

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
DECEMBER 1997 SESSION

FILED
February 4, 1998
Cecil W. Crowson
Appellate Court Clerk

MICHAEL EDWARD MINTHORN,)
)
 APPELLANT,)
)
)
 v.)
)
)
 STATE OF TENNESSEE,)
)
 APPELLEE.)

No. 01-C-01-9609-CC-00410
Cannon County
J. S. Daniel, Judge
(Post-Conviction Relief)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED IN PART AND REVERSED IN PART

Joe B. Jones, Presiding Judge

OPINION

The appellant, Michael Edward Minthorn (petitioner), appeals as of right from a judgment of the trial court summarily dismissing his post-conviction action. Three issues are presented for review. The petitioner contends (a) he “established colorable claims supporting his petition for post-conviction relief,” (b) the “trial court committed reversible error when it failed to appoint legal counsel, failed to allow Petitioner to amend his petition, and failed to conduct an evidentiary hearing,” and (c) “the trial court erred in failing to follow proper procedures under the Tennessee Post-Conviction Procedure Act.” 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 that the judgment of the trial court should be affirmed in part and reversed in part.

I.

The petitioner was convicted in Cannon County of rape, and the trial court imposed a sentence of confinement for twenty (20) years in the Department of Correction. He appealed as of right to this court. His conviction and sentence were affirmed by a panel of this court. State v. Minthorn, 925 S.W.2d 234, 235 (Tenn. Crim. App. 1995), per. app. denied (Tenn. 1996). On direct appeal the defendant challenged the sufficiency of the evidence and his sentence.

The petitioner filed a post-conviction action on May 9, 1996. The petition alleged three grounds for relief: (a) he was denied counsel when deputy sheriffs questioned him regarding the rape, (b) he was denied a fair trial due to pretrial publicity, and (c) the verdict of the jury was against the weight of the evidence. The trial court summarily dismissed this post-conviction action on July 12, 1996. The trial court found (a) the statement made by the petitioner to the deputy sheriffs was not incriminating -- it appears the statement was not introduced into evidence at the trial, (b) the sufficiency of the evidence issue had been previously determined, and (c) the allegation regarding the denial of a fair trial due to pretrial publicity was not substantiated. The petitioner did not appeal the judgment of the

trial court.

On August 20, 1996, more than thirty days after the entry of the judgment dismissing the petitioner's first post-conviction action, the petitioner filed a document entitled "Motion for New Trial or in the Alternative Motion to Reopen." The petition alleged the denial of his constitutional right to the effective assistance of counsel. He also filed a formal motion to reopen the prior proceedings. The ground for reopening the prior proceeding was this court's decision in State v. Roger Dale Hill, Sr., Wayne County No. 01-C-01-9508-CC-00267 (Tenn. Crim. App., Nashville, June 20, 1996), rev'd, 954 S.W.2d 725 (Tenn. 1997). The trial court treated the two pleadings as a motion to reopen pursuant to Tenn. Code Ann. § 40-30-217. The trial court entered an order on September 6, 1996, dismissing the pleadings. The defendant filed a notice of appeal indicating his intention to appeal as of right to this court.

The State of Tennessee moved to dismiss the petitioner's appeal, or, in the alternative, to affirm the judgment of the trial court pursuant to Rule 20, Rules of Tennessee Court of Criminal Appeals. The state contended the time for filing an appeal had expired. This court entered an order on February 14, 1997. The order provides the notice of appeal provision would be waived in the interest of justice. Tenn. R. App. P. 4(a); State v. Scales, 767 S.W.2d 157 (Tenn. 1989). In the order this court held the trial court properly dismissed the sufficiency of the evidence issue because it had been previously determined. However, the order provides the trial court should have appointed counsel to represent the petitioner and held an evidentiary hearing on the merits as to the other issues. While this court agreed the denial of a fair trial due to the pretrial publicity claim had been waived because it was not raised on direct appeal, Tenn. Code Ann. § 40-30-206(g), it decided the petitioner should be given the opportunity to rebut the presumption. The court's main concern was the allegation regarding the denial of the constitutional right to the effective assistance of counsel.

II.

The law of the case doctrine is based upon the need for judicial economy. State v.

Jefferson, 938 S.W.2d 1, 8 (Tenn. Crim. App.), per. app. denied (Tenn. 1996). Usually, an appellate court will not reconsider an issue that has been previously decided by the court. This doctrine should be applied in this case since a prior panel has decided the relevant issues.

The judgment of the trial court is affirmed as it relates to the issue concerning the sufficiency of the evidence. This issue has been previously determined. The judgment of the trial court is otherwise reversed and this cause is remanded to the trial court for the appointment of counsel and an evidentiary hearing on the issue concerning the deprivation of the petitioner's constitutional right to the effective assistance of counsel. The petitioner has the right to amend his petition with the assistance of counsel. While the petitioner waived the fair trial issue by not raising the issue on direct appeal, he has the right to allege facts and circumstances to rebut this waiver.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

(Not Participating)

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE