

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
JUNE 1995 SESSION

FILED

January 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE

Appellee,

198

V.

ROBERT JOHNSON, JR.

Appellant.

)
) C.C.A. NO. 02C01-9503-CC-00069
)
) Madison County Circuit Court No.C-92-
)
)
) Honorable Whit Lafon, Judge
)
)
) (Aggravated Rape and Incest)
)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED

MARY BETH LEIBOWITZ,
SPECIAL JUDGE

OPINION

This is an appeal of right by Robert Johnson Jr., by and through counsel, affirming the judgment of the Madison County Criminal Court which dismissed his Petition for Post-Conviction Relief. Following a jury trial Mr. Johnson was convicted on May 14, 1985 of aggravated rape and incest. His appeal to the Court of Criminal Appeals was denied on March 19, 1986, and his application for permission to appeal to the Supreme Court was denied on June 2, 1986. The Petitioner filed his Petition for Post-Conviction Relief on July 14, 1992, alleging that the statute of limitations should be waived and that he should be allowed to pursue his post-conviction petition, because his trial and appellant counsel failed to inform him that his appeal was concluded. We agree with the trial court that this petition is time barred and affirm its finding.

The Petitioner has claimed that he was not notified of any action by the Court of Criminal Appeals or the State Supreme Court following his conviction, but that he had been notified that his attorney would appeal. In the proof at the post-conviction hearing, he testified that sometime in 1991, he asked a jailhouse lawyer to file the instant petition for post-conviction relief, and was asked what had happened to his appeal. He testified that he had never heard from his attorney about his appeal and his attorney testified that he had no knowledge of notifying the appellant because he did not have an address. The State of course urges that the effective assistance of trial counsel issue is barred by the statute of limitations. T.C.A. 40-30-102, under the 1986 act, says;

"A prisoner in custody under sentence of a Court of this State must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest State Appellate Court to which an appeal is taken or consideration of such petition shall be barred."

Both sides cite Burford v. State, 845 S.W.2nd 204 (Tenn. 1992). In that case an habitual criminal who had been sentenced in 1985, in part, on prior convictions, was allowed to file a post-conviction petition outside the three (3) year statutory period after some of his prior convictions were invalidated. In this case there are no prior convictions, and the issue strictly applies to the defendant's appeal. In Mullins v. State, 767 S.W. 2nd 668 (Tenn. Crim. App. 1988), the petitioner was not outside the statute of limitations.

The State has cited Sam John Passarella v. State, Davidson County, C.C.A. No. 01C01-9402-CR-00035, Opinion filed July 28, 1984. In that case the petitioner filed his petition several years after the statutory filing period had tolled. The Court of Criminal Appeals found that, although the appellant argued that the statute of limitations should commence on the date he was advised by his attorney that he had grounds to file, a considerable period of time after the statute of limitations had run. It found that the statute of limitations did not include a discovery rule, and that a discovery rule could not be engrafted upon the statute of limitations in post-conviction cases. In Darrell Eugne Warren v. State, Knox County No. 03-C-01-9210-CR-00372 (Tenn. Crim. App., Knoxville, Aug. 17, 1993), per. app. denied, February 14, 1994, the Court said:

This court rejected the argument that the post-conviction statute of limitations should begin to run when a petitioner "learned" that application for permission to appeal had been denied by the Tennessee Supreme Court. In this case, the appellant urges us to find that the statute begins to run when a petitioner learns that certain

constitutional violations have occurred. We cannot engraft this discovery rule upon the statute of limitations which is purely statutory and which is unambiguous about its accrual.

Thus the Petition for Post-Conviction Relief as to the appellant Robert Johnson, Jr. is time barred, and the judgment of the trial court is affirmed.

MARY BETH LEIBOWITZ, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE