

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

FILED

March 19, 1997

Cecil Crowson, Jr.

Appellate Court Clerk

RANDOLPH W. BROBECK,

*

C.C.A. # 03C01-9601-CC-00043

*

Appellant,

*

GREENE COUNTY

*

VS.

*

Hon. James E. Beckner, Judge

*

STATE OF TENNESSEE,

*

(Post-Conviction)

*

Appellee.

*

*

For Appellant:

For Appellee:

Randolph Brobeck, pro se
Morgan County Regional
Correctional Facility
P.O. Box 2000
Wartburg, TN 37887

Charles W. Burson
Attorney General & Reporter

Eugene J. Honea
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Cecil C. Mills
Assistant District Attorney General
113 West Church Street
Greeneville, TN 37743

OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Randolph Brobeck, appeals from the trial court's summary dismissal of his application for post-conviction relief. The single issue presented on review is whether the action was barred by the statute of limitations.

We affirm the judgment of the trial court.

On August 31, 1985, the petitioner was found guilty of the aggravated rape and first degree murder of Shirley Fair. Expert testimony established that his bodily fluids matched samples found at the crime scene. The trial court imposed sentences of forty years and life. Both convictions were affirmed by our supreme court on direct appeal. See State v. Brobeck, 751 S.W.2d 828 (Tenn. 1988).

On November 18, 1993, the petitioner filed this petition, his first, alleging ineffective assistance of counsel and violations of newly recognized constitutional rights. In the alternative, he sought habeas corpus relief.¹ The petitioner contended that trial counsel was ineffective for failing to object to improper jury instructions and failing to adequately research the law. He alleged several other constitutional violations: jury instructions that malice could be inferred by the way the defendant handled the weapon; instructions that premeditation could be formed in an instant; instructions that moral certainty was required to convict; and that the felony murder statute violated due process of law. Those three specific jury instructions under attack are as follows:

¹ The petitioner has not appealed the dismissal of his claim for habeas corpus relief. See Potts v. State, 833 S.W.2d 60 (Tenn 1992).

(1) “Likewise, if a deadly weapon is handled in a [sic] such a manner as to make the killing a natural or probable result of such conduct, then you may infer malice sufficient to support a conviction of murder in the first degree, but again, this inference may be rebutted by direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant or exists in the evidence of the state.”

(2) “Premeditation means that the intent to kill must have been formed prior to the act itself[.] Such intent or design to kill may be conceived and deliberately formed in an instant.”

(3) “Now reasonable doubt is that doubt engendered by an investigation of all proof in the case, and an inability after such investigation to let the mind rest easily as to the certainty of guilt[.] Reasonable doubt does not mean a captious, or a possible, or an imaginary doubt. Absolute certainty is not demanded of the law to convict of any criminal charge, but moral certainty is required, and this moral certainty is required as to every proposition of proof requisite to constitute the offense.”

The state moved to dismiss the petition because it was filed more than three years from the date of the last appellate action. The petitioner insisted, however, that his jury instruction claims and certain other of his constitutional claims were based on new grounds unavailable to him before. See Burford v. State, 845 S.W.2d 204 (Tenn. 1992).

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). Obviously, the petitioner failed to do so. The petitioner may bring a claim for relief for a constitutional violation if the claim was not recognized at the time. Tennessee Code Annotated Section 40-30-105,

repealed since the filing of this petition, provides as follows²:

Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

(emphasis added).

In Burford, our supreme court carved out a narrow exception to the three-year statute of limitations. Burford had been sentenced as a habitual criminal to a term of life imprisonment based upon five prior robbery convictions. He filed a timely post-conviction petition, alleging that certain of his five prior robbery convictions were constitutionally infirm because he had not been advised of his right against self-incrimination before entering his plea; he was granted post-conviction relief from these convictions. Later, after the three-year statute of limitations had expired, Burford filed a petition to set aside the finding of habitual criminality on the basis that there was no longer a sufficient number of prior felony convictions to qualify him for the enhanced punishment. Our supreme court ruled that the statute of limitations, while generally compliant with constitutional due process, violated Burford's specific due process rights:

If consideration of the petition is barred, Burford will be forced to serve a persistent offender sentence that was enhanced by previous convictions that no longer stand. As a result, Burford will be forced to serve an excessive sentence in violation of his rights under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, which, by definition, are fundamental rights entitled to heightened protection

Burford, 845 S.W.2d at 209.

²The post-conviction act of 1995 has added a separate statute of limitations for newly recognized constitutional rights that require retroactive application. See Tenn. Code Ann. § 40-30-202(b)(1)(Supp. 1996).

In Sands, our supreme court further defined how to apply the Burford test. A court must:

(1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are “later arising,” determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. In making this final determination, courts should carefully weigh the petitioner’s liberty interest in “collaterally attacking constitutional violations occurring during the conviction process,” against the State’s interest in preventing the litigation of “stale and fraudulent claims.”

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995) (citations omitted)(quoting Burford, 845 S.W.2d at 208).

By the use of these guidelines, we have first determined that the statute of limitations for this petitioner’s convictions expired in 1991. It is our view that none of the claims fits within the exception to the rule. Initially, the claims of ineffective assistance of counsel and the unconstitutionality of the felony murder statute are not new constitutional grounds for relief. These claims have always been available to the petitioner. Our supreme court’s decision in Swanson v. State, 749 S.W.2d 731 (Tenn. 1988)(requiring the state to prove every element of the crime beyond a reasonable doubt), applied the rule of Sandstrom v. Montana, 442 U.S. 510 (1979). The opinion was released before the conclusion of the petitioner’s direct appeal; thus, the rule is not newly recognized. This court has previously held that the rule in State v. Brown, 836 S.W.2d 530 (Tenn. 1992) (clarifying the definitions of intentional, premeditation, and deliberation) did not create a new constitutional rule; thus, the jury instruction complaints have no merit. State v. Joe Nathan Person, No. 02C01-9205-CC-00106 (Tenn. Crim. App., at Jackson, Sept. 29, 1993). In Eanos Earl Hunt v. State, No. 03C01-9308-CR-00266, slip op. at 4-5

(Tenn. Crim. App., at Knoxville, Feb. 3, 1994), this court held that the phrase “moral certainty” in a jury instruction, when utilized in proper context, does not violate constitutional principles; thus, the petitioner’s reliance on Cage v. Louisiana, 498 U.S. 39 (1990), is misplaced. The petitioner’s claims fail to meet the second prong of the Burford rule.

In conclusion, we have found no basis in the pleadings for the tolling of the statute of limitations. See Tenn. Code Ann. § 40-30-102 (repealed 1995). It can be conclusively determined that the petitioner is not entitled to relief. Swanson, 749 S.W.2d at 734.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

William M. Barker, Judge

Curwood Witt, Judge