

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNIE SWANS

APPELLANT

VS.

NO. 2008-CP-1453-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On November 23, 2004 , Johnnie Swans,"Swans" pled guilty to murder. This was in the Circuit Court of Yazoo County, the Honorable Jannie Lewis presiding. He was sentenced to a term of life imprisonment. C.P. 4 ; 15; 126. Swan was represented by Mr. Alva Taylor.

On March 17, 2008, Swans filed a motion for post conviction relief. C.P. 4- 17. The trial court denied relief, finding that Swans' motion came more than three years after entry of his judgment of conviction. He was therefore time barred under the Uniform Post Conviction Collateral Relief act, M. C. A. § 99-39-3 et seq..(supp. 1984), "the UPCCRA." C.P. 26-27.

From that denial of relief, Swans filed notice of appeal to the Mississippi Supreme Court.
C. P 22.

ISSUES ON APPEAL

I.

**WAS SWANS' MOTION BARRED BY THE
STATUTE OF LIMITATIONS?**

II.

**DID THE COURT HAVE JURISDICTION OVER SWANS'
CLAIM?**

STATEMENT OF FACTS

On September 23, 2003, Johnnie Swans was indicted for the murder of Mr. Morris Ganderson. R.E. 2.

On November 23, 2004 , Johnnie Swans pled guilty to the murder of Mr. Morris Ganderson. R. E. 2; C.P. 15.. He was represented by Mr Alva Taylor.

After advising Swans and questioning him and his counsel about Swans' understanding of the charge and the consequences of his plea, the trial court found that his guilty plea was voluntarily and intelligently entered. Swans was sentenced to a term of life imprisonment. C.P.4 ; 26.

On March 17, 2008 , Swans filed a motion for post conviction relief. C.P. 4- 17. In that motion, Swans claimed that although he pled guilty to murder, he , nevertheless, believed that he should be entitled to parole eligibility. C.P. 6. There was no claim for fulfilling any of the requirements for an exception to the statute of limitations for filing for post conviction relief. C.P. 4-17.

The trial court denied relief, finding that Swans' motion came more than three years after entry of his judgment of conviction. C.P. 26-27. He was therefore time barred under the Uniform Post Conviction Collateral Relief act, M. C. A. § 99-39-3 et seq..(supp. 1984). In addition, the trial court found that the parole board had "exclusive discretion" in determining an inmate's eligibility for parole under its statutory authority. The trial court therefore found that it had no jurisdiction over the issue of parole eligibility as raised by Swans. C.P. 26-27.

From that denial of relief, Swans filed notice of appeal to the Mississippi Supreme Court. C. P 22.

SUMMARY OF ARGUMENT

1. The record reflects that trial court found that Swans was barred by the statute of limitations under M. C. A. § 99-39-5(2). C.P. 26-27. Swans' motion for post conviction relief was filed on March 17, 2008 . C.P. 4. His entry of judgment of conviction was on November 23, 2004. C.P. 15. This was more than three years after entry of Swans' judgment of conviction for murder. There was no claim of fulfilling the requirements for any exception under "the UPCCRA." See M. C. A. § 99-19-5(2). C.P. 4-17.

Therefore, the appellee would submit that the record indicates the trial court correctly found that Swans' motion was not timely under "the UPCCRA."

2. In addition, the trial court found that it lacked authority for considering whether Swans was eligible for parole. C.P. 26-27. The Court found that Swans' complaint about his alleged eligibility for parole is a matter for which the state parole board has jurisdiction rather than the circuit court judge in Yazoo County. See M. C.A. § 47-7-17(3).

M. C.A. § 47-7-17(3) states that:

The board shall have exclusive responsibility for the granting of parole as provided by sections 47-7-3 and 47-7-17 and shall have exclusive responsibility for revocation of the same. (Emphasis by appellee).

Therefore the appellee would submit that the trial court also correctly found that it lacked jurisdiction over any issue related to Swans' eligibility or lack of eligibility for parole.

ARGUMENT

THE RECORD REFLECTS THAT SWANS WAS TIME BARRED.

