

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
FEBRUARY 1997 SESSION

VICTOR JAMES CAZES,	)	
	)	
APPELLANT,	)	
	)	No. 02-C-01-9610-CR-00370
	)	
v.	)	Shelby County
	)	
	)	Leonard T. Lafferty, Judge
	)	
	)	(Post-Conviction Relief)
STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	

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

AFFIRMED

Joe B. Jones, Presiding Judge

# OPINION

The appellant, Victor James Cazes, appeals as of right from a judgment of the trial court summarily dismissing his suit for post-conviction relief. The trial court found the ground asserted is not cognizable in a post-conviction suit because it does not embrace a constitutional issue, the ground was previously determined, and, assuming arguendo the ground is actionable, it was harmless error in the context of the trial record. The appellant contends he is entitled to an evidentiary hearing because the trial court ignored Tenn. R. Evid. 609(a)(3), which "impermissibly burdened Appellant's right to testify." After a thorough review of the record, the briefs submitted by the parties, and the law governing the issues presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

On February 22, 1990, the appellant was convicted of aggravated rape, assault with the intent to commit murder in the first-degree, and second-degree burglary. This Court affirmed the appellant's conviction of these offenses as well as the punishment imposed for this criminal conduct. State v. Victor James Cazes, Shelby County No. 49 (Tenn. Crim. App., Jackson, March 6, 1991). The supreme court subsequently denied the appellant's application for permission to appeal on August 5, 1991.

The appellant was subsequently tried and convicted of felony murder. A jury imposed a death sentence. The supreme court affirmed his conviction and death sentence. State v. Cazes, 875 S.W.2d 253 (Tenn. 1994). It appears the convictions in this case were used to establish one of the aggravating circumstances found by the jury to justify the imposition of the death sentence. Apparently, the appellant seeks to have the judgment set aside to undermine the aforementioned aggravating circumstance.

The appellant has filed two prior petitions for post-conviction relief. In each case, he asked permission to dismiss the post-conviction suit without prejudice. On the second occasion, the trial court questioned the appellant regarding the matter. The appellant insisted the suit be dismissed. The trial court dismissed the suit with prejudice. This Court affirmed the trial court's judgment dismissing the suit with prejudice. State v. Victor James Cazes, Shelby County No. 02-C-01-9501-CR-00004 (Tenn. Crim. App., Jackson, August

9, 1995). The supreme court denied the appellant's application for permission to appeal on February 5, 1996.

## I.

The present suit is the appellant's third suit for post-conviction relief. The issue presented for review was not raised in his two prior suits.

The dismissal of the appellant's prior suit with prejudice effectively ended the appellant's right to file additional suits for post-conviction relief predicated upon grounds occurring prior to the time of the dismissal. An exception would be a new law which is to be applied retroactively, and if the new law constitutionally impacted the appellant's convictions and/or sentences. There are other scenarios which this Court can envision that would permit the appellant to seek post-conviction relief. In this case, the issue occurred during the course of the trial, and, therefore, occurred prior to the time of the dismissal of the second suit with prejudice.

The trial court was correct in holding the ground was not cognizable because it did not implicate a constitutional right. See Tenn. Code Ann. § 40-30-105 (1982). Here, defense counsel asked the trial court to rule upon the admissibility of an aggravated sexual battery conviction to impeach him. The trial court, apparently conducting a Morgan hearing, refused to rule upon the admissibility of the conviction prior to the appellant taking the stand. Defense counsel did not invoke Tenn. R. Evid. 609(a)(3) which had been in existence approximately one month. The appellant took the witness stand outside the presence of the jury. He was questioned about his desire to testify. The trial court advised the appellant of the instruction he would give the jury if he opted to testify and the prior conviction was ruled admissible. The court also explained to the appellant the instruction he would give to the jury if he elected not to testify. The appellant stated he did not want to testify. While the appellant attempts to shroud this ground with constitutional garments, the error of the trial court in refusing to follow Tenn. R. Evid. 609(a)(3) does not reach constitutional dimensions in the context of this case.

As the trial court ruled, this issue has been previously determined. Tenn. Code Ann.

§ 40-30-112(a) (1982). The appellant raised this issue in this Court. The issue raised was a violation of Morgan. This Court found the issue to be without merit. State v. Victor James Cazes, Shelby County No. 49 (Tenn. Crim. App., Jackson, March 6, 1991). The appellant filed a pro se application for permission to appeal. The application squarely presented the contention made in this suit, namely, the trial court should have followed Tenn. R. Evid. 609(a)(3), not Morgan. The supreme court denied the appellant's application for permission to appeal.

Given the aforementioned reasons as to why the appellant was not entitled to an evidentiary hearing, it is not necessary for this Court to conduct a harmless error analysis.

**II.**

The appellant also challenges the validity of the indictment in this case. This issue was not raised on direct appeal or in a prior post-conviction suit. This issue was first raised in this Court.

The authority asserted by the appellant is limited in scope to indictments alleging crimes occurring on or after November 1, 1989. The crimes and indictment occurred before November 1, 1989.

This issue is without merit.

The judgment of the trial court is affirmed.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOE G. RILEY, JUDGE