

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL KELLY

APPELLANT

VS.

NO. 2009-CP-1653-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant pled guilty and was sentenced on the 10th of May, 2004, (C.p. 16-20, sentence order). Defendant's motion for post-conviction relief was filed with the trial court on the 18th of September, 2009. The trial court denied the motion as being time-barred. (Order Denying Post-Conviction Relief, c.p. 29-30).

It is from that denial of post-conviction relief that defendant timely noticed this instant appeal. (C.p.31).

STATEMENT OF FACTS

Defendant pled guilty and got a good sentencing deal. Unfortunately, defendant didn't keep his part of the bargain his suspended portion was revoked.. Now that he is in prison until 2015, he has time to file legal documents.

ARGUMENT

Issue I.

THIS CLAIM IS PROCEDURALLY BARRED AND ALTERNATIVELY WITHOUT MERIT.

Defendant pled guilty and was sentenced on the 10th of May, 2004. (C.p. 16-20, sentence order). Defendant's motion for post-conviction relief was filed with the trial court on the 18th of September, 2009.

Such a filing is outside the time permitted by statute to file a motion for post-conviction relief, challenging a guilty plea. *Miss Code Ann.* ¶ 99-39-5(2). Such was the reason given for denying the motion. (Order Denying Post-Conviction Relief, c.p. 29-30).

¶ 3. A trial court's denial of post-conviction relief 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).

Myers v. State, 976 So.2d 917 (Miss.App. 2007).

It is the position of the State the trial court was absolutely correct in applying the statutory bar. As the Court noted the petition did not fit with any exceptions to the application of the 3-year limitation in filing a petition.

¶ 3. A trial court's denial of post-conviction relief 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).

Myers v. State, 976 So.2d 917 (Miss.App. 2007).

Defendant asserts the sentencing court did not have jurisdiction over the crime

committed because he was prosecuted by ‘information’ and not an indictment. Without waiving any procedural bar to review, this issue is, alternatively, without merit in law.

¶ 6. Under Mississippi law, any non-jurisdictional defect in an indictment *or information* against a defendant is considered waived when a defendant enters a valid plea of guilty.

Joiner v. State, 2010 WL 432280 (Miss.App. 2010)(emphasis added).

Prosecution of defendant for his crimes could have commenced in either manner indictment or information. When he pled guilty he waived any preference he may have had.

If this issue were not procedurally barred it would also be without merit in law. No relief should be granted based on this claim of error.

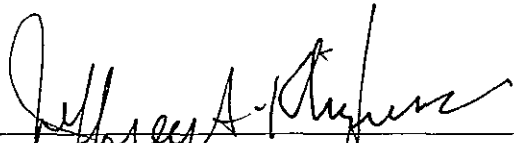
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

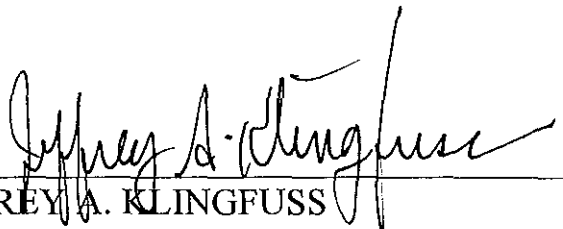
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Honorable Michael Guest
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This the 25th day of March, 2010.



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