

OPINION

The petitioner, Loring C. Warner, currently incarcerated in the Department of Correction serving an effective 52 year sentence for convictions of aggravated rape, three counts of aggravated sexual battery, and assault with intent to commit sexual battery, appeals the Bradley County Criminal Court's summary dismissal of his Petition for Post-Conviction Relief. The lower court examined the record of Warner's prior proceedings in conjunction with his petition, found the petition "conclusively show[ed] that [Warner was] not entitled to relief," and summarily dismissed the petition. It is from this determination Warner appeals, claiming that the court erred by dismissing his petition without appointing counsel and conducting a hearing, and further, that the court erred in failing to act on his petition within 30 days as required by statute. On review, we reverse and remand the lower court's summary dismissal of the petition, although we affirm the dismissal of specific claims, and we remand the matter for appointment of counsel and such further proceedings as are proper.

Warner received his convictions in late 1989. His appeal to this court and petition for permissive appeal to the Tennessee Supreme Court were unsuccessful. See State v. Loring C. Warner, No. 282 (Tenn. Crim. App., Knoxville, Feb. 16, 1993), perm. app. denied (Tenn. 1993). Warner's convictions became final on June 1, 1993, the date the supreme court declined to review his case. He filed this petition for post conviction relief on March 12, 1996. As such, his claims are governed by the Post Conviction Procedure Act of 1995. See Tenn. Code Ann. §§ 40-30-201 through -222 (1997).

I

In his petition, Warner raises nine allegations of ineffective assistance of counsel and over thirty allegations of other defects in the proceedings which resulted in his conviction and sentence. Warner's allegations in his petition are detailed and, in most cases, supported by factual assertions, references to the

record, citation to authority and legal argument. Warner also alleges he is indigent and requests the appointment of counsel to assist him in amending his petition and presenting evidence at a hearing.

The lower court dismissed the petition at the preliminary stage. See Tenn. Code Ann. § 40-30-206(a)-(f), "Amendments" (Supp. 1996) (amended 1996) ("Amendments" detailing prior version of statute) (emphasis added); see also Tenn. Sup. Ct. R. 28, § 6(B).¹ The lower court did not dismiss the petition for any of the procedural defects outlined in section 40-30-206(b) or (c) and considered the petition to be "in proper form," under section 40-30-206(f), finding it was "competently drawn." Thus, we infer that the court considered it unnecessary to allow pro se amendment of the petition under section 40-30-206(d) or to appoint counsel to assist the petitioner in filing a complete petition under section 40-30-206(e).

In passing on the petition in "proper form," the lower court found that the alleged facts would not entitle Warner to relief. However, an overriding concern about the lower court's disposition of the petition is that the court exceeded its statutory mandate, which was simply to evaluate the petition to determine whether a colorable claim was stated, rather than to examine and adjudicate the factual merits of the allegations. See Tenn. Code Ann. § 40-30-206(f) (1997); Tenn. Sup. Ct. R. 28, § 6(B)(2). Also, the court found there could be no prejudice from any alleged ineffectiveness of counsel because the petitioner was guilty.

The lower court having dismissed at least one potentially viable ground for relief, we hold that the petition as a whole should not have been dismissed based on failure to state a colorable claim. See Tenn. Code Ann. § 40-

¹ Tennessee Code Annotated section 40, chapter 30 and Supreme Court Rule 28 have been amended since the trial court entered its order dismissing the petition. We have analyzed the petition under the Post Conviction Procedure Act and Rule 28 as they were written at the time the trial court took action.

30-206(f), "Amendments" (Supp. 1996) (amended 1996); Tenn. Sup. Ct. R. 28, § 6(B)(3) ("In the event a colorable claim is stated," the court shall appoint counsel, set deadlines and enter appropriate orders.) (emphasis added).

That said, we observe that, upon remand, the next procedural step normally would be the trial court's proper evaluation of the petitioner's claims under section 40-30-206(f), an evaluation that has yet to occur. However, in our view, a remand without this court attempting to sort out and make appropriate disposition of the disparate issues places the trial court in an awkward position and would perhaps unduly impede a fair and expeditious review of the petitioner's claims by fostering a cycle of wasteful appeals. Based upon our review of the petition, we find that some issues should have been dismissed after the preliminary consideration mandated by the Act, whereas one is in need of amendment, while others survive the preliminary consideration and merit further review in the post-conviction process. Thus, we believe that a paring down of the claims, to the extent that the record allows us to do so, is in the best interest of efficient judicial administration.

