

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

FILED
January 28, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

TERRY SHANNON KIMERY,)

Appellant,)

VS.)

STATE OF TENNESSEE,)

Appellee.)

C.C.A. NO. 03001-9512-CC-00412

GREENE COUNTY

HON. JAMES E. BECKNER
JUDGE

(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF GREENE COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's dismissal of his second petition for post-conviction relief. The Petitioner was convicted on a jury verdict of armed robbery and two counts of kidnaping. He was sentenced to fifty (50) years for the armed robbery and ten (10) years for each count of kidnaping. The sentences for kidnaping were ordered to run consecutively to each other but concurrently with the sentence for armed robbery. These sentences were also ordered to begin after the expiration of a sentence for which parole had been revoked. In his only issue on this appeal, the Petitioner argues that the "moral certainty" language in the reasonable doubt jury instruction at trial impermissibly lowered the burden of proof and violated his constitutional right to the "beyond a reasonable doubt" standard of proof. We affirm the judgment of the trial court.

The Petitioner was convicted on January 22, 1987 of armed robbery and kidnaping. He appealed his convictions and this court affirmed the judgment of the trial court on March 7, 1988. State v. Terry Shannon Kimery, No. 273, Greene County (Tenn. Crim. App., Knoxville, March 7, 1988). The Petitioner did not seek permission to appeal to the Tennessee Supreme Court. On November 19, 1990, he filed a petition for post-conviction relief and the trial court denied the petition. On the appeal of the trial court's denial of the petition for post-conviction relief, this court affirmed the judgment of the trial court. Terry Shannon Kimery v. State, No. 03-C-019105CR00148 (Tenn. Crim. App., Knoxville, May 1, 1991), perm. to appeal denied, id.(Tenn. 1992).

The Petitioner filed his second petition for post-conviction relief on October 17, 1995, clearly after the three-year statute of limitations had run because the “final action” by an appellate court had occurred on March 7, 1988. See Tenn. Code Ann. § 40-301-102 (repealed 1995).¹ The trial court dismissed the petition pursuant to Tennessee Code Annotated section 40-30-206(b), finding that the Petitioner had filed a prior petition attacking the conviction that was resolved on the merits. The Petitioner appeals the judgment of the trial court dismissing his petition.

The Petitioner argues that although the time to file a petition has expired pursuant to the statute of limitations, he is entitled to relief. He contends that his petition may be considered because it is “based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. § 40-30-202(b)(1). The trial court found that because the Petitioner had previously filed a post-conviction petition and because it was resolved on the merits, he was not eligible to file another petition. Section 40-30-202(c) states that “[t]his part contemplates the filing of only one (1) petition” and if a previous petition was resolved on the merits, “any second or subsequent petition shall be summarily dismissed.” However, this subsection also provides that a petitioner may submit a motion to reopen a

¹Although not addressed by the parties, we note that the petition was filed within one year of the passage of the new Post-Conviction Procedure Act which applies to all petitions filed after May 10, 1995. At least one panel of this court has held, with one member dissenting, that this act provides a “one-year window” in which every defendant may file a petition, even if the petition would have been banned by the three-year statute provided under the previous act. Arnold Carter v. State, CCA No. 03C01-9509-CC-00270, Monroe County (Tenn. Crim. App. Filed July 11, 1996 at Knoxville). At least one other panel of this court has held to the contrary. Johnny Butler v. State, CCA NO. 02C01-9509-CR-00289, Shelby County (Tenn. Crim. App. Filed Dec. 2, 1996 at Jackson).

former petition if an appellate court has recognized a new constitutional right. Tenn. Code Ann. §§ 40-20-202(c); 40-30-217(a)(1).

The State correctly argues that the Petitioner failed to submit to the trial court a motion to reopen in proper form. We agree that the Petitioner has not satisfied the requirements under section 40-30-217. A motion to reopen based on a new constitutional rule of law must be filed within one year after the ruling of the court on which the claim is based. Tenn. Code Ann. § 40-30-217(a)(1). Also, the motion must set out a factual basis for any claims and must be supported by an affidavit. § 40-30-217(b). Furthermore, if the motion is denied, an application to appeal to the court of criminal appeals must be filed within ten (10) days. § 40-30-217(c). The Petitioner has not satisfied any of these procedural requirements to qualify his petition as a motion to reopen. Therefore, because he is limited to only one petition under section 40-30-202(c), and because he did not satisfy the requirements to file a motion to reopen, his petition is barred and should properly be denied.

