

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FILED

November 4, 1997

DANIEL VILLERS,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 01C01-9704-CR-00129
(No. 9207 Below)

Cecil W. Crowson
Appellate Court Clerk

WILSON COUNTY

The Hon. J. O. Bond

(Dismissal of Motion to Reopen)

ORDER

This matter is before the Court upon the petitioner’s pro se Motion for Appointment of Counsel.

From our review of the record, it appears that the petitioner filed a Motion to Reopen Post-Conviction Petition on May 13, 1996. Subsequently, on May 20, 1996, the trial court dismissed the motion because it was not filed within the time set forth in the statute of limitations and because the ground for relief had been previously determined. On May 24, 1997, the petitioner filed a motion to reconsider, which was denied by the trial court on August 2, 1996. A second motion to reconsider was filed on January 22, 1997, and was denied by the trial court on January 31, 1997. The petitioner then filed a notice of appeal on February 10, 1997.

It appears that the petitioner filed a motion for appointment of counsel with the Clerk of this Court, however, the motion was filed under a different case number and was denied because no record had yet been filed in this Court. Due to the confusion concerning case numbers, the petitioner filed a pro se brief. After the state was granted additional time, it filed its brief, and the petitioner filed a reply brief.

Under T.C.A. § 40-30-217(c), when a motion to reopen a post-conviction petition is denied, the petitioner has 10 days to file an application to this Court seeking permission to appeal. The application is to be accompanied by all of the documents filed

by both parties in the trial court and the order denying the motion. The state then has 10 days to respond to the application. Upon reviewing the pleadings, this Court then determines whether the trial court abused its discretion in denying the motion to reopen. There is no provision for the filing of a record.

In this case, the trial court dismissed the petitioner's motion to reopen on May 6, 1996. Rather than following the procedures set forth in T.C.A. § 40-30-217(c), the petitioner filed two motions to reconsider and a notice of appeal, and a record was then forwarded to this Court. Under the statute, the petitioner's time for filing an application has long since expired, and no application for permission to appeal the denial of the petition to reopen is properly before this Court.

Moreover, relief under T.C.A. § 40-30-217(a) may only be granted where (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 and the motion is filed within one year of the ruling; or (2) the claim in the motion is based upon new scientific evidence establishing that the 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 such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence and the motion is filed within one year of the finality of the ruling holding the previous conviction 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. The petitioner's claims raised in his motion to reopen do not fall within the criteria set forth in T.C.A. § 40-30-217(a).

Accordingly, although we regret the delays in the above-styled matter, we are compelled to dismiss the petitioner's appeal.

IT IS, THEREFORE, ORDERED that petitioner's motion for appointment of counsel is respectfully denied and this appeal is dismissed. The petitioner being indigent, costs are taxed to the state.

ENTER this the ____ day of October, 1997.

JOHN H. PEAY, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

THOMAS T. WOODALL, JUDGE