

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MERVIN SANDERS

APPELLANT

VS.

NO. 2008-CP-1052

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S "MOTION UNDER MISSISSIPPI RULES OF CIVIL PROCEDURE 60B(4) MISSISSIPPI CODE JUDICIAL CONDUCT V CANON 3C(1)(A) TO VACATE AND SET ASIDE CONVICTION AND SENTENCE."

STATEMENT OF THE FACTS

The Appellant, Mervin Sanders, was convicted of possession of cocaine with intent to deliver and on November 11, 1991 was sentenced as a habitual offender to pay a fine of \$30,000.00 and to serve thirty years without parole, probation, good time, or early release. He directly appealed this conviction raising the following issues: 1) whether the lower court erred in refusing to suppress evidence found during the warrantless search of his vehicle; 2) whether the lower court erred in allowing the State to introduce evidence of prior illegal acts; 3) whether his sentence was disproportionate to his crime; and 4) whether he was denied his right to a speedy trial. His

conviction and sentence were affirmed by the Mississippi Supreme Court on June 16, 1996. *Sanders v. State*, 678 So.2d 663 (Miss. 1996).

On April 28, 1998, the Appellant filed an Application for Leave to File a Motion for Post-Conviction Relief in the Circuit Court. Leave was granted on October 16, 1998. The Appellant then filed his Petition for Post-Conviction Relief and subsequently filed a Motion for Summary Judgment on the issues raised. The State filed a Cross-Motion for Summary Judgment. The circuit court granted the State's Cross-Motion for Summary Judgment. The Appellant appealed that decision raising the following issues: 1) whether the circuit court erred in refusing to deem admitted the facts contained within the requests for admissions filed with the State; 2) whether the circuit court erred in refusing to grant him an evidentiary hearing on the issues raised in his Petition for Post-Conviction Relief; 3) whether the actions of the MBN were so offensive that his discharge was required; 4) whether he was subjected to involuntary servitude or peonage; 5) whether his right to a speedy trial was violated; 6) whether he was denied his Fourth Amendment right to be free from unreasonable search and seizure; 7) whether he was denied due process of law in that he was denied a fundamentally fair pre-trial and trial process; 8) whether he was denied effective assistance of counsel; and 9) whether the circuit court abused its discretion when it refused to appoint Mr. Robertson as his counsel. The circuit court's decision to grant the State's Motion for Summary Judgment was affirmed on June 25, 2002. *Sanders v. State*, 846 So.2d 230 (Miss. Ct. App. 2002).

In 2005, the Appellant filed a Motion to Vacate and Set Aside his Conviction and Sentence. This motion was denied. The Appellant appealed this decision as well arguing that his sentence as a habitual offender was illegal as it was based on a conviction in 1983 which was illegal because he was not represented by counsel at a probation revocation hearing. On November 14, 2006, this Court upheld the denial of the Appellant's motion as it was time barred and as he did not have the

right to counsel at his parole revocation hearing. *Sanders v. State*, 942 So.2d 298 (Miss. Ct. App. 2006).

On February 22, 2008, the Appellant filed a “Motion Under Mississippi Rules of Civil Procedure 60B(4) Mississippi Code Judicial Conduct V Canon 3C(1)(A) to Vacate and Set Aside Conviction and Sentence.” (Record p. 6). In this Motion the Appellant argues that the circuit court should “vacate the judgment on the ground that Judge Joe N. Pigott was disqualified under Mississippi Code Judicial Conduct Canon 3c(1) at the time he heard this action in favor of the State of Mississippi and moves this Honorable Court to vacate and set aside the conviction and sentence for possession of cocaine with intent to deliver on October 31, 1991 and sentence with enhanced punishment and as an habitual offender on November 6, 1991.” (Record p. 10). The basis for this argument is “that Judge Joe N. Pigott was the judge in four (4) prior litigation” involving the Appellant. (Record p. 13). The Appellant’s Motion was denied on September 10, 2008 by an Order holding, in part, that “there is no evidence in the record that Judge Pigott was or should have been disqualified from hearing this case.” (Record p. 439 - 440). This Order is the subject of the Appellant’s current appeal.

