

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60805

RICKEY DALE MESHELL,

Petitioner-Appellant,

VERSUS

EDWARD M. HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(1:91 CV 567 GR)

September 20, 1995

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:¹

Rickey Dale Meshell appeals the district court's denial of his petition for a writ of habeas corpus as procedurally barred under Miss. Code Ann. § 99-39-5(2).² We affirm.

¹Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

²Miss. Code Ann. § 99-39-52 (Supp. 1991) provides in relevant part:

A motion for relief under this chapter 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 Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of

I.

Meshell was convicted by a jury of manslaughter and found to be a habitual offender pursuant to Miss. Code Ann. § 99-19-81 (1977).³ He was sentenced to serve twenty years without parole or early release in September, 1984. Meshell appealed the judgment of conviction alleging insufficiency of evidence, but the Mississippi Supreme Court affirmed the conviction and sentence. Meshell v. State, 506 So. 2d 989 (Miss. 1987).

On April 23, 1990, three years and one day after the Mississippi Supreme Court affirmed his conviction and sentence, Meshell filed a motion for post-conviction relief alleging constitutional defects in the 1981 conviction for burglary. This motion was denied by the trial court. Meshell initially filed for appeal, but later dismissed it.

On June 27, 1991, Meshell filed a Motion to Correct Sentence

Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

³Miss. Code Ann. § 99-19-81 (1977) provides:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

with the Mississippi Supreme Court alleging (1) he was innocent of the 1981 burglary; (2) the 1981 conviction was unconstitutional; (3) the 1984 sentence for manslaughter was unconstitutional since it relied upon the 1981 conviction for enhancement; and (4) counsel was ineffective in 1981, 1984 and on direct appeal. The Mississippi Supreme Court denied the motion for lack of merit and as time barred under the applicable three-year statute of limitations on claims for post-conviction relief. Miss. Code Ann. § 99-39-5(2).

Meshell then filed a petition for writ of habeas corpus in federal court, alleging (1) ineffective assistance of counsel relating to his guilty plea to burglary in 1981, which conviction was used to enhance his sentence; (2) the 1981 guilty plea was not entered knowingly, intelligently and voluntarily; and (3) ineffective assistance of counsel in 1984 for failing to challenge the 1981 conviction during sentencing as a habitual offender. The district court found the petition procedurally barred and dismissed with prejudice.

II.

Meshell's primary argument on appeal is that the Mississippi statute of limitations is "not strictly and regularly followed," therefore the procedural bar should not apply. Johnson v. Mississippi, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987 (1988).

Unfortunately for Meshell, we rejected this argument recently in Sones v. Hargett, No. 93-7646, slip op. at 5152 (5th Cir. Aug. 21, 1995). Faced with a similar situation, the Sones court held "that section 99-39-5(2) functions as an independent and adequate

procedural bar to review of Sones's ineffective assistance of counsel claim in federal court." Sones, slip op. at 5161. Thus, federal review of the 1984 conviction and sentence is barred unless Meshell "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991). Meshell does not allege cause or prejudice, but does allege "actual innocence" of the sentence imposed.⁴ Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). Meshell argues that if his counsel had challenged the 1981 conviction, he would not have been found to be a habitual offender and thus would not have received this sentence. This argument fails in light of Mississippi Supreme Court rulings that "attacks on prior convictions that are not facially invalid must be made collaterally, in a motion for relief from the prior judgment of conviction, not at trial or sentencing." Sones, slip op. at 5163 (citing Phillips v. State, 421 So. 2d 476, 481 (Miss. 1982); Culberson v. State, 612 So. 2d 342, 343-47 (Miss. 1992)). On the face of the evidence the state presented to establish the 1981 conviction, ineffective assistance of counsel was not indicated. Meshell's counsel would have been unable to challenge the 1981 burglary conviction at the 1984 sentencing following his

⁴As in Sones and in Smith v. Collins, we again decline to decide if the actual innocence standard can extend to non-capital convictions or sentencing procedures, but "merely assume, arguendo, the applicability of the actual innocence standard to non-capital sentencing." Sones, slip op. at 5162 n.16, quoting Smith v. Collins, 977 F.2d at 959 (5th Cir. 1992), cert. denied, 114 S. Ct. 97 (1993).

manslaughter conviction.

In summary, our recent decision in Sones resolves the important issue on appeal. Meshell's claims that the 1984 sentence was invalid is procedurally barred because the challenge was filed more than three years after his conviction was final. Meshell is unable to challenge in this proceeding the validity of his 1981 conviction under Phillips. We therefore affirm the judgment of the district court.

AFFIRMED.