Before proceeding with what will be a rather summary analysis of the myriad claims, we point out that the record on appeal consists of only the few documents contained within the technical record. There is no record of the trial or sentencing proceeding included in the record on appeal, even though the trial court relied heavily upon many findings it made after an in camera review of the record. However, we do not address whether the court's findings were supported in the record, because in most instances the court's examination and interpretation of the record was itself beyond the scope of the court's duty during the preliminary consideration stage. Therefore, the trial and sentencing record is neither a necessary nor proper referent for our review, and so the absence of the record in this particular case does not substantially hamper review on appeal.

The petitioner organizes his claims as follows:

A. Ineffective assistance of counsel.	Issues 1-9.
B. Prosecutorial misconduct.	Issues 1-8.
C. Denial of fair trial; action of trial court.	Issues 1-21.
D. Trial court's failure to require election of offenses.	1 issue.
E. Violation of double jeopardy principles.	1 issue.
F. Violation of due process from cumulative effect of errors.	1 issue.

We will address the topical issues according to the same numbering scheme. The "treatment" of each allegation is this court's finding with respect to that allegation.

<u>Allegation</u>	<u>Treatment</u>
A. Ineffective Assistance of Counsel.	
1. Counsel had minimal contact with petitioner prior to trial.	Not colorable.
2. Failure to call requested witnesses.	Incomplete; preliminary order should direct amendment if counsel deems appropriate.
3. Failure to develop strategy and conduct independent investigation.	Colorable.
4. Failure to object to victim's mother's testimony about the victim being penetrated on an earlier occasion.	Colorable.
5. Denial of petitioner's right to confront a pediatrician whose statement was read into the record.	Colorable.
6. Denial of petitioner's right to confront another witness whose statement was read into the record.	Colorable.
7. Failure of counsel to review a redacted tape before it was admitted into evidence.	Not colorable.
8. Failure to obtain the testimony of a policeman relative to a previous assault against the victim.	Colorable.
9. Failure to raise trial issues on appeal.	Colorable. (While this issue is lacking an explicit factual basis, in reality the remainder of the petitioner's claims

supply the factual allegations relative to ineffective assistance on appeal.)

B. Prosecutorial misconduct.

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| 1. Posed leading questions. | Not colorable as a constitutional issue. |
| 2. Posed repetitious questions. | Not colorable. |
| 3. Conducted unfair in-court identification of petitioner as assailant. | Colorable. |
| 4. Use of extra-judicial statement. | Colorable. |
| 5. Use of redacted confession. | Not colorable. |
| 6. Withheld exculpatory evidence. | Colorable. |
| 7. Posed unfair question at hearing. | Not colorable. |
| 8. Engaged in improper closing argument. | Not colorable. ² |

C. Denial of fair trial; action of trial court.

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| 1. Allowed prosecutor's unfair question at suppression hearing. | Not colorable. |
| 2. Allowed prosecutor to ask leading questions. | Not colorable as a constitutional issue. |
| 3. Allowed prosecutor to ask repetitious questions. | Not colorable. |
| 4. Allowed prosecutor to conduct unfair in-court identification. | Colorable. |
| 5. Assumed prosecutorial role in examining witness. | Colorable. |
| 6. Allowed state to use extra-judicial statements of absentee declarants. | Colorable. |
| 7. Allowed state to use redacted tape. | Not colorable. |
| 8. Erred in refusing to require state to surrender exculpatory evidence. | Colorable. |
| 9. Accepted prosecutor's explanation about the nature of a previous assault against the victim. | Not colorable. |
| 10. Failed to grant petitioner's motion for judgment | |

² The petition recites portions of the trial transcript which the petitioner attacks under this claim. The portions cited fail to raise an issue which could entitle the petitioner to any relief.