SUMMARY OF THE ARGUMENT

A criminal conviction may not be set aside pursuant to Mississippi Rule of Civil Procedure 60(b) as the Post Conviction Collateral Relief Act is the exclusive procedure for the collateral review of criminal convictions and sentences. Additionally, assuming for the sake of argument that the Appellant could use a 60(b) motion to collaterally attack a criminal conviction and sentence, the circuit court did not abuse its discretion in denying the Appellant’s Rule 60(b)(4) motion as it was not timely filed and as the Appellant failed to make an adequate showing of exceptional circumstances which would warrant the circuit court’s granting the motion.

ARGUMENT

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S "MOTION UNDER MISSISSIPPI RULES OF CIVIL PROCEDURE 60B(4) MISSISSIPPI CODE JUDICIAL CONDUCT V CANON 3C(1)(A) TO VACATE AND SET ASIDE CONVICTION AND SENTENCE."

The Appellant filed the motion at issue pursuant to Mississippi Rule of Civil Procedure 60(b)(4) which states that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . the judgment is void." This Court has previously held that "[w]hen reviewing a lower court's denial of a Rule 60(b) motion, we will reverse only if the lower court abused its discretion in denying the motion." *Cook v. State*, 921 So.2d 1282, 1283 (Miss. Ct. App. 2006) (citing *Askew v. Askew*, 699 So.2d 515, 519 (Miss.1997)) (*emphasis added*).

A. A criminal conviction may not be set aside pursuant to Mississippi Rule of Civil Procedure 60(b) as the Post Conviction Collateral Relief Act is the exclusive procedure for the collateral review of criminal convictions and sentences.

Mississippi Code Annotated §99-39-3 states that the purpose of the Post Conviction Collateral Relief Act is to "revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences." (*emphasis added*). The State recognizes that this Court held in *Cook v. State*, that "Mississippi courts have applied Rule 60(b) in several criminal cases" and declined to "establish a rule preventing such application in all criminal cases." 921 So.2d 1282, 1283 (Miss. Ct. App. 2006). Certainly, Rule 60(b) may be applied to certain judgments entered denying or granting Petitions for Post Conviction Relief since a post-conviction petition is filed as an original civil action and "it is not inappropriate to apply the rules of civil procedure to post-conviction relief matters." *Henry v.*

State, 999 So.2d 867, 870 FN3 (Miss. Ct. App. 2008). However, as set forth above, the Post Conviction Collateral Act is the exclusive method for collaterally attacking a criminal judgment and sentence. As such, the Appellant's 60(b) motion could have been denied solely on this ground as it sought to collaterally attack the Appellant's 1991 criminal conviction and sentence.

B. The Appellant's motion was not timely.

Assuming for the sake of argument that the Appellant could use a 60(b) motion to collaterally attack a criminal conviction and sentence, the motion was not timely filed. Rule 60(b) states that "the motion shall be made within a reasonable time." The judgment the Appellant seeks to vacate was entered on November 11, 1991, approximately seventeen years prior to his filing the 60(b)(4) motion. The facts which are the basis of his 60(b)(4) motion were known to Appellant at the time the judgment was entered. Thus, there was no reason for the delay. Further, the motion was filed only after the Appellant's direct appeal was denied, his Petition for Post-Conviction Relief was denied, and his Motion to Vacate and Set Aside his Conviction and Sentence was denied. It appears that the Appellant's Motion is simply one last effort to avoid serving the sentence imposed for his crime. Consequently, the Appellant's motion was not timely filed.

