

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

ABU ALI ABDUR'RAHMAN,)
)
 Petitioner,)
)
 v.) Case No. 87-W-417
) (Death Penalty)
 STATE OF TENNESSEE,)
)
 Respondent.)

RESPONSE IN OPPOSITION TO
MOTION TO REOPEN POST-CONVICTION PETITION

On April 4, 2002, just over 16 years after the murder of Patrick Daniels and six days before his scheduled execution, Abdur'Rahman moved this court to reopen his post-conviction petition. Relief under his initial post-conviction petition was denied by this Court in 1993 and was affirmed by the Court of Criminal Appeals in 1995. *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App., Feb. 23, 1995), *cert. denied*, 516 U.S. 1122, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996). Abdur'Rahman subsequently sought and was denied relief in federal habeas corpus proceedings. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 122 S.Ct. 386, 151 L.Ed. 2d 294 (2001).

As set forth below, because Abdur'Rahman has wholly failed to satisfy the criteria of Tenn. Code Ann. §40-30-217(a), this court is without authority to consider his claims.¹ And, as the attached exhibits plainly establish, the claims themselves are without merit. Abdur'Rahman's eleventh-hour motion to reopen is nothing more than an attempt to gain delay of his execution for its own sake and should be summarily denied.

A. Authority to file a motion to reopen.

The Post-Conviction Procedure Act is not a constitutionally-mandated procedure, but is purely a creature of the state legislature. *Oliphant v. State*, 806 S.W.2d 215, 217 (Tenn. Crim. App. 1991). As such, all procedural aspects of post-conviction are governed by the Act itself. Tenn. Code

¹As set forth in the State's response in opposition to the motion for stay of execution, the court is likewise without authority to grant a stay. *See* Tenn. Code Ann. §40-30-202(b) (court may not grant stay of execution unless motion to reopen satisfies requirements set out in §40-30-217).

Ann. §40-30-202 expressly provides that the Act contemplates the filing of only one petition for post-conviction relief. “[A]ny second or subsequent petition shall be summarily dismissed,” unless the petitioner can demonstrate certain specific grounds to support reopening the initial petition set forth in Tenn. Code Ann. §40-30-217(a)(1)-(4). Thus, the sole authority for filing a motion to reopen a post-conviction petition is Tenn. Code Ann. §40-30-217, and unless a petitioner pleads facts, which bring him within one of three narrow categories, a trial court has no authority to entertain a successive petition.

Under Tenn. Code Ann. §40-30-217(a), a petitioner may move to reopen a previous post-conviction petition only if: (1) the claim 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 (2) the claim is "based upon new scientific evidence establishing that such petitioner is actually innocent" of the convicted offense or offenses; or (3) the claim seeks relief from a sentence that was enhanced because of a previous conviction and that "previous conviction has subsequently been held to be invalid." Tenn. Code Ann. §40-30-217(a)(1), (2), and (3). A motion to reopen must be denied by the trial court without a hearing unless the factual allegations, taken as true, meet one of the three statutory requirements. *Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997).

Despite his contention that he is entitled to reopen under subsection (a)(1) based upon the existence of a “constitutional right that was not recognized as existing at the time of his trial,” Abdur’Rahman admits that there is no “final appellate ruling” establishing such a right as to any of the six claims asserted in his motion, stating that he is “relying on rights not previously recognized as existing by the Tennessee courts.” (Motion, p. 4) He argues, however, that *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), permits this court to “create” a new constitutional rule warranting retroactive application to his case. First, *Van Tran* has no application to this case because the issue presented to the Supreme Court in that case, *i.e.*, execution of the mentally retarded, was a matter of first impression in this State. All of the issues in this case, on the other hand, involved well-settled principles. In any event, the *Van Tran* decision in no way confers upon a trial court the authority “create” a new constitutional rule in the face of decisions to the contrary by the appellate

²To successfully reopen a prior petition under this subsection, the “motion to reopen must be filed within one year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. §40-30-217(a)(1).

courts of this State. Moreover, §40-30-217(a)(1) specifically refers to a “final ruling of an appellate court,” which Abdur’Rahman admits does not apply.

B. Specific Claims

1. Ineffective Assistance of Counsel

Abdur’Rahman first asserts that he was denied his right to the effective assistance of counsel due to counsel’s failure to investigate and present mitigating evidence at the sentencing phase of his trial. But his claim has already been considered and rejected by this court in his first post-conviction proceeding and the court’s decision affirmed on appeal to the Tennessee Court of Criminal Appeals. *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App., Feb. 23, 1995), *cert. denied*, 516 U.S. 1122, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996).

The petitioner asks this court to create a new standard for reviewing claims of ineffective assistance of counsel. The Tennessee Supreme Court has repeatedly held that *Strickland v. Washington*, 466 U.S. 668 (1984), provides the state standard for evaluating claims of ineffective assistance of counsel, *Butler v. State*, 789 S.W.2d 898, 899-900 (Tenn. 1990), and this court is without authority to “rewrite” the prejudice prong of the *Strickland* analysis. See *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976) (Tennessee Supreme Court is the highest judicial tribunal of the state and all other courts are constitutionally inferior tribunals subject to the actions of that Court).

