

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2004-CP-00459-COA**

**DESMOND EARL PHILLIPS**

**APPELLANT**

**v**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	2/12/2004
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DESMOND EARL PHILLIPS (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: BILLY L. GORE
DISTRICT ATTORNEY	BEN CREEKMORE
NATURE OF THE CASE:	CIVIL - POST- CONVICTION RELIEF
TRIAL COURT DISPOSITION:	TRIAL JUDGE DISMISSED PETITIONER'S MOTION FOR POST-CONVICTION RELIEF.
DISPOSITION:	AFFIRMED: 04/12/2005
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

**BEFORE BRIDGES, P.J., IRVING AND MYERS, JJ.**

**IRVING, J., FOR THE COURT:**

¶1. Desmond Earl Phillips filed a petition for post-conviction relief, attacking the validity of his prior burglary convictions which were used to enhance the sentence for a later cocaine conviction. The trial judge dismissed the petition without a hearing, and Phillips appealed raising the following issues: (1) the trial judge erred in dismissing his (Phillips's) petition as time barred, and (2) the trial judge erred in dismissing the petition without conducting an evidentiary hearing.

¶2. Finding no reversible error, we affirm the trial judge's dismissal of Phillips' petition.

#### FACTS

¶3. In November 1979, Phillips pleaded guilty to two counts of burglary and was sentenced to ten years on each count. The trial judge suspended six years of each sentence and allowed Phillips to serve the four remaining years of each sentence concurrently.

¶4. In April 1983, Phillips pled guilty to a reduced charge of conspiracy to commit forgery and received a five-year suspended sentence and was placed on probation. Thereafter, in October 1988, Phillips was convicted of possession of cocaine with intent to distribute. As a result of his prior guilty pleas, he was sentenced as a habitual offender to thirty years in the custody of the Mississippi Department of Corrections.<sup>1</sup>

¶5. In April 1999, Phillips filed two separate petitions for post-conviction relief. In his first petition, Phillips attacked the voluntariness of his 1979 burglary pleas. Phillips alleged that neither the trial judge nor his attorney advised him of his right against self-incrimination. In the second petition, Phillips attacked his forgery plea and similarly alleged that he was not advised of his right against self-incrimination.

¶6. In July 2001, the trial judge entered an order summarily dismissing Phillip's petition attacking his forgery plea. Phillips appealed the dismissal of that petition, and this Court affirmed the trial judge in an opinion. *Phillips v. State*, 856 So. 2d 568 (Miss. Ct. App. 2003).

¶7. In December 2003, Phillips filed a memorandum in support of the remaining petition attacking his 1979 burglary pleas which had not yet been decided by the trial court. In February 2004, the trial judge

---

<sup>1</sup>The record indicates that in July 1984, Phillips was also sentenced as a habitual offender to serve three years for the crime of burglary. The record further notes that the State waived the mandatory maximum sentence.

entered an order summarily dismissing Phillips' petition as time barred. Additional facts will be related during our discussion of the issues.

## ANALYSIS AND DISCUSSION OF THE ISSUES

### *(1) Timeliness of Petition*

¶8. Phillips first contends that the trial judge erred in dismissing his petition as time barred. The State, however, counters that Phillips failed to file his motion for post-conviction relief within the three-year statutory time frame.

¶9. Mississippi Code Annotated section 99-39-5(2) (Supp. 2004), which governs post-conviction proceedings, provides in pertinent part that:

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 entry of the judgment of conviction.

¶10. "This act applies prospectively from its date of enactment, April 17, 1984." *Odom v. State*, 483 So. 2d 343, 344 (Miss. 1986). "Individuals convicted prior to April 17, 1984, have three (3) years from April 17, 1984, to file their petition for post conviction relief." *Id.* Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief. *Id.*

¶11. Phillips entered his guilty plea in November 1979, prior to the enactment of section 99-39-5. Therefore, he had three years from April 17, 1984, the date of its enactment, to file his petition. This Court finds that since Phillips failed to file his petition within the statutory time frame, the trial judge was correct in dismissing Phillip's petition as time barred. As a result, this issue is without merit.

### *(2) Evidentiary Hearing*

¶12. Phillips next argues that the trial judge erred in failing to conduct an evidentiary hearing before dismissing his petition. However, Mississippi Code Annotated section 99-39-19 (Rev. 2000) makes clear that an evidentiary hearing is not required when there is no genuine issue of material fact. Similarly, Mississippi Code Annotated section 99-39-11(2) (Rev. 2000), which governs summary disposition of motions, provides for the following: “

I f i t  
plainly  
appears  
f r o m  
the face  
of the  
motion,  
a n y  
annexe  
d  
exhibits  
and the  
p r i o r  
procee  
dings in  
the case  
that the  
movant

is not  
entitled  
to any  
relief,  
t h e  
j u d g e  
m a y  
m a k e  
a n  
o r d e r  
for its  
dismiss  
al and  
c a u s e  
t h e  
prisoner  
to be  
notified  
.” ¶13.

A  
review  
of the

record  
reveals  
that the  
t r i a l  
j u d g e  
did not  
err in  
dismissi  
n g  
Phillips'  
petition  
without  
a n  
evidenti  
a r y  
hearing.  
Here,  
the trial  
j u d g e  
found  
t h a t  
Phillips'

petition  
w a s  
t i m e  
barred;  
therefor  
e, there  
was no  
genuine  
issue of  
material  
fact to  
conside  
r.

**¶14. THE JUDGMENT OF THE CIRCUIT COURT OF LAFAYETTE COUNTY DISMISSING MOTION FOR POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAFAYETTE COUNTY.**

**KING, C.J., BRIDGES AND LEE, P.JJ., MYERS, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR.**