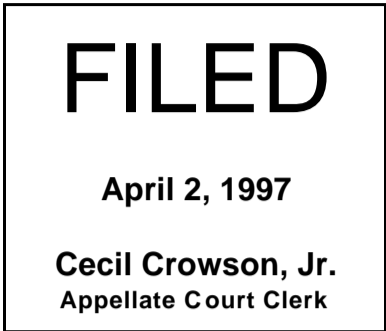


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1997 SESSION



SIDNEY PORTERFIELD, )  
 )  
 APPELLANT, )  
 )  
 v. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 APPELLEE. )

No. 02-C-01-9611-CR-00388  
 Shelby County  
 Joseph B. Dailey, Judge  
 (Post-Conviction Relief)

FOR THE APPELLANT:

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

AFFIRMED

Joe B. Jones, Presiding Judge

# OPINION

The appellant, Sidney Porterfield, (petitioner), appeals as of right from a judgment of the trial court summarily dismissing his suit for post-conviction relief.<sup>1</sup> The trial court found the petitioner's suit was barred by the statute of limitations. The court further found the issues raised had been either previously determined or waived. One issue is presented for review, namely, "Did the trial court err in dismissing the petition for post conviction relief on the ground it was time barred and that all claims had been previously determined or waived?" After a thorough review of the record, the briefs submitted by the parties, and the law governing the issue presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

The petitioner was convicted of first degree murder. The jury imposed a sentence of death. His conviction and sentence were affirmed by the supreme court January 19, 1988.<sup>2</sup> The petitioner's petition to rehear was denied on February 29, 1988.<sup>3</sup> The United States Supreme Court denied the petitioner's petition for the writ of certiorari on May 16, 1988.<sup>4</sup>

Shortly after the United States Supreme Court denied the petitioner's petition for the writ of certiorari, the petitioner filed a suit for post-conviction relief in the Criminal Court for the Thirtieth Judicial District. In this suit, the petitioner alleged he was denied his constitutional right to the effective assistance of counsel in the trial court and the appellate court. The trial court denied the relief sought. The petitioner appealed as of right to the supreme court. The supreme court bifurcated the appeal.<sup>5</sup> This Court was directed to determine the merits of the petitioner's claim trial counsel were ineffective during the

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<sup>1</sup>The petition for post-conviction relief was filed on April 20, 1995. This was prior to the effective date of the revisions made to the Post-Conviction Procedure Act in 1995. 1995 Tenn. Pub. Acts, ch. 207. The revised version became effective on May 1, 1995. 1995 Tenn. Pub. Acts, ch. 207, § 3.

<sup>2</sup>State v. Porterfield, 746 S.W.2d 441 (Tenn. 1988).

<sup>3</sup>Porterfield, *supra*.

<sup>4</sup>Porterfield v. Tennessee, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988).

<sup>5</sup>See Porterfield v. State, Shelby County No. 54 (Tenn., Jackson, December 13, 1993).

proceedings in the trial court. The balance of the appeal was remanded to the trial court for further proceedings regarding the ineffective assistance of counsel claim in the appellate court. The supreme court subsequently granted both applications for permission to appeal and decided the claims on the merits.<sup>6</sup> The supreme court affirmed the judgment of the trial court and this Court denying the petitioner relief from either his conviction or his sentence.<sup>7</sup>

The petitioner instituted the present suit on April 20, 1995. Numerous grounds were alleged in the petition. A hearing was conducted on March 8, 1996, to permit counsel to argue why the petition should not be dismissed. The trial court entered an order dismissing the petition on March 21, 1996.

The statute of limitations commenced on February 29, 1988, the date the supreme court denied the petitioner's motion to rehear. The petitioner did not file the present suit until April 20, 1995. It is undisputed the three-year statute of limitations had expired when the present suit was filed.

Counsel stated during oral argument the petitioner contends the statute of limitations should commence upon the discovery of information -- he refers to the information as "exculpatory evidence"<sup>8</sup> -- from the district attorney general, the sheriff's office, and the investigating police department's office pursuant to the Tennessee Public Records Act. It appears this information was obtained in August or September of 1994.

This Court has previously rejected the theory advanced by the petitioner.<sup>9</sup> In Passarella v. State, this court "refuse[d] to engraft a discovery rule over the statute of

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<sup>6</sup>Porterfield v. State, Shelby County No. 54 (Tenn., Jackson, December 13, 1993).

