

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES MEANS

APPELLANT

VS.

NO. 2008-CP-1117

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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APPELLANT

VERSUS

NO. 2008-1117-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

On November 1, 2005, Charles Means pleaded guilty in the Circuit Court of Forrest County to possession of a controlled substance with intent to distribute and was sentenced to a term of 25 years in the custody of the Mississippi Department of Corrections. The court went on to order that the sentence be suspended upon the defendant's good behavior and compliance with certain conditions, *inter alia*, that the defendant depart Forrest County within 24 hours and remain a distance of at least 100 miles from the Forrest County Courthouse for the entire period of the suspended sentence. (C.P.39-40)

On March 3, 2006, the state moved to revoke the suspended sentence, alleging that Means had been found in Hattiesburg on February 24, 2006. (C.P.45-46) The following March 13, the circuit court entered an order finding that Means had "waived a formal hearing and admitted that he was in Hattiesburg as alleged ... in violation of condition of the suspended sentence ..." Accordingly, the suspended sentence was revoked. (C.P.43-44)

On February 78, 2007, Means filed in the circuit court a Petition for Post-Conviction Relief which was summarily dismissed on June 22, 2007. (C.P.55-58)

Thereafter, on March 18, 2008, Means filed a successive motion for post-conviction relief (C.P.7) which was dismissed summarily on June 4, 2008. (C.P.60-62) Aggrieved by the latter judgment rendered against him, Means has perfected an appeal fo this Court.

SUMMARY OF THE ARGUMENT

No error has been shown in the circuit court's determination dismissal of Means's successive motion for post-conviction relief. The judgment entered below should be affirmed.

PROPOSITION:

THE CIRCUIT COURT PROPERLY DISMISSED MEANS'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

The circuit court dismissed Mean's motion with an order set out in pertinent part below:

THIS CAUSE came on to be heard on Charles Means' Post Conviction Motion to Vacate Illegal Sentence and Unauthorized Revocation which this Court is treating as a Motion for Post-Conviction Collateral Relief under the Mississippi Uniform Post-Conviction Relief Act. In rendering its decision, the Court has reviewed the Petitioner's Motion, together with all files, records and correspondence relating to the judgment under attack. ... Accordingly, the Court is of the opinion that the motion should be **SUMMARILY DISMISSED** and the Court finds the following, to-wit:

The fair and orderly administration of justice dictates that a person accused of a crime be afforded the opportunity to present his claims before a fair and impartial tribunal. It does not require that he be given multiple opportunities to "take a bite at the apple." Likewise, the orderly administration of justice does not require this Court to "lead a defendant by the hand" through the criminal justice system. It is this Court's responsibility to provide a meaningful opportunity for defendant to raise his claims and have them adjudicated. Means was given this opportunity.

The denial of a post-conviction relief motion is a final judgment and bars subsequent requests for post-conviction relief unless (1) there are issues with the defendant's supervening insanity prior to the execution of a death sentence, (2) there has been an intervening decision of the United States Supreme Court or of the Mississippi Supreme Court, which would require a different outcome or sentence, (3) there is newly discovered evidence, which was not previously discoverable, that would have been practically conclusive if it were available at trial, or (4) the defendant claims that his sentence has expired, or his probation, parole, or conditional release has been unlawfully revoked. Miss. Code Ann. § 99-39-23(6) Supp.2006).

This Court previously dismissed Means' first Petition for Post-Conviction Relief on June 21, 2007, finding that his claims of ineffective assistance of counsel were not supported by any evidence except his own allegations. According to the record, Means did not raise the issue of an illegal sentence in his first petition for post-conviction relief. If a petitioner could have raised an issue, but did not, the issue is barred. Mississippi Code Annotated Section 99-31-21(1) (Rev.2000). There is nothing in the record which suggests that this information could not have been discovered at the time Means filed his first petition for post-conviction relief.

Now Means has filed another post-conviction relief motion alleging that his order is in violation of his constitutional rights to due process of law, that his sentence is an illegal sentence and was improperly imposed by this Court. This Court finds that Means' is legal and that this motion is procedurally barred as a successive writ. Also, Means' claims are without merit and this Court is without authority to modify Means' lawfully imposed sentence after he has begun to serve that sentence.

Means carries the burden of proving that he satisfied at least one of the exceptions to Section 99-39-23(6) in order to survive the procedural bar. See *Carbin v. State*, 942 So.2d 231, 233 (P9) (Miss. Ct. App. 2006). Means fails his burden of production by not providing any evidence or facts that would satisfy any exceptions to the successive writ bar. Likewise, this Court's review of the record shows no evidence of facts that would satisfy the successive writ bar exceptions. This Court finds that Means' request for post-conviction relief is procedurally barred as a successive writ and his Post Conviction Motion to Vacate Illegal Sentence and Unauthorized Revocation is SUMMARILY DISMISSED.

(C.P.60-62)

This order is not subject to reversal “absent a finding” that it “was clearly erroneous.” *Taylor v. State*, 766 So.2d 830, 832 (Miss. App. 2000), citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss.1999). Accord, *Black v. State*, 963 So.2d 47, 48 (Miss. App. 2007). Moreover, “In a petition for post-conviction relief, the petitioner carries the burden of proving that his claim is not procedurally barred.” *Massey v. State*, 843 So.2d 74 (Miss. App. 2003). Accord, *Powers v. State*, 945 So.2d 386, 395 (Miss. 2006). No error has been shown in the court’s determination that Means failed to sustain his burden of showing that his petition was not subject to dismissal pursuant to the successive writ bar.

Although no further discussion should be required, the state submits for the sake of argument that Means should not be heard to argue the legality of his sentence only after he was unable to comply with its terms. “Because the suspended sentence did not prejudice” him, he “cannot now attack it.” *Watts v. State*, — So.2d. — (2008 WL 158170) (Miss. App., decided July 1, 2008).

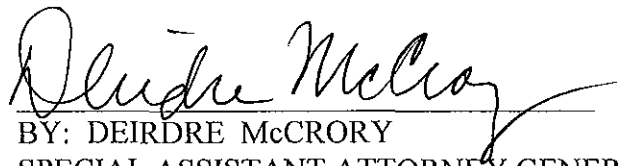
Summary dismissal was the proper disposition of this successive motion for post-conviction relief. The judgment entered below should be affirmed.

CONCLUSION

The state respectfully submits the circuit court properly dismissed Means's motion without a hearing. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**



BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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This the 19th day of February, 2009.


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