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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BOBBY EARL WILSON, JR.

FILED

APPELLANT

VS.

MAR 19 2008

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

NO. 2007-CP-1541-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS.

NO. 2007-CP-1541-COA

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On August 5, 1994, Bobby Earl Wilson, Jr., "Wilson" pled guilty to burglary of an automobile shop before the Circuit Court of Warren County, the Honorable Frank Vollar presiding. C.P. 15-16. Wilson was given a five year "suspended" sentence under the supervision of the Mississippi Department of Corrections. C.P. 15-16.

On April 25, 1995, after a hearing with notice to Wilson, Wilson's probation was revoked. He was sentenced to serve another "suspended sentence" upon completion of a program at a "restitution center." C.P. 17-18.

On June 11, 2007, Wilson filed a hand written pro se Motion for Post Conviction relief. C.P. 4-12. On June 24, 2007, the trial court denied relief. C.P. 29.

From that denial of relief, Wilson filed notice of appeal to the Supreme Court. C.P. 32-33.

ISSUE ON APPEAL

I.

**WAS WILSON TIME BARRED BY THE POST CONVICTION
RELIEF ACT?**

II.

**WAS THERE ANY MERIT TO WILSON'S OTHER CLAIMS
INCLUDING INEFFECTIVE ASSISTANCE?**

STATEMENT OF THE FACTS

On August 5, 1994, Wilson was charged by information with burglary of an automobile shop under M. C. A. § 97-17-33 on or about June 28, 1994. C.P. 13-14.

On August 5, 1994, Wilson pled guilty to burglary of an automobile shop before the Circuit Court of Warren County, the Honorable Frank Vollar presiding. C.P. 13-14. He was represented by appointed counsel, Mr. Blake Teller. C.P. 13. Mr. Teller informed the trial court, Judge Frank Vollar, that Wilson “desires to waive indictment.” C.P. 13. He wanted to plead guilty to the burglary charge. C.P. 13. After advising Wilson, and questioning Wilson and his counsel about Wilson’s understanding of the nature of the charges and the consequences of his guilty plea, the trial court found that Wilson’s plea was voluntarily and intelligently entered. C.P. 15-16.

Mr. Wilson was given a five year “suspended” sentence under the supervision of the Mississippi Department of Corrections. C.P. 15-16.

On April 25, 1995, after a hearing with notice to Wilson, Wilson’s probation was revoked. C.P. 17-18. He was again given “a suspended sentence” upon “completion of a program at a restitution center.” After completion of the program, he was to be under supervised probation for the remainder of his original five year sentence. C.P. 17-18.

On June 11, 2007, Wilson filed a hand written pro se Motion for Post Conviction relief. C.P. 4-12. Wilson believed he received ineffective assistance of counsel for not having been granted a preliminary hearing. On June 24, 2007, the trial court denied relief. The trial court found that Wilson’s Motion was barred by the three year statute of limitation for filing for post conviction relief. C.P. 29.

From that denial of relief, Wilson filed notice of appeal to the Mississippi Supreme Court. C.P. 31-34.

SUMMARY OF THE ARGUMENT

1. The record reflects that Wilson was time barred by the Uniform Post Collateral Conviction Relief Act. **Campbell v. State**, 611 So. 2d 209, 211 (Miss. 1992). See M. C. A. §99-39-5(2). Wilson's "entry of the judgment of conviction" was entered on "August 5, 1994." C.P. 18. His hand written pro se "Motion for Post Conviction Relief" was filed on "June 11, 2007." C.P. 4-12. This was well over ten years, far more than three years "after entry of the judgment of conviction" under the statute of limitations as stated under M. C. A. § 99-39-5(2). Therefore, Wilson's motion, as correctly found by the Warren County trial court, was time barred. C.P. 29.

