

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**JACK BENJAMINE PATRICKSON****APPELLANT****VS.****NO. 2016-CP-01602-COA****STATE OF MISSISSIPPI****APPELLEE****BRIEF FOR THE APPELLEE****APPELLEE DOES NOT REQUEST ORAL ARGUMENT****JIM HOOD, ATTORNEY GENERAL**

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JACK BENJAMINE PATRICKSON

APPELLANT

VS.

NO. 2016-CP-1602-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. Jack Benjamine Patrickson is not entitled to an out-of-time appeal.

STATEMENT OF FACTS

On May 20, 2011, Jack Benjamine Patrickson was indicted by the Grand Jury of Rankin County for one count of sexual battery in violation of Mississippi Code Section 97-3-95(1)(a). (CP 15). The case proceeded to trial, Circuit Judge John Huey Emfinger, presiding, and the jury found Patrickson guilty as charged on January 18, 2012. (CP 46). On January 26, 2012, Patrickson was sentenced to serve thirty (30) years in the custody of the Mississippi Department of Corrections (MDOC), with twenty (20) years to serve, ten (10) years suspended, and five (5) years of supervised probation. (CP 65-68). Patrickson will also be required to register as a sex offender upon his release. (CP 65-68). Patrickson did not file any post-trial motions or a direct appeal in this case.

In July 2014, Patrickson filed a motion in the Circuit Court of Rankin County to obtain the records and transcript from his case, but the order was denied. (CP 71-75). The circuit court noted that Patrickson had not filed a direct appeal and not petitioned for post-conviction relief (PCR), so he was not entitled to the documents and his request should be denied. (CP 78). In December 2015,

Patrickson petitioned the circuit court judge to consider his parole eligibility under House Bill 585, however, the judge declined to do so because Patrickson was ineligible as he had been convicted of a crime of violence. (CP 79-81). On June 30, 2016, Patrickson filed a motion for appointment of counsel in the Circuit Court of Rankin County. (CP 82-86). The circuit court denied and dismissed Patrickson's motion because Patrickson still had not filed a motion seeking PCR, so there was nothing pending before the court that would justify appointing counsel. (CP 87-88).

On September 15, 2016, Patrickson filed a motion for reconsideration of sentence, in which he argued his sentence should be reviewed in light of the fact that he had enrolled in GED courses and had not received a rule violation report (RVR) in two years. (CP 89-90). The motion was denied after the court determined it did not have jurisdiction to modify his sentence because the sentence had been imposed during a previous term of Court that was finished. (CP 91).

On September 29, 2016, Patrickson filed a motion for an out-of-time appeal, for a copy of the trial transcript, and for the appointment of appellate counsel. (CP 3-10). He argued he was entitled to an out-of-time appeal because he has a constitutional right to a direct appeal of his conviction. (CP 7). He claims he is entitled to the court records and transcripts of the trial in order to compose post-conviction motions, and that he should be appointed appellate counsel because he is indigent¹. (CP 5-10). Lastly, Patrickson argued that he received ineffective assistance of counsel because his retained attorney failed to file post-trial motions and notice of appeal. (CP 4-5).

The circuit court denied and dismissed Patrickson's motion because it was not filed within

¹ On February 22, 2017, this Honorable Court issued an order in which it said, "The criminal file in this cause does not include the trial transcript. As the transcript was not reviewed by the trial court and the only issue in Patrickson's post-conviction collateral relief motion is whether he is entitled to an out-of-time appeal, we do not feel it is necessary to supplement to appellate record with the trial transcript."

three (3) years after the date of his judgment of conviction and sentence and was accordingly time-barred under Mississippi Code Annotated Section 99-39-5(2). (CP 92-93). Additionally, the circuit court determined Patrickson had not offered an explanation for the delay which would except him from the three (3) year requirement. (CP 93). Patrickson filed timely notice of appeal. (CP 100).

SUMMARY OF THE ARGUMENT

Jack Benjamine Patrickson is not entitled to an out-of-time appeal because his motion was properly denied as time-barred. Additionally, Patrickson fails to demonstrate that his claim meets the requirements of one of the statutory exceptions. Lastly, he does not establish why he is entitled to an out-of-time appeal.

