IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STEPHEN M. WEST,	)	
	)	
Appellant,	)	
	)	UNION COUNTY
v.	)	No. E2010-02258-SC-R11-PD
	)	(Capital Case)
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	

ON APPLICATION FOR PERMISSION TO APPEAL FROM THE ORDER OF THE COURT OF CRIMINAL APPEALS

ANSWER IN OPPOSITION TO THE APPLICATION FOR PERMISSION TO APPEAL

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REASONS FOR DENYING THE APPLICATION

The State of Tennessee, through the Office of the Attorney General, files this answer in opposition to the application for permission to appeal filed by the appellant, Stephen West ("West" or "petitioner"), pursuant to Tenn. R. App. P. 11, seeking review of the November 3, 2010, order of the Court of Criminal Appeals denying his application to appeal pursuant to Supreme Court Rule 28, § 10(B). Because petitioner failed to demonstrate in either the trial court of the Court of Criminal Appeals any of the statutory grounds to reopen his post-conviction petition as set forth under Tenn. Code Ann. § 40-30-117(a), the trial court did not abuse its discretion in denying his motion to reopen, and his application for permission to appeal should be denied.

A. Statement of the Case

On March 25, 1987, a Union County, Tennessee, jury convicted West of the first-degree premeditated murders of Wanda Romines and her daughter, Sheila Romines, aggravated kidnapping of both victims, and aggravated rape of Sheila Romines. Finding three statutory aggravating circumstances applicable to each of the murders—that the murders were especially heinous, atrocious or cruel; that they were committed to avoid arrest or prosecution; and that they were committed while the defendant was engaged in committing first degree murder, rape or kidnapping—the jury sentenced him to death. *See* Tenn. Code Ann. § 39-2-203(i)(5), (6) and (7) (1982) (repealed 1989). This Court affirmed the judgment, *State v. West,* 767 S.W.2d 387 (Tenn. 1989), and the United

States Supreme Court denied a petition for a writ of certiorari. *West v. Tennessee*, 497 U.S. 1010 (1990).

West filed a petition for post-conviction relief in 1990. Following an evidentiary hearing, the post-conviction court denied relief. The Court of Criminal Appeals affirmed. *Stephen Michael West v. State,* No. 03C01-9708-CR-00321, 1998 WL 309090 (Tenn. Crim. App. June 12, 1998) (reh. denied). This Court granted West's application for permission to appeal and, on May 12, 2000, affirmed the judgment. *West v. State*, 19 S.W.3d 753 (Tenn. 2000).

On February 20, 2001, West initiated federal habeas proceedings in the United States District Court for the Middle District of Tennessee. *West v. Bell*, No. 3:01-cv-00174 (M.D. Tenn.). The district court transferred the case to the Eastern District of Tennessee, which granted a stay of execution on February 23, 2001. *West v. Bell*, No. 3:01-cv-00091 (E.D. Tenn.). West filed a petition for writ of habeas corpus on June 7, 2001, and an amended petition on February 25, 2002. The district court granted summary judgment in favor of the respondent on September 30, 2004. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment denying habeas corpus relief on December 18, 2008. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008), *reh'g and sugg. for reh'g en banc denied* (May 20, 2009), *cert. denied*, 130 S.Ct. 1687 (2010) (reh. denied).

On June 15, 2010, this Court set an execution date of November 9, 2010.

On October 8, 2010, 32 days before his scheduled execution, West filed a motion in the Union County Circuit Court seeking to reopen his state post-conviction proceeding, claiming that a "state or federal court has issued a final ruling establishing a constitutional right that was not recognized as existing at the time of trial but now is required to be recognized and applied to [his] case." (Motion, p. 3). The trial court denied West's motion on October 26, 2010, and, on November 3, 2010, the Court of Criminal Appeals denied his application for permission to appeal that determination. Because none of petitioner's allegations satisfy the criteria for reopening a post-conviction petition under Tenn. Code Ann. § 40-30-117, his application to appeal to this Court should be denied.

