

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHAWN MCLAURIN

APPELLANT

VS.

NO. 2008-CA-1251

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

SHAWN McLaurin

APPELLANT

vs.

CAUSE No. 2008-KA-01251-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Hinds County, Mississippi, First Judicial District, in which relief on the prisoner's petition for an out - of - time appeal was granted and relief upon his motion to set aside a prior Order of the court denying relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner filed a motion in post - conviction relief in the Circuit Court of Hinds County on 13 February 2003. In this motion, he alleged that he had been convicted of the felony of capital rape and sentenced to a term of life imprisonment, sentencing said to have occurred on 8 February 2000. The prisoner went on to allege that he had been represented by a certain attorney, that he was convicted of capital rape even though there was no physical evidence

connecting him to the felony, that he was convicted even though his identity as the perpetrator was allegedly contrary to physical evidence admitted by the victim, and that there were material facts not previously presented which required vacation of “her” sentence. The prayer for relief was for a review and reconsideration of the sentence. (R. Vol. 1, pp. 7 - 10).

Relief on this motion was denied, without an evidentiary hearing, on 6 July 2004. (R. Vol. 1, pg. 11). However, on 12 January 2007, the cause was re-assigned to another judge of the Circuit Court. (R. Vol. 1, pg. 12 - 13). There is nothing in the record to explain the reason this previously dismissed cause was re-assigned.

By Order dated 2 April 2008, the Circuit Court granted relief on a filing entitled “Petition for an Out of time Appeal and to Set Aside Order Dismissing Motion for Post Conviction Relief or, New Trial.” Whatever filing that was does not appear in the record in the case at bar, however. The relief granted was an out - of - time appeal. The court denied relief on a request for a new trial and denied relief on the request that the Order previously entered with respect to the motion in post - conviction relief be set aside. (R. Vol. 1, pp. 17 - 18). In this Order, the court made reference to “extensive briefing, affidavits and exhibits,” and further indicated that the State never replied to the prisoner’s petition or objected to the relief prayed for therein. The “extensive briefing, affidavits and exhibits” referred to are not a part of this record.

On 29 April 2008, the prisoner filed a notice of appeal, in which he indicated that he appealed from so much of the 2 April 2008 Order that denied relief on the request that the Order denying relief on the motion in post - conviction relief be set aside. (R. Vol. 1, pp. 19 - 20).

On 18 June 2008, the Mississippi Supreme Court granted the Appellant an out - of - time appeal in *McLaurin v. State*, 2008-M-0814. (R. Vol. 1, pg. 72). We assume that the appeal granted is *McLaurin v. State*, 2008-KA-00814-COA (Not Yet Decided), which is currently

pending before this Court.

The record before the Court also shows that the prisoner filed a “Motion to Quash Indictment” in September, 2003, in which the prisoner attacked the indictment on various grounds. (R. Vol. 1, pp. 53 - 64). The Circuit Court denied relief on that motion, finding that the prisoner had been convicted on 9 February 1999 and that the time in which to appeal or file a motion in post - conviction relief had expired. It also found that the allegations of the motion were without merit. (R. Vol. 1, pg. 66).

STATEMENT OF ISSUES

1. IS THE RECORD IN THE CASE AT BAR SUFFICIENT TO SUPPORT THE PRISONER’S CLAIM OR CLAIMS OF ERROR; IS THE INSTANT APPEAL OR ISSUES THEREIN PROPERLY BEFORE THE COURT?

SUMMARY OF ARGUMENT

THAT THE RECORD IN THE CASE AT BAR IS INSUFFICIENT TO SUPPORT THE PRISONER’S CLAIM OR CLAIMS OF ERROR; THAT THE INSTANT APPEAL OR ISSUES THEREIN IS NOT PROPERLY BEFORE THE COURT

ARGUMENT

THAT THE RECORD IN THE CASE AT BAR IS INSUFFICIENT TO SUPPORT THE PRISONER’S CLAIM OR CLAIMS OF ERROR; THAT THE INSTANT APPEAL OR ISSUES THEREIN IS NOT PROPERLY BEFORE THE COURT

The appeal at bar is a convoluted one. It is difficult to know quite where to begin in sorting it out. Perhaps it would be helpful to bear in mind what the prisoner wants of this Honorable Court while sorting this appeal out. He wants this Court to reverse the Circuit Court’s order to the extent that order denied relief on his request to have the prior order denying relief in post - conviction relief set aside. The prisoner would have this Court permit him to “amend and supplement his previously filed motion [in post - conviction relief] or, alternatively, file a new action for post conviction relief and proceed in an out of time manner.” (Brief for the prisoner, at

22). He wants this relief even though he has a direct appeal pending, an appeal which includes the very issues of ineffective assistance of counsel he alleges in this appeal. It appears that the prisoner wants to litigate the effectiveness of his trial attorney contemporaneously in this Court and in the Circuit Court.

