

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER, 1997 SESSION

FILED

October 30, 1997

**Cecil W. Crowson
Appellate Court Clerk**

ROBERT L. SMITH, JR.

Appellant,

vs.

**JUDGE STERLING GRAY,
WARDEN HOWARD CARLTON,
AND STATE OF TENNESSEE,**

Appellees.

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No. 01CO1-9610-CR-00450

Davidson County

Honorable J. Randall Wyatt, Jr.
Judge

(Post-Conviction)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

CURWOOD WITT
JUDGE

OPINION

The petitioner, Robert I. Smith, appeals the Davidson County Criminal Court's dismissal of his petition for post-conviction relief. The petitioner is serving four consecutive life sentences following his October, 1982 convictions for aggravated kidnaping, aggravated rape, armed robbery, and assault with intent to commit first degree murder. His convictions were affirmed by this court, and the supreme court denied his application to appeal on May 29, 1984.¹ The petitioner filed a petition for post-conviction relief on April 15, 1986, and in 1988, this court affirmed the trial judge's denial of relief.² The record indicates that early in 1990 the petitioner filed a petition seeking a writ of habeas corpus in federal court.³ On January 9, 1996, the petitioner filed this second petition for post-conviction relief alleging that he had been denied the effective assistance of counsel and that the conduct of the trial judge and prosecutor had denied him a fair trial. The lower court found that his claims were barred by the statute of limitations and dismissed the petition without appointing counsel or conducting a hearing.

On appeal, the petitioner contends that the trial judge erred in summarily dismissing his petition. He alleges that the statute of limitations was tolled because Judge Thomas A. Wiseman, Jr., of the Federal District Court for

¹ State v. Robert L. Smith, Slip op. (Tenn. Crim. App., Nashville, Feb. 8, 1984) perm. to appeal denied (Tenn. 1984).

² Smith v. State, 757 S.W.2d 14 (Tenn. Crim. App. 1988).

³ See Robert L. Smith v. Warden J. Morgan, et al., Civil Action No. 3:90-0169 (M.D. Tenn. June 20, 1990). According to Judge Wiseman's memorandum opinion, the petitioner filed his first petition for habeas corpus in 1983. This petition was dismissed for failure to exhaust state remedies in Smith v. Rose, Civil Action No. 3:84-0087 Tenn. April 19, 1983). Smith v. Morgan, Civil Action No. 3:90-0169 slip op. at 1 (M.D. Tenn. June 20, 1990).

the Middle District of Tennessee, ordered that he return to state court so that Tennessee courts could rule on all available issues in his petition. After reviewing the record before us, we find that the statute of limitations bars this petition. Therefore, we affirm the judgment of the post-conviction court.

Initially, we note that in 1984, when the supreme court denied the petitioner's request for permission to appeal, the 1967 Post-Conviction Procedure Act had no time bar and relief was available at any time during which a petitioner suffered a restraint on his liberty. See Tenn. Code Ann. § 40-30-102 (1982). In 1986, the legislature amended Section 40-30-102 to limit the filing of petitions to "within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken. . . ." Tenn. Code Ann. § 40-30-102 (Supp. 1987). The provision took effect on July 1, 1986 and applied to any petition filed on or after that date. 1986 Tenn. Pub. Acts 634 (section 2); Abston v. State, 749 S.W.2d 487 (Tenn. Crim. App. 1988). To ensure that the constitutional requirement of reasonable notice was observed, the Tennessee Supreme Court ruled that those whose convictions were final before the effective date of the act had three years from July 1, 1986 to file a post-conviction claim. Abston v. State, 749 S.W.2d at 488. The last date for filing a post-conviction petition in this case was July 1, 1989.⁴

The legislature repealed the three-year statute of limitations contained in 1986 amendment as of May 10, 1995 and now requires that post-conviction petitions be filed within one year of the date of the final action of the highest state appellate court to which the prisoner has appealed. Tenn. Code

⁴ The trial judge erred in concluding that the statute had run on Smith's petition in May of 1987. However, whether the statute expired in May of 1987 or July of 1989 makes no difference.

Ann. § 40-30-202(a) (Supp. 1996). The new Post-Conviction Procedure Act applies to all post-conviction petitions filed after May 10, 1995. See 1995 Pub. Act 207, § 3. Our supreme court recently held that the Post-Conviction Procedure Act of 1995 did not revive previously expired post-conviction claims. Arnold Carter v. State, _____ S.W.2d _____, No. 03S01-9612-CR-00117 (Tenn. Knoxville, Sept. 8, 1997).

The petitioner filed the petition at issue herein on January 9, 1996. On its face, the petition is subject to the provisions of the 1995 Act and is clearly barred. This petition is not the first Smith has filed. See Smith v. State, 757 S.W.2d 14 (Tenn. Crim. App. 1988). The new act allows for the filing of only one petition for post-conviction relief. Tenn. Code Ann. § 40-30-202(c)(Supp.1996). If a prior petition has been resolved on the merits by a court of competent jurisdiction, any subsequent petition shall be summarily dismissed unless the petitioner demonstrates that he is entitled to untimely relief. Tenn. Code Ann. § 40-30-202(b), (c) (Supp. 1996); Burford v. State, 845 S.W.2d 204 (Tenn. 1992). A petitioner may move to reopen a post-conviction proceeding that has been concluded under the limited circumstances set out in Section 40-30-217:

(1) The claim in the motion 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, if retrospective application of that right is required. . . .

(2) The claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and . . . the conviction has subsequently been held to be invalid . . . and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing

evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

Tenn. Code Ann. § 40-30-217 (a) (Supp. 1996).

The petitioner argues that this petition is not time barred because it is a continuation of the federal habeas corpus petition filed in 1990. The petitioner correctly states that his habeas petition was dismissed because the federal district court found that, although petitioner had raised each of his claims in state courts, the state courts had not had the opportunity to rule on all the factual bases for his claims. Robert L. Smith, Jr. v. Warden J. Morgan, et al., Civil Action No. 3:84-0087 slip op. at 3 (M.D. Tenn. June 20, 1990).⁵ The court dismissed the petition without prejudice to allow the petitioner to pursue “any available state court remedies.” Id. at 4 (emphasis added). If the petitioner had filed a second post-conviction petition in 1990 immediately after the dismissal in federal court, he would have discovered that he no longer had any available state remedies since the period for filing such claims had expired on July 1, 1989.

The petitioner has presented no claim which would entitle him to untimely relief. The issues in this petition are identical to those raised in his earlier petition and were previously determined in a full and fair hearing by a court of competent jurisdiction. Tenn. Code Ann. § 40-30-206(h) (Supp. 1996); See Smith v. State, 757 S.W.2d 14 (Tenn. Crim. App. 1988). He cites no new

⁵ The petitioner submitted a copy of the memorandum opinion in his reply brief. The opinion, of course, is not part of the record on appeal as it was not filed as a supplement to the record. Tenn. R. App. P. 24(e). However, we consider it here as supplemental authority pursuant to Tennessee Rules of Appellate Procedure 27(d).

constitutional rule, refers to no new scientific evidence, and makes no claim that an earlier conviction has been overturned. See Tenn. Code Ann. § 40-30-206(g)(Supp. 1996). His claims are barred. The trial court did not err in summarily dismissing his petition. Tenn. Code Ann. § 40-30-206(b) (Supp. 1996).

We find no error requiring reversal. We affirm the post-conviction court's dismissal of Robert Smith's petition for post-conviction relief.

CURWOOD WITT, Judge

GARY R. WADE, Judge

THOMAS T. WOODALL, Judge