B. Authority to File a Motion to Reopen

West has already exhausted the one (and only one) petition the legislature has afforded him; his only possible remedy is a motion to reopen. Section 40-30-102(c) provides:

> This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40-30-217.

The "limited circumstances set out in § 40-30-117" are that the claim (1) be "based

upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required," (2) be "based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted," or (3) "seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid . . . ." Tenn. Code Ann. § 40-30-217(c). The trial court correctly found that West's claims satisfy none of these criteria.

C. Petitioner's claims do not qualify under any statutory ground for reopening a petition for post-conviction relief.

Petitioner contends that his claims are cognizable for reopening under § 40-30-217 (a)(1): "The claim . . . is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Careful analysis of his claims refutes that assertion.

Petitioner first asserts that he is entitled to a re-examination of his ineffective assistance of counsel claims in light of two recent decisions of the United States Supreme Court, *Sears v. Upton*, 130 S.Ct. 3259 (2010), and *Porter v. McCollum*, 130 S.Ct. 447 (2009), which he contends "revised" the proper standard for consideration of his

claims. However, the Sixth Amendment right to the effective assistance of counsel had long been recognized at the time of petitioner's trial, *see, e.g., McMann v. Richardson*, 397 U.S. 759 (1970), and his contention that *Sears* and *Porter* "revised" the standard for such claims wholly lacks merit. The standard for establishing ineffective assistance of counsel was set forth in the Supreme Court's seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and both *Sears* and *Porter* relied squarely on the *Strickland* standard in assessing the pertinent lower court decisions. *Porter*, 130 S.Ct. at 452 ("To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him."); *Sears*, 130 S.Ct. at 3265-66 (analyzing state-court decision under the standards enunciated in *Strickland*). Neither case revised the pertinent standard or established any new law in the area of the effectiveness of counsel. *See also Pinholster v. Ayers,* 590 F.3d 651, 665 (9th Cir. 2009) (*Porter* "help[ed] illuminate which applications of *Strickland* are unreasonable").

In short, *Porter* and *Sears* neither abridge nor abrogate the *Strickland* standard for determining whether counsel was ineffective. Moreover, petitioner raises no ground in his present motion that has not already been adjudicated by both the state and federal courts. This Court previously rejected petitioner's claim that counsel was ineffective at trial. *West v. State*, 1998 WL 309090, at *8-9. Although this Court granted discretionary review on a different issue, it ultimately affirmed the judgment of the Court of Criminal Appeals. *State v. West*, 19 S.W.3d 753 (Tenn. 2000). *See* Tenn. Code

Ann. § 40-30-106(f), (h). Likewise, in federal habeas corpus proceedings under 28 U.S.C. § 2254, the United States Court of Appeals for the Sixth Circuit concluded that petitioner received constitutionally effective assistance of counsel. *West v. Bell*, 550 F.3d 542, 554, 556 (6th Cir. 2009) ("We are not convinced that all of [counsels' alleged errors] are actually errors, let alone errors that rise to the level of ineffective assistance of counsel. . . . Finally, we note that even if West could prove that his counsel was ineffective for all of the reasons he cited, he has not shown that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Petitioner further asserts that his post-conviction petition should be reopened to consider whether the execution of a person suffering from severe mental illness is a violation of the Eighth Amendment to the Constitution and Article 1, sections 8 and 16 of the Tennessee Constitution. He correctly recognizes, however, that "[this] Court has not yet recognized" such a rule, a statutory prerequisite to reopening his post-conviction petition. As such, the trial court lacked the authority to reopen West's petition and properly denied his motion.