2. Apprendi Claim

Abdur’Rahman next contends that under the authority of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), he was entitled to have the aggravating circumstances upon which his death sentence was based charged in the indictment and a jury finding on whether the State had proved those aggravators beyond a reasonable doubt. He contends that absence of either of the two elements violates his rights under the Sixth, Eighth and Fourteenth Amendments and requires that his death sentence be vacated. First, in an Order dated July 17, 2001, this court denied a prior motion to reopen post-conviction based on this same claim, concluding that the decision was inapplicable to Abdur’Rahman’s case by its terms. (Exhibit 1) Petitioner’s failure to appeal that decision constitutes a waiver of any further consideration by this, or any other, court. Moreover, the Court of Criminal Appeals has previously held that the *Apprendi* decision does not satisfy the criteria

of §40-30-217(a)(1) for reopening a post-conviction petition.³ (Exhibit 2)

3. Brady Claim

Abdur'Rahman contends that his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Article I, §§ 8, 9 and 16 of the Tennessee Constitution because the prosecution withheld evidence that was material and exculpatory with respect to his sentence. First, none of his claims satisfy the requirements to reopen under §40-30-217(a). In addition, consideration is not warranted under *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992), because Abdur'Rahman cannot demonstrate that he was deprived of a reasonable opportunity to present his claims in any of his numerous appearances before the state and federal courts.

In any event, Abdur'Rahman has failed to submit any affidavits or other evidence that the “state agents have either just recently disclosed — or as of this date failed to disclose— material exculpatory evidence” This absence of proof precludes them from obtaining the relief requested. Furthermore, the State submits the affidavits attached herewith as Exhibits to this proceeding which clearly refute any suggestion that the matters alleged in their Motion to Reopen constitute relevant or material evidence of exculpatory facts.

A. Abdur'Rahman alleges that the Tennessee Bureau of Investigation had in its possession an “investigative report” pertaining to Allen Boyd reflecting that he was engaged in criminal activities during the time of the murder of Patrick Daniels. This “report”, as well as other reports previously provided by the TBI to the Tennessee Board of Probation and Parole during the recent clemency process, consists only of information passed on to the TBI from the FDIC concerning a self report from a local bank and is irrelevant to the murder case for which the Defendant was convicted. In fact, the affidavit of Detective Mark Garafola, states that the TBI had nothing to do with the investigation other than issuing an administrative subpoena to assist Det. Garafola in obtaining some records. See attached Affidavit of Det. Garafola, attached herewith as Exhibit 3 to the State’s Response.

The affidavit of Deputy Director Reeves, which is attached herewith as Exhibit 4 to the State’s Response, explains what the specific information contained in the FDIC report has to do with Mr. Boyd, that it has absolutely nothing to do with the murder case, establishes no defense for the

³Contrary to petitioner’s suggestion, *Ring v. Arizona*, U.S. No. 01-488, has no application to this case because the Arizona capital sentencing scheme under scrutiny in light of *Apprendi* involved the imposition of the death penalty by a judge, rather than a jury. In Tennessee, juries decide whether death is the appropriate punishment.

Defendant, and contains no mitigation evidence which could have been admissible at the Defendant's sentencing.

Moreover, the Defendant himself testified and denied (during the only time he has testified) that Allen Boyd was involved in the murder of Patrick Daniels.

Q. And you're telling this jury — you want them to believe that this was part of the particular religious group that you were involved in, as part of your teachings. Is that correct?

A. My initial move, yes.

Q. I am sorry, what?

A. My intent, yes, sir.

Q. And that would have been the group that Mr. Boyd came to you and asked you to join, as well as William Beard?

A. Yes.

Q. Now, on how many occasions did Mr. Boyd go in Mr. Daniels' home with you?

A. I did not say Mr. Boyd went into the house with me.

Q. He went at no time?

A. That's right.

Q. And how many occasions did Mr. Beard go with you to the house of Mr. Daniels?

A. None.

Q. In fact, the two men who were responsible for getting you, as you say, involved in this political religious group, they were involved in nothing about this. Is that correct?

A. That's not correct.

Q. That's not correct?

A. I meant to say they were not involved in this particular incident.

Q. They were not involved in any way. Is that what you're telling this jury?

A. There were not involved in this incident.

Q. They were not involved in any way in this case. Is that what you're telling this jury?

A. There were not involved in this incident.

Trial Transcript, pp. 1878--1879.

B. Abdur'Rahman alleges that he has been "denied" access to a taped statement of an interview of his wife, Susie Bynum Jones. His counsel have made various requests over the years to inspect and copy the police investigative reports. Missing from those responses has been the taped interview of Ms. Jones given to detectives shortly after the murder. Det. Garafola states in his affidavit that the audio tape cannot be located. This is surely not news to defendant's counsel.

