

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

**FILED**

March 15, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

AT KNOXVILLE

AUGUST 1999 SESSION

**SCOTT HOUSTON NIX,**

\*

C.C.A. # 03C01-9901-CR-00044

Appellant,

\*

KNOX COUNTY

VS.

\*

Honorable Ray L. Jenkins, Judge

**STATE OF TENNESSEE,**

\*

(Post-Conviction Relief--Attempted  
Murder, Aggravated Robbery)

Appellee.

\*

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**JOHN EVERETT WILLIAMS,**  
Judge

## OPINION

### INTRODUCTION

The petitioner, Scott Houston Nix, appeals from the trial court's summary dismissal of his petition for post-conviction relief based upon the statute of limitations. The petitioner contends:

- (1) his mental incompetence tolled the statute of limitations and
- (2) a due process exception to the statute of limitations established in Burford v. State, 845 S.W.2d 204 (Tenn. 1995), applies.

We disagree with the petitioner and affirm the trial court.

### PROCEDURAL HISTORY

On November 19, 1993, the petitioner was convicted by a Knox County jury of attempted first degree murder, especially aggravated robbery and aggravated robbery. On November 21, 1995, the petitioner's direct appeal was denied. The petitioner then petitioned our Supreme Court for certiorari, which was denied May 6, 1996. Over two years later, December 18, 1998, a "next friend" petition for post-conviction relief was filed on behalf of the petitioner. On January 5, 1999, the Knox County Criminal Court summarily dismissed this petition as time barred. See Tenn. Code Ann. § 40-30-202(a). From that dismissal, the petitioner now appeals.

### ANALYSIS

#### Statute of Limitations

Tennessee Code Annotated § 40-30-202(a) provides that a person in custody under a sentence of a court of this state must petition for post-conviction relief within one year of the final action of the highest appellate court to which an

appeal is taken or, if no appeal is taken, within one year of the date on which the judgment becomes final. The statute further provides that the limitations period “shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.” Id. None of the specified exceptions to the statute apply in this case. See Tenn Code Ann. § 40-30-202(b).

#### Due Process and Incompetency

The petitioner, citing Watkins v. State, 903 S.W.2d 302 (Tenn. 1995), first argues that application of the statute of limitations in this case would violate constitutional due process. In Watkins, the relevant petition was filed outside the statute of limitations and consequently dismissed by the trial court. Our Supreme Court on review vacated the trial court’s decision and remanded the matter for further proceedings on the post-conviction petition, reasoning that due process considerations barred summary dismissal. The Court added that if the petitioner’s “allegations of incompetency prove to be valid, application of the statute of limitations would effectively deprive him of an opportunity to challenge his conviction in a meaningful time and manner.” Watkins, 903 S.W.2d at 306. Furthermore,

[i]f the petitioner was mentally incompetent, and therefore legally incapable, he would be denied any opportunity to assert his constitutional rights in a post-conviction petition, unless the period of limitations was suspended during his mental incompetence. Due process requires that some reasonable opportunity to assert those rights be afforded.

Id.

Unlike Watkins, however, the instant petition arises under the 1995 Post-Conviction Act. The relevant section under the 1995 Act provides, “[t]he statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise applicable at law or equity.” Tenn Code Ann. § 40-30-202(a). This statute therefore eliminates tolling provisions, like the saving statute at issue in Watkins; however, it cannot eliminate constitutionally required tolling provisions, like

incompetence. See Vikki Lynn Spellman v. State, No. 02C01-9801-CC-00036 (Tenn. Crim. App., filed August 21, 1998, at Jackson, *perm. to app. granted* (Mar. 15, 1999)); David Lee Hundley v. State, No. 02C01-9810-CC-00313 (Tenn. Crim. App., filed August 26, 1999, at Jackson). That is, as our Supreme Court determined in Watkins that incompetence tolled the statute of limitations under constitutional due process, it remains a viable tolling provision under the 1995 Act. See id.

However, we do not believe that the petitioner has alleged sufficient facts in the present case that, taken as true, warrant a legal conclusion that the petitioner was mentally incompetent to file a post-conviction claim at all times material to the statute of limitations issue. The petition purports to be signed by the petitioner but prepared by another inmate as “next friend” of the petitioner. In pertinent part, the petition states the following relative to the petitioner’s claimed inability to file:

- 20.** Petitioner is suffering from psychological dysfunction and illness as a result of apparent psychological and neurological brain damage. Among other things, Petitioner has an extensive family history of alcohol dependency, mania, depression, manic-depressive, and bipolar illnesses. Petitioner is now and has continued to experience and suffer from depression, delusions, hallucinations, anxiety, and radical mood swings.
- 21.** Petitioner Nix is therefore of unsound mind by reason of apparent psychological impairment and is incompetent and thus incapable of maintaining these proceedings himself or of protecting his own constitutional rights in this cause. Petitioner has been incarcerated continuously since his arrest in this cause.
- 22.** Because Petitioner is unable due to his mental condition to maintain his own post-conviction proceeding in this matter, and pursuant to Rule 17.03, Tennessee Rules of Civil Procedure, this action is being brought by Petitioner Ronald Bradford Waller, individually and as next friend (hereinafter referred to as “next friend Petitioner”) acting on behalf of Petitioner Scott Houston Nix. Next friend Petitioner is a law Clerk at STSRCF.
- 24.** But for the failure of the trial court and prior counsel to have Petitioner properly evaluated concerning his psychological disability, the outcome of this case would have been entirely different. Petitioner had a constitutional right to a proper psychological evaluation prior to being subjected to conviction for the offenses alleged against him in this matter. Consequently, Petitioner was denied his right to psychological evaluation, and was unconstitutionally convicted and sentenced in this matter.