Petitioner asserts, however, that *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), establishes that a motion to reopen under § 40-30-117(a)(1) "is a proper vehicle for establishing that right." But petitioner reads too much into *Van Tran*. In that case, a bare majority of this Court found that petitioner's claim that the execution of the

mentally retarded satisfied § 40-30-117(a)(1) "under the unusual circumstances" of the case, where there was "compelling evidence that the execution of mentally retarded individuals violates the evolving standards of decency that mark the progress of a maturing society both nationally and in the State of Tennessee." 66 S.W.3d at 812. No such "unusual circumstances" exist in this case. Moreover, in his initial motion in the trial court, the petitioner in *Van Tran* relied on Tenn. Code Ann. § 40-30-117(a)(2), alleging that "new scientific evidence establishing that [he] is actually innocent of the offense or offenses for which [he] was convicted," citing an updated version of the I.Q. test. *Van Tran*, 66 S.W.2d at 813. Petitioner's reliance on the majority's decision in *Van Tran* to address *sua sponte* the constitutionality of execution of the mentally retarded under the "unusual circumstances" of that case in order to circumvent the plain language of the Post-Conviction Procedure Act should be rejected outright.

More fundamentally, because West neither asserts nor can he establish that he is mentally retarded, *Van Tran* provides him no relief.[1] As petitioner correctly acknowledges, this Court has never extended the holding of *Van Tran* to individuals with severe mental illness. *See, e.g., State v. Taylor*, 2008 WL 624913 (Tenn. Crim. App.

[1] And even if it did, his present motion, filed nearly nine years after that decision, would be untimely. See Tenn. Code Ann. § 40-30-117(a)(1) ("The motion [to reopen post-conviction proceeding] must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial.").

2008) ("We find no law that compels this Court to [conclude that severely mentally ill defendants cannot be executed]"), *Coleman v. State*, 2010 WL 118696, at *21 (Tenn. Crim. App. Jan. 13, 2010) ("The decisions in *Van Tran* and *Atkins* bar the execution of mentally retarded persons. . . . [W]e decline the request to extend the bar to persons with . . . mental illness."); *State v. Irick*, __S.W.3d __, 2010 WL 3715153 (Tenn. 2010) ("We agree with the State that the present [competency-for-execution] appeal . . . is not the proper proceeding in which to ask this Court to adopt a new constitutional rule barring execution of persons who suffer from severe mental illness . . .). Because no appellate court has announced the rule that petitioner seeks, he cannot meet the statutory criteria for reopening his post-conviction proceeding under Tenn. Code Ann. § 40-30-117(a)(1) and this court lacks jurisdiction to entertain petitioner's claims. *See* Tenn. Code Ann. § 40-30-202(b) ("No court shall have jurisdiction" unless claim meets criteria for reopening).

Finally, *State v. Frazier*, 303 S.W.3d 674 (Tenn. 2010), provides no basis to reopen West's post-conviction proceeding. As *Frazier* makes clear, the "right" to conflict-free counsel derives from the post-conviction *statute* and is not constitutionally based. "At the outset, there is no constitutional entitlement to the effective assistance of counsel in a post-conviction proceeding. . . . There is a statutory right to counsel." *Frazier*, 303 S.W.3d at 680. The Court further observed, "[o]ur Court of Criminal Appeals has interpreted 'this statutory right, *even though not a Sixth Amendment right*, [to]

include[ ] the right to be represented by conflict-free counsel." *Id.* at 681-82 (emphasis added). *Frazier* plainly rests on the Court's interpretation of the post-conviction statute, and does not establish any new constitutional right; indeed, it makes clear the right to post-conviction counsel derives solely from the statute. To reopen a post-conviction petition, a petitioner must base the motion on "a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial." 40-30-117(a)(1). *Frazier* does not satisfy this requirement and provides no basis to reopen under that prong. Nor, apparently, does West assert any ground that would fall within sub-parts (a)(2) or (a)(3) of the statute governing reopening post-conviction proceedings.

CONCLUSION

Because petitioner failed to satisfy any of the statutory grounds to reopen his post-conviction proceeding, his application for permission to appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing response has been forwarded by electronic mail and United States mail, first class postage prepaid, to: Stephen A. Ferrell, Federal Defender Services of Eastern Tennessee, Inc., 800 S. Gay St., Suite 2400, Knoxville, TN 37929; and Roger W. Dickson, 832 Georgia Ave., Suite 1000, Chattanooga, TN 37402, on the 3rd day of November, 2010.

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