2. Wilson waived issues related to the effectiveness of his guilty plea counsel. Motion, page 1-12, Appellant's brief 1-12. He waived those issues because his motion for post conviction relief was time barred, as stated under proposition I. **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996). In addition, even if this issue was not waived, the record reflects no affidavits from any proposed witness to a hearing knowledgeable about Wilson's claims of deficient performance against his court appointed attorneys, Mr. Teller and Mr. Bonner. C.P. 4-24. See M. C. A. § 99-39-9 (1)(e).

The record contains neither evidence of any professional deficiency by his attorneys nor any prejudice to Wilson's defense to the charge(s) against him. Wilson is still incarcerated apparently as a result of both having his probation revoked as well as having faced additional felony charges. C.P. 19. His guilty plea counsel can not be faulted for Wilson's subsequent reckless behavior. In addition, the record reflects that Wilson's counsel, Mr. Teller, informed the trial court, Judge Frank Vollar, that Wilson "desires to waive indictment and plead guilty" to the burglary charge. C.P. 13. This was prior to his pleading guilty to burglary. This would appear to contradict one of Wilson's central factual claims in his pro se motion.

Wilson also waived due process and factual issues raised for the first time in his appeal brief.

Gardner v. State, 531 So. 2d 808-809 (Miss. 1988)

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT WILSON WAS TIME BARRED FOR FILING MORE THAN THREE YEARS AFTER ENTRY OF HIS JUDGMENT OF CONVICTION.

The record reflects that Wilson filed a pro se “motion for post conviction relief” on “June 11, 2007.” C.P. 4-12. Wilson believed that he had received ineffective assistance of counsel. Wilson complains that he was not given a preliminary hearing, and that his counsel did not properly advise him of the consequences of his guilty plea prior to his entering a guilty plea to the charge of burglary . Motion, page 4-12, Appellant’s brief 1-12.

The record reflects that Wilson pled guilty to burglary for which he was given a five year “suspended” sentence on “August 5, 1994.” C. P. 14. This was also the day his “entry of the judgment of conviction” was entered. C.P. 26.

The trial court’s Order denying relief found that Wilson’s hand written pro se motion was outside the time limits established by statute for filing for post conviction collateral relief.

Came on the motion for post conviction collateral relief and the court having reviewed said motion finds that the time limits for filing said motion has expired. C.P. 29. (Emphasis by Appellee).

In **Campbell v. State** , 611 So. 2d 209, 211 (Miss. 1992), the Supreme Court found that even if Campbell had not been time barred, the trial court properly denied his petition where Campbell had only his own allegations in support of his claims for relief.

Campbell’s petition stated that he alleged witness was not available to make an affidavit because he was incarcerated. Such mere allegation is insufficient to require the trial court to grant an evidentiary hearing. On the basis of Campbell’s pleading and the record in the prior proceedings, the trial court did not err in finding, without an evidentiary hearing, that Campbell had not made the requisite showing to entitle him to post-conviction relief. M. C. A. Sect. 99-39-11(2) and 99-39-19(1) and (2)(Supp. 1992).

The Appellee would submit that the record reflects that Campbell's pro se "Motion for Post Conviction relief" came more than ten years after entry of his judgment of conviction. R. 4-12; 18. In addition there were no affidavits in support of any of Wilson's complaints against his counsel. See M. C. A. § 99-39-9 (1)(e). Therefore, the trial court correctly found Wilson was barred by the statute of limitations included in the Uniform Post Conviction Collateral Relief act, M. C. A. §99-39-5(2). This issue is lacking in merit.

PROPOSITION II

WILSON'S CLAIM OF INEFFECTIVE ASSISTANCE WAS WAIVED AND HE DID NOT MET HIS BURDEN FOR ESTABLISHING HIS CLAIM.

Wilson complains in his motion with the trial court and in his appellant brief that he did not receive effective assistance of counsel from Mr. Blake Teller and Mr. Mike Bonner. He complains of a lack of a preliminary hearing, and inadequate advice and counsel about the evidence against him prior to his pleading guilty or attending a revocation hearing in the Circuit Court of Warren County. C. P. 4-24; Appellant brief page 1-13.

