

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

**FILED**  
**March 25, 1996**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

WILLIAM L. HAMPTON )  
 )  
 Appellant )  
 )  
 V. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 Appellee )

NO. 03C01-9504-CR-00108  
BRADLEY COUNTY  
HON. R. STEPHEN BEBB  
JUDGE  
POST-CONVICTION

FOR THE APPELLANT:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, William L. Hampton, appeals as of right the dismissal of his petition for post-conviction relief by the Bradley County Criminal Court.

The appellant was convicted by a Bradley County jury of the aggravated rape of his five-year-old daughter and ordered to serve a sentence of thirty-five (35) years in the Tennessee Department of Corrections. In an opinion filed May 20, 1986, this Court affirmed the conviction. State v. William Lester Hampton, No. 246 (Tenn. Crim. App., at Knoxville, May 20, 1986). The Supreme Court denied the appellant permission to appeal on September 8, 1986. On September 15, 1989, the appellant filed a post-conviction relief petition. The appellant was represented by counsel and in July 1990 received a hearing on the issues presented in the petition.<sup>1</sup> In an order dated September 19, 1990, the trial court denied appellant the relief requested in the post-conviction petition. No appeal was filed from that order.

On July 1, 1994, the appellant filed a petition for post-conviction relief requesting that the trial court permit him to file a delayed appeal from his first post-conviction case pursuant to Tennessee Code Annotated section 40-30-122 and Rules 3(b) and 4(a) of the Tennessee Rules of Appellate Procedure.<sup>2</sup>

On October 31, 1994, the trial court appointed counsel for the appellant and held an evidentiary hearing on December 1, 1994. Although the order filed by the trial court dismissing the petition does not contain the trial court's findings of fact and conclusions of law as required by Tennessee Code Annotated section 40-30-118, the

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The record is silent as to why the appellant's first petition for post-conviction relief was heard notwithstanding the apparent expiration of the three-year statute of limitations. In any event, the State has not argued that the expiration of the statute of limitations on the first post-conviction relief provides grounds for disposing of the current petition for post-conviction relief.

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On appeal, the appellant asks this court to grant a delayed appeal based in part on his contention that his "constitutional right" to the effective assistance of counsel in the first post-conviction proceeding was violated. We decline to grant relief upon this alleged constitutional infirmity for two (2) reasons. First, the appellant did not assert such a claim in the trial court. Second, there is no constitutional right to the effective assistance of counsel in post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 554-555, 107 S.Ct. 1990, 1993, 95 L.Ed. 539 (1987); House v. State, 911 S.W.2d 705 (Tenn.1995); State v. Wilson, 667 S.W.2d 113 (Tenn. Crim. App. 1983); Recor v. State, 489 S.W.2d 64, 68 (Tenn. Crim App. 1972).

court placed its findings of fact on the record orally. We, therefore, base our assessment of the trial court's decision upon our review of the transcript of the evidentiary hearing. See State v. Higgins, 729 S.W.2d 288 (Tenn. Crim. App. 1987) (holding that the trial court's failure to prepare written memorandum detailing findings of fact and conclusions of law was not reversible error where the court placed its findings on the record orally).

The transcript of the hearing reveals that the trial court dismissed the petition based upon the factual finding that more than three years had elapsed since the court's order denying post-conviction relief and the filing of the second petition for post-conviction relief, and there were no grounds to excuse the delay in filing the petition because the appellant knew that the trial court had denied the relief requested in the first post-conviction relief within a month of the denial. Having so concluded, the trial court dismissed the instant post-conviction relief petition.

After a careful review of the record and the applicable law, we affirm the judgment of the trial court in dismissing the appellant's petition for post-conviction relief.

Rule 4(a) of the Tennessee Rules of Appellate Procedure provides that in an appeal as of right to an appellate court of this state, "the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within thirty days after the date of the entry of the judgment appealed from; however, in all criminal cases the "notice of appeal" document is not jurisdictional and the filing of such document may be waived in the interest of justice." In State v. Scales, 767 S.W.2d 157, 158 (Tenn. 1989), the Supreme Court held that "[f]or purposes of Rule 4(a), Tenn. R. App. P., post-conviction proceedings are criminal in nature and the notice of appeal may be waived 'in the interest of justice.'"

The appellant argues that our decision in Warren v. State, 833 S.W.2d 101 (Tenn. Crim. App. 1992) requires that he be granted permission for a delayed appeal

in this case. In Warren this court held that under certain circumstances the timely filing of a notice of appeal from a denial of a petition for post-conviction relief may be waived in the interest of justice and fundamental fairness. Id. at 102. The appellant's reliance on Warren is misplaced. Warren stands for the proposition that the requirement of timely filing a notice of appeal may be waived in the absence of evidence in the record disputing a petition's claim that counsel failed to inform him of the trial court's dismissal of his post-conviction petition and failed to advise him of his right to appeal until the thirty (30) day appeal period had lapsed. Id. In this case the trial court determined that the appellant was aware of the court's decision to deny the relief requested in the post-conviction petition within one month "or earlier" of the filing of the order and that he knew of his right to appeal. This finding is well-supported by the testimony given at the evidentiary hearing.

The attorney who represented the appellant at the first post-conviction hearing testified that he had no independent recollection of discussing the possibility of an appeal with the appellant. He did testify, however, that within a week of the court's order, he sent a copy of the trial court's order of dismissal along with a letter requesting that the appellant let him know if he wanted to take an appeal. The attorney admitted that he did not spell out the appellant's right to an appeal in the letter. The attorney testified that he heard no response from the appellant after sending the order and letter. The appellant testified that he received no communication from his attorney concerning the denial of the petition or the possibility of appeal. Additionally, the appellant contended at the hearing that he did not know that he had a right to appeal the trial court's order. In finding that the appellant knew of the court's disposition of his case, the court obviously credited the testimony of the attorney over the appellant's testimony. However, the court found that, independent of the letter from his attorney, the appellant knew at the time of the hearing that he could appeal an adverse decision of the court. The appellant's own testimony was

that he told his attorney at the conclusion of the hearing that he wanted to appeal if the court ruled against him. Where the facts are in dispute in a post-conviction proceeding the trial court's factual findings carry the same weight as a jury verdict and are conclusive on appeal unless the evidence preponderates against its findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); see also, Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974).

The appellant contends that he was justified in believing that his attorney had appealed the case for him and that the delay in filing the appeal was not the appellant's fault. We disagree. The petitioner had a duty to inquire about the status of his case. This is true particularly in light of the fact that he had not heard from his attorney or this Court concerning the status of his appeal. Appellant's curiosity was apparently piqued only after some three years had passed since the trial court's dismissal of his petition. The appellant has given no reasonable explanation for this delay.

Based upon the foregoing, we hold that the trial court properly dismissed the petition for post-conviction relief and we affirm the judgment of the trial court.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID G. HAYES, JUDGE