Even if we disregard the procedural defects and assume that the petition is, in essence, a motion to reopen his previous petition, the Petitioner's assertions must fail. He claims that a new federal constitutional rule of law invalidating the type of burden of proof jury instruction that was employed at his trial merits consideration through his petition for post-conviction relief. However, he argues that the new rule of law was decided in Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn. 1994), a federal District Court case that found a jury instruction similar to that used with the Petitioner was a constitutional "jury-instruction error

. . . not subject to harmless error review.” Id. at 709. This decision is insufficient to support the Petitioner’s contention that a new rule of law has been established.

For a constitutional right to be recognized for the purposes of post-conviction relief, the claim must be “based upon a final ruling of an appellate court” and any petition “must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court.” Tenn. Code Ann. § 40-30-217(a)(1); see also 40-30-202(b)(1). In the case sub judice, the Petitioner’s claim is based on the ruling of a federal District Court. The District Court is a trial court, not an appellate court. Any interpretation of constitutional law in that court has no precedential value applicable to the Tennessee Post Conviction Procedure Act. Also, the Petitioner filed his post-conviction petition on October 17, 1995, more than one year from the September 2, 1994, filing date of the decision upon which he relies. Therefore, the Petitioner is not entitled to relief under section 40-30-217(a)(1).

Even if we were to address the Petitioner’s claim on its merits, his contention must fail. The Petitioner bases his argument on a ruling in Rickman, that a jury instruction including “moral certainty” language impermissibly lowered the burden of proof below the “beyond a reasonable doubt” standard. 864 F. Supp. at 709. In Rickman, the jury instruction given was quite similar to that which the Petitioner asserts the jury was instructed at his trial. The relevant portion reads:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt.

Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Rickman, 864 F. Supp at 708. The District Court found that the “moral certainty” language, combined with the statement “an inability after such investigation to let the mind rest easily upon the certainty of guilt” did not provide the jury with the proper standard of “beyond a reasonable doubt.” 684 F.Supp. at 709.

The Petitioner asserts that the jury at his trial was instructed on the burden of proof in terms that were “routinely used as pattern jury instructions in Tennessee at the time of appellant’s trial.” He cites the following as the instruction the jury received:

Reasonable doubt has been said to be a term well understood and to require no further definition. However, if you need further guidance, it is defined as an honest misgiving on your part, touching the guilt of the defendant, arising out of the proof or lack of same. Reasonable doubt does not arise from possibility, but is that doubt engendered by an investigation [*of all the proof in the case and an inability, after such investigation,*] to let the mind rest easily as to the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict of a criminal charge, but moral certainty is required as to every proposition of proof requisite to constitute the offense.

(Emphasis added).² Although the Rickman court found a similar jury instruction to be error, we decline to follow Rickman in the case sub judice.

A longstanding tenet of criminal law is that the government must prove every element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358,(1970). The due process provisions of our state and federal constitutions require that the reasonable doubt standard be used, but they do not specify that any particular definition or form of words be used in instructing the jury on the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 138, 99 L.Ed. 150 (1954).

Tennessee appellate courts have consistently held that instructions similar to those in the case at bar passed constitutional scrutiny. State v. Nichols, 877 S.W.2d 722, 734 (Tenn.1994); Pettyjohn v. State, 885 S.W.2d 364, 365-66 (Tenn.Crim.App.), perm. to appeal denied, id. (Tenn.1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn.Crim.App.1993), perm. to appeal denied, id. (Tenn.1994); State v. Gay Lee Blank, No. 01C01-9105-CC-00139, Williamson County, slip op. at 5-6 (Tenn.Crim.App., Nashville, filed Feb. 26), applic. dismissed (Tenn. Filed May 4, 1992).

