following exchange took place during the plea colloquy:

By the court: Now why are you pleading guilty to the
crimes of murder and robbery?
Mann: Because I am guilty, Sir.
By the Court: Of both crimes?
Mann: Yes, sir.

While there is some confusion regarding who was robbed, the confusion is clarified when the prosecutor states the admissible evidence showing that Bernard Sanders was the murder victim and his companion was robbed of his money. (C.P. 81)

Further, Mann cites no relevant, applicable authority for this contention. This issue is without merit and should be dismissed.

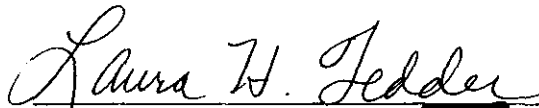
CONCLUSION

Mann's Motion for Post Conviction Collateral Relief is time barred pursuant to Section 99-39-5(2) and is further barred as a successive writ. Additionally, errors asserted by Mann are without substantive merit or are barred as being presented for the first time on appeal.

Accordingly, the trial court's dismissal of Mann's Motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

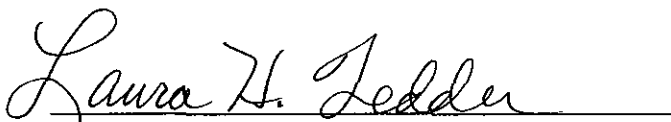
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 15th day of May, 2008.


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