Also attached to Garafola's affidavit is not only his supplemental police report of the interview but also Detective Clyde Taylor's police report. Neither report even suggests that there is any exculpatory evidence within those reports, both of which counsel have had for years. Furthermore, Ms. Jones provided much information to officials at MTMHI during the 30 day evaluation (which was available to the defense) and also testified at the penalty phase. The fact that the audio tape record of the interview is missing after fifteen years is not "newly discovered"

information.

C. Abdur'Rahman finally contends that the facts and circumstances surrounding the capture of the co-defendant, Miller, is somehow exculpatory due to a remark made at the co-defendant's sentencing hearing. The affidavit of Det. Garafola explains the facts and circumstances surrounding that arrest. Clearly, the authorities did everything possible to capture him in a timely fashion and had nothing to gain by delaying Miller's arrest. Counsel offer no reason why the defendant was prejudiced by the delay in Miller's arrest, or even suggest that there is any evidence of any strategic gain by the State in the delay.

4. *"Heinous, Atrocious or Cruel" Aggravating Circumstance*

Abdur'Rahman next contends that his sentence is constitutionally infirm in that it is based, in part, on an invalid aggravating circumstance, specifically the "heinous, atrocious or cruel" aggravating circumstance. While admitting that the Tennessee Supreme Court has never found that aggravating circumstance to be unconstitutionally vague, he nevertheless asks this court to "establish a new rule of law that is retroactively applicable."⁴ (Motion, p. 20) Accordingly, because his motion is not based on a "final ruling of an appellate court establishing a constitutional right," he is not entitled to reopen under §40-30-217(a)(1).

Moreover, on direct appeal from his conviction and sentence, the Tennessee Supreme Court specifically found that the evidence at trial supported the jury's application of the "heinous, atrocious or cruel" aggravating circumstance, since the defendant had engaged in torture of the victim and/or acted with a depraved state of mind.

The victim in this case was bound, gagged, and blindfolded with duct tape. He was distressed, crying and begging not to be hurt. Defendant stood over him and stabbed him six times, four times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth.

Jones, 789 S.W.2d at 550.

Likewise, in federal habeas corpus proceedings, District Judge Campbell upheld the jury's application of the "heinous, atrocious and cruel" aggravating circumstance, concluding that "a reasonable factfinder would have agreed that [Abdur'Rahman] engaged in torture of the victim prior to his death and acted with depravity of mind." *Abdur'Rahman v. Bell*, 990 F.Supp. 985, 990 (M.D.

⁴Indeed, Abdur'Rahman admits that "Tennessee courts have repeatedly upheld the validity of the 'heinousness' aggravating circumstance that was weighed by the jury in [his] case. See *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *State v. Henley*, 774 S.W.2d 908, 918 (Tenn. 1989); *State v. Taylor*, 771 S.W.2d 387, 399 (Tenn. 1989); *State v. Thompson*, 768 S.W.2d 239, 252 (Tenn. 1989); *State v. Williams*, 690 S.W.2d 517, 526-30 (Tenn. 1985)."

Tenn. 1998).

5. *Reasonable Doubt Jury Instruction*

Abdur'Rahman contends that he is entitled to post-conviction relief because the jury received an unconstitutional instruction on the meaning of "reasonable doubt" at the guilt and sentencing phases of his trial. Again, he admits that "[n]o court in the state of Tennessee has ever held that a jury instruction on 'reasonable doubt' is unconstitutional, despite numerous cases raising such issues." (Motion, p. 21) Therefore, because his motion is not based on a "final ruling of an appellate court establishing a constitutional right," he is not entitled to reopen under §40-30-217(a)(1). Moreover, Abdur'Rahman has waived consideration of the issue by failing to present it for determination in any previous proceeding in which it could have been presented. Tenn. Code Ann. §40-30-206(g).

6. *Constitutionality of Lethal Injection*

Finally, Abdur'Rahman contends that lethal injection as a means of execution is cruel and unusual under Article I, §16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. First, as Abdur'Rahman admits, no appellate court has declared lethal injection to be unconstitutional. Indeed, such challenges have been repeatedly rejected by the federal courts. *See LaGrand v. Stewart*, 133 F.3d 1253, 1264-65 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997); *Kelly v. Lynaugh*, 862 F.2d 1126, 1135 (5th Cir. 1988); *Woolls v. McCotter*, 798 F.2d 695, 698 (5th Cir. 1986). Thus, he cannot meet the requirement of §40-30-217(a)(1) to reopen his post-conviction petition on that basis.

Finally, consideration of petitioner's claim under the due process principles established in *Burford v. State, supra*, is not warranted, because he has not been deprived of a reasonable opportunity to present his claim. Abdur'Rahman has been on notice that he faced lethal injection as a possible means of execution since 1998. *See* 1998 Tenn. Pub. Acts. ch. 982 (eff. May 18, 1998) (codified in Tenn. Code Ann. §40-23-114).

CONCLUSION

The allegations of Abdur'RAhman's motion to reopen fail to satisfy the statutory criteria of Tenn. Code Ann. §40-30-217(a)(1). Accordingly, petitioner is not entitled to reopen his post-conviction petition, and the court should deny his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been hand delivered
on this the _____ day of April, 2002, to:

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JOHN ZIMMERMANN
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