² We note that the jury instruction cited by the Petitioner in his brief does not include the portion of the pattern jury instruction as we have indicated in italics: "of all the proof in the case and an inability, after such investigation.". See T.P.I-Crim. 2.03 (2d. ed.). The jury instructions are not contained in the original trial record, however, the pattern jury instruction for reasonable doubt used at the time of the Petitioner's trial do include this phrase. In his brief, the Petitioner refers to the pattern jury instruction and, therefore, the variation in his brief appears to be an unintentional typographical error. We shall consider the jury instruction in question as the one which includes this phrase.

The United States Supreme Court has found similar results, holding in only one case that a definition of reasonable doubt that included the phrase “moral certainty” violated the Due Process Clause of the Constitution. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam). The Supreme Court determined that the words "actual substantial doubt" and "grave uncertainty" as used in the jury instruction suggested a higher degree of doubt than required for acquittal under the reasonable doubt standard. 498 U.S. at 41, 111 S. Ct. at 329. Moreover, when these words were considered with the term "moral certainty" rather than evidentiary certainty, a danger arose that a jury could find a defendant guilty based on a lesser degree of proof than required by the Due Process Clause. The Court subsequently reversed the Defendant's conviction.

The Court considered similar due process challenges to jury instructions defining reasonable doubt in Victor v. Nebraska, 114 S.Ct. 1239, 127 L.Ed. 583 (1994), and the companion case of Sandoval v. California, *id.* In analyzing the relationship of reasonable doubt to the "moral certainty" phrase, the Court upheld the use of the "moral certainty" language when the complete instruction lends context to the phrase. We have recently examined at length the background and use of “moral certainty” language in the context of a very similar jury instruction, James David Carter v. State, No. 03C01-9506-CC-00179, Greene County (Tenn. Crim. App., Knoxville, July 15, 1996), appeal granted (Tenn., Dec. 9, 1996), and we found it to be constitutionally sound.

In the case before us, the instructions informed the jury that reasonable doubt did not include a “doubt that may arise from possibility” but was one

"engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt." The instruction clearly stated that the jury must consider the proof, that the burden of proof was on the State, and that the proof required a moral certainty as to every element of the offense. The instructions explained that absolute certainty was not required.

Moreover, the instructions here did not contain the objectionable language of "grave uncertainty" and "actual substantial doubt" found in Cage, which overstated the quantum of doubt necessary for acquittal; rather, they only contained the "moral certainty" language. This court has held that Cage does not mandate the abandoning of the "moral certainty" terminology. State v. Hallock, 875 S.W.2d 285, 294 (Tenn.Crim.App.1993), perm. to appeal denied, id. (Tenn.1994). Likewise, the Tennessee Supreme Court has further held that the "use of the phrase 'moral certainty' by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt." State v. Nichols, 877 S.W.2d 722, 734 (Tenn.1994). The phrase is permissible if the context in which the instruction is given "clearly convey[s] the jury's responsibility to decide the verdict based on the facts and the law." Id.

In light of the foregoing, we conclude that the jury instruction in the Petitioner's case falls within the parameters required to satisfy constitutional scrutiny and that the "moral certainty" language in context of the entire jury instruction correctly states the burden of proof.

As we have previously stated, the Petitioner's claim is barred by the prior three-year statute of limitations. Under the 1995 Act, the petition was properly dismissed because a prior petition attacking the conviction was resolved on the merits, and this petition does not satisfy the requirements to reopen the petition he filed in 1991. Also, under the applicable standard for assessing the constitutionality of jury instructions, the instruction applied in this case presents no error. For these reasons, the trial court properly dismissed the petition.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JERRY L. SMITH

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FILED January 28, 1997 Cecil Crowson, Jr. Appellate Court Clerk

CONCURRING OPINION

I differ with the majority only because I believe that the 1995 Post Conviction Procedure Act, by its plain (if unintended) language provided a one-year window of opportunity for those who had been primarily barred from presenting their claims by the statute of limitations. Arnold Carter v. State, No. 03C01-9509-CC-00270 (Tenn. Crim. App., at Knoxville, July 15, 1996), appeal granted (Tenn., Dec. 2, 1996).

I concur in the result because the petitioner is not, in my view, entitled to relief on his claim that the jury instructions violated constitutional safeguards. The concept of reasonable doubt was adequately defined for the jury. See, e.g., State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994).

Gary R. Wade, Judge