

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES LEE PARKER

APPELLANT

VS.

NO. 2008-CP-1350

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Charles Lee Parker filed a motion for post-conviction relief in the Circuit Court of Neshoba County. The circuit court summarily dismissed the motion finding it time-barred and Parker lacked standing. Aggrieved, Parker appeals.

ISSUES

- I. Whether the trial court erred by finding that Parker's motion for post-conviction relief was time barred?
- II. Whether the trial court erred by finding that Parker was not "in custody" for the purpose of filing for post-conviction relief?

FACTS

On September 29, 1986, after a jury convicted Charles Lee Parker of possession of more than one ounce of marijuana, the Circuit Court of Neshoba County, in Cause No. 7880, sentenced him to three (3) years in the penitentiary. CP 53-54. The sentence was consecutive to a fifteen (15) year sentence imposed for robbery in Cause No. 7895 . CP 55-59.

According to Parker, he was subsequently sentenced on a drug violation by the U.S. District Court for the Southern District of Mississippi to life imprisonment. Parker claims the basis for his federal sentence was the existence of the instant felony drug offense and an earlier felony drug offense from Neshoba County Circuit Court. Appellant's Brief at 3.

On May 15, 2008, Parker filed the subject *pro se* motion for post-conviction relief in an attempt to reduce his federal life sentence. Parker claimed ineffective assistance of counsel for failure to investigate and failure to challenge the legality of the search and seizure. Even though Parker was convicted of possession in a trial by jury, he claimed his attorney failed to explain to him the elements of the offense; failed to advise him of the consequences of his plea; and failed to object to lack of factual basis for his plea. Parker also claimed he was innocent and his plea was not knowingly, intelligently, and voluntarily made. CP 4-19.

By order dated July 14, 2008, the trial court summarily denied the post-conviction relief citing a lack of jurisdiction due to the fact that Parker is "not serving a sentence of a court of record of the State of Mississippi" and due to a time bar pursuant to Miss.Code Ann. Sec. 99-39-5(2). CP 22-23. Aggrieved, Parker appealed.

SUMMARY OF THE ARGUMENT

The trial judge properly dismissed Parker's motion for post conviction relief. Parker is time-barred from raising a post-conviction relief claim and is no longer in custody in Mississippi as required by statute. This Court held in *Willis v. State*, 856 So.2d 555, 556 (Miss.2003), "[t]he preeminent requirement of the Post-Conviction Collateral Relief Act is that the petitioner be 'a prisoner in custody under sentence of a court of record of the State of Mississippi.'" Miss.Code Ann. § 99-39-5 (Rev.2000). *Phillips v. State*, 856 So.2d 568, 570 (Miss.App.2003). By his own admission, Parker was serving a federal sentence in a federal penitentiary in Kentucky at the time of the filing the motion sub judice. CP 9, 12, 41. This fact alone warranted the dismissal of Parker's motion for post-conviction collateral relief. As Parker was not in custody under sentence of a court of record of this state, "the issue of whether the statute of limitations has run is moot." *Phillips*, 856 So.2d at 570.

ARGUMENT

ISSUE I. WHETHER THE TRIAL COURT ERRED BY FINDING THAT PARKER'S MOTION FOR POST-CONVICTION RELIEF WAS TIME BARRED?

In reviewing a trial court's decision to deny a motion for post-conviction relief, the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148, 1150(¶ 3) (Miss.Ct.App.2002). However, the applicable standard of review is de novo where questions of law are raised. *Id.*

Parker argues that the trial judge abused his discretion by summarily denying his application for post-conviction relief. However, the trial court may summarily dismiss a motion for post-conviction relief “[i]f 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 any relief....” Miss.Code Ann. § 99-39-11(2) (Rev.2007). We conduct a de novo review of the record to determine whether the petitioner has failed to demonstrate “a claim procedurally alive ‘substantially showing denial of a state or federal right, ...’” *Young v. State*, 731 So.2d 1120, 1122(9) (Miss.1999) (quoting *Myers v. State*, 583 So.2d 174, 176 (Miss.1991)).

The Neshoba County Circuit Court properly concluded Parker's post-conviction relief motion was time barred because he filed his petition more than three years after the expiration of the time to appeal the 1986 jury verdict. Miss.Code Ann. § 99-39-5 (Rev.2000); *Wilson v. State*, 990 So.2d 828 (Miss.App.,2008). Parker's claim does not fall under any of the listed exceptions for out-of-time petitions as listed in § 99-39-5(2). The State contends Parker has not demonstrated an intervening decision that would adversely affect the outcome of his sentence.

The Mississippi Supreme Court has held that the three-year statute of limitations may be waived when a fundamental constitutional right is implicated. *Lockett v. State*, 582 So.2d 428, 430

(Miss.1991). However, Parker has made no such showing that a fundamental right was violated. The State submits that the cases cited by Parker dealing with the equitable tolling of the statute of limitations are inapplicable and therefore fail to support his argument.. This issue is consequently without merit.

**ISSUE II. WHETHER THE TRIAL COURT ERRED BY FINDING THAT
PARKER WAS NOT “IN CUSTODY” FOR THE PURPOSE OF
FILING FOR POST-CONVICTION RELIEF?**

Parker cannot collaterally attack his 1986 conviction through his current appeal because he lacks standing to do so. A person eligible for post-conviction relief must be “in custody under sentence of a court of record of the State of Mississippi [.]” Miss.Code Ann. § 99-39-5(1) (Rev.2007). Therefore, post-conviction relief applies solely to a prisoner who is actually in the custody of the State under a sentencing order from a Mississippi court. *Isaac v. State*, 793 So.2d 688, 690(¶ 7) (Miss.Ct.App.2001). This Court has refused to grant post-conviction relief because the petitioner had already completed his complained-of sentence in the State's custody and had been discharged therefrom. See *Durant v. State*, 914 So.2d 295, (Miss.Ct.App.2005).

After being convicted by a jury in 1986 for a drug violation, Parker was sentenced to serve three (3) years in the penitentiary, consecutive to a fifteen (15) year sentence rendered in a robbery case. CP 54-59. Simple math shows us Parker has served the three-year sentence for which he now complains. Additionally, Parker admitted in his motion and brief that he served the three-year sentence and was serving a federal sentence in a federal penitentiary in Kentucky at the time of the filing the motion *sub judice*. CP 9, 12, 41; Appellant’s brief at 3.

Parker claims that because his 1986 drug conviction was used to enhance a subsequent federal sentence, he is still “in custody” for purposes of having standing to file for post-conviction relief under Miss.Code Ann. § 99-39-5(1) (Rev.2007). The cases cited by Parker fail to support

his argument.

He incorrectly relies on *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (May 15, 1989). The United States Supreme Court ruled, “The question presented by this case is whether a habeas petitioner remains “in custody” under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. We hold that he does not.” *Maleng* at 493. Although a federal prisoner, the Court found Maleng was “in custody” for habeas subject-matter jurisdiction for challenging an unserved 1978 sentence imposed upon him by the State of Washington because the State of Washington had a detainer with federal authorities to ensure that at conclusion of Maleng’s federal sentence, he would be returned to state authorities to begin serving the 1978 sentence. In the case *sub judice*, Parker’s 1986 drug conviction expired.

The State would submit that the trial court correctly found Parker lacked standing for post-conviction relief. There is no indication in the record that the trial court’s decision was clearly erroneous.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, The State would ask this Court to affirm the judgment of the Circuit Court of Neshoba County denying post-conviction relief to Charles Lee Parker.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa 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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