

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COREY PARKER

APPELLANT

VS.

NO. 2010-CP-1886-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
PARKER'S POST-PLEA MOTION FOR POST-CONVICTION RELIEF FILED IN 2010 AND BASED UPON AN ALLEGEDLY INVOLUNTARY GUILTY PLEA AND ILLEGAL SENTENCE ENTERED IN 1995, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2).	
IT WAS MANIFESTLY WITHOUT MERIT AS WELL.	3
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

STATE CASES

Austin v. State, 863 So.2d 59 (Ct.App.Miss. 2003)	6
Bester v. State, 976 So.2d 939 (Ct.App.Miss. 2007)	2
Crawford v. State, 867 So.2d 196, 202 (Miss. 2003)	2
Freelon v. State, 569 So.2d 1168, 1169 (Miss. 1990)	7
Grubb v. State, 584 So.2d 786 (Miss. 1991)	5
Jackson v. State, 506 So.2d 994, 995 (Miss. 1987)	7
Little v. State, 918 So.2d 97 (Ct.App.Miss. 2006)	2
Lockett v. State, 656 So.2d 68, 71 (Miss. 1995)	7
Lockett v. State, 656 So.2d 76, 78-79 (Miss. 1995)	7
Luckett v. State, 582 So.2d 428 (Miss. 1991)	6
Odom v. State, 483 So.2d 343, 344 (Miss. 1986)	7, 8
Phillips v. State, 856 So.2d 568 (Ct.App.Miss. 2003)	9, 10
Sones v. State, 828 So.2d 216 (Ct.App.Miss. 2002)	2
Stroud v. State, 978 So.2d 1280 (Ct.App.Miss. 2008)	2
Trotter v. State, 907 So.2d 397, 402 (Ct.App.Miss. 2005)	1, 2, 9
Wallace v. State, 823 So.2d 580 (Ct.App.Miss. 2002)	6

STATE STATUTES

Miss.Code Ann. § 99-39-11 (Supp. 1999)	9
Miss.Code Ann. §97-3-73	4

Miss.Code Ann. §97-3-75	2
Miss.Code Ann. §97-3-79	1, 3, 4
Miss.Code Ann. §99-3-79	4
Miss.Code Ann. §99-39-1	8
Miss.Code Ann. §99-39-5(2)	2, 7, 8, 10
Miss.Code Ann. §§ 99-39-1	5

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COREY PARKER

APPELLANT

VS.

NO. 2010-CP-1886-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this appeal from his quest in a state trial court for time-barred post-conviction relief sought in the wake of his guilty plea in 1995 to a charge of armed robbery, COREY PARKER, proceeding *pro se*, seeks to exempt himself from the time bar based upon exceptions found in §99-39-5 MCA (1992), as well as the judicially created exception mentioned in **Trotter v. State**, 907 So.2d 397, 402 (Ct.App.Miss. 2005) . *See* Brief of Appellant at 5, 8, where Parker thrice mentions a violation of “fundamental constitutional rights.”

The “fundamental rights” exception relied upon by Parker targets what he claims is an illegal sentence imposed in the wake of a voluntary plea. (Brief of Appellant at pp. 5-8)

Parker seeks vacation of his conviction and the twenty (20) year sentence imposed after pleading guilty to *armed* robbery in violation of Miss.Code Ann. §97-3-79. We assume Parker desires immediate release.

Regrettably, Parker’s sentence was not illegal, and his claims are time barred.

STATEMENT OF FACTS

More than fifteen (15) years ago, on April 6, 1995, Corey Parker, following plea negotiations, entered a voluntary plea of guilty to armed robbery. (C.P. at 8) The circuit judge accepted the recommendation of the prosecutor and sentenced Parker to serve twenty (20) years in the custody of the MDOC with the service of the first ten (10) years to be served “ . . . without benefit of good time, earned time, early release or parole.” (C.P. at 8)

Fast forward fifteen (15) years.

On September 1, 2010, Parker filed, *pro se*, a pleading styled “Motion to Vacate and or Set Aside Sentence and Conviction.” (C.P. at 3-6)

Parker claimed therein the circuit judge misadvised him with respect to the penalty for “robbery” which, by virtue of Miss.Code Ann. §97-3-75, is a term not more than fifteen (15) years.

On November 10, 2010, Judge Landrum, treating Parker’s pleading as a motion for post-conviction collateral relief, summarily denied Parker’s motion on the ground it was time barred and manifestly without merit as well.

SUMMARY OF ARGUMENT

“The burden of proving that no procedural bar exists falls squarely on the petitioner.” **Crawford v. State**, 867 So.2d 196, 202 (Miss. 2003).