1. Ineffective assistance of counsel claims

According to the prisoner, in his "Statement of Issues," the issue presented is whether the Circuit Court erred in refusing to set aside the prior Order denying relief on the motion in post - conviction relief. (Brief for the prisoner, at 1). It should be recalled, though, that there are only two such orders shown by the record. The motions to which they were directed did not allege ineffective assistance of counsel except in one respect, that being the alleged failure of the trial attorney to perfect an appeal. The prisoner has been granted a direct appeal.

However, when one arrives at the prisoner's argument here, one finds that he alleges numerous instances of ineffective assistance of counsel, instances said to have occurred not only in the process of filing an appeal, but also in the trial of the case against the prisoner. He even goes so far as to allege ineffective assistance of counsel on the appellate level, notwithstanding the fact that, so far as we can see, the only appeal the prisoner took is the one presently pending before the Court. (Brief for the Appellant, at 6 - 12). None of those issues was alleged in the February, 2003 filing; indeed, the prisoner did not ask that his conviction be vacated on account of ineffective assistance of counsel.

Now, the first difficulty with this is that, so far as the record shows, the only possible claim of ineffective assistance of counsel alleged was that the prisoner's trial attorney failed to perfect an appeal. But even then, the prisoner did not seek an out - of - time appeal; what he sought was simply a review of his sentence. (R. Vol. 1, pg. 8). If there was a subsequent motion

or petition filed alleging these particular instances of ineffective assistance of counsel raised here, the prisoner, through counsel, did not see to it that it was included in the record.

The problem with any subsequent motion based on ineffective assistance of counsel, had one been filed which alleged the ineffective assistance of counsel claims alleged here, would have been that it would have been barred by the successive writ bar, Miss. Code Ann. Section 99-39-23(6) (Supp. 2008), and the statute of limitations, Miss. Code Ann. 99-39-5(2) (Rev. 2007). This in addition to the fact that the February, 2003 filing was itself time - barred.

Since the record does not show that these numerous instance of alleged ineffective assistance of counsel raised here were raised and ruled upon, the Circuit Court cannot be put in error. A Circuit Court cannot be put in error on issues never presented to it. *Austin v. State*, 971 So.2d 1286 (Miss. Ct. App. 2008). In addition to this, this Court has nothing to review, the record being entirely insufficient to demonstrate that the court below had ineffective assistance of counsel claims before it. As for the one claim that the record does show was made, the prisoner has a direct appeal pending before this Court. In other words, that particular claim was mooted by the granting of an out - of - time appeal.¹ And all of this despite the fact that the prisoner's

¹ The granting of the out - of - time appeal by the Circuit Court is itself a strange thing. While the Uniform Post Conviction Relief Act does authorize the grant of an out - of - time appeal, Miss. Code Ann. Section 99-39-5(1)(h) (Rev. 2007), the request for one is subject to the three - year statute of limitations, the successive writ bar, and the doctrines of res judicata and collateral estoppel. No exception to that statute of limitations and the successive writ bar would appear to be applicable to a request for an out - of - time appeal. In any event, the record does not show that any exception was asserted. The statute of limitations had long passed by the time the Circuit Court considered and granted the out - of - time appeal. The Circuit Court should have so ruled. To the extent that there was some filing that is not included in this record, then the court should have denied relief on the basis of the successive writ and time bar as well.

The Circuit Court, in its order granting the out - of - time appeal, merely stated that there was no objection or position expressed by the State. However, it is hardly clear that the State was ever aware of the pendency of the prisoner's request. A shadowy statement to the effect that there was no objection expressed by the State does not demonstrate that the State was ever

2003 motion was not filed in a timely fashion.

It was the prisoner's duty to see to it that the record supports the claims made here by him. Where an appellant fails to do so, the lower court's order will be affirmed. *Ross v. State*, 936 So.2d 983 (Miss. Ct. App. 2006). Because the record does not demonstrate that these ineffective assistance of counsel claims raised here were raised in the trial court, they may not be raised here.

The prisoner has not attempted to show error on other grounds in the Circuit Court's refusal to set aside a prior denial of relief in post - conviction relief. There is no basis, then, to disturb the lower court's ruling in this respect.

2. The prisoner's account of how he attempted to "perfect" his post - conviction relief motion

Beginning at page thirteen of the prisoner's brief, the prisoner begins a long tale of woe

requested to respond pursuant to Miss. Code Ann. Section 99-39-11(3) (Rev. 2007). The prisoner should not have been granted relief without the State having first had the opportunity to respond.

If in fact the Circuit Court did not request a response from the State, as it should have done prior to granting relief, then we invoke here the statute of limitations and the successive writ bar as to the prisoner's motion in the Circuit Court, and here.

However, complicating the matter further is the odd Order by the Mississippi Supreme Court granting an out - of -time appeal. We have no idea of what to make of it since the Circuit Court had already granted that relief. It seems to us that the Supreme Court's Order was superfluous in light of the Circuit Court's order and should be treated as such. The Supreme Court's Order was in some way based upon Rule 4 MRAP, but how that rule gave the Supreme Court jurisdiction to consider whether to grant an appeal is a thing which will probably remain a mystery. None of the provisions of that rule appears to have any application under the facts of the case at bar.

On thing about the Supreme Court's Order should be clear, though, when one reads the prisoner's "Conclusion" in the pleading he filed in the Supreme Court in cause No. 2008-M-0814. At page 6 of that pleading, the prisoner prayed the Court to "...consider and ratify the Order of the Hinds County Circuit Court which finds that there are grounds for allowing the defendant to pursue an out of time direct appeal". (Emphasis added). This is what the Supreme Court granted – an out of time direct appeal, even though that had already been granted by the Circuit Court. By way of contrast, it did not grant an appeal from so much of what the Circuit Court denied in the way of relief. The prisoner did not seek that relief.

about his troubles in filing a motion in post - conviction relief, which he says he filed in an attempt to obtain an out - of - time appeal even though that was not the relief he sought. (Brief for the prisoner, at 13 - 17). This account is filled with facts not supported by the record. This Court has often stated that facts alleged by counsel must be supported by the record. Where counsel alleges a fact which has no support in the record, that allegation of fact is to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). These facts alleged here are to be ignored, and we move to strike them from the prisoner's brief.

Beyond this, since the prisoner has a direct appeal pending before this Court, an appeal in which he has raised ineffective assistance of counsel, we fail to see why these issues should be addressed on this appeal.

3. The prisoner's record excerpts

We also note that the prisoner's record excerpts contain nothing included in the record. Much of it appears to be a trial transcript or a part of one. There are affidavits and pictures and a number of other items, none of which are part of the record in this appeal certified by the circuit court clerk.

There is no authority under Rule 30 MRAP to include in the record excerpts materials that are not part of the record, except in the case of a *pro se* inmate appeal. Here, the prisoner is represented by counsel. We move to strike the prisoner's record excerpts to the extent they are not found in the record.

4. That, holding aside that there is a direct appeal of the prisoner's pending, the prisoner is time barred and successive writ barred from pursuing an action in post - conviction relief

The record demonstrates that the prisoner filed motions in post - conviction relief on 13 February 2003 and 13 September 2003. (R. Vol. 1, pp. 7 ;53). He was convicted and sentenced

on 8 February 2000. (R. Vol. 1, pg. 48). An attorney filed the 13 February 2003 motion; consequently, the “prison mailbox rule” does not potentially apply. The February filing was five days late.

The three year statute of limitation applicable to post - conviction relief actions had expired. Even had the Circuit Court for some reason set aside the July, 2004 Order denying relief on the motion, the statute of limitation would bar relief in favor of the prisoner on the February motion. If for some reason the court had set aside the Order, and was of the view that an evidentiary hearing might be called for, the court would have had a duty to ask the State for a response. The State undoubtedly would have invoked the statute of limitation. So would it now, and does, and in the event that this Court should reverse and remand this case, so shall it invoke it in the Circuit Court upon remand. There is, then, no purpose to be served in considering the prisoner’s arguments on this appeal. They are barred, and no exception to the statute of limitation has been argued by the prisoner, and none exist to his benefit.

As for the *pro se* September, 2003 filing, the statute of limitation and the successive writ bar apply to it. The prisoner was seven months late in his filing, and he urged no grounds in an effort to excuse his extreme tardiness. The filing was simply too late. *Prather v. State*, 2007-CP-01452-COA (Decided 14 October 2008, Not Yet Officially Reported).

Any filing after the expiration of the statute of limitations, whenever filed, would have been or was time - barred and barred by the successive writ bar.

5. That the prisoner may not proceed in post - conviction relief while his direct appeal is pending

As we have pointed out above, the prisoner has a direct appeal pending at this time. The particular instances of alleged ineffective assistance of counsel raised here are raised in that appeal, as a review of the prisoner’s brief in that cause will reveal.

What the prisoner would have this Court do is to permit him to have the Circuit Court consider the same claims of ineffective assistance of counsel as this Court will do. This is an absurd request. If this Court should find for or against the prisoner on his direct appeal, what purpose would be served in having the Circuit Court review the claims as well? And what a state of affairs it would be if the Circuit Court found merit in one or more claims after this Court found no merit in them, or vice versa. Is it to be that the Circuit Court will have the authority to second - guess this Court?

This conundrum has been foreseen, fortunately. In *Connell v. State*, 691 So.2d 1004 (Miss. 1997), the Mississippi Supreme Court held that a trial court correctly dismisses a motion in post - conviction relief where there is pending a direct appeal of the same conviction involved in the post - conviction filing. Now, it may be that the facts are somewhat different here in that the prisoner is appealing so much of an order in post - conviction relief that denied him a post - conviction action in the trial court while granting an out - of - time appeal, but we submit that *Connell* stands for the proposition that an action in post - conviction relief may not be instituted in a circuit court while there is a direct appeal pending concerning the same conviction in the appellate courts.

One important reason for the decision in *Connell* was that the Circuit Court lacked jurisdiction in the case while the case was in the appellate courts. The same is true here: When the prisoner was granted an out - of - time appeal, and filed his notice of appeal, the filing of the notice conveyed jurisdiction of the case to the Mississippi Supreme Court. Consequently, the Circuit Court of Hinds County has no jurisdiction to entertain these claims while the appellate courts exercise jurisdiction.

Direct appeal is the principal means of reviewing criminal convictions. Miss. Code Ann.

Section 99-39-3(2) (Rev. 2007). No post - conviction relief action should be considered by the Circuit Court until such time it regains jurisdiction and until such time as the prisoner is authorized to proceed in the trial court under Miss. Code Ann. Section 99-39-27 (Supp. 2008).

6. That there is no need here to address the prisoner's ineffective assistance of counsel claims on the merits

Aside from the many deficiencies with this appeal, pointed out above, there is no need to consider the ineffective assistance of counsel claim here. The prisoner has got his direct appeal, in which those claims were also raised. They have been addressed there. That ought to be entirely sufficient. As for the prisoner's claim that there is no existing avenue for relief (Brief for the prisoner, at 17), this is manifestly untrue since he has got his appeal.

7. That the prisoner has not been denied "meaningful recourse" on appeal

The prisoner natters on about an alleged denial of the right to pursue an action in post - conviction relief in order to litigate the question of his trial attorney's effectiveness. (Brief for the prisoner, at 17 - 19). This is neither here nor there in light of the direct appeal and in light of the potential application of Section 99-39-27 in the event that this Court should affirm his conviction and sentence on direct appeal.

The prisoner asserts that effective assistance of counsel is a fundamental right and that the denial of same ought to be reason to ignore the statute of limitations appurtenant to an action in post - conviction relief. Again, since the prisoner has his appeal, in which the issue of ineffectiveness has been raised, the point is otiose.

We will note, though, the logical absurdity of attempting to state that the denial of effective assistance of counsel is good cause to ignore a statute of limitation. As the Court well knows, counsel is presumed to have rendered effective assistance of counsel. That presumption

stands until a court finds otherwise. What this prisoner is trying to say is that his mere claim of ineffective assistance of counsel should be good cause to ignore the statute of limitations. Yet, it has never been, to our knowledge, that an allegation has ever been of itself cause to allow a court to ignore a statute of limitation. The prisoner would have this Court assume that, if allowed a hearing in the trial court, the trial court would find that counsel was ineffective. Because the trial court would so find, in the prisoner's opinion, then the result that he says would be found is cause itself to ignore the statute of limitations and cause to find that the presumption of effective assistance of counsel has been overcome. It is a matter of getting the cart before the horse.

There is no authority that the statute of limitation may be ignored because the claim raised is ineffective assistance of counsel. *Chancy v. State*, 938 So.2d 267, 270 (Miss. Ct. App. 2005). It is true that the Court in *Chancy* (or *Chancey*, as the prisoner would have it) noted that the Mississippi Supreme Court has opined that there might be occasions in which the statute of limitation might be ignored on such a claim, but here there is nothing to support the prisoner's claims, the record being wholly insufficient for the purpose. It will, in any event, be a matter for the Supreme Court to determine whether and how the statute of limitation may be ignored on a claim of this kind.

Beside these considerations is the fact that these claims were not raised in the Circuit Court so far as the record shows. Furthermore, the motions in post - conviction relief that are of record are wholly lacking in affidavits. *Chancy* is no authority to support the prisoner's position.

CERTIFICATE OF SERVICE

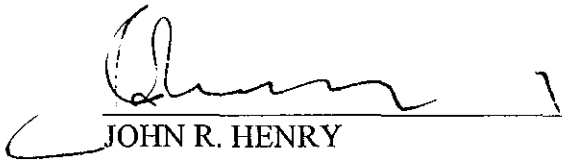
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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