

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1998 SESSION

FILED

June 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

LAWRENCE ALLEN HODGE,)
)
 Appellant,)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

NO. 03C01-9708-CR-00332

KNOX COUNTY

HON. RAY L. JENKINS,
JUDGE

(Post-Conviction)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

Petitioner, Lawrence Allen Hodge, appeals the summary dismissal of his petition for post-conviction relief by the Knox County Criminal Court. The sole issue is whether the trial court erred in dismissing the petition without a hearing based upon the statute of limitations. After a careful review of the record, we affirm the judgment of the trial court.

I

Petitioner was convicted in 1979 of first degree murder and first degree criminal sexual conduct (now aggravated rape) and received consecutive life sentences. He filed a petition for post-conviction relief in 1988 for the first degree murder conviction and a separate petition in 1989 for the first degree criminal sexual conduct conviction. He alleged ineffective assistance of counsel with regard to both convictions. Following evidentiary hearings, the trial court dismissed both petitions. Both dismissals were affirmed by this Court. See Lawrence Allen Hodge v. State, C.C.A. No. 03C01-9406-CR-00201, Knox County (Tenn. Crim. App. filed February 28, 1995, at Knoxville) (affirming dismissal of post-conviction petition in the first degree murder case); Lawrence Allen Hodge v. State, C.C.A. No. 03C01-9212-CR-00442, Knox County (Tenn. Crim. App. filed June 23, 1993, at Knoxville) (affirming dismissal of post-conviction petition in the first degree criminal sexual conduct case).

On March 20, 1997, he filed another post-conviction relief petition entitled "Motion for Post-Conviction Relief Based Upon Newly Discovered Evidence" challenging both convictions. He again attacked the effectiveness of trial counsel and alleged "newly discovered evidence" consisting of mental health evaluations conducted between 1966 and 1972. He alleges these evaluations establish a defense of insanity and incompetence to stand trial in 1979. The trial court dismissed the petition based upon the statute of limitations. See Tenn. Code Ann. §§ 40-30-202, 217. This dismissal forms the basis of the present appeal.

II

Since the subject petition was filed after May 10, 1995, it is governed by the Post-Conviction Procedure Act of 1995. See Tenn. Code Ann. § 40-30-201 Compiler's Notes. The Post-Conviction Procedure Act contemplates the filing of only one petition for post-conviction relief. Tenn. Code Ann. § 40-30-202(c). Ordinarily, a second or subsequent petition is to be summarily dismissed. Id. A petitioner may file a motion to reopen a prior post-conviction proceeding under limited circumstances as set out in Tenn. Code Ann. § 40-30-217(a).

The petition does not meet any of the criteria for a motion to reopen pursuant to Tenn. Code Ann. § 40-30-217. Petitioner alleges that in May 1996 he discovered certain mental health records compiled between 1966 and 1972 and then filed the present petition within one year. He concludes that these records, which reveal a diagnosis of chronic or organic brain syndrome, establish that he was not competent to stand trial in 1979 and could have been used to establish an insanity defense. The only arguable basis to reopen would be Tenn. Code Ann. § 40-30-217(a)(2) allowing a claim "based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted." Petitioner would also have to "establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." Tenn. Code Ann. § 40-30-217(a)(4). The records relied upon by petitioner do not establish actual innocence of the offenses for which the petitioner was convicted. Even if the facts underlying the claim are true, that petitioner was diagnosed at various times between 1966 and 1972 with chronic or organic brain syndrome, this would not entitle petitioner to have the convictions or sentences set aside.

Furthermore, petitioner did not properly perfect his appeal to this Court. The denial of a motion to reopen must be appealed within ten (10) days by filing an application for permission to appeal. Tenn. Code Ann. § 40-30-217(c). Petitioner did not follow this procedure.

Moreover, petitioner may not again challenge the effectiveness of his trial counsel. A ground for relief is “previously determined” if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Tenn. Code Ann. § 40-30-206(h). A full and fair hearing has occurred where the petitioner was afforded an opportunity to call witnesses and present evidence. Id.; House v. State, 911 S.W.2d 705, 711 (Tenn. 1995). Petitioner litigated the effectiveness of trial counsel in the prior petitions. Thus, the issue of the effectiveness of trial counsel has been previously determined.

For these reasons, we affirm the judgment of the trial court.

JOE G. RILEY, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

CURWOOD WITT, JUDGE