

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1995 SESSION

<p>FILED</p> <p>January 19, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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EDDIE PHILLIPS and
CHARLES PHILLIPS,

Appellants

v.

STATE OF TENNESSEE,

Appellee

) C.C.A. NOS. 03C01-9504-CR-00123
) & 03C01-9504-CR-00124
)
) ANDERSON COUNTY
)
) HON. JAMES B. SCOTT, JR.
) JUDGE
)
) Post-conviction
) Underlying offenses--1st degree
) murder

FOR THE APPELLANTS

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FOR THE APPELLEE

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OPINION FILED _____

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

OPINION

In July 1981, the petitioners were sentenced to serve life for first degree murder. The Court of Criminal Appeals affirmed the convictions on November 4, 1986. Permission to appeal was denied by the Supreme Court on February 9, 1987. The petitioners filed their petitions for post-conviction relief on December 30, 1993.

On November 21, 1994, the trial court dismissed the petition for post-conviction relief because they were filed beyond the time in which the statute of limitations had run. TENN. CODE ANN. § 40-30-102.

We affirm the judgments.

The petitioners claim they did not timely file their petition for post-conviction relief because their counsel gave them erroneous advice which led to their failure to timely file a petition for post-conviction relief.

This Court, in an opinion by the most able Judge Tipton, held in *State v. Phillips*, 904 S.W.2d 23 (Tenn. Crim. App. 1995) that incompetency of counsel gives no excuse for a relief from a failure to timely file a petition for post-conviction relief.¹

The petitioners contend this Court should adopt a rule applied to medical malpractice cases which triggers the running of the statute of limitations from the time the injured party discovered the injury, rather than stating the time the statute commences to run from the date of the medical surgery. This Court has consistently rejected the application of this rule to post-conviction proceedings. See *Jackie Payne v. State*, (Anderson County, C.C.A. No. 03C01-9310-CR-00349, filed at Knoxville, January 11, 1995). We see no reason to depart from the rule in *Payne*.

The petitioners further argue that the statute of limitations should not have begun to run until April 19, 1988, the date of the last action on petitions for writs of *coram nobis* filed by them to attack the convictions. Even if this would toll the running of the statute, which it did not do, the time period from April 19, 1988 until

¹We need not, and do not, reach the question of incompetency of counsel as alleged by the petitioner.

December 30, 1993 is more than the three year statute of limitations applicable in this case.

We find the petitioners are entitled to no relief in this case, and we affirm the judgments of the trial court.

Costs of appeal are taxed equally to appellants Charles Phillips and Eddie Phillips.

John K. Byers, Senior Judge

CONCUR:

William M. Barker, Judge

F. Lee Russell, Special Judge