

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEWIS E. WALTON

APPELLANT

VS.

NO. 2008-CP-0369

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**

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LEWIS E. WALTON

APPELLANT

vs.

CAUSE No. 2008-CP-00369-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 DeSoto County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

STATEMENT OF FACTS

The prisoner was indicted by a grand jury in the August 2005 term of the Circuit Court of DeSoto County, Mississippi in twelve counts alleging sexual battery or fondling of a child of fourteen years of age but under sixteen years of age. (R. Vol. 1, pp. 53 - 57). On 25 April 2006, the prisoner filed his "Petition to Enter Plea of Guilty", in which he stated that he wished to enter pleas of guilty to one count of sexual battery and one count of fondling. (R. Vol. 1, pp. 62 - 67). After the usual enquiry by the Circuit Court, the prisoner's pleas were accepted and he was

convicted of the offenses. (Vol. 1, pp. 68 - 69; Vol. 2).¹

On 2 October 2007, the prisoner filed a motion in post - conviction relief, in which he challenged, apparently both convictions. The grounds raised for relief were: (1) that he did not penetrate the victim; (2) that his attorney rendered ineffective assistance of counsel; (3) that the trial court failed to inform the prisoner that he would be ineligible for early release; and (4) that he was denied a speedy trial. (R. Vol. 1, pp. 6 - 30). The Circuit Court, in a detailed finding of fact and conclusion of law entered on 2 January 2008, denied relief on the prisoner's motion without an evidentiary hearing. (R. Vol. 1, pp. 36 - 39).

On 25 February 2008, the prisoner filed his notice of appeal. In that notice, he stated that he received the Circuit Court's order denying relief on the motion in post - conviction relief on 15 January 2008. (R. Vol. 1, pg. 40). The prisoner's designation of record, also filed 25 February 2008, was signed by him on 13 February 2008 as well as his "Motion to Proceed *in forma pauperis.*, affidavit of poverty, authorization for release of institution account information. (R. Vol. 1, pg. 41 - 48). The last document was received by the penal institution's inmate banking department on 22 February 2008. (R. Vol. 1, pg. 49).

STATEMENT OF ISSUES

- 1. IS THE INSTANT APPEAL PROPERLY BEFORE THIS HONORABLE COURT?**
- 2. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?**

¹ The prisoner was also convicted and sentenced upon his pleas of guilty to other charges of fondling and sexual battery. (R. Vol. 2, pg. 65 - 66). However, the motion for post - conviction relief involved in the case at bar sought relief was restricted to two convictions arising from two counts of one of the indictments exhibited against the prisoner. (R. Vol. 1, pg. 36).

SUMMARY OF ARGUMENT

- 1. THAT THE INSTANT APPEAL IS NOT PROPERLY BEFORE THE COURT**
- 2. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

ARGUMENT

- 1. THAT THE INSTANT APPEAL IS NOT PROPERLY BEFORE THE COURT**

As we have pointed out in our "Statement of Facts", the prisoner, by his own admission, received the order denying relief on his motion in post - conviction relief on 15 January 2008. The order itself was entered on 2 January 2008. The notice of appeal, though, was not filed until 25 February 2008; all of the other documents filed on that date by the prisoner clearly show that he did not execute those documents until 13 February 2008, this both by the prisoner's statements and the notary public's statement as to the date the prisoner swore to those documents.

Under Rule 4(a) MRAP, the prisoner had thirty days from 2 January 2008 in which to file his notice of appeal, that date having been the date of entry of the order. Since there was a State holiday during the time between 2 January 2008 and February 2008, that holiday occurring on 21 January 2008, we calculate that the prisoner's last day to file his notice of appeal was on 2 February 2008. However, that day was a Saturday, so the actual final date by which to file the notice of appeal would have been Monday, 4 February 2008. It is quite clear that the prisoner was in receipt of the Circuit Court's order no later than 15 January 2008. The prisoner failed to file his notice of appeal in the time provided by Rule 4 MRAP.

Our attempts to reach the custodian of the prisoner inmate mail log have thusfar been unavailing. Consequently, we are unable to provide a certificate of the custodian as of the filing

of this brief, as requested by this Honorable Court in *Jewell v. State*, 946 So.2d 810 (Miss. Ct. App. 2006). However, under *Prather v. State*, No. 2007-KA-01452-COA (Miss. Ct. App., Decided 14 October 2008, Not Yet Officially Reported), the Court found that it lacked jurisdiction to entertain that appeal on the basis of the dates indicated in that prisoner's filings in the Circuit Court, without reference to a certificate by the custodian of the prison inmate logs. The same result should obtain here. Nonetheless, we shall endeavor to obtain such a certificate and, if successful, will move to supplement this brief with it.

