

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NATHAN SELLERS

APPELLANT

VS.

NO. 2009-CP-1366

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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STATEMENT OF THE ISSUES

- I. The trial court did not err in dismissing Seller's Motion to File an Out-of-Time Appeal.**
- II. Sellers was not denied effective assistance of trial counsel.**

STATEMENT OF THE CASE

Sellers was convicted of aggravated assault on February 21, 2008 by a Rankin County jury. On February 25th, 2008, a Judgment of Conviction and an Order of Sentence were entered, and Sellers was sentenced to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections.

On March 5, 2008, Seller's trial counsel filed a Motion for J.N.O.V. or, in the Alternative, Motion for New Trial. The Motion was never noticed for hearing. The Court was unaware of the motion until November 4, 2008, upon review of the court filed in connection with a Petition for Writ of Mandamus apparently filed in the Mississippi Supreme Court that was dismissed on November 5, 2008.

Seller's *pro se* Motion for Records and Transcripts was denied on November 21, 2008. The trial court set Seller's Motion for JNOV or, in the Alternative, Motion for New Trial for hearing on December 8, 2008. By order of the trial court, Sellers was transported to the courthouse and attended the hearing. The trial court entered an order denying Seller's Motion for JNOV or, in the Alternative, for a New Trial on December 10, 2009, commencing the time in which Seller's could file his Notice of Appeal. Seller's filed his Motion for Extension of Time to Take Appeal on or about July 15, 2009. (C.P. 7) The trial court entered its Order denying Seller's Motion for Extension of Time to Take Appeal on July 21, 2009. (C.P. 20) On August 19, 2009, Seller's filed a Notice of Appeal from the trial court's Order entered July 21, 2009. (C.P. 23)

SUMMARY OF THE ARGUMENT

The time for Seller's appeal began to run at the time the Order denying his Motion for Motion for JNOV or in the alternative for new trial was entered on December 10, 2009. As the trial court noted in its Order Denying Motion for Extension of Time to Take Appeal, Seller's was clearly aware that his trial attorney was not representing him on appeal. The contract between Sellers and his trial attorney specifically states that the representation does not include an appeal to a higher court. (Appellant's Brief, Exhibit A-1) Further, Sellers was present at the hearing on his Motion for JNOV or, in the alternative, for New Trial, and was directly informed that his trial counsel would not represent him on appeal. (C.P. 20-21) Sellers did not file a Notice Appeal within 30 days of the court's final order denying his Motion for JNOV or, in the alternative, for a new trial. More than six months after the denial of his Motion for JNOV or in the Alternative for New Trial, Sellers filed a Motion for an Extension of Time in which to file his appeal. The trial court therefore correctly denied Seller's Motion for Extension of Time in which to file his appeal.

Sellers alleges that he received ineffective assistance of trial counsel due to his trial counsel's failure to file a notice of appeal from Seller's conviction and sentence. However, as the trial court noted in its Order Denying Motion for Extension of Time to Take Appeal, Seller's was clearly aware that his trial attorney was not representing him on appeal. The contract between Sellers and his trial attorney specifically states that the representation does not include an appeal to a higher court. (Appellant's Brief, Exhibit A-1) Further, Seller's was present at the hearing on his Motion for JNOV or in the Alternative for a New Trial and therefore knew that his trial attorney would not represent him on appeal. There is nothing in the record that overcomes

the presumption that Seller's received effective assistance of counsel. The trial court correctly denied Seller's Motion and this issue is without merit and should be dismissed.

ARGUMENT

I. The trial court did not err in dismissing Seller's Motion to File an Out-of-Time Appeal.

Mississippi Rule of Appellate Procedure 4(a) requires the notice of appeal to be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order being appealed. M.R.A.P. 4(a). Rule 4(g) allows the trial court to extend the time for filing a notice of appeal upon a timely motion, where good cause is shown. M.R.A.P. 4(g). The trial court may grant a party an additional thirty days in which to file his or her notice of appeal. M.R.A.P. 4(g) and cmt. (2007).

The Mississippi Supreme Court has adopted the following standard when reviewing a trial court's ruling on a motion for an extension of time to file a notice of appeal: "To the degree that a trial judge's decision to grant or deny a motion for an extension of time is based upon precept of law, the standard for this Court's review shall be 'plenary'; otherwise, this Court shall simply apply the abuse-of-discretion standard." *In re Estate of Ware*, 573 So.2d 773, 776 (Miss.1990) (citation omitted).

The time for Seller's appeal began to run at the time the Order denying his Motion for Motion for JNOV or in the alternative for new trial was entered on December 10, 2009. As the trial court noted in its Order Denying Motion for Extension of Time to Take Appeal, Seller's was clearly aware that his trial attorney was not representing him on appeal. The contract between Sellers and his trial attorney specifically states that the representation does not include an appeal

to a higher court. (Appellant's Brief, Exhibit A-1) Further, Sellers was present at the hearing on his Motion for JNOV or, in the alternative, for New Trial, and was directly informed that his trial counsel would not represent him on appeal. (C.P. 20-21) Sellers did not file a Notice Appeal within 30 days of the court's final order denying his Motion for JNOV or, in the alternative, for a new trial. More than six months after the denial of his Motion for JNOV or in the Alternative for New Trial, Sellers filed a Motion for an Extension of Time in which to file his appeal.

