

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDRICK RUSSELL

APPELLANT

VS.

NO. 2010-CP-0870-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On March 9, 2007, Fredrick Russell, "Russell" pled guilty to possession of marijuana with intent to sell. He was given an eight year sentence. On November 26, 2007, Russell filed a pro se "Motion for Post Conviction Relief" which the trial court denied. C.P. 57-58.

On "May 10, 2010," Russell filed another Motion for Post Conviction Relief. C.P. 4-56.

The trial court denied relief, finding that this was a second or a "successive motion." C.P. 57-58. It was dismissed as "frivolous" and "with prejudice." From that denial of relief, Russell filed notice of appeal to the Mississippi Supreme Court. C.P. 59.

ISSUE ON APPEAL

I.

IS MR. RUSSELL'S 2010 MOTION BARRED AS A SUCCESSIVE MOTION?

STATEMENT OF THE FACTS

On March 9, 2007, Russell formally signed a waiver of indictment for a possession of marijuana with intent to sell charge. **Russell v. State, 2009-CP- 01428-COA., (¶ 2)** (September 21, 2010).

On May 9, 2007, Russell pled guilty to possession of 237 grams of marijuana with intent to sell or distribute. C. P. 53. He was represented by Mr. Eric Tiebauer. Russell with the assistance of his guilty plea counsel entered a "Petition To Enter A Guilty Plea."

The trial court advised Russell and questioned him and his counsel about Russell's understanding of the felony possession with intent to sale drug charge, and the consequences of his plea based upon a proposed negotiated plea agreement.

After advising and questioning Russell, the trial court found that Russell's plea was voluntarily and intelligently entered.

Russell was sentenced to an eight year term and a fine. Other felony charges were dismissed.

On November 26, 2007, Russell filed a hand written pro se "Petition For Post Conviction Relief." In that motion, Russell claimed an involuntary plea, as well as ineffective assistance of counsel. **Russell v. State, (¶ 2)**, decided September 21, 2010.

This motion was denied by the trial court. **Russell v. State, (¶ 4)**. The court found there was sufficient evidence from the guilty plea hearing transcript to deny Russell's allegations of an involuntary plea and ineffective assistance of counsel. There was no evidence of any misrepresentation to Russell about an alleged lesser sentence.

Russell filed notice of appeal.

On “May 10, 2010,” Russell filed another pro se “Motion for Post Conviction Relief” which the trial court denied on “May 12, 2010.” The trial court found that this was barred as “a successive motion.” C.P. 4-56; 57-58.

On May 29, 2010, Russell filed notice of appeal to the Mississippi Supreme Court. C.P. 59. He was appealing the trial court’s Order of “May 12, 2009” denying his pro se motion as “a successive motion.” C.P. 59.

On “September 21, 2010,” the Court of Appeals affirmed the trial court’s denial of Russell’s pro se Motion For Post Conviction relief of “November 26, 2007.” **Russell v. State, 2009-CP-01428-COA**, (¶8) September 21, 2010.

SUMMARY OF THE ARGUMENT

1. The record reflects that Russell's pro se "Motion For Post Conviction Collateral Relief" is a second such motion filed with the trial court of Wayne County. C.P. 4-56. As found by the trial court in denying relief, it is barred as "a successive motion." This is under the authority of M. C. A. 99-39-23(6) (Rev. 2007) C.P. 57-58. See **Russell v. State, 2009-CP- 01428-COA, (¶ 8)** decision of September 21, 2010 for documentation of Court of Appeals' denying Russell's previous pro se Motion for Post Conviction Relief.

The record in this second pro se PCR motion does not reflect any claim for any exception to the filing of a motion for post conviction relief under "the UPCC relief act." C.P. 57-58.

The appellee would submit that the record supports the trial court's Order denying relief, and this dismissal should be affirmed on appeal. C.P. 57-58. Russell's appeal should be dismissed as frivolous and with prejudice. C.P. 58.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT RUSSELL'S MOTION IS BARRED AS A SUCCESSIVE MOTION.

The record reflects that the trial court of Wayne County on "March 12, 2010" denied Russell's pro se motion for post conviction relief. C.P. 4-56; 57-58. Mr. Russell appealed from that denial of relief. C.P. 59. Meanwhile, Russell's pro se appeal from a previous Wayne County trial court order denying relief by the trial court on "August 11, 2009" was denied by the Mississippi Court of Appeals on "September 21, 2010."

The Appeal Court's Order affirmed the Wayne County trial court's denial of relief. **Russell v. State, 2009-CP- 01428-COA, (¶ 8)** September 21, 2010.

