

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFF WAYNE TUCKER

APPELLANT

VS.

NO. 2011-CP-0790

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I.	
THIS ISSUE IS PROCEDURALLY BARRED AND	
WITHOUT MERIT.	5
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

STATE CASES

Dickerson v. State, 2011 WL 6213139 (Miss.App. 2011)	6
Reeder v. State, 783 So.2d 711, 714 (Miss. 2001)	5

STATE STATUTES

Mississippi Code Annotated section 99–39–23(6) (Supp.2011)	5, 6
Mississippi Code Annotated section 47–7–33 (Rev.2011)	5
Mississippi Code Annotated section 97–3–95 (Rev.2006)	1
Mississippi Code Annotated section 97–5–23 (Rev.2006)	1
Mississippi Code Annotated sections 45–33–25 & –27 (Supp.2010)	1

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**STATEMENT OF THE CASE
&
STATEMENT OF FACTS**

¶ 1. Jeff Wayne Tucker appeals the judgment of the Lee County Circuit Court denying his motion for post-conviction collateral relief. He claims: (1) his guilty plea was entered involuntarily; (2) his trial counsel was ineffective; and (3) he was entitled to an evidentiary hearing. We find no error and affirm.

FACTS

¶ 2. In cause number CR08–497, Tucker was indicted on Count I, gratification of lust under Mississippi Code Annotated section 97–5–23 (Rev.2006), and Count II, sexual battery under Mississippi Code Annotated section 97–3–95 (Rev.2006). By separate indictment in cause number CR08–640, Tucker was also charged with the felonious failure to register as a sex offender under Mississippi Code Annotated sections 45–33–25 & –27 (Supp.2010). By an agreed order with the State, Tucker's status as a habitual offender was dropped from the indictments.

¶ 3. On September 24, 2008, Tucker appeared before the circuit court and entered guilty pleas to all three charges. Tucker was sentenced to fifteen years and ordered to pay a \$1,000 fine in Count I, and he was sentenced to thirty years with fifteen years suspended and ordered to pay a \$1,000 fine in Count II. He was ordered to serve the sentences in Counts I and II concurrently. Tucker was further sentenced to five years for his failure to register as a sex offender. That sentence was ordered to run consecutively to the sentences in Counts I and II.

¶ 4. *On August 26, 2009, Tucker filed a motion for post-conviction relief.* The motion attacked his conviction and sentence for the felonious failure to register as a sex offender under cause number CR08-640. He claimed that: (1) he had received ineffective assistance of counsel; (2) his guilty plea was entered involuntarily; and (3) the 1997 conviction which gave him the status of a sex offender was invalid. *On September 15, 2009, Tucker filed a second motion for post-conviction relief* that challenged his convictions and sentences for gratification of lust and sexual battery under cause number CR08-497. He again asserted claims that his counsel was ineffective and that his guilty pleas were entered involuntarily.

¶ 5. The circuit court found that Tucker's claims had no merit. Therefore, the relief requested in both of Tucker's motions for post-conviction relief was denied. Tucker now appeals the circuit court's judgment.

Tucker v. State, 60 So.3d 221 (Miss.App. 2011)(Emphasis added).

During the pendency of the appeal from the denial of the first two motions for post-conviction relief Tucker did file on October 4, 2010 his third petition for post-conviction relief in these convictions. (C.p. 4-32), and a fourth petition for post-conviction relief on Oct. 18, 2010 (c.p. 33-46).

On April 19, 2011 the Court of Appeals for the State of Mississippi issued an opinion affirming the trial Court's denial of the first two petitions for post-conviction relief. *Tucker v. State*, 60 So.3d 221 (Miss.App. 2011).

On August 12, 2011, the Circuit Court of Lee County denied and dismissed petitioner's third and fourth motions for post-conviction relief (c.p. 102-104).

Later that month, petitioner filed his notice of appeal from the denial of his third and fourth post-conviction motions. (C.p. 111-118).

SUMMARY OF THE ARGUMENT

The issues raised regarding the sentenced are procedurally barred as successive writs. Further, being a convicted felon petitioner received a term of incarceration followed by post-release supervision which is not illegal. This claim is without merit.

ARGUMENT

I.

THIS ISSUE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The facts of this case, successive writs and a claim of illegal sentence have been heard and dealt with before, to wit:

¶ 4. “When reviewing a lower court's decision to deny a [motion] for post-conviction relief [the appellate court] will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised the applicable standard of review is de novo.” *Reeder v. State*, 783 So.2d 711, 714 (¶ 5) (Miss.2001) (quoting *Pickett v. State*, 751 So.2d 1031, 1032 (¶ 8) (Miss.1999)).

DISCUSSION

¶ 5. Dickerson argues that his sentence is illegal because a convicted felon cannot receive a suspended sentence. Dickerson cites to Mississippi Code Annotated section 47–7–33 (Rev.2011), which states that a trial court has the authority to suspend a defendant's sentence “except ... where the defendant has been convicted of a felony on a previous occasion....” Dickerson argues that because he was a four-time convicted felon, his sentence was in violation of the law.

¶ 6. Dickerson's appeal is barred as a successive writ. Miss.Code Ann. § 99–39–23(6) (Supp.2011). Under section 99–39–23(6), a movant is prohibited from filing successive writs challenging his or her conviction unless an exception is shown. *Id.* Dickerson has shown no exception to this rule, and the issue raised in his PCR motion has already been decided by this Court. *Dickerson*, 37 So.3d at 652–53 (¶¶ 1–2).

¶ 7. Notwithstanding the procedural bar, we also find Dickerson's argument without merit. Dickerson argues he was not eligible to serve a suspended sentence since he was a prior convicted felon. However,

Dickerson was not given a suspended sentence. He was placed on post-release supervision. Thus, not only is this appeal procedurally barred, the issue raised by Dickerson is without merit.

Dickerson v. State, 2011 WL 6213139 (Miss.App. 2011).

The State would argue these latest petitions are successive writs and barred. *Miss.Code Ann.* § 99-39-23(6). The very facts judicially found and recorded in the opinion affirming the trial court's denial of two post-conviction motions refer to a first and second petition for post-conviction relief. *Dickerson* at ¶4. Further, it would appear the sentence of which petitioner complains was in the same nature as in *Dickerson*, being a term of incarceration followed by a period of post-release supervision. (Sentencing Order, c.p. 29-30).

Consequently, while the trial court arrived at the correct conclusion by a different route, there is no doubt the trial court was correct in denying the petitions for post conviction relief.

The State would ask that no relief be granted based upon a claim of an illegal sentence.

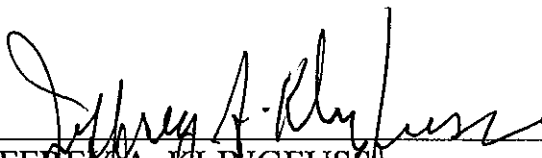
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial and dismissal of post-conviction relief.

Respectfully submitted,

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BY:



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CERTIFICATE OF SERVICE

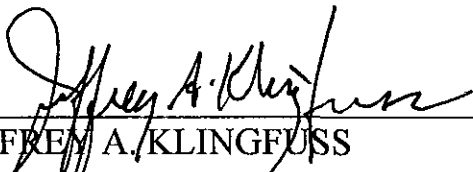
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Paul S. Funderburk
Circuit Court Judge
Post Office Drawer 1100
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Jeff Wayne Tucker, #61859
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This the 26th day of January, 2012.



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