

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

FILED

March 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

LESTER DALE HERRON,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 03C01-9506-CR-00167

HAWKINS COUNTY

Hon. James E. Beckner, Judge

(Post-Conviction)

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Pro Se

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Lester Dale Herron, appeals *pro se* the dismissal of his petition for post-conviction relief without the appointment of counsel or an evidentiary hearing. In this appeal, the appellant presents essentially two issues for our review. First, the appellant argues that the post-conviction court's order of dismissal does not comply with Tenn. Code Ann. § 40-30-118(b) (1990). Second, the appellant contends that his petition sets forth a colorable claim of relief on the basis of "newly discovered evidence." After reviewing the record, we affirm the judgment of the post-conviction court.

I. Factual Background

The appellant is currently incarcerated in the state penitentiary pursuant to a 1989 conviction for aggravated sexual battery. This court affirmed the appellant's conviction on February 9, 1990. State v. Herron, No. 120 (Tenn. Crim. App. at Knoxville, February 9, 1990).¹ Due to the ineffective assistance of counsel, the appellant failed to timely file an application to the Tennessee Supreme Court for permission to appeal this court's judgment. The appellant filed a petition for post-conviction relief, which was denied. On appeal, this court vacated and reinstated its earlier judgment in order to allow application to the supreme court pursuant to Tenn. R. App. P. 11. State v. Herron, No. 03C01-9109-CR-00284 (Tenn. Crim. App. at Knoxville, March 10, 1992).² The appellant

¹On direct appeal, the appellant challenged the sufficiency of the convicting evidence; contested the introduction into evidence of a videotape of the victim's pretrial interview with the police; alleged newly discovered evidence in the form of testimony by his uncle; asserted that his sentence is excessive; and argued that the trial court erred in denying bond pending appeal.

²On appeal from the dismissal of his first petition for post-conviction relief, the appellant argued ineffective assistance of counsel on direct appeal and, again, contested the introduction into evidence of a videotape of the victim's statements to the police.

filed a Rule 11 application, which was denied by the supreme court on October 26, 1992. The appellant then filed a habeas corpus petition in the United States District Court for the Eastern District of Tennessee. This petition was dismissed on December 17, 1993, for failure to exhaust state remedies. Although not otherwise reflected in the record, the appellant states in the petition which is the subject of this appeal that he filed a second petition for post-conviction relief on or about December 29, 1993, which was dismissed without the appointment of counsel or an evidentiary hearing on February 17, 1994. Finally, the appellant filed the instant *pro se* petition on November 30, 1994. He filed amendments on January 30, 1995, and April 5, 1995. The post-conviction court dismissed the instant petition on May 17, 1995, stating that "the [appellant] has previously had an evidentiary hearing on all the matters in this Petition and ... no new grounds for relief are raised and further ... this [p]etition is time-barred."³ The appellant filed a petition to rehear on May 30, 1995. This petition was dismissed on June 5, 1995.

II. Analysis

Again, on appeal the appellant contends that the post-conviction court's order of dismissal does not comply with Tenn. Code Ann. § 40-30-118(b). Tenn. Code Ann. § 40-30-118(b) provides:

Upon the final disposition of every petition, the court shall enter a final order, and ... shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

This court has observed that, "[a]lthough this requirement has been determined

³The State concedes that the petition is not time-barred under Tenn. Code Ann. § 40-30-102 (1990) because of this court's 1992 decision vacating and reinstating its direct appellate decision. It is unclear from the record whether the issues raised in the appellant's petition were previously determined. Nevertheless, for the reasons set forth in this opinion, we affirm the dismissal of the appellant's petition for post-conviction relief.

to be mandatory, the failure of the trial judge to abide by the requirement does not always mandate a reversal of the trial court's judgment." State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984)(citations omitted). See also Swanson v. State, 749 S.W.2d 731, 739 n.3 (Tenn. 1988). Noncompliance by the post-conviction court does not warrant a reversal if the record is sufficient to effectuate a meaningful appellate review. Brown v. State, No. 03C01-9107-CR-00233 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1992). Even if not ideal in form, the order of dismissal in this case does set forth the reasons for the post-conviction court's dismissal of the appellant's petition. "[W]here the record of the proceedings contains the reasons of the trial judge for dismissing the petition, the record is sufficient to effectuate meaningful appellate review." Watkins v. State, No. 1121 (Tenn. Crim. App. at Knoxville, September 18, 1989).

The appellant also argues that the post-conviction court should have appointed counsel and granted the appellant an evidentiary hearing in order to adequately consider the appellant's claim of newly discovered evidence.⁴ The

⁴The appellant raised numerous issues in his amended petition for post-conviction relief. On appeal, the appellant relies upon his claim of newly discovered evidence. He concedes that the post-conviction court properly refused to consider issues set forth in his petition pertaining to the ineffective assistance of counsel.

We note that the following issues are interwoven with the appellant's allegations of ineffective assistance of counsel: The trial court failed to properly examine child witnesses in order to determine if they were competent, thereby violating the appellant's right to due process of law. Moreover, the appellant was not given an opportunity to prepare for the sentencing hearing. Specifically, the appellant was not given notice of the State's intent to seek enhanced punishment. Finally, the appellant alleges that, pursuant to a change in the policy of the Tennessee Board of Paroles, he is no longer eligible for parole. Therefore, his actual sentence is "not one that the sentencing judge contemplated" and "is void."

