

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SAMMIE JOHNSON

APPELLANT

VS.

NO. 2009-CP-0486

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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vs.

CAUSE No. 2009-CP-00486-COA

THE STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF THE CASE

This is an appeal against an order of the Circuit Court of Marshall County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The record in the case at bar contains little more than the prisoner's "Application for leave to file successive motion for Post - Conviction collateral relief pursuant to Mississippi Code Ann. Section 99-39-5(2) Section 99-39-7." (R. Vol. 1, pp. 3-13) and supporting brief, and the order denying relief (R. Vol. 1, pg. 36).

The prisoner was convicted of capital murder in August, 2002 upon his plea of guilty. Thereafter, he filed three separate motions in post - conviction relief. Relief upon those motions was denied. He appealed the denial of relief on the last one; this Honorable Court affirmed the Circuit Court's finding that the third filing was time - barred and successive writ barred.

Johnson v. State, 962 So.2d 87 (Miss. Ct. App. 2007).

On 18 September 2008, the prisoner filed his fourth motion in post - conviction relief in the Circuit Court. In that motion he alleged: (1) that his sentence of life without possibility of parole is illegal; (2) that he did not waive indictment and that the Circuit Court erred in failing to permit a jury to set sentence; (3) newly discovered evidence in the form of an affidavit putatively signed by one Darryl Swanier, in which this Swanier claimed to have been the murderer. (R. Vol. 1, pg. 1).

The Circuit Court denied relief on the motion on the basis that it was a successive motion and because it was time barred. It further ruled that there was no merit to the prisoner's contentions, aside from those reasons. (R. Vol. 1, pg. 36).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WITHOUT AN EVIDENTIARY HEARING

Holding aside for the moment the prisoner's claim of newly discovered evidence, the other claims raised by the prisoner are clearly time - barred and barred by the prohibition against successive writs. *Johnson v. State*, 962 So.2d 87 (Miss. Ct. App. 2007). Furthermore, those other claims could and should have been raised in the prisoner's initial filing. Thus, we invoke res judicata as to them. *Rowland v. State*, 2008-CP-00731-COA (Miss. Ct. App., decided 9 June 2009, Not Yet Officially Reported). If, on the other hand, those claims were raised in the initial

filing, we invoke the doctrine of collateral estoppel. *Pickle v. State*, 791 So.2d 204 (Miss. 2001).

We now come to the affidavit filed by the prisoner, signed by a Darryl Swanier, or someone purporting to be Darryl Swanier, in which Swanier claimed that he killed someone named Bobby McGregor and not the prisoner. This affidavit was dated 28 November 2006. (R. Vol. 1, pg. 13). In considering whether a new trial should be granted on the basis of newly discovered evidence, it must appear that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered prior to the trial in the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. The proponent of the evidence said to be newly discovered has the burden of proof on all five considerations. *Witherspoon v. State*, 767 So.2d 1065, 1067 (Miss. Ct. App. 2000).

The prisoner makes the claim that the testimony this Swanier would give is newly discovered. The prisoner, however, does not trouble himself to explain or to attempt to explain how he discovered this Swanier's alleged testimony. It is true that he claims that Swanier's information is newly discovered, but he wholly fails to demonstrate that Swanier could not have been discovered prior to trial in the exercise of due diligence. The Court has nothing more than the prisoner's word for it, and that is hardly sufficient.

The affidavit itself is ambiguous. While Swanier rather makes th claim that he killed one Bobby McGregor, he goes on further to state that the man accused of having killed McGregor did not kill him. The prisoner is not said to have been the man who actually killed McGregor, yet the Court is left to assume so. All that Swanier says with respect to the killing of McGregor is that the prisoner did not hire Swanier for the purpose. That the prisoner did not hire Swanier would not necessarily mean that the prisoner was not guilty of McGregor's murder.

In addition to the vagueness of the affidavit, the plain fact remains that the prisoner entered a plea of guilty to capital murder, presumably of McGregor.¹ In other words, the prisoner admitted his guilt for the capital murder of the victim. The prisoner's admission was under oath.² In view of this, the affidavit by this Swanier would not be sufficient to overcome the prisoner's statements at the plea colloquy. *Chancy v. State*, 938 So.2d 267, 269 (Miss. Ct. App. 2005); *Sherrod v. State*, 784 So.2d 256, 259 (Miss. Ct. App. 2001). *McClendon v. State*, 539 So.2d 1375 (Miss. 1989), cited by the prisoner, is of no purpose here. That decision merely held that the burden of proof in a post - conviction relief action is the preponderance - of - the - evidence standard, rather than the clear - and - convincing standard employed by the lower court.

We would further point out that it is quite difficult to see how the result would probably change for the prisoner, if a trial were granted, in view of the fact that a jury would be presented with the spectacle of Swanier alleging that he killed the victim along with the prisoner's sworn statements that he killed the victim. Under such an absurdity, perhaps both should be convicted.

Given the ambiguous nature of the affidavit only now presented by the prisoner, together with the fact that the prisoner previously admitted under oath his guilt for the capital murder, the Circuit Court did not abuse its discretion in denying relief on the prisoner's successive motion in post - conviction relief.

¹ Given the perfunctory nature of the Circuit Court's order denying relief in the case at bar, and the fact that we do not have to hand materials from the guilty plea and subsequent motions in post - conviction relief, our knowledge of the facts concerning the capital murder to which the Appellant entered a guilty plea is limited indeed.

² The transcript of the plea colloquy is not contained in the record at bar. However, the record presented to this Court in the prisoner's last appearance before this Court, *Johnson v. State*, 962 So.2d 87 (Miss. Ct. App. 2007), apparently did contain a transcript of the plea colloquy, and pages 134 - 35 of the record were cited by the State in its brief to support this statement of fact, in order to rebut the prisoner's claim in that appeal of "actual innocence".

In his brief in this Court, the prisoner appears to raise issues that were not raised in the court below, such as one based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Those issues may not be raised here because: (1) they were not raised in the court below; and (2) those issues could and should have been raised in the prisoner's initial filing. The prisoner's sentence for capital murder is not an illegal sentence.


CONCLUSION

The order of the Circuit Court in which relief was denied upon the prisoner's successive motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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 October, 2009.


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