

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

**FILED**  
**September 30, 1996**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

GEORGE L. McGHEE, )  
 )  
 APPELLANT, )  
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 v. )  
 )  
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 )  
 STATE OF TENNESSEE, )  
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 )  
 APPELLEE. )

No. 02-C-01-9607-CR-00213  
Shelby County  
Chris Craft, Judge  
(Application for Permission to Appeal)

FOR THE APPELLANT:

W. Mark Ward  
Attorney at Law  
147 Jefferson Avenue, Suite 900  
Memphis, TN 38103

FOR THE APPELLEE:

Charles W. Burson  
Attorney General & Reporter  
450 James Robertson Parkway  
Nashville, TN 37243-0497

William David Bridgers  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

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

APPLICATION FOR PERMISSION TO APPEAL DENIED

Joe B. Jones, Presiding Judge

**OPINION**

The appellant, George L. McGhee, has filed an application for permission to appeal pursuant to Tenn. Code Ann. § 40-30-217(c). He seeks relief from a judgment of the trial court dismissing his motion to reopen a prior post-conviction suit. He asks this Court to grant his application for permission to appeal, hear the matter on the merits, and, if relief is granted, waive the notice of appeal requirement. This Court finds that the trial court did not abuse its discretion in denying the motion to reopen. The appellant failed to state a ground that is cognizable, and the suit is barred by the statute of limitations. Consequently, the application for permission to appeal is denied.

The appellant was convicted of murder in the second degree and sentenced to life on November 8, 1986. This Court affirmed the appellant's conviction and sentence on February 24, 1988. State v. George Lester McGhee and George Washington, Shelby County No. 11 (Tenn. Crim. App., Jackson, February 24, 1988). The Supreme Court denied the appellant's application for permission to appeal on June 27, 1988.

On March 4, 1991, the appellant timely filed a petition for post-conviction relief. The State of Tennessee filed a motion to dismiss the suit. The motion alleged that the suit was barred by the statute of limitations. The State of Tennessee alleged that the statute of limitations commenced on February 24, 1988, the date the judgment was filed by this Court. On March 26, 1991, the trial court found that the suit was barred by the statute of limitations. The trial court found that the statute of limitations commenced on February 24, 1988. The appellant did not appeal as of right from the judgment.

On December 28, 1992, the appellant filed his second suit for post-conviction relief. The State of Tennessee moved to dismiss the suit on the ground that the petitioner had previously filed a petition for post-conviction relief, and the trial court denied the petition. The State concluded that any issues not raised in the first petition had been waived. On April 20, 1993, the trial court granted the State's motion to dismiss. The trial court found that the suit was barred by the statute of limitations. The court stated in its order:

2. The issues alleged in this Petition were that Petitioner's prior Petition for Post-Conviction Relief . . . was wrongfully dismissed by Division 8 [of the] Criminal Court. Specifically, Petitioner alleges that he mailed [the] petition . . . in time but it was not timely filed by the Criminal Court Clerk's Office.

3. The Court finds that it does not have authority to reconsider Division 8 [of the] Criminal Court's dismissal of [that] case. . . . Furthermore, the Court states that if Petitioner believes [the prior suit] was dismissed in error, that the proper remedy is to appeal that decree to the Court of [Criminal] Appeals.

The appellant did not appeal as of right from this judgment.

The appellant initiated the present suit on June 24, 1996. While the pleading is entitled "Petition for Relief from Conviction or Sentence," the appellant seeks to reopen his prior suit. The trial court treated the petition as a motion to reopen pursuant to Tenn. Code Ann. § 40-30-217 and dismissed the motion. The trial court found that the statute does not provide for the reopening of a post-conviction suit based on the grounds asserted by the appellant. The order of the trial court states in part:

This Court finds that petitioner is deserving of relief. The ruling of the trial court on his first petition was clearly in error, and at the time of the ruling petitioner was not represented by counsel, and did not appeal. All further petitions were dismissed due to the erroneous ruling of that court, fostered by an erroneous response filed by the State of Tennessee. In this Court's opinion, the judgment of the trial court in [the first suit] should be set aside, and Petitioner should be appointed an attorney, be allowed to amend his petition and have a hearing on the merits.

This Court would like to grant a delayed appeal in [the prior suit], pursuant to T.C.A. 40-30-213, but feels that since this fact situation is not covered in T.C.A. 40-30-21[7] as one of the reasons for the granting of a Motion to Reopen, that this Court must deny the motion. . . . Petitioner would have had an opportunity to present his claims, had he successfully appealed the trial judge in his first petition. . . . Therefore, this Court cannot grant relief. . . .

Since this Court has no jurisdiction to overrule the prior decision of the trial court in [the prior suit] and also cannot grant the motion to reopen, it is finding petitioner indigent for purposes of appeal, and is appointing attorney Mark Ward to represent petitioner on appeal. He has ten days from this date to file an application in the Court of Criminal Appeals seeking permission to appeal pursuant to T.C.A. 40-30-217(c).

The appellant has timely filed an application for permission to appeal. The State of Tennessee has filed a response in opposition to the application.

