

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**GARY W. OVERSTREET**

**APPELLANT**

**VS.**

**NO. 2008-CP-1199-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

This appeal proceeds from the denial of a pro se motion for post-conviction relief from the Circuit Court of Forrest County, Mississippi, Honorable Robert B. Helfrich, presiding.

**STATEMENT OF THE FACTS**

On May 15, 1996, Gary W. Overstreet pleaded guilty to one count of capital murder in the Circuit Court of Forrest County. Honorable Dickey MacKenzie sentenced Overstreet to life imprisonment without the possibility of parole.

On August 31, 1999, the Circuit Court of Forrest County, Honorable Dickie McKenzie presiding, denied Overstreet's first motion for post conviction collateral relief. (CP 39). Overstreet filed a second pro se motion for post conviction relief on March 20, 2007. (CP 7-45). Overstreet asserted in the motion that he was innocent of the crime of capital murder and that his trial counsel, Jeff Bradley, coerced him into pleading guilty.

On May 14, 2008, Overstreet filed in Cause Number 2007-M-0191 in the Supreme Court

of Mississippi a *pro se* Petition for Writ of Mandamus requesting the Court direct the Forrest County Circuit Court to issue a ruling on the Motion for Post-Conviction Relief.

By an opinion and order dated June 19, 2008, Forrest County Circuit Court Judge Robert Helfrich found the motion to be a successive writ and summarily denied the relief without hearing. (CP 56-57). On June 25, 2008, the Mississippi Supreme Court dismissed Overstreet's Petition for Writ of Mandamus as moot. (CP 58). Feeling aggrieved at the trial court, Overstreet appealed raising as his sole issue whether Circuit Judge Robert Helfrich abused his discretion in ruling on Overstreet's motion for post conviction relief.

## **STATEMENT OF THE ISSUES**

- I. WHETHER THE TRIAL JUDGE IN OVERSTREET'S SECOND MOTION FOR POST CONVICTION RELIEF SHOULD HAVE RECUSED HIMSELF?**
- II. WHETHER THE MOTION FOR POST CONVICTION RELIEF IS TIME-BARRED?**
- III. WHETHER THE SUCCESSIVE MOTION FOR POST CONVICTION RELIEF IS PROCEDURALLY BARRED AS A SUCCESSIVE WRIT?**

## **SUMMARY OF THE ARGUMENT**

The Forrest County Circuit Court's ruling denying Overstreet's motion for post conviction relief should be affirmed.

Overstreet failed to properly establish that Judge Helfrich was the assistant district attorney at the time Overstreet entered his guilty plea and that he took an active role in Overstreet's prosecution.

Overstreet knew of the possible conflict with Judge Helfrich but waived any objection he might have when he failed to raise the issue in the lower court and in his Petition for Writ of Mandamus with the Supreme Court wherein he asked that Judge Helfrich be directed to rule on his motion.

Overstreet filed the instant motion for post-conviction relief more than eleven years after entry of his guilty plea; therefore, it is procedurally barred by time, as set forth in Mississippi Code Annotated section 99-39-5(2). Further, Overstreet's motion is procedurally barred as an impermissible second attempt to obtain post-conviction relief, as set forth in Mississippi Code Annotated section 99-39-27(9).

## ARGUMENT

### **I: WHETHER THE TRIAL JUDGE IN OVERSTREET'S SECOND MOTION FOR POST CONVICTION RELIEF SHOULD HAVE RECUSED HIMSELF?**

An appellate court will not reverse the trial court's decision to dismiss a motion for post-conviction relief "absent a finding that the trial court's decision was clearly erroneous." *Williams v. State*, 872 So2d 711, 712 (Miss.Ct.App. 2004).

Overstreet asserts that the single page attached to his brief as Exhibit "A" is from his sentencing on the capital murder charge. Appellee would respectfully submit that Overstreet provided neither the necessary transcripts nor an adequate record that Judge Helfrich was the assistant district attorney at the time Overstreet entered his guilty plea or that he took an active role in Overstreet's prosecution. The appellant bears the burden of presenting a record which is sufficient to undergird his assignment of error. *Peterson v. State*, 518 So.2d 632 (Miss. 1987); *Winters v. State*, 473 So.2d 452, 457 (Miss. 1985).

Notwithstanding the inadequacies of the record, in *Ryals v. State*, 914 So.2d 285 (Miss.App.,2005), this Court held that Judge Helfrich should have recused himself from hearing a post-conviction relief motion because he was the prosecutor in the underlying criminal case. In *Ryals*, McKenzie was the circuit court judge when Ryals filed his motion for post conviction relief, Helfrich was subsequently sworn in as judge and ruled on Ryals' motion. However, such was not the case here, when Overstreet filed the subject motion, Judge Helfrich was the sitting circuit judge and the judge who ultimately ruled on his motion.

Overstreet asserts he did not have a transcript of his plea hearing at the time of filing his motion for post conviction relief, so he would have no way of knowing that Judge Helfrich was an assistant district attorney in attendance at his plea. However, Judge McKenzie indicated in his



August 31, 1999 denial of Overstreet's first motion for post conviction relief that a transcript of the plea was attached. (CP 39). Also, Overstreet states in Issue IV of the subject motion for relief "Petitioner asserts that not only was there not a factual basis' for the plea (see transcript pages 1-20), but there is a reasonable probability that had such evidence as EXHIBIT "B," "C," "E," AND "F" been submitted...." (CP 34)(Emphasis added by Appellee).

As stated in Overstreet's brief, his Certificate of Interested Parties, dated January 30, 2007, identified Hon. Robert E. (Bob) Helfrich, Circuit Court Judge, as a party interested in the outcome of his motion for post conviction relief, so that Judge Helfrich could evaluate possible disqualification or recusal. (CP 8). Appellee would submit at that point in time, Overstreet knew of the possible conflict.

