

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1997 SESSION

KENNY FOWLER, * C.C.A. # 02C01-9605-CC-00185
Appellant, * DYER COUNTY
VS. * Hon. Joe G. Riley, Judge
STATE OF TENNESSEE, * (Post-Conviction)
Appellee. *

FILED

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OPINION FILED: _____

AFFIRMED

PER CURIAM

OPINION

The petitioner, Kenneth Wayne Fowler, appeals the trial court's denial of his petition for post-conviction relief. There was no evidentiary hearing. The single issue presented for review is whether the petition was barred by the statute of limitations.

We affirm the judgment of the trial court.

On April 15, 1980, the Dyer County Grand Jury returned one indictment against the petitioner for attempting to obtain a controlled substance by use of an altered prescription and two indictments for obtaining a controlled substance by use of an altered prescription. On October 6, 1980, the petitioner entered pleas of guilt to each of the charges. The trial court imposed three concurrent one-year sentences, suspended the sentences, and ordered a probationary term of two years.

This post-conviction petition was filed April 26, 1996. The petitioner complained that he had not been fully advised of his right against self-incrimination and would not have pled guilty had he been informed of the collateral consequences of the convictions. In the meantime, the 1980 convictions had been used, he claimed, to enhance his punishment for a federal offense.¹

There was no statute of limitations at the time the petitioner entered his guilty pleas. The legislature established a three-year statute of limitations on July 1, 1986, ruled effective July 3, 1989. See Tenn. Code Ann. § 40-30-102

¹A transcript of the guilty plea establishes that the petitioner acknowledged his understanding that he "could not be forced to testify" against himself. In Housler v. State, 749 S.W.2d 758, 760 (Tenn. Crim. App. 1988), this court held that the failure to warn about the collateral consequences of a conviction did not rise to the level of a constitutional abridgment.

(repealed 1995); see also Abston v. State, 749 S.W.2d 487 (Tenn. Crim. App. 1988). Effective May 10, 1995, the new Post-Conviction Procedure Act replaced the prior act in its entirety. See 1995 Tenn. Pub. Act 207, §§ 1 and 3. The most recent legislation adopted a one-year limitation:

(a) ...[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....

(b) No court shall have jurisdiction to consider a petition filed after such time unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States [S]upreme [C]ourt establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

Tenn. Code Ann. § 40-30-202 (Supp. 1996).

Because the conviction in this case became final in 1980, this petition appears to have been barred not only by the current one-year statute of limitations but also the former three-year statute. Moreover, the grounds raised do not appear to fall within any of the exceptions set out in Tenn. Code Ann. § 40-30-202(b)(1), (2), or (3) (Supp. 1996).

That petitioner may not have been advised of his right against self-incrimination and may not have received the effective assistance of counsel does not create an exception to the statute of limitations. Our court has held "ignorance of the existence of the statute of limitations, even when alleged to stem from an attorney's negligent failure to render advice to the petitioner, does not toll the running of the statute of limitations." State v. Phillips, 904 S.W.2d 123, 124 (Tenn. Crim. App. 1995).

The petitioner argues that the 1995 Act creates a new one-year filing period. A portion of the 1995 Act provides as follows:

This act shall take effect upon becoming a law, the public welfare requiring it and shall govern all petitions for post-conviction relief filed after this date, and any motions which may be filed after this date to reopen petitions for post-conviction relief which were concluded prior to the effective date of this act. Notwithstanding any other provision of this act to the contrary, any person having a ground for relief recognized under this act shall have at least one (1) year from the effective date of this act to file a petition or a motion to reopen under this act.

1995 Tenn. Pub. Act 207, § 3 (emphasis added).

In Arnold Carter v. State, No. 03C01-9509-CC-00270 (Tenn. Crim. App., at Knoxville, July 11, 1996), appeal granted, (Tenn., Dec. 2, 1996), a panel of this court, by a two-to-one margin, ruled that the literal terms of the new statute created a one-year window during which post-conviction petitions may be filed,

notwithstanding the date of the judgment. This majority found no ambiguities in the terminology of the statute despite the persuasive argument by the dissent to the contrary. In Carter, our supreme court granted the state's application for permission to appeal. While no decision has yet been filed, other panels of this court have adopted the dissenting view in Carter. See, e.g., Ronald Albert Brummitt v. State, No. 03C01-9512-CC-00415 (Tenn. Crim. App., at Knoxville, March 11, 1997); Jimmy Earl Lofton v. State, No. 02C01-9603-CR-00073 (Tenn. Crim. App., at Jackson, March 7, 1997); Roy Barnett v. State, No. 03C01-9512-CV-00394 (Tenn. Crim. App., at Knoxville, Feb. 20, 1997); Stephen Koprowski v. State, No. 03C01-9511-CC-00365 (Tenn. Crim. App., at Knoxville, Jan. 28, 1997); Johnny L. Butler v. State, No. 02C01-9509-CR-00289 (Tenn. Crim. App., at Jackson, Dec. 2, 1996). A majority of this panel now adheres to the holding in these subsequent cases. Thus, this claim is barred by the statute of limitations.

Because the petition was filed on April 26, 1996, it was barred by the statute of limitations.

Accordingly, the judgment is affirmed.

PER CURIAM

Joe B. Jones, Presiding Judge
Gary R. Wade, Judge
Curwood Witt, Judge