

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WENDELL DUNCAN

APPELLANT

VS.

NO. 2008-CP-1115

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO VACATE CONVICTION AND SENTENCE AS IT WAS TIME-BARRED AND SUCCESSIVE WRIT BARRED.

STATEMENT OF THE CASE

In 1994, the Appellant, Wendell Duncan, was indicted as a habitual offender for conspiracy and burglary of a business. (Record p. 398 - 399). He was tried, convicted, and sentenced to serve five years for the conspiracy count and seven years for the business burglary count with the sentences to run consecutively. (Record p. 397). According to the trial judge, Duncan filed a Motion for Post-Conviction Relief which was denied by the trial court. (Record p. 453). The trial court's denial of this motion was affirmed by the Mississippi Supreme Court on June 11, 1998. (Record p. 453 and *Duncan v. State*, 96-CA-1017SCT (Miss. June 11, 1998)).

Subsequently, Duncan filed numerous motions and other documents with both the trial court

and the Mississippi Supreme Court which are a part of the record. On January 3, 2008, he filed a Motion to Vacate Conviction and Sentence. (Beginning at Record p. 368). The State responded to said motion on March 14, 2008. (Beginning at Record p. 435). The trial court, treating the motion as a motion for post-conviction relief, dismissed the motion as being both time barred and successive writ barred on May 14, 2008. (Record p. 453 - 454). Duncan is now appealing that decision.

SUMMARY OF THE ARGUMENT

Duncan's Motion to Vacate Conviction and Sentence was properly denied as time barred and successive writ barred. The motion was time barred as it was filed approximately fourteen years after Duncan was sentenced. Duncan's Motion to Vacate Conviction and Sentence was also properly denied as successive writ barred as he previously filed a Motion for Post-Conviction Relief which was denied by the trial court. The Mississippi Supreme Court affirmed that denial.

ARGUMENT

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)).

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO VACATE CONVICTION AND SENTENCE AS IT WAS TIME-BARRED AND SUCCESSIVE WRIT BARRED.

Duncan raises the following issues on appeal: (1) "whether Duncan is actually innocent of the defective indictment"; and (2) "whether Duncan is actually innocent of the sentence received under §99-19-81, after being indicted under §99-19-83." (Appellant's Brief p. 1 - 2). However, these issues are time barred.

Mississippi Code Annotated §99-39-5(2) states in pertinent part as follows:

A motion for relief under this article 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 from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after the entry of the judgment or conviction.

As noted above, Duncan was sentenced in 1994 and the denial of his first Motion for Post-Conviction Relief was affirmed by the Mississippi Supreme Court in 1998. His Motion to Vacate Conviction and Sentence was filed in 2008, ten years after the denial of his first Motion for Post-Conviction Relief was affirmed and almost two years after he completed serving his sentence.¹ Thus, the trial judge properly dismissed Duncan's motion as it was time barred.

Duncan's Motion to Vacate Conviction and Sentence is also successive writ barred.

Mississippi Code Annotated §99-39-23(6) reads in pertinent part as follows:

The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article.

As noted above, Duncan previously filed a Motion for Post-Conviction Relief which was denied by the trial court. This denial was affirmed by the Mississippi Supreme Court on June 11, 1998. Thus, he is also successive writ barred. *See Smith v. State*, 923 So.2d 241 (Miss. Ct. App. 2006). Accordingly, the trial judge properly dismissed Duncan's Motion to Vacate Conviction and Sentence as it was also successive writ barred.

¹ Duncan is currently in the custody of the Mississippi Department of Corrections serving a separate thirty year sentence for armed robbery.

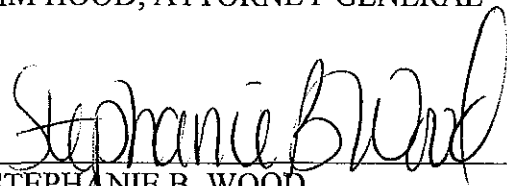
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the trial court's dismissal of the Appellant's Motion to Vacate Conviction and Sentence as it is time barred and successive writ barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

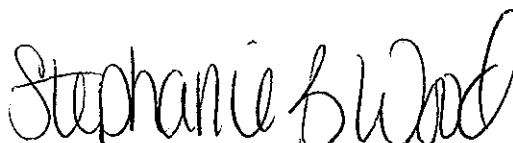
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Honorable W. Ashley Hines
Circuit Court Judge
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This the 5th day of March, 2009.



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