Appellee would also submit that Overstreet knew of this possible conflict when he asked the Mississippi Supreme Court in a petition for writ of mandamus filed in Cause Number 2007-M-0191 to direct Judge Helfrich to rule on his pending motion for post conviction relief.

The State asserts that Overstreet failed to object or file a motion asking for Judge Helfrich to recuse himself and did not raise this argument until his appeal. Under the ruling in *Tubwell v. Grant*, 760 So.2d 687 (Miss.2000), Overstreet is procedurally barred from arguing the issue. The Mississippi Supreme Court held in *Tubwell*

This argument was not raised until his appeal, which procedurally bars *Tubwell* from arguing the issue in this case. Over the years, this Court has been quick to point out that it will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion. *Buchanan, v. Buchanan*, 587 So.2d 892. Where the party knew of the grounds for the motion or with the exercise of reasonable diligence may have discovered those grounds, and where that party does not move timely prior to trial, the point will be deemed waived. *Ryals v. Pigott*, 580 So.2d 1140, 1175-76 (Miss.1990); *City of Biloxi v. Cawley*, 332 So.2d 749, 750 (Miss.1976); *McCune v. Commercial Publ'g Co.*, 148 Miss. 164, 172, 114 So. 268, 269 (1927). This Court has consistently held that failing to object to a trial judge's appearance in a case can result in a waiver. *Foster v. State*, 716 So.2d

538, 540 (Miss.1998); *Banana v. State*, 635 So.2d 851, 853 (Miss.1994)(where trial judge disclosed previous service as District Attorney for appellant's indictment and arraignment, the appellant “waived this issue by entering his voluntary plea of guilty”). See also *Wells v. State*, 698 So.2d 497, 514 (Miss.1997)(“Any claim is waived for failure to raise a contemporaneous objection.”).

The State would respectfully ask this Court to affirm the denial of Overstreet’s motion based on the lack of a proper record before this Court establishing that Judge Helfrich prosecuted Overstreet in the underlying criminal case or took an active role as prosecutor; and Overstreet’s failure to object to the conflict at the trial court and at the Mississippi Supreme Court when he requested in his Petition for Writ of Mandamus that the Supreme Court direct Judge Helfrich to rule on his motion.

## **II. WHETHER THE MOTION FOR POST CONVICTION RELIEF IS TIME-BARRED?**

A circuit court may deny relief of a prisoner's motion for post-conviction relief without an evidentiary hearing where "...if it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief." Miss.Code Ann. § 99-39-11(2)(Rev.2007). This Court will not disturb a circuit court's decision to deny relief on a motion for post conviction relief absent a showing that the circuit court's decision was clearly erroneous. *Epps v. State*, 926 So.2d 242 (Miss.Ct.App.2005).

A motion for post-conviction relief that was not filed within three years after defendant's guilty plea is statutorily time-barred, absent any applicable exception to statute. *Jones v. State*, 995 So.2d 822 (Miss.App.2008). In the event this Court rules that Overstreet waived his right to object to any conflict, the State would submit that the motion *sub judice* is time-barred, pursuant to Miss. Code Ann. § 99-39-5(2) (Rev.2007). Overstreet entered his guilty plea on May 15, 1996; the motion which is the subject of this appeal was filed on March 20, 2007, far past the expiration of the time in which to file such post-conviction requests for relief, unless it fits within some enumerated statutory exception. (CP 3-13) Appellee submits Overstreet failed to raise any arguments or submit any evidence which would allow him to file his motion outside of the three-year time period.

## **II. WHETHER OVERSTREET'S SECOND MOTION FOR POST CONVICTION RELIEF IS PROCEDURALLY BARRED AS A SUCCESSIVE WRIT?**

Again, should this Court rule Overstreet waived any objection to a conflict, the State contends Overstreet's motion is procedurally barred as an impermissible subsequent attempt to obtain post-conviction relief. Overstreet has failed to show that it falls within any of the statutory exceptions to the successive-writ bar. Accordingly, the circuit court's judgment dismissing Overstreet's motion for post-conviction relief should be affirmed.

Mississippi Code Annotated section 99-39-27(9) reads in part: "The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article." Excepted from the successive-writ bar are certain enumerated exceptions, such as an application filed regarding insanity prior to the execution of a sentence of death, intervening case of the United States Supreme Court or the Mississippi Supreme Court, or newly discovered evidence which was not reasonably discoverable at the time of trial. *Id.*

On August 31, 1999, the Circuit Court of Forrest County denied Overstreet's first motion for post conviction relief (CP 39). Overstreet filed this successive writ for post conviction collateral relief on March 20, 2007. (CP 7-45). The Circuit Court denied the relief and summarily dismissed the motion by order filed June 20, 2008. (CP 56, 57).

This Court previously held in *Johnson v. State*, 962 So.2d 87, 89 (¶12) (Miss.Ct.App.2007) that it will not overturn a denial of a motion for post-conviction relief without a showing that an exception to the successive-writ bar exists. Overstreet fails to cite any case or evidence that exempts his successive writ and none of the statutory exceptions apply. Therefore, the motion *sub judice* is procedurally barred as an impermissible second attempt to obtain post-conviction relief.

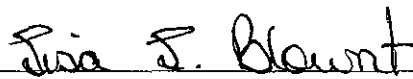
## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the order of the Circuit Court of Forrest County denying Gary W. Overstreet's motion for post-conviction relief.

Respectfully submitted,

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BY:

  
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## CERTIFICATE OF SERVICE

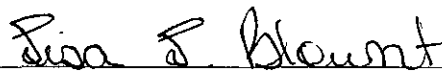
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 5th day of March, 2009.

  
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