The case at bar is a civil case. Miss. Code Ann. Section 99-39-7 (Rev. 2007); *Cook v. State*, 921 So.2d 1282 (Miss. Ct. App. 2006). Under Rule 2(c) MRAP the time in which to take an appeal may not be extended in civil cases. Unless the prisoner can demonstrate that he filed his notice of appeal with prison authorities within the time allowed to file a notice of appeal, the instant appeal should be dismissed for want of jurisdiction.

2. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

This Court will not disturb the Circuit Court's decision to deny relief on a motion in post - conviction relief absent a finding that the Circuit Court was clearly erroneous. *Cogle v. State*, 966 So.2d 827 (Miss. Ct. App. 2007). As we have stated above, the Circuit Court extensively considered the prisoner's claims and found them to be without merit. (R. Vol. 1, pp. 36 - 39). We have reviewed the Circuit Court's analysis and findings and are in agreement with them. We adopt them here as our response to such of those claims raised here that were raised in the motion for post - conviction relief.

However, it appears that the prisoner has attempted to raise issues here that he did not raise in the Circuit Court. Specifically, he appears to attempt to assert a disproportionality claim

with respect to his sentences (Brief for the prisoner at 6). To the extent that the prisoner may present or has presented issues not contained in the motion filed in the Circuit Court, they are not properly before this Court.

In addition to the Circuit Court's ruling, we will briefly point out several matters. First, as noted by the Circuit Court, the prisoner did not support his claim of ineffective assistance of counsel with affidavits. The failure to so support the claim worked a fatal defect with regard to that claim, especially where, as here, an accused expresses satisfaction with his attorney in the course of the plea colloquy (R. Vol. 2, pg. 17). *Ealey v. State*, 967 So.2d 685 (Miss. Ct. App. 2007). While the prisoner claims that his lawyer did not investigate the case and so on, he does not identify a single witness or item of evidence the attorney failed to investigate.

The prisoner claims that a factual basis for his pleas was not presented during the plea colloquy. This claim is wholly belied by the record of that colloquy. (R. Vol. 2, pp. 6 - 7). Moreover, the prisoner stated that he did not disagree with the prosecutor's statements as to what the State would prove; in fact, the prisoner stated, under oath, that he committed these felonies. (R. Vol. 1, pp. 8; 15 - 17). Since the prisoner admitted his guilt, this was not an *Alford* plea. *Cogle v. State*, 966 So.2d 827 (Miss. Ct. App. 2007).

The prisoner also appears to allege that he was not told that he would be ineligible for any form of early release. In addition to the analysis provided by the Circuit Court with respect to this claim, we would point out that the prisoner was so informed. (R. Vol. 2, pp. 12 - 13; Vol. 1, pg. 65).

To the extent that the prisoner claims that he was misled as to what sentence he was going to receive, the record clearly shows that the prisoner's plea was an "open plea". (R. Vol. 1, pg. 65). The only recommendation the State was prepared to make was that the sentences

imposed under the “newer” indictment be served concurrent with those in the case at bar. The prisoner stated that he understood that that would be the recommendation, understood that the Circuit Court was not bound by that recommendation, understood the maximum sentences imposable, and that there was no specific sentence agreed to by the prosecutor and his attorney. (R. Vol. 2, pp. 13 - 15).

As for the other claims of ineffective assistance of counsel, there was nothing at all presented to the Circuit Court to suggest that the prisoner’s attorney failed to investigate the case and otherwise provide effective representation beyond the prisoner’s mere allegation. This allegation, as we have said above, was insufficient to require an evidentiary hearing. There is nothing to demonstrate mistaken advice by the attorney, nothing to show that evidence in mitigation of the felonies was available beyond that which was presented to the Circuit Court in sentencing

The plea colloquy clearly shows that the prisoner entered a knowing and voluntary plea of guilty.


CONCLUSION

The order of the Circuit Court in which relief was denied on the prisoner's motion in post
- conviction relief 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 Robert P. Chamberlin
Circuit Court Judge
P. O. Box 280
Hernando, MS 38632

Honorable John W. Champion
District Attorney
365 Loshier Street, Suite 210
Hernando, MS 38632

Lewis E. Walton, #120704
Central Mississippi Correctional Facility (C.M.C.F.)
Post Office Box 88550
Pearl, Mississippi 39288

This the 4th day of November, 2008.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

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