

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

**FILED**

**January 9, 1997**

JAMES JACKIE JONES,

Appellant,

VS.

CHARLES L. NOLES, WARDEN,

Appellee.

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C.C.A. # 03C01-9502-CR-00236  
**Cecil W. Crowson**

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MCMINN COUNTY  
**Appellate Court Clerk**

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Hon. Mayo Mashburn, Judge

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(Habeas Corpus)

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

AFFIRMED

GARY R. WADE, JUDGE

## OPINION

The pro se petitioner, James Jackie Jones, appeals the trial court's denial of his petition for writ of habeas corpus. The sole issue presented for review is whether the dismissal was proper. We hold that it was and affirm the judgment of the trial court.

On August 25, 1977, the petitioner was convicted of armed robbery and given a life sentence. His conviction and sentence were affirmed on direct appeal to this court. Jasper Jones, a/k/a/ Jack Jones, James Jackie Jones, and Gary William Holt v. State, No. 85 (Tenn. Crim. App., at Knoxville, March 2, 1979). Our supreme court denied review on July 2, 1979. In 1985, the petitioner filed a federal petition for writ of habeas corpus, alleging ineffective assistance of counsel. In denying relief, Judge Thomas Hull observed that the issue of effective assistance of counsel had been resolved on direct appeal and that the record "support[ed] the Appellate Court's decision" to deny relief on that ground. Jackie Jones v. State, Michael Dutton, Warden, No. CIV-2-85-266, slip op. at 2 (E.D.Tenn., Northeastern Division, Nov. 27, 1985). The petitioner subsequently filed a petition for post-conviction relief, which challenged certain jury instructions; that petition was denied and this court affirmed. Jasper Alonza (Jack) Jones v. State, No. 144, (Tenn. Crim. App., March 11, 1987). The supreme court denied petitioner's application for permission to appeal on May 2, 1988.

The petitioner filed this petition for writ of habeas corpus on May 26, 1994, claiming he was denied the right to counsel during his trial. Petitioner also alleges that he cannot read or write. The trial judge dismissed the petition because it did not allege that the judgment was void or that the petitioner's sentence had expired. Also, considering the petition as one for post-conviction relief, the trial court

ruled the grounds were previously determined and that the petition had been filed outside the statute of limitations. We must agree.<sup>1</sup>

Initially, we note that the habeas corpus remedy in this state is limited. The writ may be granted only where a petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 432 S.W.2d 656 (Tenn. 1968); State ex rel. Wade v. Norvell, 443 S.W.2d 839 (Tenn. Crim. App. 1969). If, however, a petitioner attempts to set aside a conviction because of the abridgement of a constitutional right, the petitioner must use the Post-Conviction Procedure Act. Luttrell v. State, 644 S.W.2d 408 (Tenn. Crim. App. 1982); see Tenn. Code Ann. § 40-30-105 (repealed 1995).

While there is a three-year statute of limitations upon actions for post-conviction relief, Tenn. Code Ann. § 40-30-102 (repealed 1995),<sup>2</sup> habeas corpus has no statutory period of limitations. A petitioner may not, however, file a habeas corpus action as a means of circumventing the statute of limitations contained in the Post-Conviction Procedure Act. See Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992).

Habeas corpus relief is available in this state only when it appears on the face of the judgment or the record that the trial court was without jurisdiction to

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<sup>1</sup>After filing his notice of appeal, petitioner was sent a letter by the clerk of our court advising the petitioner to file a brief. The petitioner responded to this letter by filing a "motion to file a delayed appeal" and document entitled "permission to appeal." These documents were accompanied by a pared down version of the petitioner's habeas corpus petition, which the petitioner apparently intended to be considered his brief.

<sup>2</sup>The new Post-Conviction Procedure Act provides for a one-year statute of limitations. Tenn. Code Ann. § 40-30-202 (Supp. 1996).

convict or sentence the defendant or that the sentence of imprisonment has otherwise expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); Potts v. State, 833 S.W.2d at 62.

This action seeks to set aside the prior convictions based upon the failure of counsel to adequately represent the petitioner. We view that as an attack upon a voidable rather than a void judgment. See Passarella v. State, 891 S.W.2d 619, 627-28 (Tenn. Crim. App. 1994). The writ of habeas corpus is available only upon an expiration of the sentence or a showing of deficiency on the face of the judgment. Neither has been shown here.

Treating the petition as one for post-conviction relief, we must conclude first, that the asserted ground for relief has been previously determined and, second, that the petition was filed outside the statute of limitations. "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (repealed 1995). The petitioner has litigated his claim of ineffective assistance of counsel not only on direct appeal but in a federal habeas corpus petition as well; neither court found merit to the claim.

The Post-Conviction Procedure Act provides that a petition for relief, irrespective of the remedy sought, must be filed "within three years of the date of the final action of the highest state appellate court to which an appeal is taken...." Tenn. Code Ann. § 40-30-102 (repealed 1995). This petition was not filed until May 26, 1994, and the trial court properly held that it was well outside the limitations period. See State v. St. John, 751 S.W.2d 453 (Tenn. Crim. App. 1988).

Moreover, the petitioner has not alleged any reason why the statute of limitations would not apply to his claim. In Burford v. State, 845 S.W.2d 204, 208-09 (Tenn. 1992), our supreme court carved out a narrow exception to the three-year statute; it held that the statute may not apply to grounds which might have arisen after the expiration of the limitation period. The petition here, however, does not identify any ground which might have arisen subsequent to the expiration of the statute of limitations. We will attempt to explain.

In the habeas corpus petition, the petitioner does not specifically allege a reason why the Burford exception would apply. He has, however, presented several affidavits attesting to his illiteracy. Apparently, he has included this information to explain why he has not filed his petition in a timely fashion. That does not qualify as an exception to the statute of limitations. In Bernard Nelson v. State, No. 01C01-9212-CC-00375, slip op. at 2, 4 (Tenn. Crim. App., at Nashville, Nov. 18, 1993), our court held that "illiteracy, ignorance, and difficulty in obtaining assistance while incarcerated" does not toll the statute of limitations.

Although it is "rarely proper" to dismiss a pro se petition without the appointment of counsel, that may be done when it can "be conclusively determined" that no relief is available. Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988). That is the case here.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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Paul G. Summers, Judge