25. By reason of his mental condition and inability to bring and maintain an action properly raising and protecting all of his issues and rights either prior to, during, or subsequent to his conviction and sentence in this matter, and because Petitioner is indigent and unable to hire and pay for counsel, or a psychological evaluation, Petitioner has never had an opportunity to raise all of his claims for relief or to have all of his claims for relief raised, considered and properly determined in this matter. Petitioner has never been and is not currently competent in this cause to raise or waive any of his claims for relief, nor was Petitioner psychologically sound at the time of his conviction and sentence. Petitioner has a documented history of psychological illness, and at a proper evaluation would reveal this. This evidence is a matter of record and located at, among others, as follows:

(a) Lakeshore Mental Health Institute, Chota Building 5<sup>th</sup> Floor, 5908 Lyons View Drive, Knoxville, TN 37919-7520. These records and information will evidence that, on May 13, 1988, Petitioner was admitted on an emergency basis in Patient Case No. 62-6222, for depression and attempted suicide. Evaluations of Petitioner revealed a history of alcohol and drug abuse. Records and documentation further revealed that Petitioner had a history of suicidal ideology and a family history of alcohol abuse and mental illness. Petitioner was later diagnosed as having an adjustment disorder with mixed disturbances of emotions and conduct; alcohol dependency; and, polysubstance abuse.

(b) Tennessee Department of Corrections, Route #4, Box 600, Pikeville, TN 37367. These records and information will evidence that petitioner has been diagnosed and treated for anxiety attacks, depression, schizophrenia, and anti-social disorder.

(c) Knox County Jail, City-County Building, 400 Main Avenue, Knoxville, TN 37902. These records and information will evidence that subsequent to the trial in this cause petitioner was diagnosed and treated for insomnia, schizophrenia, post-traumatic stress disorder, and for a sleeping disorder.

(d) All of the foregoing documented instances of diagnosed mental health history were available to petitioner's said trial counsel at all times prior, during and subsequent to petitioner's conviction and sentencing in this cause. However, petitioner's prior or current mental health history. Consequently, if petitioner had been permitted to properly, through counsel, present all of the foregoing documented mental health history, the outcome of petitioner's conviction would have been entirely different. But for said counsel's failure to properly investigate and timely present all of the above mitigating evidence, petitioner would have never been convicted in this matter.

26. Accordingly, Petitioner's psychological disability and incompetency in fact tolled the statute of limitations under Petitioner's right to constitutional due process concerning the raising of any of his claims for relief in this cause. Petitioner's claims are therefore properly before this Honorable Court for consideration. See Watkins v. State, 903 S.W.2d 302 (Tenn. 1995); see also

Spellman v. State, 23 TAM 40-38 (Tenn. Crim. App. at Jackson, 8/21/98).

The petition also alleges that the petitioner has never received an adequate psychological evaluation.

The standard for mental incompetence that tolls a statute of limitations in civil cases under Tennessee's disability statute, Tenn. Code Ann. § 28-1-106, stems from Porter v. Porter, 22 Tenn. 586 (1842), in which the Supreme Court stated about the deceased in question, "from her extreme old age and mental imbecility . . . [the deceased] was incapable of attending to any business, or of taking care of herself, and had to break up keeping house and remove to the house of a relative to be taken care of by a friend." Id. at 589. The court concluded that there was no doubt that she was "non-compos mentis." Id.; see Doe v. Coffee County Board of Education, 852 S.W.2d 899, 905 (Tenn. Ct. App. 1992) (noting that the Porter formulation "is generally consistent with the common understanding of 'unsound mind'"). In this respect, one treatise states that the condition of the mind that tolls a statute of limitations must be "of such a nature as to show him unable to manage his personal affairs or estate, or to comprehend his legal rights or liabilities." C.S. Patrinelis, Annotation, Proof of Unadjudged Incompetency Which Prevents Runnings of Statue of Limitations, 9 A.L.R. 2d 964, 965 (1950). We believe the civil standard is the standard to be used in post-conviction cases, as well.

Mental incompetence for tolling purposes does not simply equate with mental illness. In Seaton v. Seaton, 971 F. Supp. 1188, 1195 (E.D. Tenn. 1997), the court noted that although a psychological evaluation reflected that the plaintiff had severe depression with psychotic symptoms, "it in no way states that she was so incompetent as to be unaware of the injuries she allegedly sustained through her husband's actions." Similarly, we do not believe that the petitioner's claim of certain mood disorders, depression, schizophrenia, insomnia, and alcoholism necessarily

shows that he has not had the capacity to handle his affairs or to understand his legal rights and circumstances.

Moreover, the petitioner's allegations do not show the existence of mental incompetence over the period of time needed to make his present petition viable. We acknowledge that the petitioner has alleged that he "has never been and is not currently competent" and is mentally disable. However, we view these allegations, in context, to be nothing other than conclusory claims that are not otherwise supported by the petitioner's remaining allegations.

#### Burford Exceptions

The petitioner also presents two additional arguments regarding a due process exception to the statute of limitations established in Burford v. State, 845 S.W.2d 204 (Tenn. 1992). These arguments were not considered by the trial court. In Burford, the petitioner's post-conviction claim in one county did not arise until several prior convictions were set aside in a separate post-conviction suit in another county. The court held that applying the statute of limitations in such a case created a procedural trap that deprived the petitioner of a reasonable opportunity to raise and litigate a viable post-conviction issue. Id. at 204. The present case does not involve the same type of procedural trap, nor does it raise the due process concerns as in Burford. Thus, it does not control the present case.

#### **CONCLUSION**

Accordingly, we AFFIRM the trial court's order dismissing the petition for post-conviction relief.

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JOHN EVERETT WILLIAMS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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ALAN E. GLENN, Judge