

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VINCENT BAILEY

APPELLANT

VS.

NO. 2010-CP-0699

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE APPELLANT'S MOTION FOR POST CONVICTION RELIEF WAS PROPERLY DENIED.

STATEMENT OF THE FACTS

On March 22, 2010, the Appellant, Vincent Bailey, filed a Motion for Post Conviction Relief in the Circuit Court of Clay County, Mississippi. (Record p. 7). In his motion, he noted that in August of 2004, he pleaded guilty to several counts of Sale of a Controlled Substance. (Record p. 7 - 8). He also indicated that he was sentenced as a habitual offender pursuant to Miss. Code Ann. §99-19-81 and as a subsequent offender pursuant to Miss Code Ann. §41-29-147. (Record p. 7 - 8). He further indicated that his sentences, three years on one count, six years on another, and thirteen years on another, all running consecutively, would put him in the custody of the Mississippi Department of Corrections for twenty-two years. (Record p. 8). In his motion, he first argued that "the sentence was imposed in violation of the Constitution of the United States." (Record p. 9). He

also argued that he “is entitled to an out of time appeal.” (Record p. 9).

On April 14, 2010, the trial court denied the motion holding as follows:

The Court, after having considered same finds that said Motion is filed past the statute of limitations provided in Section 99-39-5 MCA (1972), which allows for a post-conviction motion to be filed three years after a conviction following a plea of guilty or three years following a ruling on direct appeal following a trial. Further, the motion meets none of the exceptions of Section 99-39-5 MCA (1972), since no new evidence has appeared which was not available when the case could have gone to trial, no intervening higher court decision has passed, nor in the Petitioner being detained on an expired sentence. The Court is therefore of the opinion that said Motion is time barred and should be, and hereby is, overruled and denied.

(Record p. 20). It is from this Order that the Appellant appeals.

SUMMARY OF THE ARGUMENT

The trial court’s denial of the Appellant’s Motion for Post Conviction Relief should be affirmed as the Appellant’s claim that his sentences are illegal is time-barred. The Appellant did not establish that any of the exceptions to the time-bar listed in Miss. Code Ann. §99-39-5(2) were met. Additionally, the time limitation is not waived because there is no basis of truth in the Appellant’s claims that his sentences are illegal. First, it was within the trial court’s discretion to order that the Appellant’s sentences be served consecutively instead of concurrently. Second, a guilty plea waives all non-jurisdictional defects in the indictment.

ARGUMENT

A trial court's dismissal of a motion for post conviction relief is reviewed by this Court under an abuse of discretion standard and will only be disturbed in cases “where the trial court's decision was clearly erroneous.” *Crosby v. State*, 16 So.3d 74, 77 (Miss. Ct. App. 2009) (quoting *Moore v. State*, 985 So.2d 365, 368 (Miss. Ct. App. 2008)).

THE APPELLANT'S MOTION FOR POST CONVICTION RELIEF WAS PROPERLY DENIED.

The Appellant's Motion for Post Conviction Relief was filed approximately six years after he pleaded guilty and was sentenced. The trial court held that the Motion should be dismissed as time-barred pursuant to Miss. Code Ann. §99-39-5(2) which reads as follows:

A motion for relief under this article 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 (3) 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 (3) years after entry of the judgment 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 discovered 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. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

(*emphasis added*). The trial court correctly noted in its Order denying the motion that none of the exceptions set forth in the statute were met. Nonetheless, the Appellant argues on appeal that "because [he] met the requirements of Miss. Code Ann. 99-39-5(2) [he] is entitled to a out of time appeal." (Appellant's Brief).

