

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GERALD JONES

APPELLANT

VS.

NO. 2009-CP-1890-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On January 8, 9, 2003, Gerald Jones, "Jones" was tried for two counts of sexual battery of a twelve year old female child, Ms. Regina Lipsey, by a Lafayette County Circuit Court jury, the Honorable Henry L. Lackey presiding. C.P. 15. Jones was found guilty and given two twenty five year concurrent sentences in the custody of the M. D. O.C.. This was on January 9, 2003. C.P. 15.

On June 24, 2008, Jones filed a pro se motion for post conviction relief requesting permission for "an out of time appeal" which was denied by the trial court. C.P. 38-52; 64.

Jones, through previous trial counsel, as directed by the trial court, filed a pro se notice of appeal to the Mississippi Supreme Court. C.P. 26-27.

ISSUE ON APPEAL

I.

WAS JONES ENTITLED TO AN OUT OF TIME APPEAL?

II.

**WAS INEFFECTIVE ASSISTANCE OF COUNSEL WAIVED
AS WELL AS LACKING IN MERIT?**

STATEMENT OF THE FACTS

On September 17, 20002, Jones was indicted by a Lafayette County Grand jury for two counts of sexual battery of a twelve year old female child, Ms. Regina Lipsey ,which occurred in July and November, 2001. C.P. 1-2.

On January 8, 9, 2003, Jones was tried for two counts of sexual battery of a twelve year old female child by a Lafayette County Circuit Court jury, the Honorable Henry Lackey presiding. C.P. 15. Jones was represented by Mr. Thomas Levidiotis. C.P. 8; 24.

Jones was found guilty. He was sentenced to serve two twenty five year concurrent sentences in the custody of the M. D. O. C.. This was on "January 9, 2003." C.P.13; 14-15.

On January 23, 2003, the trial court denied a timely motion by trial counsel for a new trial. C.P. 18.

On January 12, 2003, the record reflects that Jones was put on notice by his trial counsel that without "specific written instructions" there would be no appeal from his conviction. C.P. 24. The record reflects that this letter of "February 15, 2004" clearly stated that over a year after this timely notice, no instruction to appeal , written or otherwise, had been received. C.P. 24.

On "June 24, 2008," Jones filed a pro se motion for post conviction relief. C.P. 38. Jones

requested permission to file "an out of time appeal." C.P. 38. There were no authenticated affidavits from anyone in support of Jones' claim to have requested of his previous trial counsel an appeal from his convictions. C.P. 38-52. There were alleged letters from Jones to counsel inquiring about the status of his appeal. C.P. 55-56. However, they were not witnessed, notarized or authenticated in any way. There was no affidavit from trial counsel included with that motion. C.P. 32-61.

In addition, copies of letters from trial counsel included in the record indicate that Jones was "specifically" advised that there would be not appeal unless he indicated that he wanted to do so. C.P. 24.

Jones' unsupported request for out of time appeal was denied by the trial court. C.P. 38-52; 64.

Jones, through counsel, filed "a pro se notice of appeal" to the Mississippi Supreme Court. C.P. 26-27. This was on "June 2, 2006." Trial counsel's letter in the record indicates that he filed this notice at the request of the trial court. In other words, trial counsel no longer represented Jones. This was more than three years after Jones' convictions. Trial counsel also advised Jones by letter that this assistance as requested by the trial court "terminated" any responsibility that he might have to Jones. C.P. 59.

Jones filed "a pro se notice of appeal" from the Lafayette County trial court's denial of relief. C.P. 65.

SUMMARY OF THE ARGUMENT

1. The record reflects the trial court did not abuse its discretion in denying a motion for an out of time appeal. C.P. 64. The record reflects that Jones was convicted of two counts of sexual battery and sentenced on "January 9, 2003." C.P. 12-13.

The record also reflects that Jones filed his motion "for an out of time appeal" on "June 24, 2008." C.P. 38. There was no affidavits or witnesses in support of his claim to have notified his counsel of a desire for a timely appeal. C.P. 38-63. In addition, the record contains evidence that trial counsel advised Jones in a timely manner that there would be no appeal without specific notice from Jones. C.P. 24.

While Jones included alleged letters to counsel indicating his alleged desire for a timely appeal, there were no authenticated affidavits or proposed witnesses in support of these unsupported statements. C.P. 38-62. **Fair v. State**, 571 So.2d 965, 967 (Miss.1990).

