

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
OCTOBER SESSION, 1995

FILED

February 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

RICKY CALDWELL,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 03C01-9503-CR-00104

CAMPBELL COUNTY

Hon. **LEE ASBURY**, Judge

(Post-Conviction)

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(ON APPEAL)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Ricky Caldwell, appeals from the summary dismissal of his petition for post-conviction relief. The appellant contends that the post-conviction court erred in finding that the petition was barred by the three year statute of limitations.¹

The judgment of the post-conviction court is affirmed.

FACTUAL BACKGROUND

The appellant was convicted by a jury on September 11, 1982, of the offenses of first degree murder and assault with the intent to commit voluntary manslaughter. The convictions were affirmed by this court on January 12, 1984. State v. Caldwell, No. 28 (Tenn. Crim. App. at Knoxville, Jan. 12, 1984). No further appeal was taken. The appellant is currently serving a sentence of life imprisonment with the Tennessee Department of Correction.

On April 28, 1994, the instant petition for post-conviction relief was filed. The petition alleges, *inter alia*, ineffective assistance of counsel at trial, unconstitutional burden shifting jury instructions, and prosecutorial misconduct. The petition was twice amended to include additional claims of ineffective assistance of trial counsel and a challenge to the sufficiency of the evidence. At the motion hearing, the post-conviction court found that the limitations period on

¹Tenn. Code Ann. § 40-30-102 (1990) (repealed 1995), provides: "A prisoner in custody under sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or consideration of such petition shall be barred."

the appellant's claims began to run on July 1, 1986. At the conclusion of the hearing, the post-conviction court granted the State's motion to dismiss, finding that the petition is time barred by the applicable statute of limitations.² The appellant acknowledges that the three year statute of limitations has run. However, he contends that his claims of unconstitutional jury instructions remain viable *via* Brown and Sandstrom when buttressed by our supreme court's decision in Burford v. State, 845 S.W.2d 204 (Tenn. 1992). The appellant's contention is unfounded. We address the claims raised under Brown and Sandstrom in turn.

ANALYSIS

In order for the appellant to prevail, his claims must fall within a recognized exception to the applicable three year statute of limitations. Two exceptions to the statute of limitations are available. First, in Burford, our supreme court recognized that, because of a procedural trap, "it is possible that under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided." Id. at 208 (citations omitted). Additionally, the Post-Conviction Procedure Act provides a second exception when a new constitutional rule has been created or recognized, and applies retroactively. See Tenn. Code Ann. § 40-30-105 (1990) (repealed 1995).

²This statute, which became effective July 1, 1986, was given prospective application for those cases which were final prior to its effective date. See State v. St. John, 751 S.W.2d 453, 454 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); Abston v. State, 749 S.W. 2d 487, 488 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988). Thus, in such cases, petitions for post-conviction relief were required to be filed within three years from the effective date of July 1, 1986.

In State v. Brown, 836 S.W.2d 530, 534 (Tenn. 1992), our supreme court held that "it is prudent to abandon an instruction that tells the jury that premeditation may be formed in an instant." However, the court did not find that this instruction implicated a constitutional right or new rule of law. This court has repeatedly held that such a claim may not be used as a basis for relief within the post-conviction context. See, e.g., Lofton v. State, 898 S.W.2d 246 (Tenn. Crim. App. 1994), perm. to appeal denied (Tenn. 1995); Timothy Wayne Peters v. State, No. 03C01-9409-CR-00331 (Tenn. Crim. App. at Knoxville, Oct. 30, 1995), applic. filed (Tenn. Dec. 15, 1995); John Wayne Slate v. State, No. 03C01-9201-CR-00014, perm. to appeal denied (Tenn. Oct. 24, 1994) (concurring in results only). Additionally, Brown is not to be applied retrospectively. Peters, No. 03C01-9409-CR-00331; Lofton, No. 02C01-9310-CR-00242. The appellant's claim under Brown is without merit.

The appellant also raises a Sandstrom issue. The United States Supreme Court, in Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459 (1979), held that the use of the word presume or presumption in a jury instruction was unconstitutional as this language improperly shifts the burden of proof from the prosecution to the defendant. In the case *sub judice*, the appellant alleges in his petition that the trial court instructed the jury that, "If it is shown beyond a reasonable doubt that the alleged victim was killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption." Additionally, the appellant alleges that the trial court erroneously instructed the jury that the "use of a deadly weapon ... raises a presumption of malice."³

³Initially, we note that the post-conviction court recited in its findings that, in addition to this issue being time barred, no Sandstrom violation occurred in this case. The record supports the post-conviction court's finding that no Sandstrom violation occurred. The entire case file, including jury instructions, was filed as an exhibit during the motion hearing. However, it would appear that

In Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995), the Tennessee Supreme Court instituted a three-step process to be utilized by the courts when applying Burford to determine whether a petitioner's claim for relief is time barred. The three-step process requires the reviewing court to: (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. Id.

With regard to step one, the post-conviction court, in accordance with Abston, correctly determined that the limitations period for the appellant, in this case, began to run on July 1, 1986. Moreover, in determining when the ground for relief actually arose, we note that the factual scenarios and issues raised in Sands, i.e. Sandstrom, are analogous to those now before us. In Sands, the supreme court found that Sandstrom had been retroactively applied in Tennessee proceedings for several years prior to July 1, 1986. Sands, 903 S.W.2d at 302. Thus, the three year statutory period of limitations began to run on a Sandstrom claim on July 1, 1986. Id. Therefore, the Sandstrom claim was not a "later arising ground" as contemplated by Burford. Id. Accordingly, in the instant case, we likewise conclude that, because the statute of limitations began to run on July 1, 1986, the appellant's Sandstrom claim became time barred on July 1, 1989.

CONCLUSION

the post-conviction court's disposition of this case was based upon the State's motion to dismiss on grounds that the petition was time barred. Accordingly, we confine our review within the scope of the State's motion.

The appellant's remaining claims, although not argued, are equally time barred for purposes of review by this Court. Moreover, they are waived for failure to present the facts relevant to the issues, for failure to set forth an argument as to the issues, and for failure to cite authority or make reference to the record in support of the appellant's argument. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. R. App. 10(b).

No exceptions to the applicable three year statute of limitations are presented by the appellant's claims. Accordingly, the judgment of the post-conviction court dismissing the petition is affirmed.

David G. Hayes, Judge

CONCUR:

John H. Peay, Judge

Joseph M. Tipton, Judge