With regard to this issue, this Court has previously held:

For defendants who have pleaded guilty, a motion for post-conviction relief must be made within three years after the entry of the judgment of conviction. Miss. Code Ann. § 99-39-5(2) (Rev.2000). Excepted from the three-year statute of limitations are cases where the prisoner claims his sentence has expired or his probation, parole, or conditional release has been unlawfully revoked. *Id.* Additionally, the supreme court has carved out an exception to procedural bars when necessary to protect a fundamental right such as the right to a legal sentence. *Ivy v. State*, 731 So.2d 601, 603(¶ 13) (Miss.1999) (citing *Luckett v. State*, 582 So.2d 428, 430 (Miss.1991)); *Sneed v. State*, 722 So.2d 1255, 1257(¶ 11) (Miss.1998). Thus, post-conviction relief

petitions alleging an illegal sentence are not subject to the time bar. *Jackson v. State*, 965 So.2d 686, 690(¶ 11) (Miss.2007).

Campbell v. State, 993 So.2d 413, 415-16 (Miss. Ct. App. 2008). “However, merely asserting ‘a constitutional right violation is not sufficient to overcome the time bar.’” *Crosby*, 16 So.3d at 79 (quoting *Stovall v. State*, 873 So.2d 1056, 1058 (Miss. Ct. App. 2004)) (*emphasis added*). “There must at least appear to be some basis for the truth of the claim before the limitation period will be waived.” *Id.* (*emphasis added*). In the case at hand, there is no basis for the truth of the Appellant’s claims, therefore the limitation period should not be waived.

In his motion, the Appellant claimed that his sentences are illegal for two reasons. First he claimed that “it was error to sentence [him] to three consecutive sentences totaling twenty-two years” and that “each sentence should have been consolidated and imposed concurrently and [he] should be left with a thirteen year sentence.” (Record p. 12 - 13). However, Miss. Code Ann. §99-19-21(1) states that “when a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the trial court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.” (*emphasis added*). See also *Coffey v. State*, 856 So.2d 635, 638 (Miss. Ct. App. 2003) (holding that “whether or not a sentence is to be served concurrently or consecutively is clearly within the discretion of the trial judge”). Accordingly, there is no basis for this claim.

Secondly, the Appellant claimed that “the indictment clearly failed to apprise [him] that the State was seeking an enhanced penalty.” (Record p. 14). This claim fails for two reasons. First, the record does not support the claim as the indictment was not made a part of the record. “The appellant has the duty of insuring that the record contains sufficient evidence to support his

assignments of error on appeal.” *Scott v. State*, 24 So.3d 1039, 1041 (Miss. Ct. App. 2010). “It is an appellant’s duty to justify his arguments of error with a proper record, which does not include mere assertions in his brief, or the trial court will be considered correct.” *Dearman v. State*, 910 So.2d 708, 711 (Miss. Ct. App. 2005). Second and most importantly, “[a] claim ‘alleging a defective indictment is barred when a motion for post-conviction relief is not filed within the three-year time limitation.’” *Crosby*, 16 So.3d at 78 (quoting *Barnes v. State*, 949 So.2d 879, 881(¶ 8) (Miss. Ct. App. 2007) *See also* *Jefferson v. State*, 855 So.2d 1012, 1015 (Miss. Ct. App. 2003) (holding that “a guilty plea waives all non-jurisdictional defects in the indictment”); *Rivers v. State*, 807 So.2d 1280, 1282 (Miss. Ct. App. 2002) (holding that “a valid guilty plea admits all elements of the crime charged and waives all non-jurisdictional assertions of error in the indictment”); and *McClurg v. State*, 758 So.2d 473, 479 (Miss. Ct. App. 2000).

Because there is no basis for the Appellant’s claims that his sentence is illegal, the three year time limitation of Miss. Code Ann. §99-39-5(2) is not waived. Thus, the time-bar is in effect and the trial court properly denied the Appellant’s Motion for Post Conviction Relief as time-barred.

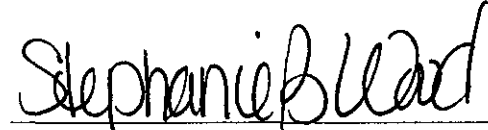
CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the trial court denial of the Appellant's Motion for Post Conviction Relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "Stephanie B. Wood", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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 5th day of October, 2010.



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