ARGUMENT

I. Jack Benjamine Patrickson is not entitled to an out-of-time appeal.

Standard of Review

“When reviewing the denial of a movant’s PCR motion, an appellate court will not disturb the trial court’s factual findings unless they are clearly erroneous.” *Johnson v. State*, 110 So.3d 353, 354 (Miss. Ct. App. 2013)(internal citations omitted).

Argument

Patrickson is not entitled to an out-of-time appeal because he is time-barred and does not meet any statutory exceptions to the time-bar. The trial court’s dismissal of his motion for PCR was not clearly erroneous. Under Mississippi Code Annotated Section 99-39-5(2), if no direct appeal was filed following a criminal conviction, any motion for PCR must be filed within three years after the time for taking an appeal has expired. According to Mississippi Rules of Appellate Procedure Rule 4, notice of appeal must be made within thirty (30) days of entry of the judgment or order appealed

from. “A prisoner may seek an out-of-time appeal in a PCR motion, Miss. Code Ann. § 99-39-5(1)(i), but such a claim is still subject to the three-year statute of limitations. See *DeLoach v. State*, 890 So.2d 934, 936 (Miss. Ct. App. 2004).” *Balle v. State*, 205 So. 3d 1087, 1088 (Miss. Ct. App. 2016).

No direct appeal was filed in Patrickson’s case, and his time for taking an appeal expired around February 17, 2012, which was thirty (30) days after his judgment of conviction was entered on January 18, 2012. Under Miss. Code Ann. §99-39-5(2), Patrickson’s motion for PCR was time-barred because it was not filed until September 2016, over one and a half years after the three-year statutory limit had tolled. Therefore, the trial court properly dismissed his motion for PCR as time-barred.

Additionally, Patrickson fails to demonstrate that he meets an exception to the statutory time-bar. He briefly argues that he has a constitutional right to a direct appeal, however, “merely asserting a constitutional-right violation is insufficient to overcome the procedural bars. There must at least appear to be some basis for the truth of the claim before the procedural bar will be waived.” *Id.* (Citing *Sanders v. State*, 179 So.3d 1190, 1192-93 (Miss. Ct. App. 2015)). Here, there is no evidence that Patrickson’s constitutional rights were violated or that he meets any other exception to the statutory time-bar.

A similar case was presented in *Balle v. State*, whereby the movant was convicted of murder and failed to file a direct appeal. *Id.* at 1088. Thirteen years later, Balle filed a motion for PCR in which he claimed he was entitled to relief because he was allegedly innocent and his attorney failed to file an appeal. *Id.* The circuit court summarily dismissed Balle’s motion as time-barred under Miss. Code Ann. §99-39-5(2). *Id.* Balle appealed and argued he was entitled to an out-of-time

appeal. *Id.* On appeal, this Honorable Court affirmed the trial court's dismissal because Balle's motion was time-barred and failed to meet a statutory exception to the three-year statute of limitations imposed on motions for PCR; it was also determined that Balle failed to identify a reason why he was entitled to an out-of-time appeal. *Id.*

Like the *Balle* case, the circuit court here dismissed and denied Patrickson's motion for PCR because it determined the three-year statutory limit had tolled and Patrickson failed to establish an exception to the time-bar. Moreover, as in *Balle*, Patrickson failed to articulate why he is entitled to an out-of-time appeal. A circuit court may summarily dismiss a motion for PCR if it plainly appears from the face of the motion that the movant is not entitled to any relief. Miss. Code Ann. §99-39-11(2); *Friday v. State*, 141 So.3d 18, 20 (Miss. Ct. App. 2014). Accordingly, the circuit court properly dismissed and denied Patrickson's motion because it was clear that he was not entitled to any relief under the Uniform Post-Conviction Collateral Relief Act.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests this Honorable Court to affirm the trial court's denial and dismissal of Jack Benjamine Patrickson's motion for an out-of-time appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KAYLYN HAVRILLA MCCLINTON, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system. Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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