In addition, the record reflects that Jones had no evidence that he ever requested "an application to proceed in the trial court" from the Mississippi Supreme Court. C.P.1-73. See M. C. A. Sect. 99-39-27, "Application to Supreme Court for leave to proceed in trial court..."**Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983).

The record also indicates that although trial counsel filed a notice of appeal "on June 2, 2006" on behalf of Mr. Jones, he did not represent him at the time. C.P. 24-26. This was more than three years after Jones' final judgment of conviction had been entered with no notice of appeal. In response to previous counsel's notice of appeal, the Mississippi Court of Appeals found that this notice was "not timely filed." It was therefore dismissed for "lack of jurisdiction." C.P. 34.

The record also indicates that the request for an out of time appeal came more than three years after entry of judgments of conviction. M. C. A. Sect. 99-39-5(2). The request for an out of

time appeal would therefore also be procedurally barred. See M. C. A. Sect. 99-39-5 (h).

2. The record reflects no evidence of ineffective assistance of counsel. The record contains no authenticated affidavits or proposed witnesses in support of Jones' claim. And more importantly, there was no affidavit from trial counsel who is being accused of ineptitude by Jones. To the contrary, the record contains trial counsel's letters to Jones which contradict Jones claims in his motion and his appeal. C.P. 24; 59.

In **Ford v. State**, 708 So. 2d 73, 75 (Miss. 1998), the Court found that Ford failed to meet his burden of proof for establishing ineffective assistance. He failed because he did not allege with "specificity and detail" how his counsel was ineffective where there was record evidence to the contrary.

This issue was waived as well as lacking in merit. **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION. THERE WAS NO APPLICATION FOR LEAVE TO PROCEED FROM THE SUPREME COURT. M. C. A. 99-39-27. IT IS ALSO PROCEDURALLY BARRED BY THE STATUTE OF LIMITATIONS.

Jones sought permission to file “an out of time appeal” in his pro se motion for post conviction relief. This was “June 24, 2008.” C.P. 38 .

In his appeal brief from the trial court’s denial of relief, Jones alleges that he notified his counsel of his request for an appeal within thirty days of the entry of his judgment of conviction. Appellant’s brief page 5. In his pro se motion for out of time appeal, Jones included an unwitnessed statement to that effect. However, this self serving statement of alleged previous intent to appeal was filed with his motion in “June 17, 2008.” C.P. 61.

The record reflects that Jones’ motion for an out of time appeal was filed on “June 24, 2008.” C.P. 38; 51. It was denied by the trial court. C.P. 64.

The record reflects that his judgment of conviction was entered on “January 9, 2003.” C.P. 12-13. The record indicates that Jones’ trial counsel placed Jones on timely notice. This was after his convictions. Jones was informed there would be no appeal without “specific written” request from him. This written notice was provided on January 12, 2003. C.P. 24. This was within the thirty days required for filing notice of appeal.

Contrary to the assertions in Jones’ unwitnessed pro se statement in 2008, he provided no evidence indicating that he notified his counsel of any such request for an appeal. C.P. 61. There are no authenticated affidavits or statement of witnesses in support of any of his claims of intent to appeal. This would be either for an intent to appeal within the thirty days for filing , or a pro se

request for an out of time appeal at any time prior to “June, 2008.” C.P. 24-26.

The record reflects that Jones’ court appointed counsel, Mr. Levidiotis, notified him by letter on February 15, 2004 that he had been previously informed of his right to appeal. C.P. 24. He specifically informed him that he would have to receive “specific written instructions” if he were to assist him in any way with an appeal. C.P. 24. Over a year after being placed on notice, Jones still had not notified Mr. Levidiotis of his desire to appeal his conviction. C.P. 24.

As stated in that letter of February 15, 2004 by trial counsel:

Enclosed please find a copy of the letter I sent to you on January 12, 2003, indicating that my duties to you were completely terminated and discharged upon your conviction in Lafayette County Circuit Court on January 9, 2003. **I specifically told you that I would not file an appeal unless I received specific written instructions from you to do so. It has been over a year and the time to appeal your conviction has long since passed.**

I advised you to ask the Lafayette County Circuit Court for leave to file an out of time appeal. **Since I no longer represent you, I am unable to act on your behalf unless specifically instructed by the Court.** C.P. 24. (Emphasis by appellee).

In **Fair v. State**, 571 So.2d 965, 967 (Miss.1990), the Court stated that at the very least a would be appellant must show that failure to timely perfect an appeal was “through no fault of his own.”

