

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-CA-00490 COA**

HENRY COLEMAN A/K/A HENRY E. COLEMAN

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 03/25/97
TRIAL JUDGE: HON. GRAY EVANS
COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: PRO SE
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: JEFFREY KLINGFUSS
DISTRICT ATTORNEY: HALLIE GAIL BRIDGES
NATURE OF THE CASE: CIVIL - POST CONVICTION RELIEF
TRIAL COURT DISPOSITION: PCR DENIED
DISPOSITION: AFFIRMED - 12/18/1998
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED: 2/8/99

BEFORE McMILLIN, P.J., COLEMAN, HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

¶1. On February 11, 1993, Henry Earl Coleman was convicted of aggravated assault in the Sunflower County Circuit Court and sentenced to a term of twenty years in the custody of the Mississippi Department of Corrections. On direct appeal, this Court held his assignments of error were without merit and affirmed his conviction. He then filed an "Application for Leave to File Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence" which the Supreme Court of Mississippi granted on February 21, 1997. His motion for post-conviction relief was denied by the Circuit Court of Sunflower County on March 25, 1997. Coleman appeals the order of the Sunflower County Circuit Court to this Court *pro se* on a motion for post-conviction relief. In his brief, he asserts similar assignments of error to those which he originally raised on direct appeal to this Court. We find that these issues are procedurally barred and

therefore affirm the decision of the trial court.

A. THE FACTS

¶2. Henry Earl Coleman shot James Earl Franklin in the back of the leg on a public street in Indianola, Mississippi, after the two men had engaged in an argument. The argument arose when Coleman's automobile was struck by a beer bottle, and he exited his vehicle to determine who had thrown the bottle. Some bystanders informed Coleman that it was Franklin who had thrown the bottle, and upon confronting Franklin an argument ensued. It is undisputed that Coleman shot Franklin in the leg. However, some witnesses testified that Coleman acted in self-defense, while others testified that Franklin was running away from Coleman at the time of the shooting.

¶3. Coleman was indicted in June of 1992 on charges of aggravated assault against James Earl Franklin. On February 11, 1993, he was convicted and sentenced to serve a term of twenty years in the custody of the Mississippi Department of Corrections. His conviction and sentence were affirmed by this Court on direct appeal on April 4, 1995. Thereafter, on February 27, 1997, he petitioned the Sunflower County Circuit Court for post-conviction relief but his request was denied on March 25, 1997. He now appeals from the order of the Sunflower County Circuit Court denying his motion for post-conviction relief.

B. THE ISSUES

¶4. Coleman raises the following issues which are taken verbatim from his brief:

I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL AS WAS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION; AND ARTICLE (3) SECTION (26) OF THE MISSISSIPPI CONSTITUTION (1890), WHEN THE TRIAL COURT ALLOWED THE STATE TO PRESENT A REBUTTAL WITNESS WHO HAD BEEN IN THE COURTROOM DURING TRIAL AFTER THE STATE HAD INVOKED THE RULE

II. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL AS WAS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE (3) SECTION (26) OF THE MISSISSIPPI CONSTITUTION (1890), WHEN THE TRIAL COURT FAIL TO ALLOW THE TESTIMONY OF A DEFENSE WITNESS WHO HAD ALSO BEEN IN THE COURTROOM AFTER THE RULE HAD BEEN INVOKED

III. APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW, DURING THE SENTENCING PHASE OF HIS CRIMINAL PROSECUTION AS WAS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION; AND ARTICLE (3) SECTION (26) OF THE MISSISSIPPI (1890), WHERE THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT IMMEDIATELY AFTER THE VERDICT WAS ANNOUNCED AND IN IN THE ABSENCE OF A PRESENTENCING REPORT

IV. APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW AS WAS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH

AMENDMENTS OF THE U.S. CONSTITUTION; AND ARTICLE (3) SECTION (26) OF THE MISSISSIPPI CONSTITUTION (1890) WHEN THE TRIAL COURT ERRED IN FAILING TO GRANT A MIS-TRIAL AFTER IT WAS APPARENT TO THE COURT THAT ALL OF THE STATE'S WITNESSES AND THE VICTIM WAS REPEATEDLY LYING DURING TESTIMONY

V. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS WAS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION; AND ARTICLE (3) SECTION (26) OF THE MISSISSIPPI CONSTITUTION (1890)

VI. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT AND REASONABLY CROSS EXAMINE HIS ACCUSER WHO GAVE TESTIMONY AGAINST HIM AS WAS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION; AND ARTICLE (3) SECTION (26) OF THE MISSISSIPPI CONSTITUTION (1890), WHERE THE TRIAL COURT FAILED TO ALLOW THE DEFENSE TO QUESTION A WITNESS FOR THE STATE'S PENDING JAIL INCARCERATION, WHICH COULD HAVE SHOWN A PENAL INTEREST

C. ANALYSIS

I. DID THE TRIAL COURT ERR IN ALLOWING A WITNESS TO TESTIFY FOR THE STATE WHEN THE RULE HAD BEEN INVOKED AND THE WITNESS HAD BEEN PRESENT IN THE COURTROOM PRIOR TO TESTIFYING?

II. DID THE TRIAL COURT ERR IN EXCLUDING A WITNESS FOR THE DEFENSE DUE TO THE FACT THAT THE WITNESS HAD BEEN SEATED IN THE COURTROOM DURING PREVIOUS TESTIMONY WHILE THE RULE HAD BEEN INVOKED?

III. WAS APPELLANT DENIED DUE PROCESS OF LAW WHERE HE WAS SENTENCED IN THE ABSENCE OF A PRE-SENTENCING REPORT?

¶5. In Coleman's first, second, and third assignments of error he raises issues which have been disposed of by this Court on direct appeal.⁽¹⁾ Thus, his first three issues are procedurally barred due to the doctrine of *res judicata*. Section 99-39-21 (3) of the Mississippi Code Annotated (Rev. 1994) provides in part "the doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal." "The Post-Conviction Collateral Relief Act provides a procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal." *Foster v. State*, 687 So. 2d 1124, 1129 (Miss. 1996).⁽²⁾ Thus, these issues are without merit and will not be addressed again on this motion for post-conviction relief.

IV. DID THE TRIAL COURT ERR IN FAILING TO GRANT A MISTRIAL IN THE COURT BELOW?

V. WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNCIL AS GUARANTEED BY THE UNITED STATES CONSTITUTION AND ARTICLE THREE, SECTION TWENTY-SIX OF THE MISSISSIPPI

CONSTITUTION?

VI. DID THE TRIAL COURT ERR BY DENYING THE APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY PROHIBITING THE APPELLANT FROM CROSS EXAMINING A WITNESS CONCERNING THAT WITNESS' PENDING INCARCERATION?

¶6. The remaining three issues are also procedurally barred because each raises an issue that could have been addressed by the Court on direct appeal. The Mississippi Code Annotated addresses this problem in the Mississippi Uniform Post-Conviction Collateral Relief Act. The pertinent section of the Act reads as follows:

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

Miss. Code Ann. § 99-39-21 (1) (Rev. 1994).

¶7. The Supreme Court of Mississippi has held that this procedural bar is effective even in death penalty cases. *Foster v. State*, 687 So. 2d 1124, 1129 (Miss. 1996). The court explained that the purpose of post-conviction proceedings is to bring "to the trial court's attention facts not known at the time of judgment." *Id.* Additionally, the Mississippi Supreme Court has warned that "issues which were either presented through direct appeal or could have been presented on direct appeal or at trial are procedurally barred and cannot be relitigated under the guise of poor representation by counsel." *Id.*

¶8. The appellant argues in his reply brief that he is exempt from the procedural bars upon his assignments of error because the Mississippi Post Conviction Collateral Relief Act allows these arguments to be asserted where there is a showing of cause and actual prejudice. However, appellant cites no authority and proposes no argument showing cause or actual prejudice. Therefore, his argument is without merit.

¶9. THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT OF DENIAL OF POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO SUNFLOWER COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. See a copy of this Court's opinion dated April 11, 1995, attached hereto.
2. We note that in appellant's second assignment of error he does attempt to reform his argument by asserting the same issue as presented to this court on direct appeal with a different legal argument. However, this new argument would also be procedurally barred by Section 99-39-19 (1) of the

Mississippi Code Annotated (Rev. 1994).