C. The Appellant failed to make "an adequate showing of exceptional circumstances."

Again assuming for the sake of argument that the Appellant could use a 60(b) motion to collaterally attack a criminal conviction and sentence, the motion did not substantively prove what is required for relief. "[T]he general rule is that Rule 60(b) provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.... A party is not entitled to relief merely because he is unhappy with the judgment...." *Cook v. State*, 921 So.2d 1282, 1283 (Miss. Ct. App. 2006) (quoting *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss.1984)) (*emphasis added*). As noted above, the Appellant's motion was filed pursuant to Rule 60(b)(4)

which allows for the setting aside of void judgments. This Court previously held in *Harvey v. Stone County School Dist.* that “[a] judgment is void if ‘the court that rendered it lacked jurisdiction of the subject matter of the parties, or if it acted in a manner inconsistent with due process of law.’” 982 So.2d 463, 468 (Miss. Ct. App. 2008) (quoting *Soriano v. Gillespie*, 857 So.2d 64, 69 (Miss. Ct. App. 2003)). The Appellant does not suggest that the circuit court lacked jurisdiction so the focus is on whether the court acted in a manner inconsistent with due process of law. The *Harvey* Court held in that regard that “due process is satisfied where there is notice and an opportunity to be heard.” *Id.* at 468 - 469 (quoting *State v. Blenden*, 748 So.2d 77, 90 (Miss.1999)). The Appellant does not suggest that he was not given notice or an opportunity to be heard. In fact, the judgment which is the subject of the motion has previously been upheld by the Mississippi Supreme Court holding that there were no reversible errors. Moreover, the *Harvey* Court further held that “a due process violation so gross as to make the judgment void is extremely rare.” *Id.* at 469 (quoting *Bryant, Inc. v. Walters*, 493 So.2d 933, 938 (Miss.1986)) (*emphasis added*).

Nonetheless, the Appellant argues that his motion should have been granted as Judge Joe Pigott should have been disqualified from presiding over his 1991 criminal trial and from sentencing him for that conviction due to his involvement with the Appellant’s prior criminal proceedings. The Appellant claims that Judge Pigott presided over his trial in violation of several Canons of the Code of Judicial Conduct. The crux of his argument is that Judge Pigott should not have presided over his 1991 trial and sentencing hearing as he had previously presided over the Appellant’s prior criminal proceedings including, but not limited to, a parole revocation hearing. Mississippi law is well-settled in this area and provides that “[a] judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.” *King v. State*, 821 So.2d 864, 868 (Miss. Ct. App. 2002) (quoting *Hunter v. State*, 684 So.2d 625, 630

(Miss.1996)). Additionally, the party challenging the judge has to overcome the presumption “that a judge, sworn to administer impartial justice, is qualified and unbiased.” *Id.* In the case at hand, the Appellant did not overcome this presumption especially in light of the Mississippi Supreme Court’s holding in *Brown v. State*, wherein the Court held that “[a] judge is not disqualified to sit at the trial of one accused of crime merely because previously thereto he has participated in other legal proceedings against the same person.” 829 So.2d 93, 99 (Miss. 2002) (quoting *Adams v. State*, 72 So.2d 211, 214 (Miss. 1954)). See also *King v. State*, 897 So.2d 981, 987-88 (Miss. Ct. App. 2004).

Additionally, this issue could have been properly handled during the Appellant’s direct appeal or in his Petition for Post Conviction Relief. See *Harvey*, 982 So.2d at 470 (holding that “Rule 60(b) is designed for the extraordinary, not the commonplace”). Thus, the circuit court did not abuse its discretion in denying the Appellant’s motion.

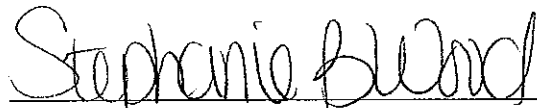
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the circuit court’s denial of the Appellant’s Rule 60(b) motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

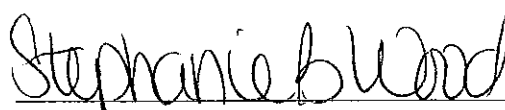
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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