Legal principles enforceable here need be reiterated and made clear. A defendant convicted in a criminal action enjoys an appeal of right. Miss. Code Ann. § 99-35-101 (1972). That right is temporally entailed in that he must give notice thereof by filing notice of appeal with the clerk of the trial court within thirty (30) days of the date of the judgment imposing sentence or following final disposition of any post-trial motions, whichever is later, see Rule 4(a) and (e), Miss. Sup. Ct. Rules. This Court has not been grudging in granting out-of-time appeals in criminal cases, all to the interest that substantial justice may be done in the case of each individual convicted and sentenced through our criminal processes. On the other hand, it is settled that a defendant desiring an out-of-time appeal must, at the very least, show that the failure timely to perfect an appeal was through no fault of his own. See, e.g., **Moawad v. State**, 531 So.2d 632, 633 (Miss.1988); **Barnett v. State**, *supra*.

The record contains an Order from the Court of Appeals in August, 2006. That Order

dismissed Jones' attempted appeal. The Court, Judge T. Kenneth Griffis, Jr. stated that Jones' notice of appeal on or about "June 2, 2006" was "not timely filed and therefore should be dismissed for lack of jurisdiction." C.P. 34.

This matter came before the court on appeal and the court on its own motion finds that the notice of appeal was not timely filed and therefore the case should be dismissed for lack of jurisdiction. The appellant states that his appeal is from the sentencing order of January 9, 2003. The docket shows that the order denying the appellant's JNOV was entered on January 24, 2003. The notice of appeal was filed on or about June 2, 2006. The docket does not show that a motion for out of time appeal was filed or granted. (Emphasis by appellee).

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

The appellee would submit that the record which includes trial counsel's letters, as well as the Court of Appeals' dismissal was sufficient for showing the trial court did not abuse its discretion in denying such an requested untimely appeal. C.P. 24; 34. This was under M. C. A. 99-39-11(1)(2).

The appellee would submit that there is a lack of record evidence for showing that Jones "through no fault of his own" failed to perfect his appeal from his convictions. **Fair, supra**. There is also no evidence in the record that the Supreme Court granted permission to proceed in the trial court after Jones' conviction in 2003. M. C. A. Sect. 99-39-27. This was the basis for the Court of Appeals dismissing the pro se appeal for "want of jurisdiction."

This pro se appeal was also more than three years after the entry of his judgment of

conviction. Jones was therefore procedurally barred under the provisions of “the M. P. C. C. R. act,” M. C. A. Sect.. 99-39-5(2).

The appellee would submit that this issue is lacking in merit.

PROPOSITION II

INEFFECTIVE ASSISTANCE WAS WAIVED AS WELL AS LACKING IN MERIT.

In Jones' Motion for Post Conviction relief, he claimed that although he allegedly communicated with his trial counsel, he did not follow through and perfect his appeal from his conviction. There were no authenticated affidavits or proposed witnesses in support of Jones' attempts to blame his counsel for his failure to actively pursue his personal right to appeal. The alleged letters to counsel inquiring about the status of an alleged appeal in progress were no authenticated, and were filed with the motion three years after Jones' conviction. Motion, page 38-61.

The record reflects no evidence of ineffective assistance of counsel. The record contains no authenticated affidavits in support of Jones' claim. And more importantly, there is no affidavit from trial counsel who is being accused of ineptitude and unprofessional conduct by Jones. To the contrary, the record contains trial counsel's letters to Jones which contradict Jones claims in his motion and in this appeal. C.P. 24; 59.

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance where a defendant was time barred was not enough to constitute an exception to the statute of limitations. As stated:

Bevel raises a claim of ineffective assistance of counsel. It is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant, that the defendant's fundamental constitutional rights were violated. However, this Court has never held that merely raising a claim of ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court's failure to advise a defendant of maximum and minimum sentences does not implicate a "fundamental constitutional right" sufficient to except a case from the procedural bar of Sect 99-39-5.

In **Ford v. State**, 708 So. 2d 73, 75 (Miss. 1998), the Court found that Ford failed to meet his burden of proof for establishing ineffective assistance. He failed because he did not allege with “specificity and detail” how his counsel was ineffective where there was record evidence to the contrary.

The appellee would submit that this issue was waived as well as lacking in merit.


CONCLUSION

The trial court's denial of relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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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 Andrew K. Howorth
Circuit Court Judge
1 Courthouse Sq., Ste. 201
Oxford, MS 38655

Honorable Ben Creekmore
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This the 10th day of February, 2010.



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