<sup>7</sup>Porterfield v. State, 897 S.W.2d 672 (Tenn. 1995).

<sup>8</sup>This Court has reviewed the information he calls "exculpatory evidence." The information does not constitute "exculpatory evidence" in the constitutional sense. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993). The information neither exculpates the petitioner nor is it favorable to him. Moreover, it certainly is not material within the meaning of Kyles v. Whitley, \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

<sup>9</sup>See Passarella v. State, 891 S.W.2d 619, 624-25 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); Warren v. State, Knox County No. 03-C-01-9210-CR-00372 (Tenn. Crim. App., Knoxville, August 17, 1993), per. app. denied (Tenn. February 14, 1994); Brown v. State, Davidson County No. 01-C-01-9112-CR-00367 (Tenn. Crim. App., Nashville, August 6, 1992), per. app. denied (Tenn. November 2, 1992).

limitations in post-conviction cases."<sup>10</sup>

In the alternative, the appellant argues it is a violation of due process to deny him the right to litigate his grounds in an evidentiary hearing. He relies upon the supreme court's decisions in Burford v. State<sup>11</sup> and Sands v. State.<sup>12</sup> This Court will apply the Sands criteria to determine if the petitioner is entitled to an evidentiary hearing pursuant to the rule announced in Burford.

In Sands the supreme court discussed Burford at length. The court concluded:

[I]n certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner's claim when the grounds for relief, whether legal or factual, arise after the "final action of the highest state appellate court to which an appeal is taken" -- or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run.<sup>13</sup>

The supreme court then delineated a three-step process which must be applied when determining whether the Burford exception should be applied. Sands requires courts to determine (a) when the statute of limitations expired, (b) whether the grounds for relief arose after the statute of limitations expired, and (c) if the grounds asserted are "late arising," and if so, whether a strict application of the statute of limitations will effectively deny the petitioner a reasonable opportunity to present the grounds asserted in an evidentiary hearing on the merits of these grounds.<sup>14</sup>

In this case, the statute of limitations commenced on February 29, 1988, the date the supreme court denied the petitioner's motion to rehear. Thus, the statute of limitations expired on or before March 1, 1991. The parties agree the three-year statute of limitations had expired before the petitioner filed the present suit.

The Tennessee Public Records Act<sup>15</sup> existed prior to the petitioner's conviction. The

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<sup>10</sup>891 S.W.2d at 625.

<sup>11</sup>845 S.W.2d 204 (Tenn. 1992).

<sup>12</sup>903 S.W.2d 297 (Tenn. 1995).

<sup>13</sup>903 S.W.2d at 301.

<sup>14</sup>Sands, 903 S.W.2d at 301.

<sup>15</sup>Tenn. Code Ann. § 10-7-503.

pleadings do not contain an allegation establishing that the petitioner pursued the remedy provided by the Tennessee Public Records Act prior to the expiration of the statute of limitations. To the contrary, he waited until the statute of limitations had expired before pursuing this right. It appears the information was obtained in August or September of 1994. As previously stated, this suit was not filed until April 20, 1995.

The petitioner apparently contends his rights pursuant to the Tennessee Public Records Act were "late arising." He relies upon the cases of Freeman v. Jeffcoat<sup>16</sup> and Capital Resource Center v. Woodall,<sup>17</sup> as creating new law. Assuming arguendo these decisions did create new law, the present suit was filed more than three years after Freeman and Woodall were decided. Thus, even if this court held the statute of limitations commenced to run following the Court of Appeals decisions in Freeman and Woodall, the present suit would be barred by the three-year statute of limitations. Jeffcoat was decided on August 30, 1991. Woodall was decided January 29, 1992.

The application of the Sands criteria makes it crystal clear the trial court properly dismissed the petitioner's suit for post-conviction relief on the ground the suit was barred by the statute of limitations. Thus, this Court is not required to determine if the issues raised have been previously determined or waived.

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JOE B. JONES, PRESIDING JUDGE

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<sup>16</sup>Davidson County No. 01-A-01-9103-CV-00086, (Tenn. Ct. App., Nashville, August 30, 1991), per. app. denied (Tenn. 1992).

<sup>17</sup>Davidson County No. 01-A-01-9104-CH-00150 (Tenn. Ct. App., Nashville, January 29, 1992).

CONCUR:

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GARY R. WADE, JUDGE

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J. CURWOOD WITT, JR., JUDGE