IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 30, 2008

DANIEL LEE DRAPER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sullivan County
No. C53,688 R. Jerry Beck, Judge

No. E2007-01485-CCA-R3-PC - Filed December 5, 2008

The petitioner, Daniel Lee Draper, appeals from the Sullivan County Criminal Court's dismissal of his petition for post-conviction relief from his convictions for first degree murder and aggravated child abuse. The trial court found that the petition (1) was filed outside the statute of limitations and (2) raised issues that had been previously determined. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and CAMILLE R. MCMULLEN, JJ., joined.

Daniel Lee Draper, Whiteville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; and H. Greeley Wells, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner pled guilty on September 26, 2002, to first degree felony murder and aggravated child abuse and received sentences of life and twenty-five years, to be served concurrently. He filed a petition for post-conviction relief. On September 8, 2005, after the trial court denied his motion to disqualify the district attorney's office, the petitioner voluntarily dismissed his petition. On August 22, 2006, the petitioner filed a motion to reopen the post-conviction petition, which the trial court denied. This court then denied his application to appeal the trial court's denial of the motion to reopen. See State v. Daniel L. Draper, No. E2006-02167-CCA-R28-PC, Sullivan County (Tenn. Crim. App. Jan. 25, 2007) (order).

The petitioner filed the present petition for post-conviction relief on May 14, 2007. The petitioner alleged that he was entitled to relief because (1) the association between agents of the State and a member of the victim's family led to "biased mishandling" of the case to the petitioner's detriment, including coercion of an involuntary confession from the petitioner, (2) trial counsel had

a conflict of interest with the petitioner because a member of the district attorney general's staff was a former employee of trial counsel, and (3) he entered an unknowing and involuntary guilty plea after the State failed to disclose exculpatory evidence. The petitioner alleged that his claims were based upon newly discovered evidence which he said consisted of information from (1) depositions of members of the victim's family that were taken in another action in May and June 2006, which detailed the extent of the involvement of the defendant's former father-in-law, who was the victim's grandfather, involvement in the investigation and association with a member of the district attorney general's staff and a police investigator, and (2) the September 2005 investigation of the medical evidence by his previous post-conviction counsel, the import of which was that the medical examiner who conducted the victim's autopsy gave conflicting opinions regarding the victim's injuries and death and the significance of which the petitioner claimed he did not understand until he received a February 9, 2006 letter from his former counsel. The petitioner also alleged that his request for dismissal of his original post-conviction claim was based upon his belief that he did not have sufficient evidence to prove his claims. He alleged that his claims were not previously determined because he never had a full and fair hearing on the merits, either in the proceedings on the first petition or in his unsuccessful attempt to reopen those proceedings.[1] The trial court summarily dismissed the petition, finding that the petition was barred by the statute of limitations and that the claims raised had been previously determined on their merits by this court in the order dismissing the motion to reopen. This appeal followed.

The issue before us is whether the trial court properly dismissed the post-conviction petition without appointing counsel and conducting a hearing. We will consider both the statute of limitations and the previous determination grounds cited by the trial court.

I

With respect to the statute of limitations, the Tennessee Post-Conviction Procedure Act specifies that

> a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.

T.C.A. § 40-30-102(a) (2006). If a petitioner files a petition for post-conviction relief outside the one-year statute of limitations, a court may still consider the petition if (1) a new constitutional right

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[1]The petitioner raised these claims in his previous motion to reopen. Daniel L. Draper, slip op. at 1-2. This court held that the newly discovered evidence alleged did not qualify under any of the permissible grounds for reopening a post-conviction petition. Id. at 2; see T.C.A. § 40-30-117(a) (2006).

has been recognized; (2) the petitioner's innocence has been established by new scientific evidence; or (3) a previous conviction that enhanced the petitioner's sentence has been held to be invalid. T.C.A. § 40-30-102(b).

A court may also consider an untimely petition for post-conviction relief if applying the statute of limitations would deny the petitioner due process. Burford v. State, 845 S.W.2d 204, 209-10 (Tenn. 1992). Due process requires that a petitioner be afforded the opportunity to present his claim "at a meaningful time and in a meaningful manner." Id. at 208 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 437, 102 S. Ct. 1148, 1158-59 (1982)).

The petitioner raises several arguments with respect to the statute of limitations. He says that he complied with the statute of limitations, that there is no statute of limitations for newly arising claims, and that the post-conviction statute of limitations is unconstitutional.