The first question this Court must resolve is the procedure that governs applications for permission to appeal seeking relief from a judgment of the trial court denying a motion to reopen a prior post-conviction suit. The applicable statute, Tenn. Code Ann. § 40-30-

217(c), simply refers to “an application in the court of criminal appeals seeking permission to appeal.”

The Tennessee Rules of Appellate Procedure provide for two types of appeals by permission. Rule 9 provides for an interlocutory appeal. Rule 10 provides for an extraordinary appeal. The Tennessee Rules of Post-Conviction Procedure adopt the language of Tenn. Code Ann. § 40-30-217(c). Tenn. Sup. Ct. R. 28, § 10(B).

The remedy provided by Tenn. Code Ann. § 40-30-217(c) parallels Rule 10, Tenn. R. App. P. This rule provides in part:

**(c) Content of Application.** The application shall contain: (1) a statement of the facts necessary to an understanding of why an extraordinary appeal lies, (2) a statement of the reasons supporting an extraordinary appeal, and (3) the relief sought. The application shall be accompanied by copies of any order or opinion or parts of the record necessary for determination of the application. The application may also be supported by affidavits or other relevant documents.

This Court recommends that the petitioner, or counsel representing the petitioner, use subsection (c) as a guide when drafting an application pursuant to Tenn. Code Ann. § 40-30-217(c). Such a format permits the petitioner to present the application in an intelligent, understandable, and orderly manner. It will also permit this Court to determine the specific reason why the trial court erred in denying the motion to reopen; and this Court will be able to rule on the application with dispatch.

It is obvious that the Tennessee General Assembly wanted to provide the petitioner with a simple and plain remedy for review of the trial court’s decision. Therefore, the technical requirements of Rule 10(c), Tenn. R. App. P., may not be invoked to deny an application. So long as the application is filed timely, ten (10) days from the entry of the order denying the motion, and the application is accompanied “by all the documents filed by both parties in the trial court and the order denying the motion,” this Court is obligated to hear and determine the application on the merits.

The second question this Court must resolve is the standard of review that governs these cases. The statute, Tenn. Code Ann. § 40-30-217(c), provides that the “court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion [to reopen].” Thus, this Court must review the present

application to determine whether the trial court abused its discretion in denying the appellant's application to reopen the previous post-conviction case. This Court must either deny the petition, or, in the alternative, grant the petition and remand the case to the trial court for an evidentiary hearing. The statute does not contemplate the procedure provided by Rules 9 and 10, Tennessee Rules of Appellate Procedure, namely, grant the application, permit the parties to brief the issues, and either hear oral argument or decide the matter on briefs. This is consistent with the Tennessee General Assembly's desire to have a quick determination of the issue so that the proceeding may be expedited. This is one of the goals of the new Post-Conviction Procedure Act.

The statute of limitations barred the right of the appellant to post-conviction relief. Tenn. Code Ann. § 40-30-102 (Repl. 1995). The statute of limitations commenced on June 27, 1988, the date the Supreme Court denied the appellant's application for permission to appeal. See Ernest Lawson v. State, McMinn County No. 03-C-01-9401-CR-00037 (Tenn. Crim. App., Knoxville, July 7, 1994). The appellant had three years from that date to file a suit for post-conviction relief.

This Court agrees with the appellant that the first suit was filed within the time constraints of the statute. The assistant district attorney general erroneously alleged in the answer that the statute of limitations began to run on February 24, 1988, the date this Court entered its judgment. The statute in effect clearly stated that the statute of limitations commenced to run on the date of "the final action of the highest appellate court to which an appeal has been taken." Tenn. Code Ann. § 40-30-102 (Repl. 1995). The trial court erroneously adopted this date in its order dismissing the first suit. However, the appellant did not appeal the erroneous judgment of the trial court. There is no allegation that either counsel or the state impaired his right to appeal as of right to this Court.

The second suit was filed on December 23, 1992. The trial court properly dismissed this suit on the ground it was barred by the statute of limitations. The judgment of the trial court was not appealed. Again, there is no allegation that either counsel or the state impaired his right to appeal as of right to this Court.

The present suit was filed on June 24, 1996. It is clear that the statute of limitations had expired. The trial court properly dismissed the suit on the ground that it was barred

by the statute of limitations.

This Court also finds that the grounds alleged in the petition and asserted in this Court are not cognizable in a post-conviction suit. The substance of his motion is the reopening of a prior post-conviction suit for the purpose of filing a delayed appeal. This Court has held on numerous occasions that the remedy provided by Tenn. Code Ann. § 40-30-120 (Repl. 1995) [now Tenn. Code Ann. § 40-30-213] cannot be invoked to obtain a delayed appeal in a post-conviction case. Moreover, if such relief could be obtained, the remedy must be commenced before the statute of limitations expires. Otherwise, the statute of limitations will bar relief based upon this remedy. See Handley v. State, 889 S.W.2d 223, 225 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); Thomas A. Hartley v. State, Hamilton County No. 03-C-01-9301-CR-00006 (Tenn. Crim. App., Knoxville, September 15, 1993), per. app. denied (Tenn. 1994).

This Court concludes that the trial court did not abuse its discretion in denying the appellant's motion to reopen the prior post-conviction suit. Therefore, the application for permission to appeal is denied.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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DAVID G. HAYES, JUDGE