IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2013-CA-00547-COA

MILTON TROTTER **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	02/27/2013
TRIAL JUDGE:	HON. ROBERT WALTER BAILEY
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES A. WILLIAMS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: STEPHANIE BRELAND WOOD
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	MOTION FOR POST-CONVICTION RELIEF DISMISSED
DISPOSITION:	AFFIRMED - 11/04/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. This case involves Milton Trotter's two separate life sentences—one imposed by a federal judge and the other by a Mississippi circuit judge. Trotter's first life sentence was handed down in federal district court after Trotter pled guilty to a federal kidnapping charge. Shortly after, Trotter waived indictment and pled guilty in a Mississippi circuit court to a murder committed by his accessories during the abduction. For the murder, the circuit judge imposed a life sentence, which he ordered to be served concurrently with Trotter's federal life sentence. The circuit judge's sentencing order says he "allowed" Trotter to serve the concurrent Mississippi life sentence in federal prison.

¶2. After the Mississippi sentencing hearing, Trotter was placed in federal custody and began serving his concurrent life sentences. Trotter had served thirty years in federal prison when the federal parole board granted him parole on the kidnapping conviction. But the Mississippi Parole Board denied him parole on his state murder conviction. So Trotter was transferred to a Mississippi prison to continue serving his life term.

¶3. Trotter filed a post-conviction-relief (PCR) motion,[1] complaining this was not the deal he struck with the state prosecutor. As he sees it, because he was paroled from federal custody, he had to be released by Mississippi. His more specific argument is that since his life sentence for murder was ordered to run concurrently with his federal sentence and because he was "allowed" to serve his time in federal prison, the State was bound to parole him upon his parole release from federal custody. We disagree.

¶4. On appeal, we find Trotter was serving two distinct life sentences, in two separate jurisdictions, for two different crimes. And nothing in the record suggests Trotter was promised state parole as part of his plea agreement on the murder charge. Furthermore, Mississippi prisoners have no constitutionally recognized liberty interest in parole. Instead, the sole discretion to grant or deny parole lies with the Parole Board, not the courts. We thus affirm the dismissal of his PCR motion.

Discussion

---

[1] This is Trotter's second PCR motion; his first was filed in 2003. The trial judge dismissed that motion, and this court affirmed the dismissal. *See Trotter v. State*, 907 So. 2d 397, 403 (¶21) (Miss. Ct. App. 2005).

¶5. In reviewing the dismissal of a PCR motion, we "will not disturb the circuit court's factual findings unless they are clearly erroneous." *Smith v. State*, 118 So. 3d 180, 182 (¶6) (Miss. Ct. App. 2013) (citing *Holloway v. State*, 31 So. 3d 656, 657 (¶5) (Miss. Ct. App. 2010)). We review questions of law de novo. *Id*.

I. Procedural Bars

¶6. Because this is Trotter's second PCR motion, we must determine if his claims are procedurally barred. His first PCR motion was filed in 2003, nearly twenty-two years after he pled guilty to murder. In that motion, he claimed he was actually innocent of murder—a claim he also rehashes in his present motion. The circuit court dismissed his 2003 PCR motion on both procedural and substantive grounds, and this court affirmed. *See Trotter*, 907 So. 2d at 403 (¶21).

¶7. The gist of Trotter's new PCR argument is that Mississippi's refusal to parole him on his murder conviction amounted to the State breaching its plea agreement. So in his eyes, he is being wrongly jailed. While the State argues Trotter's PCR motion is time-barred since it was not filed within three years of his 1981 guilty plea and is impermissibly successive, we find his main argument challenging custody is not.

¶8. Generally, PCR claims must be filed within three years of a guilty plea. *See* Miss. Code Ann. § 99-39-5(2) (Supp. 2014). And successive PCR claims are typically not allowed. *See* Miss. Code Ann. § 99-39-23(6) (Supp. 2014). However, there are certain fundamental-rights exceptions and other codified exceptions, which permit PCR petitioners to circumvent these bars.

