

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELVIN MARTIN

APPELLANT

VS.

NO. 2010-CP-1286

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELVIN MARTIN

APPELLANT

vs.

CAUSE No. 2010-CP-01286-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Marshall County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

On 12 January 2000, the prisoner appeared before the Circuit Court of Marshall County and entered a pleas of guilty to the felonies of aggravated assault and robbery by exhibition of a deadly weapon. The prisoner's pleas were accepted, and he was convicted and sentenced of those felonies. (R. Vol. 1, pp. 12 - 23).

On 26 March 2010, the prisoner filed a petition or motion styled "Habeas Corpus or Petition for an Order to Show Cause" in the circuit court. In this filing, the prisoner alleged that he had entered pleas of guilty to aggravated assault and armed robbery on 10 February 2000 and that he was of the opinion that he was "to serve ten (10) years to flat - time his sentences." The prisoner claimed that the sentences imposed ten years previously were ambiguous. He asserted that the plea bargain

was for a thirty-year sentence of imprisonment, with ten years suspended and five years on post-release supervision, and twenty years imprisonment on each count of aggravated assault set out in one of the indictments returned against him at some time prior to the date of his guilty pleas. The prisoner further alleged that the sentences for the convictions of aggravated assault were to run concurrently, and those to run concurrently with the sentence imposed for the armed robbery conviction.

The prisoner then went on to allege that his plea agreement was “voided” on account of some alleged change in the way or means by which the Mississippi Department of Corrections calculated “trusty time” or some other such time, resulting in an ambiguous sentence. He then went to assert that he had been given erroneous advice concerning his eligibility for early release. As for the relief the prisoner sought, he did not seek a vacation of one or another of his convictions, but only a re-sentencing in such a way as to permit him to “flat time” his sentence (presumably his sentence on armed robbery) in ten years. (R. Vol. 1, pp. 1 - 7).

It appears that there is a memorandum by the Department of Corrections to the prisoner to the effect that he could earn no earned time or “trusty time” on his sentence for armed robbery, and that his twenty - year sentence was “mandatory.” (R. Vol. 1, pg. 25).

The circuit court treated the prisoner’s motion as one filed under the Uniform Post - Conviction Relief Act and denied relief on that motion, without an evidentiary hearing. (R. Vol. 1, pg. 30). As night follows day, the prisoner appealed.

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION WITHOUT HAVING HELD AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION

A circuit court may deny relief on a motion in post - conviction relief where it appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief. Miss. Code Ann. Section 99-39-11(2) (Supp. 2010). This Court will affirm a summary dismissal of a motion in post - conviction relief where the movant fails to demonstrate a claim procedurally alive substantially showing the denial of a State or federal right. Questions of law, however, are reviewed *de novo*. *Chapman v. State*, 47 So.3rd 203 (Miss. Ct. App. 2010).

Preliminarily, we point out that the relief sought by the prisoner – re-sentencing – was not relief that the circuit court could have granted. *Hampton v. State*, 724 So.2d 449 (Miss. Ct. App. 1998). Consequently, the circuit court was correct to refuse to entertain as request for such relief.

Beyond this, we will point out that the prisoner's filing in post - conviction relief occurred over ten years after the time of his convictions and sentences. Relief on the prisoner's motion was barred by the provisions of Miss. Code Ann. Section 99-39-5(2) (Supp. 2010). The prisoner did not allege in the circuit court and does not allege here any exception to the application of the statute of limitations. Even if he had, those exceptions would not be applicable here. *Salter v. State*, No. 2010-CP-00098-COA (Miss. Ct. App., Decided 14 December 2010, Not Yet Officially Reported). While the circuit court was not specific as to what ground or grounds it dismissed the prisoner's motion without an evidentiary hearing, the expiration of the statute of limitations was surely one

valid basis for that dismissal.

Assuming for argument that the prisoner's motion was filed within the time permitted for such a motion, or that some heretofore unknown and unsuspected exception to the operation of the statute of limitations is discovered, there is no merit in the prisoner's claim.

The prisoner, essentially, asserts that his attorney and perhaps the circuit court misadvised him as to the amount of time he would have to serve on his armed robbery conviction or convictions.¹ The prisoner sought to be re-sentenced on account of the alleged fact that he was told that he would only be required to serve ten years of a twenty-year sentence for armed robbery.

To the extent that the prisoner's claim is based upon erroneous advice of the prisoner's attorney, there is nothing whatever in this record to demonstrate that the prisoner was given incorrect advice by his attorney, and there is no affidavit appended to the prisoner's pleadings in support of such a claim. This claim alleged in the pleadings is merely the prisoner's say-so. The prisoner's pleadings were insufficient to allege and support what was in effect an ineffective assistance of counsel claim as to his attorney. *Hamilton v. State*, 44 So.3d 1060 (Miss. Ct. App. 2010); *Edge v. State*, 962 So.2d 81, 87 (Miss. Ct. App. 2007).

As to the claim that the circuit court misadvised the prisoner as to the amount of time he would have to "flat time" on the armed robbery sentence, the prisoner does not appear to have

¹ The record is somewhat confusing as to how many convictions the prisoner suffered for aggravated assault and armed robbery. The indictments are not included in the record, nor are the judgments. The transcript of the plea colloquy does not clearly identify the number of counts involved. It is likely, though, that the prisoner suffered one conviction for armed robbery, the rest being convictions for aggravated assault. There is a document purporting to have been prepared by the Department of Corrections which indicates that the prisoner was convicted of one count of armed robbery and sentenced to a term of twenty years imprisonment, and two counts of aggravated assault, and sentenced to terms of twenty years imprisonment on each, to be served concurrently. (R. Vol. 1, pg. 26).

alleged in his pleadings that he relied upon any such advice in deciding to enter a plea of guilty. Thus, to the extent that the circuit court did misadvise the prisoner, no evidentiary hearing would have been required. Nonetheless, it is clear that the circuit court informed the prisoner that he would have to “flat time” the sentence imposed upon the armed robbery conviction. (R. Vol. 1, pg. 18). This was correct. *Salter, supra*, Slip Op. at 1.

The prisoner, though, focuses upon what the judge of the circuit court said next concerning a minimum service of sentence of ten years. While no doubt it would have been better had the court left out any mention of a prior rule concerning parole eligibility with respect to armed robbery, when one considers the rest of the comment made by the court it seems clear that the court abandoned any mention of such. The court dropped any discussion about the prior ten - year rule and went on to inform the prisoner that it did not want him to plead guilty on account of some recommendation by the district attorney, it being the court’s decision as to what sentence to impose. (R. Vol. 1, pp. 18 - 19). We submit that the court did not and did not intend to advise the prisoner that he would be eligible for parole or early release after having served ten years on the armed robbery sentence. The court’s brief mention of the prior law concerning such eligibility was abandoned as soon as it was begun. It was the court’s intention to inform the prisoner, correctly we will add, that the decision of what sentence to impose was the court’s decision, notwithstanding any recommendation or agreement as to sentence by the district attorney.

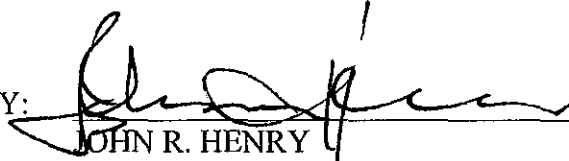
CONCLUSION

The order of the circuit court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "John R. Henry", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, John R. Henry, 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 27th day of January, 2011.


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