

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

**FILED**  
July 5, 1996  
Cecil W. Crowson  
Appellate Court Clerk

GARY ROCCO DENAMI, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 Appellee. )

No. 01C01-9507-CR-000224  
Davidson County  
Hon. J. Randall Wyatt, Jr. , Judge  
(Post-Conviction)

For the Appellant:

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For the Appellee:

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

AFFIRMED

Joseph M. Tipton  
Judge

OPINION

The petitioner, Gary Rocco Denami, appeals as of right from the Davidson County Criminal Court's dismissal of his petition for post-conviction relief. The petitioner was convicted of attempted first degree murder and sentenced to twenty years in the Department of Correction as a Range I, standard offender. While the direct appeal of his conviction has been pending, the petitioner filed a petition for post-conviction relief, which the trial court dismissed as prematurely filed.<sup>1</sup> In this appeal, the petitioner contends that his right to due process was violated because the opinion in his direct appeal had not been rendered. He also contends that the premature filing of his petition is a "technical defect" under T.C.A. § 40-30-115(b) and that the trial court erred by dismissing the petition without giving him the opportunity to amend it. We disagree with the petitioner's contentions.

First, we note that the record reflects that the petitioner's counsel essentially agreed to a dismissal of the petition without prejudice and raised no concern to the trial court that relates to the issues now presented. Moreover, the petitioner's brief, which includes only one-half page of argument, asserts no fact, claims no prejudice, and cites no law in support of the bold assertions the petitioner now makes.

The Post-Conviction Procedure Act does not authorize the filing of a post-conviction petition while a direct appeal of the conviction is pending in the Tennessee courts. See Jones v. State, No. 02C01-9103-CR-00038, Shelby Co. (Tenn. Crim. App. Dec. 11, 1991), app. denied (Tenn. Dec. 30, 1991). Nothing is alleged or argued that would justify an exception in this case.

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<sup>1</sup>The petitioner's judgment of conviction was affirmed in this court. State v. Gary Rocco Denami, No. 01C01-9309-CR-00307, Davidson Co. (Tenn. Crim. App. Feb. 23, 1996), applic. filed (Tenn. April 18, 1996).

We also disagree with the petitioner's assertion that the timeliness of his petition for post-conviction relief is a "technical defect" under T.C.A. § 40-30-115(b) which states:

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel to file amendments.

This section protects a pro se petitioner from summary dismissal of an incompetently drafted petition when the petitioner has not had the opportunity to amend the petition with the aid of counsel. It does not protect a petitioner from summary dismissal of an untimely filed petition. See Fredrick v. State, 906 S.W.2d 927, 930 (Tenn. Crim. App. 1993). In any event, the petitioner was represented by counsel at the hearing on the state's motion to dismiss and counsel did not contend that he lacked a reasonable opportunity to amend the petition. Rather, he acknowledged that the petition was filed prematurely.

The trial court properly concluded that the petitioner filed his petition for post-conviction relief prematurely. The dismissal of the petition is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Paul G. Summers, Judge

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David H. Welles, Judge