¶9. Trotter is not challenging the denial of parole eligibility. Instead, he argues a statutory exception in section 99-39-5 exists because "his sentence has expired." But "by definition, a life sentence does not 'expire.'" *Smith*, 118 So. 3d at 183 (¶9). "Rather, the only ways to 'terminate' a life sentence are through vacatur of the sentence, pardon, death, or the parole process." *Id.* We do note, however, that section 99-39-5(1)(h) does except untimely PCR challenges when the petitioner is "unlawfully held in custody." Because this is essentially what Trotter argues, we find his challenge—that based on his plea agreement, he is being wrongly held in custody—is not untimely or successive.

¶10. But we find his actual-innocence claim is barred as a successive writ. In his 2003 PCR motion, Trotter brought an identical actual-innocence argument—that he was passed out when the murder happened. The circuit court previously rejected this claim, and we affirmed. *See Trotter*, 907 So. 2d at 402 (¶13). Because that judgment is conclusive, we do not address his renewed actual-innocence argument.

II. Breach of Plea Agreement

A. Guilty Pleas

¶11. Though Trotter pushes a "breach of plea agreement" claim, we find he is reading into both his state plea agreement and sentencing order a term that simply does not exist. What Trotter is trying to do is stretch the circuit judge's courtesy of allowing him to serve his concurrent state sentence in a federal correctional institution into some sort of "promise" that he "must" immediately be granted state parole if he is ever paroled in the federal system.

¶12. Trotter pled guilty to a federal kidnapping charge in the Southern District of

Mississippi and received a life sentence. And on October 19, 1981, he waived indictment and pled guilty to murder in the Lauderdale County Circuit Court. Trotter's sentencing order for his state murder conviction shows he was "sentenced to a term of life in the Mississippi State Penitentiary at Parchman, Mississippi." This sentence was "to run concurrent[ly] with the life sentence of the United States Federal Court." The order also stated that Trotter "[is] allowed to serve said sentence in the [f]ederal [p]enitentiary."

¶13. It is clear Trotter pled guilty to two different crimes, in two distinct jurisdictions, and received two separate concurrent life sentences. But there is absolutely nothing in his plea agreement, the sentencing order, or any other part of Trotter's record submissions that shows he was promised parole on his Mississippi sentence if granted parole in the federal system. What is more, Mississippi's parole mechanism is permissive, not mandatory, so the judge could not have bound the Parole Board. Instead, our review shows Trotter got just the sentence he bargained for in his murder case—a concurrent life sentence.

B. Vice *and the Parole System*

¶14. The Mississippi Supreme Court has previously addressed a claim like Trotter's—that a defendant in federal prison serving concurrent federal and state sentences had been promised state parole as part of his plea agreement and that the State breached the agreement. *Vice v. State*, 679 So. 2d 205, 207 (Miss. 1986). And like Trotter's case, in *Vice*, there was no evidence the defendant had been promised parole. *Id*. Still, our high court noted that even if there had been some evidence of such a promise, "there is no basis in law [to argue] that the Parole Board 'violated' the plea agreement by not granting him parole." *Id.* at 208.

This is because matters of parole are solely "within the discretion of the Parole Board." *Id.*; *see also* Miss. Code Ann. §§ 47-7-3 (Rev. 2011) & 47-7-17 (Rev. 2011).

¶15. Though Mississippi has its own parole system, the United States Supreme Court has held that mere maintenance of a parole system does not, itself, create a protected parole interest. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Instead, a protected parole interest exists only where mandatory language creates an entitlement to parole if certain criteria are met. *Id.* And "Mississippi['s] parole statutes contain no such mandatory language[.]" *Vice*, 679 So. 2d at 208. Because our statutes employ "the permissive 'may' rather than 'shall,' prisoners have 'no constitutionally recognized liberty interest' in parole." *Id*. (citing *Smith v. State*, 580 So. 2d 1221, 1225-26 (Miss. 1991); *Harden v. State*, 547 So. 2d 1150, 1151-52 (Miss. 1989)). *See also Scales v. Miss. State Parole Bd.*, 831 F.2d 565, 565 (5th Cir. 1987). So we find Trotter was not implicitly entitled to parole on his life sentence.

