

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1998 SESSION

**FILED**  
July 30, 1998  
Cecil W. Crowson  
Appellate Court Clerk

WILLIAM RADLEY )  
 )  
Appellant )  
 )  
v. )  
 )  
STATE OF TENNESSEE )  
 )  
Appellee. )

NO. 01C01-9704-CC-00159

WILLIAMSON COUNTY

HON. CORNELIA A. CLARK

(Post Conviction)

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

REVERSED

WILLIAM M. BARKER, JUDGE

## OPINION

The appellant, William Radley, appeals as of right from the Williamson County Circuit Court's dismissal of his petition for post-conviction relief. Appellant's sole issue on appeal is that his trial counsel was ineffective in failing to timely file an application for permission to appeal to the Supreme Court following this Court's decision in the direct appeal. He contends that he is entitled to a delayed application for permission to appeal to the Supreme Court in accordance with Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App. 1984), *perm. app. denied* (Tenn. March 19, 1984).

After a review of the record and applicable law, we conclude that the appellant is entitled to a delayed appeal.

The appellant was originally convicted of selling a controlled substance, to wit: cocaine. This Court affirmed his conviction in the direct appeal. See State v. William Radley, No. 01C01-9502-CC-00045 (Tenn. Crim. App. at Nashville, Nov. 21, 1995), *per. app. dismissed* (Tenn. June 3, 1996). Thereafter, the appellant filed an application for permission to appeal to our Supreme Court; however, the application was dismissed for untimeliness.

On September 9, 1996, the appellant filed a *pro se* petition for post-conviction relief alleging that his counsel was ineffective in failing to file a timely application for permission to appeal to the Supreme Court. Through a newly appointed counsel, the appellant filed an amended post-conviction petition alleging additional grounds of ineffective assistance of counsel. However, at the evidentiary hearing, appellant agreed to waive the additional grounds and to proceed solely upon the claim involving the late-filed application for permission to appeal.

This Court's decision in the direct appeal was entered on November 21, 1995. However, appellant's counsel did not file the application for permission to appeal until March 29, 1996, approximately two (2) months after the sixty (60) day time limit. Tenn. R. App. P. 11. Counsel did not receive a copy of our November opinion until

February 1, 1996, and apparently thought that he had sixty (60) days from February 1 to file the application for permission to appeal.

After filing the application, appellant's counsel filed a motion to late-file his brief. The Supreme Court denied the motion and subsequently dismissed appellant's application for permission to appeal. Counsel next filed a motion requesting this Court to vacate and re-enter its judgment of November 21, 1995. We denied the motion on July 17, 1996.

The trial court at the post-conviction hearing reviewed the above evidence and concluded that a factual basis existed to grant a delayed appeal. However, the trial court dismissed appellant's petition for a lack of jurisdiction in accordance with Pinkston v. State, 668 S.W.2d 676, 677-78 (Tenn. Crim. App. 1984), *per. app. denied* (Tenn. 1984).

In Pinkston, this Court held that the unilateral termination of a direct appeal following first-tier review entitles the appellant to relief in the form of a delayed appeal. See id. at 677. Thus, as in this case, where the appellant through no fault of his own is deprived of second-tier review by the Supreme Court, the appellant may obtain a delayed appeal to the Supreme Court.

Traditionally, when an appellant sought relief under Pinkston, the trial court was required to conduct an evidentiary hearing to determine whether a factual basis existed for the appellant's petition. See 668 S.W.2d at 677. The appellant then had to appeal to this Court requesting that we vacate and re-enter our original opinion in the direct appeal.<sup>1</sup> From the date of re-entry, the appellant had sixty (60) days to file an application for permission to appeal to the Supreme Court. Tenn. R. App. P. 11.

Those procedural requirements have been questioned in light of Rule 28 of the Rules of the Supreme Court. See Darrel D. Hayes v. State, No. 01C01-9604-CR-00163 (Tenn. Crim. App. at Nashville, Sept. 2, 1997). Rule 28 was first enacted in

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<sup>1</sup>See id. The trial court was required to dismiss the case for a lack of jurisdiction because the trial court had no authority to vacate and re-enter the opinion of this Court. Id.

1995, to supplement the Post Conviction Procedure Act. Tenn. Code Ann. § 40-30-218 (Supp. 1996). The original language of Rule 28 section (9)(D), which was in effect when appellant filed his post-conviction petition, 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 Appellant 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.

As amended in 1996, Rule 28 section 9(D) provides that: “[u]pon 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 Appellant Procedure, the petitioner shall have sixty (60) days to seek Rule 11 review.”

Although Rule 28 affords the “delayed appeal” relief as provided in Pinkston, both versions of the rule omit the procedural requirements in Pinkston. Under Rule 28, trial courts are not required to dismiss a case for a lack of jurisdiction when an appellant seeks a delayed appeal to the Supreme Court. Instead, both trial courts and the Court of Criminal Appeals are empowered to grant a delayed appeal upon determining that the defendant has been deprived of the right to request Supreme Court review under Rule 11 of the Tennessee Rules of Appellate Procedure.

Moreover, nothing in the text of Rule 28 requires this Court to vacate and re-enter its decision in the direct appeal before granting the delayed appeal.

We conclude that Rule 28 is the proper authority for obtaining a delayed appeal to the Supreme Court.<sup>2</sup> Under the language of Rule 28, the trial court in this case was authorized to grant appellant’s request for a delayed appeal. Although the trial court declined to do so, we nevertheless have jurisdiction to review appellant’s case and to afford the appropriate relief.

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<sup>2</sup>We note that other panels of this Court have continued to cite Pinkston when granting delayed appeals to the Supreme Court. See Charles E. Dorse, Jr. v. State, No. 02C01-9706-CR-00205 (Tenn. Crim. App. at Jackson, March 18, 1998); Thomas A. Miles v. State, No. 03C01-9701-CC-00029 (Tenn. Crim. App. at Knoxville, Oct. 3, 1997); Joe Glasgow, Jr. v. State, No. 01C01-9603-CC-00092 (Tenn. Crim. App. at Nashville, Sept. 30, 1997). However, our decision today is not intended to disturb the rule in Pinkston, providing for a delayed appeal when a defendant has been deprived of second tier review in the Supreme Court. Instead, our decision is merely a departure from the Pinkston procedural requirements in light of Rule 28.

The appellant has presented sufficient evidence that through the neglect of his trial counsel, he was deprived of the right to seek permission to appeal to the Supreme Court. We, therefore, grant appellant's request for a delayed appeal to the Supreme Court in accordance with Rule 28. From the date of the opinion filed herein, appellant shall have thirty (30) days to file an application seeking permission to appeal.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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GARY R. WADE, Presiding Judge

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J. CURWOOD WITT, JUDGE