The record reflects that on November 23, 2004 , Johnnie Swans pled guilty to the murder of Mr. Morris Ganderson. R.E. 2; C.P. 15.. He was represented by Mr. Alva Taylor.

After advising and questioning Swans and his counsel about Swans' understanding of "the charge and the consequences of his plea," the trial court found that his guilty plea was voluntarily and intelligently entered. Swans was sentenced to serve a term of life imprisonment. C.P.4 ; 26.

His judgment of conviction was entered on November 23, 2004. C.P. 15; 18.

On March 17, 2008, Swans filed a motion for post conviction relief. C.P. 4- 17. In that motion, Swans claimed that although he pled guilty to murder, he , nevertheless, believed that he was entitled to parole eligibility. C.P. 6.

The trial court denied relief, finding that Swans' motion "is procedurally time barred" by coming more than three years "after entry of his judgment of conviction." C.P. 26-27. He was therefore time barred under the Uniform Post Conviction Collateral Relief act, M. C. A. § 99-39-3 et seq..(Supp. 1984).

In *Odom v. State*, 483 So. 2d 343, 344 (Miss. 1986), the court stated under "the Uniform Post Conviction Collateral Relief Act," a prisoner has only three years to apply for relief. Unless his case falls under one of the exceptions provided, which are for newly discovered evidence or for a relevant intervening decision, he is time barred.

We would also point out that in dismissing the petition, the trial judge erroneously applied the three year statute of limitations provided for under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss. Code Ann. Sect. 99-39-1 et seq (Supp 1985). This act applies prospectively from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three years from April 17, 1984, to file their petition for post conviction relief. Those

individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss Code Ann. Sect 99-39-5(2)(Supp. 1985), which states:

A motion for relief under this chapter 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 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 years after entry of the judgement of conviction. Excepted from this three year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise, excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. (Emphasis by appellee).

The record reflects that Swans' motion came more than three years after entry of his judgement of conviction on November 23, 2004. C.P. 26. He had until November 23, 2007 to apply for relief under "the UPCRRA." Swans' post conviction relief motion was filed on March 17, 2008 . C.P. 4-17.

Therefore, the appellee would submit that the trial court correctly found that Swans was time barred under "the UPCCRA." This issue is therefore lacking in merit.

PROPOSITION II

THE PAROLE BOARD HAS JURISDICTION FOR DETERMINING PAROLE ELIGIBILITY.

In Swans' motion for post conviction relief he claimed that he was allegedly informed that if he pled guilty to murder he would be eligible for parole. Swans had no affidavits from his guilty plea counsel or anyone who might be knowledgeable about this claim included with his brief. Motion, page 4-17.

The trial court pointed out in its order denying relief that it lacked authority to make any decisions with regard to parole eligibility. C.P. 19. Under the statutory authority provided by the Mississippi legislature, M. C. A. § 47-7-17, "the state parole board" has "exclusive responsibility" for determining issues related to parole.

As stated by the trial court in its order denying relief:

The prisoner must make application to the parole board and, even then, the parole board shall allow parole only in the best interest of society. M C A § 47-7-17. Thus the circuit court does not have jurisdiction to grant or deny parole. C.P. 19.

M. C.A. § 47-7-5(3) , deals with the "State Parole Board." It states that the board has "exclusive responsibility for granting and revoking parole."

(3) The board shall have exclusive responsibility for the granting of parole as provided by sections 47-7-3 and 47-7-17 and shall have exclusive responsibility for revocation of the same. The board shall have exclusive responsibility for investigating clemency recommendations upon request of the Governor. (Emphasis by Appellee).

The record reflects that the legislature granted "exclusive responsibility" for determining parole eligibility to the state parole board. Based upon this statutory authority, the trial court found that it lacked jurisdiction to deal with any of Swans' claims concerning eligibility for parole. C.P. 19.

Therefore, the appellee would submit that this issue concerning parole eligibility is outside the jurisdiction of the Circuit Court of Yazoo County. It is an issue for the parole board to consider based upon its own rules and regulations as provided by its statutory and enabling authority.

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

Honorable Jannie M. Lewis
Circuit Court Judge
Post Office Box 149
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Honorable James H. Powell, III
District Attorney
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This the 15th day of December, 2008.



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