

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

FILED

July 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

GEORGE A. RUFF,)
)
 APPELLANT,)
)
)
 v.)
)
)
 STATE OF TENNESSEE,)
)
)
 APPELLEE.)

No. 03-C-01-9510-CC-00312

Blount County

D. Kelly Thomas, Jr., Judge

(Post-Conviction Relief)

FOR THE APPELLANT:

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OPINION FILED: _____

JUDGMENT VACATED AND REINSTATED

Joe B. Jones, Presiding Judge

OPINION

The appellant, George A. Ruff, appeals as of right from a judgment of the trial court denying his petition for post-conviction relief. The trial court found that the appellant was denied his right to file an application for permission to appeal in the Supreme Court, but it did not have jurisdiction to grant the relief sought. The appellant contends that this Court should vacate its prior judgment and reinstate it so that he can pursue an application for permission to appeal. This Court has made a thorough review of the record, the briefs of the parties, and the authorities governing the issue presented for review. It is the opinion of this Court that the relief sought by the appellant should be granted. Therefore, the prior judgment entered by this Court is hereby vacated and reinstated so that the appellant can file an application for permission to appeal in the Supreme Court.

The appellant was tried and convicted of aggravated sexual battery, a Class B felony, by a jury of his peers. The trial court, finding that the appellant was a standard offender, imposed a Range I sentence consisting of confinement for ten (10) years in the Department of Correction. This Court affirmed the appellant's conviction and sentence.¹ No application for permission to appeal was filed with the Clerk of the Supreme Court.

The District Public Defender was appointed to represent the appellant prior to trial. The parties stipulated that the assistant public defender who represented the appellant on appeal did not withdraw as counsel of record pursuant to Rule 14 of the Tennessee Supreme Court. Nor did this assistant district public defender file an application for permission to appeal or advise the appellant that he could file an application for permission to appeal. The parties further stipulated that no other employee of the District Public Defender either moved to withdraw as counsel, filed an application for permission to appeal, or advised the appellant he could file an application for permission to appeal pro se.

The trial court entered its written findings of fact and conclusions of law. The order set forth the stipulation of the parties and, based upon the stipulation concluded:

¹State v. George [Anthony] Ruff, Blount County No. 03-C-01-9206-CR-00200 (Tenn. Crim. App., Knoxville, March 25, 1993).

1. That the Petitioner has sustained his Amended Petition for Post Conviction Relief in that his counsel, through the first tier of appellate review in the Court of Criminal Appeals, failed to file a Motion pursuant to Rule 14 of the Rules of the Supreme Court of Tennessee asking for permission to withdraw and failed to advise the Petitioner of his withdrawal, thereby depriving him of his right to seek a second tier review by virtue of an Application for Permission to Appeal to the Tennessee Supreme Court.
2. That this Court has no jurisdiction to overrule or otherwise affect a Court of Criminal Appeals Judgment, therefore[,] the Petition is dismissed.

The stipulation of the parties supports the ruling of the trial court.

When an attorney is appointed to represent an accused, and the attorney appeals as of right to this Court, the attorney has the right to withdraw as counsel following the filing of this Court's judgment.² If the attorney does not seek to withdraw as counsel of record, the attorney is obligated to file an application for permission to appeal with the Clerk of the Supreme Court. In short, the attorney must either "fish or cut bait" -- the attorney cannot stand mute and take no action. If the attorney does not advise the accused that he will seek to withdraw as counsel of record and provide the information required by the appropriate rule, the accused has the right to assume that appointed counsel is protecting his right to an appeal by permission in the Supreme Court.³

The trial court took the appropriate action in this case. The court made a finding of facts based upon the stipulation. The court also properly dismissed the petition because only the Court of Criminal Appeals can take the appropriate action to permit an accused the right to file an application for permission to appeal. This is accomplished by this Court vacating its previous judgment and reinstating the judgment.

The judgment of this Court that was entered by this Court on March 25, 1993, is vacated and immediately reinstated. The appellant's time for the filing of an application for

²Tenn. Sp. Ct. R.14.

³Tenn. R. App. P. 11.

permission to appeal will commence on the date this Court enters its judgment in this case.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

GARY R. WADE, JUDGE

PAUL G. SUMMERS, JUDGE