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| of acquittal based upon insufficiency of the evidence. | Colorable. |
| 11. Failed to require the state to file a bill of particulars. | Colorable. |
| 12. Overruled defense objection to state's use of charts and diagrams during argument. | Not colorable as a constitutional claim. |
| 13. Failed to give curative instructions concerning state's improper final argument. | Not colorable. ³ |
| 14. Failed to instruct jury as to lesser included offenses. | Colorable. |
| 15. Overruled defense objection to state's expert testimony. | Colorable. |
| 16. Denied due process by relying upon the expert proof at sentencing. | Not colorable as a constitutional claim. |
| 17. Improperly considered prior misdemeanor convictions at sentencing. | Previously determined. |
| 18. Considered redacted portions of petitioner's confession at hearing. | Not colorable. |
| 19. Allowed hearsay testimony at sentencing. | Colorable. |
| 20. Trial court injected religious beliefs at sentencing. | Colorable. |
| 21. Denial of due process from cumulative effect of above errors. | Colorable. |

D. Failure to Require Election of Offenses.

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| 1. Failed to require election of offenses based upon proof of multiple offenses. | Colorable. |
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E. Violation of Double Jeopardy Principles.

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| 1. Denial of double jeopardy protection to enter three convictions. | Colorable. |
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F. Cumulative Effect of Trial Errors.

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| 1. Denial of general due process. | Colorable. |
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A post-conviction court is empowered upon preliminary consideration to sever unworthy claims for dismissal from colorable claims which shall be further

³ See footnote 2, supra.

processed. Tenn. Sup. Ct. R. 28, § 6(B)(5). Because the trial court has dismissed all of the petitioner's claims, we in effect have severed the unworthy claims from the colorable claims by affirming the dismissal of the claims designated above as "not colorable" or "not colorable as a constitutional issue" and by reversing the dismissal of all other claims. Therefore, upon remand, the trial court shall enter (1) an order dismissing the claims herein designated as not colorable for any reason and (2) an appropriate preliminary order for purposes of further post-conviction review of the surviving claims. If the court finds the petitioner to be indigent, counsel shall be appointed and directed to file either an amended petition or a notice that no amendment will be filed. Tenn. Code Ann. § 40-30-207(b) (1997). Counsel shall take appropriate action with respect to the issue above designated as "incomplete."

II

In his second issue, Warner claims he is entitled to relief because the lower court failed to act on his petition within 30 days. While we agree with the petitioner that Code section 40-30-206 requires the trial court to act on a post conviction petition within 30 days, we disagree with his conclusion that the proper sanction for the trial court's failure to comply is the granting of post conviction relief.

As the state points out, Warner has cited no authority for his claim he is entitled to relief on this basis, and we find no indication the General Assembly contemplated such a result in enacting the Post Conviction Procedure Act of 1995. Rather, as we have acknowledged in the past, the legislative intent behind the Post Conviction Procedure Act of 1995 was to limit the number of petitions a convict could file and the time within which he or she could do so. See, e.g., Ronald Albert Brummitt v. State, No. 03C01-9512-CC-00415, slip op. at 3 (Tenn. Crim. App., Knoxville, Mar. 11, 1997). As Judge Welles noted in Robert Albert Brummitt, one of the bill's sponsors, speaking to members of the House of Representatives, summarized the purpose of the bill as "put[ting] time constraints on the 'interminable duration of criminal appeals.'" Ronald Albert Brummitt, slip op. at 3-4 (citation to

legislative tapes omitted). Moreover, we note that the Act imposes time limitations for actions to be taken at the various stages of post conviction proceedings. See, e.g. Tenn. Code Ann. § 40-30-209(a) (1997) (after state files its answer or other responsive pleading, trial court to enter order of dismissal or order setting evidentiary hearing within 30 days, evidentiary hearing to be held within four months of entry of order, extension of time for hearing shall not exceed 60 days). These facts lead us to conclude that the General Assembly enacted the 30 day time limitation to provide a guideline for trial courts to utilize in keeping post conviction petitions moving toward final resolution, rather than as a period after which a petitioner is entitled to relief as a matter of law. This is in accord with the general proposition that statutory provisions requiring an act to be accomplished within a specified period of time are directory, rather than mandatory. See State v. Jones, 729 S.W.2d 683, 685 (Tenn. Crim. App. 1986) (30 day time period for conducting a sentencing hearing); cf. Tenn. Code Ann. § 40-30-208(a) (1997) ("Failure of the state to timely respond [by filing an answer or other responsive pleading to a petition] does not entitle the petitioner to relief.") (emphasis added). Accordingly, we decline to grant the petitioner's requested relief on this basis.

In summary, the judgment of the lower court dismissing the petition is reversed, subject to the specified dismissal of certain claims being affirmed. The cause is remanded for proceedings consistent with this opinion.

CURWOOD WITT, JUDGE

CONCUR:

JOSEPH B. JONES, PRESIDING JUDGE

PAUL G. SUMMERS, JUDGE