Parker’s post-conviction claims were clearly time-barred by virtue of Miss.Code Ann. §99-39-5(2). **Steward v. State**, 18 So.3d 895 Ct.App.Miss. 2009); **Stroud v. State**, 978 So.2d 1280 (Ct.App.Miss. 2008); **Bester v. State**, 976 So.2d 939 (Ct.App.Miss. 2007), reh denied, cert denied 977 So.2d 343 (2007); **Little v. State**, 918 So.2d 97 (Ct.App.Miss. 2006); **Trotter v. State**, 907 So.2d 397 (Ct.App.Miss. 2005); **Sones v. State**, 828 So.2d 216 (Ct.App.Miss. 2002).

The fundamental rights exemption provides no basis for any relief grounded upon a denial

of due process or upon any other constitutional or statutory grounds. Parker's sentence was not illegal. If it was not illegal, his claim is time-barred. Contrary to his claim of a violation of due process (C.P. at 14), Parker received all the process he was due.

ARGUMENT

PARKER'S POST-PLEA MOTION FOR POST-CONVICTION RELIEF FILED IN 2010 AND BASED UPON AN ALLEGEDLY INVOLUNTARY GUILTY PLEA AND ILLEGAL SENTENCE ENTERED IN 1995, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2).

IT WAS MANIFESTLY WITHOUT MERIT AS WELL.

Parker states in his brief that he, "... acting alone[,] robbed three fast food establishments of currency." Parker admits that in 1995 he was indicted for armed robbery in violation of Miss.Code Ann. §97-3-79 and subsequently entered a guilty plea to that offense. (Brief of Appellant at 2)

That should pretty well settle Parker's present complain. The penalty for armed robbery, if a jury fails to fix the punishment at imprisonment for life, is for any term not less than three (3) years. Parker was sentenced to twenty (20) years. Obviously, that is not an illegal sentence.

The record in this cause, much like the cupboard of old mother Hubbard, is bare, consisting only of Parker's motion to vacate, a brief in support thereof, and the order of the lower court denying the request for post-conviction relief. A transcript of the plea-qualification hearing is not included in the record.

No matter.

Parker points to the fact the very statute under which he entered his guilty plea - Miss.Code Ann. §97-3-79 - declares that a person guilty of robbing another by putting him in fear by the

exhibition of a deadly weapon “shall be guilty of robbery.”

In either a novel or disingenuous argument, Parker argues that the word “shall” in Miss.Code Ann. §97-3-79, is considered “mandatory,” and the penalty for “robbery” is only fifteen (15) years. Therefore, says Parker he was misadvised as to the duration of his possible sentence, and the twenty (20) year sentence imposed is illegal because it is five (5) years too long. According to Parker, Judge Landrum failed to adhere to the mandatory language of the statute which required him to sentence Parker to not more than fifteen (15) years, the penalty for “robbery.”

The problem with this argument is that Parker did not enter a guilty plea to “strong-arm” robbery proscribed by Miss.Code Ann. §97-3-73; rather, he entered a guilty plea to “robbery” with a firearm defined in Miss.Code Ann. §99-3-79 which, according to the plain language of the statute, is punishable by life imprisonment if so fixed by the jury but, if not, for any term not less than three (3) years.

The sentencing order reflects quite clearly that Parker, “[a]fter a thorough examination . . . as to his understanding of all of his trial and constitutional rights . . .” entered a guilty plea to a charge of *armed* robbery. (C.P. at 7) Parker concedes as much in his brief at page 3.

Parker seeks to take advantage of the following language found in §97-3-79:

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be *guilty of robbery*, . . . [emphasis ours]

Since the penalty for “robbery” by virtue of §97-3-75 is a term of imprisonment not more than fifteen (15) years, Parker concludes he was misadvised and illegally sentenced to twenty (20) years. Obviously, he is wrong.

Parker overlooks the fact that both §97-3-73 and 97-3-79 use the word “robbery” to describe

the crime, whether with or without a putting in fear by the display of a deadly weapon. There are two forms of “robbery.” One is strong-arm “robbery,” the other is armed “robbery.” Although we give him credit for a new and unusual argument, Parker is simply playing a meaningless game with words.

Judge Landrum correctly treated Parker’s papers as a motion for post-conviction collateral relief filed under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. §§ 99-39-1 *et. seq.* See **Grubb v. State**, 584 So.2d 786 (Miss. 1991).

Judge Landrum dismissed summarily Parker’s motion to vacate on the basis of a time bar and found it manifestly without merit as well. (C.P. at 18; appellee’s exhibit A, attached) Specifically, he found that Parker’s “ . . . [s]aid [m]otion was filed well after the statute of limitations for filing said motion had run [and [i]n addition, [p]etitioner’s submission has no merit and should be denied.” (C.P. at 18)

Stated differently, Judge Landrum found that Parker’s motion to vacate was time-barred.

It was.