¶16. After review, we find Trotter cannot now complain the State somehow breached his plea agreement, particularly when he has not set forth any evidence of a breach, much less shown he is wrongly jailed or should no longer be in custody. "It is well established that parole is not a consequence of a guilty plea because it is a matter of legislative grace." *Garlotte v. State*, 915 So. 2d 460, 467 (¶21) (Miss. Ct. App. 2005) (citing *Ware v. State*, 379 So. 2d 904, 907 (Miss. 1980)). And it is the Parole Board, not the courts, that has authority over the grant or denial of parole. Because he was not required to be paroled by Mississippi when he was released from federal custody, just as the circuit judge did, we too find Trotter

is serving the exact sentence he bargained for. We affirm.[2]

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

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, CARLTON AND FAIR, JJ., CONCUR. JAMES, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

JAMES, J., DISSENTING:

¶18. I respectfully dissent from the majority opinion. In the plea agreement entered on October 7, 1981, Trotter's life sentences were to run concurrently, and he would be allowed to serve the sentences at the federal penitentiary. The trial court's order reflected the terms of the agreement. Trotter was paroled by the United States Parole Commission on May 13, 2011. However, the Mississippi Parole Board denied Trotter parole almost a month before Trotter was scheduled to be released from federal custody, so when he was actually released from federal prison, he was immediately transferred to the custody of the Mississippi Department of Corrections.

¶19. Trotter's current PCR motion ordinarily would be procedurally barred. "Under the Uniform Post-Conviction Collateral Relief Act (UPCCRA), a motion for relief following a

---

[2] Trotter argues the circuit judge erred in not holding an evidentiary hearing on his PCR motion. Under Mississippi Code Annotated section 99-39-11(2) (Supp. 2014), "[i]f 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 petitioner to be notified." Because it plainly appears from the face of the sentencing order and record, along with caselaw, that Trotter is not entitled to any relief, no hearing was necessary.

guilty plea is untimely unless filed within three years after entry of the judgment of conviction." *Smith v. State,* 118 So. 3d 180, 182 (¶7) (Miss. Ct. App. 2013). Trotter filed his latest PCR motion over thirty years after he was sentenced; well outside the statute of limitations.

¶20. Trotter was sentenced on October 19, 1981, and Trotter did not file his first PCR motion until October 9, 2003. The trial court denied his PCR motion and this Court affirmed. Trotter filed another PCR motion on April 11, 2012, which the trial court dismissed, holding that the motion constitutes a successive writ. Under the UPCCRA, "[t]he order as provided in subsection (5) of this section or any order dismissing the petitioner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article." Miss. Code Ann. § 99-39-23(6) (Supp. 2014). We have also stated that "[a] petitioner who files a second PCR motion must demonstrate that he meets an exception in section 99-39-23. The burden of proving that no procedural bar exists falls squarely on the petitioner." *Cosner v. State,* 111 So. 3d 111, 113 (¶13) (Miss. Ct. App. 2013).

¶21. There is, however, an exception to this rule. The statute provides: "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." Miss. Code Ann. § 99-39-23(6). Trotter asserts essentially that his parole has been revoked by the State after he was released from federal prison, which falls into the statutory exception. This issue goes to the heart of the plea agreement. According to the plea agreement, Trotter did not consent to serve time

in the Mississippi Department of Corrections. Parole is an issue only because he was transferred to the state penitentiary after leaving federal custody.