Noting that Sellers was aware that his trial attorney did not represent him on appeal due to the language of his contract and also due to his presence at the hearing on his Motion for JNOV or, in the alternative, for a New Trial, and also noting the length of time which had expired since Seller's post trial motion was denied, the trial court correctly denied Seller's Motion for an extension of time to file his appeal. The trial court did not abuse its discretion after Sellers, knowing that his trial counsel was not representing him on appeal, waited 6 months before moving for an extension of time to appeal.

M.R.A.P. Rule 4(g) allows the trial court to

extend the time for filing a notice of appeal upon motion *filed not later than 30 days after the expiration of time otherwise prescribed by this rule*. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and maybe ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time of 10 days from the date of the entry of the order granting the motion, whichever occurs later.

M.R.A.P. 2(a)(1) states as follows:

Mandatory Dismissal. An appeal shall be dismissed if the notice of appeal was not timely

filed pursuant to Rules 4 or 5.

M.R.A.P 3(a) states, in pertinent part, as follows:

An appeal permitted by law as of right from a trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule

4. M.R.A.P. 4(a) states, in pertinent part, that:

[t]he notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

In the case at bar, the judgment appealed from was entered on December 17, 2008. (C.P. 21) The notice of appeal was not filed until July 27, 2006. (C.P. 21) Accordingly, the notice of appeal was not timely filed pursuant to M.R.A.P. 4, and this putative appeal should be dismissed pursuant to M.R.A.P. 2.

The only statutory authority for a defendant to appeal in a criminal case is found in Section 99-35-101, Miss. Code Ann. (1972), which states as follows:

In the case of Pipkin v. State, 292 So.2d 181, 182 (Miss.1974), this Court stated, in pertinent part, that an attempt to appeal an unappealable order is a total departure from the orderly administration of justice and cannot and should not be approved." That is precisely what Sellers is attempting to do in this case. His actions should not be sanctioned.

Sellers is too late to receive an out of time appeal, since his Motion to File a Late Notice of Appeal was filed with the Circuit Clerk of Rankin County on July 17, 2009, some 218 days after the date the trial court entered it's Order denying Seller's Motion for J.N.O.V. or, in the Alternative, Motion for New Trial, on December 10, 2008.

The trial court did not err in dismissing Seller's Motion for Extension of Time to Take

Appeal. This issue is without merit and the ruling of the trial court should be affirmed.

II. Sellers was not denied effective assistance of trial counsel.

Sellers alleges that he received ineffective assistance of trial counsel due to his trial counsel's failure to file a notice of appeal from Seller's conviction and sentence. However, as the trial court noted in its Order Denying Motion for Extension of Time to Take Appeal, Seller's was clearly aware that his trial attorney was not representing him on appeal. The contract between Sellers and his trial attorney specifically states that the representation does not include an appeal to a higher court. (Appellant's Brief, Exhibit A-1) Further, Seller's was present at the hearing on his Motion for JNOV or in the Alternative for a New Trial and therefore knew that his trial attorney would not represent him on appeal. There is nothing in the record that overcomes the presumption that Seller's received effective assistance of counsel.

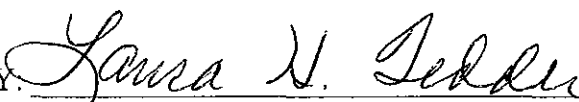
Seller's only appropriate form of action at this point is a Motion for Post-Conviction Collateral Relief. When a party raises an ineffective assistance of counsel claim on direct appeal, "the proper resolution is to deny relief without prejudice to the defendant's right to assert the same claim in a post-conviction relief proceeding." Willis v. State, 811 So.2d 450, 454 (Miss.Ct.App.2001) (citing *Read v. State*, 430 So.2d 832, 837 (Miss.1983)). Mississippi Appellate Courts have held that they may determine the merits of the claim on direct appeal only if "the record affirmatively shows ineffectiveness of constitutional dimensions, or ... the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed." Ramsey v. State, 959 So.2d 15, 25 (Miss.Ct.App.2006) (citing *Read*, 430 So.2d at 841)). Neither factor is met in the instant case. Therefore, the issue should not be addressed at this time and should be dismissed.

CONCLUSION

The issues presented by Seller's in his appeal from the trial court's order denying his Motion for Extension of Time to Take Appeal are without merit and the rulings of the trial court should be affirmed.

Respectfully submitted,

**JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI**

BY: 

LAURA HOGAN TEDDER, MSB # 9530
SPECIAL ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
Post Office Box 220
Jackson, MS 30205-0220
Telephone: (601) 359-3680