

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1997 SESSION

FILED

September 30, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JACKIE SLAGLE,

*

C.C.A. # 03C01-9611-CR-00429

Appellant,

*

SULLIVAN COUNTY

VS.

*

Hon. D. Kelly Thomas, Jr., Judge
By designation

STATE OF TENNESSEE,

*

(Post-Conviction)

Appellee.

*

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For Appellee:

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Jackie Slagle, appeals the trial court's dismissal of his petition for post-conviction relief. The single issue presented for our review is whether the petition was barred by the statute of limitations.

We affirm the judgment of the trial court.

On May 30, 1990, the petitioner was convicted of aggravated rape and aggravated kidnapping. The trial court imposed Range I, twenty-five and fifteen-year concurrent sentences. The court affirmed the convictions and sentences on direct appeal. State v. Jackie Slagle, No. 03C01-9101-CR-00026 (Tenn. Crim. App., at Knoxville, Aug. 15, 1991). Although counsel for the petitioner was granted additional time, until October 16, 1991, within which to file an application for permission to appeal to the supreme court, no application was made, and a mandate issued from this court on November 25, 1991. In this petition for post-conviction relief, filed August 2, 1996, petitioner complains that he was deprived of his right to the effective assistance of counsel on appeal due to the failure to either withdraw and advise petitioner of appeal procedures or file an application for permission to appeal to the supreme court. The petitioner insists that the trial court should have granted relief.

Ordinarily, the petitioner would prevail. Pinkston v. State, 668 S.W.2d 676, 677 (Tenn. Crim. App. 1984), has traditionally governed the procedure for obtaining a delayed appeal. The holding in Pinkston required the trial court to hold an evidentiary hearing and make findings of fact. The defendant then had to appeal to this court for relief in the form of vacating and re-entering its original opinion. Id. at 677-78. In 1995, the Tennessee Supreme Court adopted Rule 28, Tenn. Sup. Ct.

R., which established the Tennessee Rules of Post-Conviction Procedure. This new rule, which was in effect at the time the petition in this case was filed, provides as follows:

(D) If the court finds that petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the court shall make and certify such a finding and shall enter an order granting petitioner thirty (30) days to seek Rule 11 review.

Tenn. Sup. Ct. R. 28, § 9 (D) (as originally adopted on November 17, 1995). Rule 28 was amended on October 28, 1996, to provide as follows:

(D) Grant of a Delayed Appeal--Upon determination by the trial court or the Court of Criminal Appeals that petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the petitioner shall have sixty (60) days to seek Rule 11 review.

Tenn. Sup. Ct. R. 28, § 9 (D) (as amended on October 28, 1996).

The problem, of course, is that the statute of limitations bars any relief. Even if the remedy sought is in the nature of a delayed appeal, the petition is still subject to the time constraints of the Post-Conviction Procedure Act. Handley v. State, 889 S.W.2d 223 (Tenn. Crim. App. 1994). Originally, the Post-Conviction Procedure Act of 1967 did not include a statute of limitations. Effective July 1, 1986, the General Assembly adopted a three-year statute of limitations. Tenn. Code Ann. § 40-30-102 (repealed 1995). In consequence, any petitioner whose judgment had become final before July 1, 1986, had only three years thereafter to file a petition for post-conviction relief. State v. Masucci, 754 S.W.2d 90 (Tenn. Crim. App. 1988).

Here, the petitioner was subject to that three-year statute of limitations. The statute allowed the petitioner three years from "the date of the final action of the highest state appellate court to which an appeal [was] taken...." Tenn. Code Ann. §

40-30-102 (repealed 1995). The 1995 amendment did not enlarge the time within which this petitioner could file, as "the enabling provision ... is not intended to revive claims that were barred by the previous [three-year] statute of limitations." Arnold Carter v. State, ____ S.W.2d ____, No. 03-S-01-9612-CR-00117, slip op. at 6 (Tenn., at Knoxville, Sept. 8, 1997).

In Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992), our supreme court held that in certain situations application of the statute of limitations in a post-conviction proceeding would violate due process. In determining whether there has been a violation of due process, the essential question is whether the time period allowed by law provides petitioner a fair and reasonable opportunity to file suit. Id. In Burford, the petitioner could not file within the three-year limitation absent a determination on his prior post-conviction petition. Our supreme court ruled that Mr. Burford was "caught in a procedural trap and unable to initiate litigation ... despite the approach of the three-year limitation." Id. There was no such trap here.

In Sands v. State, 903 S.W.2d 297 (Tenn. 1995), 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, 903 S.W.2d at 301 (citations omitted) (quoting Burford, 845 S.W.2d at 207, 208).

By the use of these guidelines, we have first determined that the statute of limitations for this petitioner's convictions began to run in October, 1991, when no application for permission to appeal was filed within the required time period. Second, petitioner's grounds for relief are based on claims of ineffective assistance of counsel. Such grounds arose well before the limitations period commenced. Thus, petitioner's claim fails to meet the second requirement of Sands in that it is not later arising. Nothing prevented the petitioner from raising the issue before the three-year period of opportunity expired.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Paul G. Summers, Judge

William M. Barker, Judge