Admittedly, this Court has said that “[a] claim that the defendant is serving an illegal sentence is not subject to the time bar ‘because errors affecting fundamental constitutional rights are excepted from the time bar .’ ” **Caviness v. State**, 1 So.3d 917, 918 (¶9) (Ct.App.Miss. 2008)

Circumvention of the time bar by prisoners claiming an illegal sentence is only possible where the sentence is, in fact, illegal. If that is the posture of the sentence, the time bar will not be held to bar the issue from review. If, on the other hand, the allegation of an illegal sentence is frivolous, devoid of merit on its face, or fails to state a claim *prima facie*, there should be no requirement for a trial or appellate court to specifically address the allegation. To hold otherwise is to say that any prisoner can file from now until doomsday a post-conviction paper claiming his

sentence was illegal and clutter the courts with unnecessary litigation.

Here and now Parker invites this Court to reverse the trial judge's summary dismissal and vacate and/or set aside his twenty (20) year sentence and perhaps even set him free. (Brief of Appellant at 9)

We respectfully submit Judge Landrum found, although implicitly, no plain error or error involving fundamental rights, or any other rights, sufficient to exempt Parker from the statute barring his belated claims. In this posture, Parker's motion for post-conviction relief was correctly denied by the lower court as time-barred and manifestly without merit as well. (C.P. at 18; appellee's exhibit A, attached) This ruling was both judicious and correct.

Post-conviction relief claims based on allegedly involuntary guilty pleas are subject to the three (3) year statute of limitations and the time bar. **Luckett v. State**, 582 So.2d 428 (Miss. 1991); **Wallace v. State**, 823 So.2d 580 (Ct.App.Miss. 2002). *See also Austin v. State*, 863 So.2d 59 (Ct.App.Miss. 2003), reh denied [Claim that defendant's guilty plea to rape was not knowing, intelligent, and voluntary was the type of claim that fell squarely within the three-year statute of limitations governing post-conviction relief.]

The same should be true to no less extent when only the sentence imposed is assailed in a post-conviction environment. **Owens v. State**, 17 So.3d 628 (Ct.App.Miss. 2009). The argument made by Parker in the case *sub judice* does not fall within the exceptions to the three (3) year statute of limitations.

Time bar notwithstanding there is no merit to Parker's claim(s) which are without merit on their face.

No fundamental rights have been implicated by Parker's claim his sentence was illegal and therefore his guilty plea involuntary. Parker was not misadvised with respect to the duration of his

sentence which was a term of years not less than three (3) years but reasonably expected to be less than life.

Miss.Code Ann. §99-39-5(2) identifies, in plain and ordinary English, the time limitations for motions to vacate guilty pleas, judgments of conviction obtained other than by plea, and erroneous sentences filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. It reads as follows:

(2) **A motion for relief under this chapter 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 discoverable 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. [emphasis supplied]

The post-conviction relief act applies prospectively from its date of enactment, April 17, 1984. Individuals such as Corey Parker who entered pleas of guilty or were otherwise convicted *after* April 17, 1984, have three (3) years from the date of the entry of their conviction via guilty plea to file their petition for post-conviction relief. **Lockett v. State**, 656 So.2d 68, 71 (Miss. 1995); **Lockett v. State**, 656 So.2d 76, 78-79 (Miss. 1995); **Freelon v. State**, 569 So.2d 1168, 1169 (Miss. 1990); **Jackson v. State**, 506 So.2d 994, 995 (Miss. 1987); **Odom v. State**, 483 So.2d 343, 344 (Miss. 1986).

In *Odom, supra*, we find the following language:

* * * * * This act applies *prospectively* from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three (3) years from April 17, 1984, to file their petition for post conviction relief. **Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss. Code Ann. §99-39-5(2) (Supp. 1985), . . . [emphasis supplied]**

Parker entered his plea of guilty to armed robbery on April 6, 1995, well *after* the enactment on April 17, 1984, of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss.Code Ann. §99-39-1 *et seq.* (C.P. at 7-8) Pursuant to a recommendation by the State, Parker was sentenced to serve twenty (20) years for the robbery with a firearm, with the first ten (10) years of said sentence to be served day-for-day without the benefit of probation or parole or good time, earned time or early release. (C.P. at 7-8)

It is no secret that Parker had three (3) years from April 6, 1996, the date of the entry of the judgment of conviction for attempted armed robbery, to file in the trial court his motion for post-conviction collateral relief.

Consequently, the deadline for filing Parker's post-conviction papers was on or about April 6, 1998.

Parker's motion for post-conviction relief was not filed, however, until on or about September 1, 2010, over a dozen years after the time for assailing his conviction and sentence following guilty plea had expired. This was excruciatingly tardy and too little too late. The old adage that "it's better late than never," once again, does not apply here.