To the contrary, the record reflects that Wilson was given two five year suspended sentences. C.P. 15-16; 17-18. This was both his original sentence for pleading guilty to burglary, as well as his sentence after his probation was revoked. Wilson was incarcerated after these favorable court orders only after he failed to met the condition for his is probation and his participation in “a restitution program.” C.P. 17-18. His guilty plea or revocation plea counsel can not be faulted for Wilson’s subsequent actions which violated the favorable terms of his restitution program and/or his subsequent probation. C.P. 16.

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance was not enough to constitute an exception to the statute of limitations. As succinctly stated: “this court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar.”

Bevel raises a claim of ineffective assistance of counsel. It is conceivable that under the facts of a particular case, this Court might find that a lawyer’s performance was so deficient, and so prejudicial to the defendant, that the defendant’s fundamental constitutional rights were violated. However, this Court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court’s failure to advise a defendant of

maximum and minimum sentences does not implicate a “fundamental constitutional right” sufficient to except a case from the procedural bar of Sect 99-39-5.

The Appellee would submit that Wilson by raising unsubstantiated claims of ineffective assistance of counsel could not overcome the three year time limit for motions for post conviction relief. Nor was there any statement of “good cause why they(the affidavits)cannot be obtained.” See M. C. A. § 99-39-9 (1)(e).

Issues related to due process, or the factual proof in support of Wilson’s original burglary conviction or in support of his revocation for violations of the conditions of his probation or restitution program were waived when Wilson plead guilty.

In **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990)., the Court stated a guilty plea waives all non-jurisdiction issues in a proceeding against a defendant.

A valid guilty plea, however, admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant. See **Houston v. State**, 461 So.2d 720, 723 (Miss.1984); **Sanders v. State**, 440 So.2d 278, 283 (Miss.1983); **Winters v. State**, 244 So.2d 1, 2 (Miss.1971); **United States v. Diaz**, 733 F.2d 371, 376 (5th Cir.1984) (A valid guilty plea waives all non-jurisdictional defects in proceedings against a defendant);

...

Issues raised for the first time in Wilson’s appeal brief were waived for failure to raise them with the trial court. See Appellant’s brief page 1-12.

In **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

The issue regarding the constitutionality vel non of Sect. 97-1-1, M.C.A. (1972), was not raised in Gardner’s motion for post conviction relief and may not be raise now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983)

In addition, Wilson’s claim of not having been indicted or advised of his right to a

preliminary hearing is contradicted by the record.

And the State of Mississippi shows unto the Court that the said Defendant is represented by Counsel, to-wit: Honorable Blake Teller, and that said defendant through counsel, has informed the State of Mississippi that he desires to waive indictment and enter a plea of guilty to the crime herein charged, and to receive the sentence of the Court accordingly. C.P. 13.

In **Hebert v. State** 864 So.2d 1041, 1045 (¶ 11) (Miss. App. 2004), the Court relied upon **Meeks v. State**, 781 So.2d 109, 114(¶ 14) (Miss. 2001) in finding that granting a hearing on a motion is within the trial court's discretion. It need not be granted where assertions are contradicted by the record taken from a movant's guilty plea hearing.

¶ 11. It is noteworthy that Frank also alleges that he should have been afforded an evidentiary hearing before the circuit judge. A trial court has considerable discretion in determining whether to grant an evidentiary hearing. **Meeks v. State**, 781 So.2d 109, 114(¶ 14) (Miss. 2001). Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Jones v. State**, 795 So.2d 589, 590(¶ 3) (Miss. Ct. App. 2001). A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilt. **White v. State**, 818 So.2d 369, 371(¶ 4) (Miss. Ct. App.2002).

The Appellee would submit that the trial court correctly found that this issue was also lacking in merit.

CONCLUSION

The Appellee would submit that Wilson's appeal should be dismissed as time barred as well as lacking in merit for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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