

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM ANTONIO AVERY

APPELLANT

VS.

NO. 2011-CP-0664

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S PETITION FOR POST-CONVICTION COLLATERAL RELIEF AS TIME-BARRED.

STATEMENT OF THE FACTS

In May of 2003, the Appellant, William Avery entered a guilty plea to one count of simple possession of methamphetamine after being charged with possession of methamphetamine with intent to sell and with the enhancement penalty for violations for the Uniform Controlled Substance Law while in possession of a firearm. (Record p. 19-25). He was sentenced in June of 2003 to serve fifteen years in the custody of the Mississippi Department of Corrections with ten years suspended, five years to serve, and five years reporting probation. (Record p. 26-29). He was released on parole in 2004. (Record p. 40). His parole was revoked in 2010 and he was ordered to serve the remainder of his sentence. (Record p. 40).

On March 31, 2011, Avery filed a Petition for Post-Conviction Collateral Relief raising two issues: the legality of his sentence and ineffective assistance of counsel. (Record p. 2-18). The trial court denied the Petition as time-barred. (Record p. 39-41). Avery now appeals that decision raising not only the two issues raised in his original Petition, but also raising the issue of whether his guilty plea was voluntarily, intelligently, and knowingly entered.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's denial of Avery's Petition for Post-Conviction Collateral Relief as the Petition was time-barred. It was filed almost eight years after he was sentenced and he failed to establish an exception to the bar.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S PETITION FOR POST-CONVICTION COLLATERAL RELIEF AS TIME-BARRED.

"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(¶ 9) (Miss. Ct. App. 2008)). The trial court did not abuse its discretion in denying Avery's Petition as time barred. Mississippi Code Annotated §99-39-5(2) states in pertinent part 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 the entry of the judgment or conviction.

As noted above, Avery was sentenced in 2003. His Petition was filed in 2011, almost eight years after he was sentenced. Miss. Code Ann. § 99-39-5(2) does, however, set forth exceptions to the

time-bar:

- (a)(i) 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; or
- (ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
- b) Likewise excepted are those cases in which the petitioner 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.

Avery has not raised nor established any of these exceptions.

As set forth above, Avery raised three issues on appeal. His ineffective assistance of counsel claim clearly falls within the time-bar. *See Crosby*, 16 So.3d at 78 (quoting *Chancy v. State*, 938 So.2d 267, 270(Miss. Ct. App. 2005) (holding that “the Mississippi Supreme Court has consistently held that the time bar of Mississippi Code Annotated section 99-39-5(2) applies to post-conviction relief claims based on ineffective assistance of counsel”). Likewise, his claim that his plea was not voluntarily, intelligently, and knowingly entered is barred as he did not raise it before the trial court in his Petition. *See Ewing v. State*, 34 So.3d 612, 617 (Miss. Ct. App.2009) (holding that the Appellant’s “failure to raise the issue of the voluntariness of his guilty plea before the trial court in his motion for post-conviction relief bars this issue from our review”). Avery’s claim that his sentence is illegal may, however, be considered an exception to statutory bar. This Court has previously held that:

“[T]he 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.” *Campbell v. State*, 993 So.2d 413, 415 (Miss. Ct. App. 2008). Consequently, a petition for post-conviction relief which alleges an illegal sentence is exempt from a time bar. *Id.* at 416(¶ 6) (citing *Jackson v. State*, 965 So.2d 686, 690(¶ 11) (Miss.2007)). However, merely asserting “a constitutional right violation is not sufficient to overcome the time bar.” *Stovall v. State*, 873 So.2d 1056, 1058(¶ 7) (Miss.Ct.App.2004). “There must at least appear to be some basis for the truth of the claim before the limitation period will be waived.” *Id.* Therefore, we must review the merit of the issue in order to determine whether Crosby’s illegal sentence claim survives the statutory time limitation.

Crosby, 16 So.3d at 79 (*emphasis added*). Here, there is no basis for the truth of Avery’s claim that his sentence is illegal. Avery was sentenced for simple possession of methamphetamine (41.5 grams) pursuant to Miss. Code Ann. §41-29-139(c)(1)(E) which sets the sentence at “imprisonment for not less than ten (10) years nor more than thirty (30) years and a fine of not more than One Million Dollars (\$1,000,000.00).” As set forth above, Avery was sentenced to serve fifteen years in the custody of the Mississippi Department of Corrections with ten years suspended, five years to serve, and five years reporting probation. This sentence clearly falls within the statutory limitations. Thus, the illegal sentence exception to the bar does not apply.

As Avery’s Petition was filed almost eight years after he was sentenced, his Petition was time-barred. He did not establish that any of the exceptions to the bar applied to his case. Accordingly, the trial court did not abuse its discretion in denying the Petition.

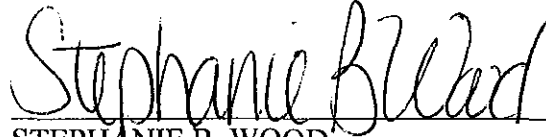
CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, reading "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 13th day of September, 2011.



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