The post-conviction relief act provided Parker with a statutory procedure for assailing his conviction and sentence within a reasonable time. Parker, however, missed the window of opportunity by twelve (12) years.

The three year statute of limitations bars a post-conviction relief motion absent a showing the case falls within any one of the three statutory exceptions [**Phillips v. State**, 856 So.2d 568 (Ct.App.Miss. 2003)] or the judicially created fundamental rights exception talked about in **Trotter v. State**, 907 So.2d 397, 402 (Ct.App.Miss. 2005).

We concur with the finding made implicitly by the trial judge that the case at bar clearly does not exist in this posture. *See* appellee's exhibit A, attached.

In the final analysis, none of the exceptions, statutory or judicially created, to the time bar, which is alive and well, apply to this case. The findings and conclusions made by Judge Landrum in his order denying relief were eminently correct and not clearly erroneous.

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) *If it plainly 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, the judge may make an order for its dismissal and cause the prisoner to be notified.*

(3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does. He did. And he was.

Parker's belated claims were time-barred. They were manifestly without merit as well.

CONCLUSION

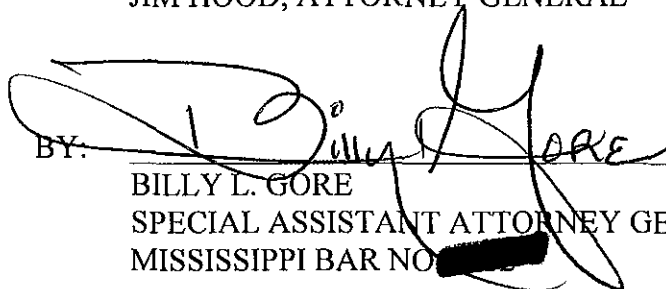
"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State**, 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Parker is time barred from bringing his post-conviction claim at this late date. He failed to file his motion for post-conviction relief within the three-year time frame prescribed by Miss.Code Ann. §99-39-5(2), and he fails to make a claim falling under any of the recognized exceptions to the statutory time bar.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal, as either time-barred or plainly without merit, of Parker's post-conviction motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 
BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT
OF JONES COUNTY, MISSISSIPPI

COREY PARKER

PETITIONER

VERSUS

CAUSE NO. 2010-87-CV9

STATE OF MISSISSIPPI

RESPONDENTS

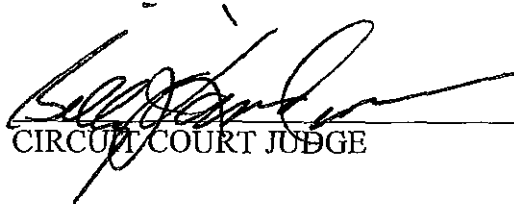
**ORDER DENYING MOTION TO VACATE AND/OR SET ASIDE SENTENCE
AND CONVICTION**

COMES NOW the Court, on Motion to Vacate and/or Set Aside Sentence and Conviction in the above-styled and numbered cause, and after reviewing said Motion and being fully advised in the premises, the Court finds that said Motion is not well-taken and should be denied.

The Mississippi Uniform Post Conviction Relief Act is the exclusive means for obtaining relief after conviction in this State. The Motion filed hereinabove appears to be a motion for post-conviction relief. Said Motion was filed well after the statute of limitations for filing said motion had run. In addition, Petitioner's submission has no merit and should be denied.

As such, Petitioner's request is DENIED.

SO ORDERED this 5th day of November, 2010.


CIRCUIT COURT JUDGE



CERTIFICATE OF SERVICE

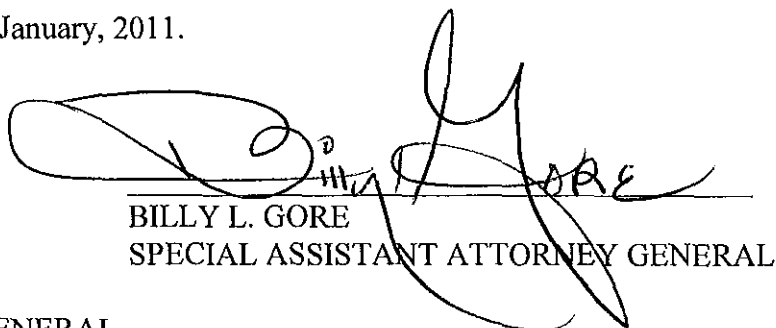
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

Honorable Billy Joe Landrum
Circuit Court Judge, District 18
P. O. Box 685
Laurel, Mississippi 39441

Honorable Anthony J. Buckley
District Attorney, District 18
P.O. Box 313
Laurel, Mississippi 39441

Corey Parker, Pro Se
MDOC #38570
Jefferson/Franklin Corr. Fac.
279 Hwy 33
Fayette, Mississippi 39069

This the 28th day of January, 2011.


BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680