¶22. Trotter's plea-agreement terms were that both sentences ran concurrently, and he would be allowed to serve them in the federal penitentiary. The trial court accurately stated that it does not have jurisdiction to grant or deny parole. The law is well settled that there is no statutory right of appeal from the denial of parole. *Rochell v. State,* 36 So. 3d 479, 482 (¶9) (Miss. Ct. App. 2010). However, "the trial court may assert jurisdiction over those claims which raise constitutional issues." *Id.*

¶23. The majority opinion cites *Vice v. State,* 679 So. 2d 205 (Miss. 1996); however, in that case, the judge clearly explained that the federal sentence "will not start to run until you have finished the service of your term with the state. It's to run consecutive, not concurrent. Let's have that clearly understood." *Id.* at 206. The judge did not exceed his jurisdictional boundaries and further stated: "This order shall in no way terminate or release Vice from his obligation to serve the state life sentence in Jackson County, Mississippi." *Id.* at 207. The judge further stated that the sentence imposed by the court will not "affect the discretion of the responsible federal and state authorities determining parole policy." *Id.* The language of the court clearly stayed within its jurisdictional boundaries. Here, the trial court's language was unclear and did not refer to parole policy or reconcile any conflict between the sentence imposed by the state and the sentence imposed by the federal government.

¶24. Here, Trotter raises due-process concerns over his continued incarceration after being awarded parole from the United States Parole Commission. Further, the promise to allow

him to serve his sentence at a federal penitentiary is in the plea agreement and order; therefore, it could be inferred that it was intended to be part of the plea agreement. However, the trial court overreached its authority by promising Trotter that he could serve his sentence in a federal penitentiary. As the majority opinion states, the life sentences were in two separate jurisdictions. The trial court exceeded its jurisdiction by ordering Trotter to serve his Mississippi sentence in the federal penitentiary, creating a conflict when he was paroled by the federal government, but not the state. As a result, the trial court interfered with Trotter's parole, which is a "legislative grace."

¶25. In *Santobello v. New York,* 404 U.S. 257 (1971), the Supreme Court of the United States addressed the issue of the breach of a plea agreement. The Court ultimately held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The Court also stated "[t]hat the breach of agreement was inadvertent does not lessen its impact." *Id.* Further, "[t]he state, whether it be through the prosecutor, the trial judge, or both is bound by its plea bargain agreement with a defendant who pleads guilty pursuant to the agreement." *Lewis v. State,* 776 So. 2d 679, 681 (¶13) (Miss. 2001).

¶26. Further, "[w]e apply general principles of contract law in order to interpret the terms of a plea agreement. To determine whether a plea agreement was breached we consider 'whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement.'" *United States v. Hinojosa,* 749 F.3d 407, 413 (5th Cir. 2014). The Supreme Court of Mississippi has also held that "[q]uestions concerning the

construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact[-]finder." *City of Belzoni v. Johnson,* 121 So. 3d 216, 219 (¶6) (Miss. 2013).

¶27. In *Santabello,* the ultimate relief due to the petitioner was left for the trial court to decide, "whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner." *Santabello,* 404 U.S. at 499. An evidentiary hearing should be conducted by the trial court to determine what type of relief Trotter is entitled to receive.

¶28. In *State v. Parker,* 640 A.2d 1104 (Md. 1994), the Court of Appeals of the State of Maryland addressed a similar issue. The Court stated: "Specific enforcement of plea agreements is a common remedy when a party breaches the agreement or when a party has demonstrated substantial reliance on the agreement." *Id.* at 1115. However, the court still recognized that the plea agreement entered into between Parker and the State was unenforceable, and "unlike many other 'unfulfillable promise' cases, the promise in this case was not only beyond the authorities of the prosecutors to promise, it is also beyond the power of this Court to enforce." *Id.* at 1116. Neither the sentencing judge nor the prosecutor had the authority to assign the defendant to a specific institution, especially one in a foreign jurisdiction. *Id.* The Court held that under certain conditions, the defendant may be allowed to choose the remedy for an unfulfillable plea bargain. *Id.* at 1119. The court further held

that the defendant should be offered a choice between two options: (1) leave the guilty plea in place and accept the sentence imposed, or (2) withdraw the plea and possibly go to trial on the initial charges or negotiate another plea agreement. *Id*.

¶29. Therefore, I would find that the trial court erred in dismissing Trotter's PCR motion and reverse and remand for further proceedings.