On May 10, 2010, Russell filed another pro se "Motion For Post Conviction Relief" which was denied by the trial court on May 12, 2010. C.P. 57-58. Russell filed notice of appeal from the trial court's second order denying relief . C.P. 59. This was while his previous appeal from denial of post conviction relief was pending before the Court of Appeals.

The trial court found that Russell's pro se motion of May 10, 2010 was "a second or a successive motion" under M. C. A. Sect. 99-39-23 (6) and that there was no claim and no evidence in support of a claim for an exception from this procedural bar. C.P. 57-58.

As stated in 99-39-23(6):

(6) The order as provide in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this chapter is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this chapter.

There was no claim of "newly discovered evidence" or of "an intervening decision" which would have made it practically conclusive that the outcome of Russell's original plea and/ or

sentence would have been different. M. C. A. Sect. 99-39-23(6)

As stated in the Wayne County trial court's Order denying relief:

This cause came before this court on a motion for post conviction relief filed by the petitioner on May 10, 2010, and the court having considered the motion, the entire record, and applicable authority, does hereby find that on March 13, 2009, this court entered an Order Denying Petition for Post Conviction Relief in cause number CV-2007-211-B. The Petitioner subsequently filed a motion to vacate order which was denied by this court on August 11, 2009. The petitioner filed his appeal which is now pending before the Mississippi Court of Appeals in cause number 2009-CP-02428-COA. The petitioner also filed post conviction petitions in cause number 2009-56-B and CV-2007-171-B, both of which were dismissed....

Under M. C. A. 99-39-23(6) (Rev. 2007), an inmate is barred from filing a second or successive motion for post conviction relief if he had previously filed a post conviction relief motion that was denied by the trial court. **Lyons v. State**, 990 So. 2d 262,264 (P8) (M. C.A. 2008). An order denying post conviction relief is considered a final judgment and a bar to a second or successive writ. M C A 99-39-23(6), **Dobbs v. State**, 18 So. 3d 295, 298 (P9)(M. C. A. 2009).

The Court finds that the petitioner's motion for post conviction relief is barred as a successive writ, and the petitioner has failed to demonstrate that his motion falls under one of the exceptions to the successive writ bar. C.P. 57-58. (Emphasis by appellee).

In **Dobbs v. State** 18 So. 3d 295, 297-298 (¶ 6-¶ 9) (Miss. App. 2009), the Court found that an Order denying a motion for post conviction relief was "a final judgement" and a bar to a second motion. The Court also found that it would not reverse a trial court's decision unless it was "clearly erroneous."

¶ 6. We will not reverse a circuit court's dismissal of a motion for post-conviction relief unless we find that the circuit court's decision was clearly erroneous. **Williams v. State**, 872 So.2d 711, 712(¶ 2) (Miss. Ct. App.2004). However, when reviewing issues of law, this Court's proper standard of review is de novo. Id.

...

¶ 9. The Mississippi Uniform Post-Conviction Collateral Relief Act delivers a clear message regarding successive post-conviction relief writs. An order denying a motion for post-conviction relief is considered a final judgment and a bar to a second or

successive motion. Miss. Code Ann. § 99-39-23(6) (Rev.2007). Essentially, an appellant is granted one bite at the apple when requesting post-conviction relief. See, e.g., **Sykes v. State**, 919 So. 2d 1064, 1066(¶ 8) (Miss. Ct. App.2005) (holding that a prisoner's successive claims were procedurally barred by the prohibition against successive writs as well as res judicata).

The record cited above indicates that this pro se “Motion For Post Conviction Relief” filed in May 10, 2010 is “a successive motion.” Russell’s previous pro se Motion for Post Conviction Relief was denied by the trial court on “March 13, 2009.” Russell’s pro se appeal from that denial of relief was dismissed by the Court of Appeals on “September 21, 2010.” **Russell v. State**, 2009-CP- 01428-COA, September 21, 2010.

Therefore, the appellee would submit that this motion should be denied as a second or “successive motion” under M. C. A. Sect. 99-39-23(6).

CERTIFICATE OF SERVICE

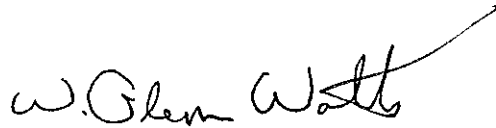
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert Walter Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, MS 39302

Honorable E.J. (Bilbo) Mitchell
District Attorney
Post Office Box 5172
Meridian, MS 39302

Fredrick Russell, #81782
SMCI
Post Office Box 1419
Leakesville, MS 39451

This the 5th day of October, 2010.



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CONCLUSION

Mr. Russell's pro se motion should be dismissed as "a successive motion" with prejudice for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "W. Glenn Watts", written over a horizontal line.

W. GLENN WATTS
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