IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1996 SESSION

FILED

December 2, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JOHNNY L. BUTLER,	)	
	)	**C.C.A. NO. 02C01-9509-CR-00289**
Appellant,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. W. FRED AXLEY,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Petitions for Writ of Error
	)	Coram Nobis/Habeas
	)	Corpus/Post-Conviction)

FOR THE APPELLANT:

JOHNNY L. BUTLER, pro se
F.R.N. 12790-076
USP Box PMB
Atlanta, GA 30315

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

ELLEN H. POLLACK
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

JOHN W. PIEROTTI
District Attorney General

C. ALANDA HORNE
Asst. District Attorney General
201 Poplar, Suite 301
Memphis, TN 38103-1947

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner, who is serving a sentence for a federal court conviction, has filed two petitions attacking prior state convictions which were used to enhance the sentence for the federal conviction. These two petitions, called petitions for the writ of coram nobis or for habeas corpus, were dismissed by the trial court without a hearing on the basis that they were actually petitions for post-conviction relief and barred by the statute of limitations. We agree with the trial court.

On July 17, 1995, the petitioner filed these petitions attacking his guilty pleas to the offenses of robbery and attempt to commit a felony. These pleas were entered on November 19, 1974, and January 25, 1989, respectively. The petitioner alleges that neither plea was entered knowingly and voluntarily because he was not advised that the convictions could be used against him in the future nor was he advised as to the range of punishment for robbery. He further alleges, as to the robbery conviction, that he received ineffective assistance of counsel because his attorney had a conflict in representing all three codefendants on the robbery charge and that his attorney failed to properly investigate that charge and file necessary pretrial motions.

The petitions cannot be treated as ones for the writ of error coram nobis because such pleadings must be filed within one year after the judgment under attack becomes final. T.C.A. § 27-7-103. Nor can the petitions be properly treated as ones for habeas corpus relief since there is no allegation that the judgments are void or that the defendant is imprisoned on a sentence that has expired. Passarella v. State, 891 S.W.2d 619, 626-27 (Tenn. Crim. App. 1994).

For the above reasons, the trial judge properly treated the petitions filed as ones for post-conviction relief. Moreover, we hold that the statute of limitations applicable to these petitions was three years pursuant to T.C.A. § 40-30-102 (1986 Supp). Therefore, the statute of limitations would have run in 1989 on the robbery conviction and in 1992 on the attempt conviction. Since these petitions were filed in July of 1995, the trial court correctly held, without a hearing, that the petitions were barred by the statute of limitations.

We acknowledge that this petition falls within the purview of the new Post-Conviction Procedure Act, T.C.A. § 40-30-201 et seq. (1996 Supp), which applies to all post-conviction petitions filed after May 10, 1995. See 1995 Tenn. Pub. Act 207, § 3. This new Act provides, in pertinent part, that "[n]otwithstanding any other provision of this part to the contrary, any person having ground for relief recognized under this part shall have at least one (1) year from May 10, 1995, to file a petition or a motion to reopen a petition under this part." Compiler's Notes to T.C.A. § 40-30-201 (1996 Supp) referring to Acts 1995, ch. 207, § 3. And we realize that another panel of this Court has held, with one member dissenting, that the new Post-Conviction Procedure Act provides "a one-year window" in which every defendant may file a petition. Arnold Carter v. State, C.C.A. No. 03C01-9509-CC-00270, Monroe County (Tenn. Crim. App. filed July 11, 1996, at Knoxville). That case holds that the one-year window is available even if the petition would have been barred by the three year statute provided under the previous act.

However, we adopt the view set forth in Judge Welles' dissent, concluding that

> this language is only applicable to those who were not barred by the statute of limitations at the time this statute went into effect. Thus, if less than three years had already passed at the bill's enactment, a

> defendant assuming that he had three years in which to file a petition for post-conviction relief would not be foreclosed from bringing a suit; instead, he would still have the one year from the effective date of the statute.

Like Judge Welles, we do not believe that the new Act provides to those defendants previously barred a new one year period in which to petition for post-conviction relief. At most, it provides those barred an opportunity to reopen a prior petition within one year of the new Act's effective date. T.C.A. § 40-30-217 (1996 Supp). The allegations under review do not meet the criteria of this section.

As held by the trial court, the instant petitions are barred by the three year statute of limitations applicable under the prior Act. Therefore, the action of the trial court in dismissing the petitions was appropriate and we therefore affirm the judgment below.

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JOHN H. PEAY, Judge

CONCUR:

_____
PAUL G. SUMMERS, Judge

_____
DAVID G. HAYES, Judge