In his claim that he complied with the statute of limitations, the petitioner argues that he did not receive the deposition transcripts which contain some of the new evidence upon which his current petition is based until July 31, 2006, that he had until July 31, 2007 to file his petition, and that his May 14, 2007 filing fell within that time period. He also argues that he received an explanation of the new medical information from his former attorney on February 9, 2006. He argues that he had until February 9, 2007, to file a claim based upon this newly discovered evidence and that his "original petition" was filed within this time period on August 29, 2006.[2]

Because there was no direct appeal of his convictions, the petitioner had one year from October 26, 2002, the date his judgments of conviction became final, to file his post-conviction claim. The present petition was filed over three and one-half years beyond that time. The petitioner's claims do not fit within any of the statutory criteria for tolling of the statute of limitations. See T.C.A. § 40-30-102(b). Notably, the evidence which the petitioner claims is newly discovered is not of the type that is subject to the tolling provision. See id. at (b)(2) (allowing tolling when petitioner raises a claim of new scientific evidence establishing actual innocence of the offense). Further, we are not compelled to hold that the statute of limitations should be tolled on due process grounds. The trial court properly dismissed the petition on this basis.

We reject the petitioner's argument that there is no statute of limitations for claims based upon newly discovered evidence. It is beyond question that the Post-Conviction Procedure Act provides a one-year statute of limitations with only three statutory exceptions, and among those exceptions there is no provision for newly discovered evidence claims other than new scientific evidence. Id., § 40-30-102(a), (b)(1)-(3). Further, the judicially recognized due process exception to the statute of limitations does not provide the potential for endless litigation of claims. Due process requires that a petitioner be afforded the opportunity to raise his claims "at a meaningful time and in a meaningful manner." Burford v. State, 41 S.W.3d 204, 208 (Tenn. 1992) (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 437, 102 S. Ct. 1148, 1158-59 (1982)).

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[2]We presume the petitioner intends to refer to the August 22, 2006 motion to reopen. See Daniel L. Draper, slip op. at 1 (order).

We likewise reject the petitioner's argument that the statute of limitations is unconstitutional. As noted, our supreme court has recognized that in some instances, due process requires that the statute of limitations be tolled. That the statute of limitations remains subject to the dictates of constitutional due process does not invalidate the statute in all situations.

Finally, we note that the petitioner's petition, despite raising claims of newly discovered evidence, does not seek relief in the form of the writ of error coram nobis. See T.C.A. § 40-26-105 (2006). While we are not unmindful of the typical framework for seeking relief based upon newly discovered evidence is through a writ of error coram nobis, rather than through post-conviction proceedings, we do not believe it is appropriate for us to consider the allegations of the petition relative to coram nobis relief. See Harris v. State, 102 S.W.3d 587, 591-92 (Tenn. 2003) (holding that the motion to reopen a post-conviction petition could not be treated as a petition for a writ of coram nobis).

II

Notwithstanding our determination that the petitioner's claims are barred by the statute of limitations, we will consider the trial court's finding that the petitioner's issues had been previously determined. The trial court found that the issues raised "have been previously addressed by the appellate courts on the merits [in the application for appeal of the denial of the motion to reopen]." The petitioner argues that his issues have not been previously determined because they have never been determined following a full and fair hearing. The state counters that the petitioner had the opportunity for a hearing on the merits of his original petition but waived the hearing by requesting dismissal of the petition.

Tennessee Code Annotated section 40-30-106(h) (2006) provides:

> (h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

In the context of the previous Post-Conviction Act, our supreme court has said, "A defendant who, with leave of court, voluntarily withdraws a post-conviction petition may later reinstitute that petition or substitute a new petition for it, without fear of being denied adjudication on the merits." Williams v. State, 831 S.W.2d 281, 282 (Tenn. 1992). The petitioner requested dismissal of his original petition before a hearing was conducted. His request to reopen his original petition was denied by both the trial court and the appellate court based upon his failure to raise issues which were a cognizable basis for reopening the previous petition. See Daniel L. Draper, slip op. at 1-2. This determination was made without a hearing having been conducted on the merits of his claims. Thus, the petitioner's claims have never been heard on the merits as contemplated by the statute, either in the original proceedings or in the attempt to reopen the original proceedings. This avails the petitioner nothing, though, because the petition was untimely.

III

The petitioner has raised for the first time on appeal claims that the state is concealing exculpatory tapes of his interrogation and that "the entire investigation was null, void, unconstitutional, and illegal" because the victim's mother was not questioned, which he claims was a violation of Tennessee Code Annotated section 37-1-406. Because these issues were not raised in the post-conviction petition filed in the trial court, they are not properly before us and are waived. See T.R.A.P. 36(a); Cauthern v. State, 145 S.W.3d 571, 599 (Tenn. 2004).

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE