

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1995 SESSION

**FILED**  
**September 18, 1995**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

RICHARD LYNN NORTON,

Appellant

V.

STATE OF TENNESSEE,

Appellee

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CCA NO. 03C01-9409-CR-00324,  
GREENE COUNTY

HON. BEN K. WEXLER, JUDGE

(Post-Conviction)

CONCURRING OPINION

While in agreement with the result reached in the majority opinion, I write separately to express my view that the appellant's complaints of a denial of due process are without merit for an even more basic and fundamental reason than that expressed in the majority opinion.

In this post-conviction petition, appellant complains of certain events which occurred following his arrest but before his first trial. Specifically, he complains that he was denied counsel at his preliminary hearing; that he was wrongfully transferred from the county jail to the state penitentiary while awaiting his first trial, thereby denying him the ability to communicate with counsel; and that he was denied needed medical care and treatment while in custody awaiting trial.

As noted in the majority opinion, appellant's conviction following his first trial was reversed by this Court and remanded for a new trial. Accordingly, the defendant was retried in 1989 and once again convicted on the same charges. Following his second trial, the appellant perfected an appeal to this Court which was unsuccessful.

At no time prior to his first trial or in the appeal which followed did appellant raise the due process complaints which are now before this Court in the present post-conviction petition. Similarly, at no time in the course of his second trial or the appeal following did he raise these issues.

Accordingly, there is a rebuttable presumption that those alleged grounds for relief have been waived. Tenn. Code Ann. § 40-30-112(b)(2) (1990 Repl.). There is no evidence in this record which demonstrates that the appellant in any way attempted to rebut the presumption of waiver.

For the above reasons, it is my view that the issues of due process as heretofore described have been waived, and a discussion of the "outrageous government conduct" issue is unwarranted in this case.

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WILLIAM M. BARKER, JUDGE