

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1995

FILED
November 30, 1995
Cecil Crowson, Jr. Appellate Court Clerk

ALLEN RAY CARLTON,)
)
 Appellant,)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

C.C.A. NO. 01C01-9504-CR-00107
 SUMNER COUNTY
 HON. JANE WHEATCRAFT
 JUDGE
 (Post-Conviction)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SUMNER COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals as of right from the trial court's denial of his petition for post-conviction relief. The trial court ruled that the petition was barred by the statute of limitations. We affirm the decision of the trial court.

The Petitioner was convicted of first degree murder and carrying a gun while committing a felony in 1987. His convictions were upheld on appeal to this court on September 30, 1988. The Tennessee Supreme Court denied permission to appeal on December 12, 1988. The Petitioner then filed a petition for post-conviction relief on September 8, 1989. The sole issue in that petition was whether he was afforded effective assistance of counsel. That petition was unsuccessful. The Petitioner filed the present petition on November 28, 1994. The last date for the Petitioner to file a post-conviction petition within the three-year statute of limitations was December 12, 1991. Therefore, this petition is time-barred.

For the Petitioner's argument to be successful it must fit within one of two exceptions to the application of the three year statute of limitations. The first exception is if the application of the statute of limitations violates due process, such as in the case of a procedural trap, Burford v. State, 845 S.W.2d 204, 210 (Tenn. 1992), and the second is if a new rule of law has been created and applied retroactively, see Tenn. Code Ann. § 40-30-105; Rudy Wendell Myers v. State, No. 01-C-01-9308-CC-00270, Franklin County, 2-3 n.5 (Tenn. Crim. App., Nashville, filed Jan. 20, 1994), perm. to appeal denied, (Tenn. 1994); Robert Lee Sands v. State, No. 03C01-9207-CR-00241, Union County (Tenn. Crim. App., Knoxville, filed Jan. 13, 1994), perm. to appeal granted, (Tenn. 1994); Julius Fate Branam v. State, No. 03-C-01-9204-CR-00066,

Bradley County (Tenn. Crim. App., Knoxville, filed Aug. 12, 1993); see also Laney v. State, 826 S.W.2d 117 (Tenn. 1992).

The Petitioner argues that the trial court erred in summarily dismissing the Petitioner's second post-conviction petition because the Tennessee Supreme Court has held that the first degree murder jury instruction used in the Petitioner's case is contrary to Witt v. State, 46 Tenn. 5, 7 (1868), a case the supreme court cited to support its decision in State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

Brown, and a later case, State v. West, 844 S.W.2d 144 (Tenn. 1992), noted that the concepts of deliberation and premeditation had, in many prior instances, been wrongly commingled. Those two decisions separated deliberation, an act done with cool purpose and undertaken after the exercise of reflection and judgment, and premeditation, which was defined as the process of thinking about the murder before committing it. The precise holding in Brown involves a confusing jury instruction.

This court has previously ruled in a number of cases that Brown is not to be applied retroactively. State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993); State v. David Lee Richards, No. 03C01-9207-CR-230, Hamilton County (Tenn. Crim. App., Knoxville, filed Mar. 23, 1993), perm. to appeal denied, (Tenn. 1993); State v. Willie Bacon, Jr., No. 1164, Hamilton County (Tenn. Crim. App., Knoxville, filed Aug. 4, 1992), perm. to appeal denied, (Tenn. 1992).

Furthermore, the fact that such a jury instruction has been abandoned because it is confusing does not mean that its use was error of a constitutional magnitude. Eric M. Lofton v. State, No. 02C01-9310-CR-00242, Shelby County, slip. op. at 7 (Tenn. Crim. App., Jackson, filed Oct. 26, 1994), perm. to appeal denied, (Tenn. 1995) (this opinion has been recommended for publication); State v. John Wayne Slate, No.

03C01-9201-CR-00014, Sevier County, slip. op. at 8 (Tenn. Crim. App., Knoxville, filed Apr. 27), perm. to appeal denied, (Tenn. 1994).

The Petitioner attempts to avoid this problem by arguing that the Brown decision relied on Witt, which has never been overruled, and therefore, the trial court violated the Petitioner's due process rights because the trial court misapplied the concepts of Witt by instructing the jury with pre-Brown instructions. We do not agree with the Petitioner's argument. The pre-Brown instructions were used with approval for many years after Witt was decided. The supreme court relied on Witt in Brown for the proposition that once murder has been established it is presumed to be second degree, not the proposition that premeditation cannot be formed in an instant. Brown, 836 S.W.2d at 543. Furthermore, the Petitioner's argument does not meet one of the two exceptions to the statute of limitations, because the application of the statute does not violate the Petitioner's due process rights, and there has not been the development of a new law which is being applied retroactively.

Therefore, the trial court correctly dismissed this petition as time-barred. We affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

ROBERT E. CORLEW, III, SPECIAL JUDGE