In his brief, the appellant does not argue that these issues constitute colorable claims for relief, mandating the appointment of counsel and an evidentiary hearing. Therefore, we need not evaluate their viability. Tenn. R. App. P. 27(a)(4) and (7); Ct. of Crim. App. Rule 10(b). See also Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987). In any event, these issues are not colorable claims for relief, if only because they are waived due to the appellant's failure to raise them in prior proceedings. Tenn. Code Ann. § 40-30-112(b) (1990). Moreover, "substantial justice" does not require the remand of

newly discovered evidence consists of an affidavit executed by the appellant's daughter, Tina Herron, on June 22, 1994. In her affidavit, Ms. Herron alleges that the victim falsely testified against the appellant at trial.

This court has observed that there is a discernible trend toward appointing counsel to assist *pro se* appellants in post-conviction proceedings, providing opportunities to amend petitions, and allowing evidentiary hearings. Carmley v. State, No. 03C01-9305-CR-00167 (Tenn. Crim. App. at Knoxville, January 13, 1994). Nevertheless, if there is "a lack of legal merit, appearing upon the face of the petition," then the post-conviction court may dismiss the petition without permitting the appellant to confer with counsel and without an evidentiary hearing. Burt v. State, 454 S.W.2d 182, 184 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1970). See also Allen v. State, 854 S.W.2d 873, 875-876 (Tenn. 1993); Swanson, 749 S.W.2d at 734. In other words, "a clear but patently non-meritorious petition may be dismissed summarily," without the appointment of counsel or an evidentiary hearing. Martucci v. State, 872 S.W.2d 947, 949 (Tenn. Crim. App. 1993); Cureton v. Tollett, 477 S.W.2d 233, 236 (Tenn. Crim. App. 1971), perm. to appeal denied, (Tenn. 1972). A petition sets forth a colorable claim if it alleges facts showing that the conviction resulted from an abridgment of a constitutional right and demonstrates that the ground for relief was not previously determined or waived. Carmely, No. 03C01-9305-CR-00167. In deciding whether a colorable claim is presented, *pro se* petitions should be

the appellant's case for either the appointment of counsel or an evidentiary hearing with respect to these issues. Tenn. Code Ann. § 40-30-115 (1990); State v. Smith, 814 S.W.2d 45, 47 (Tenn. 1991); Swanson, 749 S.W.2d at 734-736. In his petition, the appellant does not allege that the grounds for relief were previously unavailable. Swanson, 749 S.W.2d at 736. Rather, he asserts that he, personally, was unaware of these grounds and never discussed them with the attorney who represented him during his first post-conviction proceeding. However, "the rebuttable presumption of waiver is not overcome by an allegation that [the appellant] did not personally and therefore, 'knowingly and understandingly,' waive the ground for relief. ... [An appellant] is bound by the action or inaction of his attorney." House v. State, No. 03S01-9407-CR-00069 (Tenn. September 25, 1995).

held to less stringent standards than formal pleadings drafted by lawyers. Allen, 854 S.W.2d at 875. If the availability of relief cannot be conclusively determined from a *pro se* petition and the accompanying records, the appellant must be given the aid of counsel. Swanson, 749 S.W.2d at 734.

This court has previously observed that a claim of newly discovered evidence does not, alone, constitute a proper ground for post-conviction relief. Massey v. State, No. 1121 (Tenn. Crim. App. at Knoxville, November 5, 1987). Under Tenn. Code Ann. § 40-30-105 (1990), the appellant must state a constitutional claim. Therefore, a claim of newly discovered evidence, to be cognizable in post-conviction proceedings, must implicate a constitutional right. See Grizzell v. State, No. 88-139-III (Tenn. Crim. App. at Nashville, December 29, 1988), perm. to appeal denied, (Tenn. 1989). In Massey, No. 1121, we stated that a proffer of newly discovered evidence generally "amounts to no more than a request to relitigate the sufficiency of the evidence at trial, which a post-conviction proceeding may not be employed to do." See also Hatcher v. State, No. 03C01-9304-CR-00130 (Tenn. Crim. App. at Knoxville, November 12, 1993)("[t]he insufficiency of evidence [and] witness impeachment are not matters reviewable in these collateral proceedings). However, in State v. Slate, No. 03C01-9201-CR-00014 (Tenn. Crim. App. at Knoxville, May 23, 1994), we held that a challenge to the sufficiency of the evidence may, under Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), implicate due process of law. "Thus, the issue of whether the evidence was sufficient to meet the due process standard provided in Jackson is a proper subject of post-conviction review." Nevertheless, the United States Supreme Court in Herrera v. Collins, 506 U.S. 390, 402, 113 S.Ct. 853, 861 (1993), held that Jackson does not extend to nonrecord evidence, including newly discovered evidence. Thus, the appellant

has not stated a colorable claim for relief.⁵

Accordingly, the judgment of the post-conviction court dismissing the appellant's petition for post-conviction relief is affirmed.

David G. Hayes, Judge

CONCUR:

⁵ The discovery of new evidence, following the expiration of the thirty days within which a defendant must file a motion for new trial, must be raised in a writ of error *coram nobis*. Tenn. Code Ann. § 40-26-105 (1990). The purpose of this remedy is to bring to the attention of the court some fact, unknown to the court, which if known would have resulted in a different judgment. Teague v. State, 772 S.W.2d 915, 920 (Tenn. Crim. App. 1988) ("newly discovered evidence which ... serves no other purpose than to contradict or impeach the evidence adduced during the course of the trial ... will not justify the granting of a petition ... when the evidence, if introduced at the trial, would not have resulted in a different judgment"), overruled on other grounds by Owens and Payne v. State, 908 S.W.2d 923 (Tenn. 1995). Tenn. Code Ann. §27-7-103 (1980) provides that a writ of error *coram nobis* must be submitted "within one year after the judgment becomes final," reflecting the legislature's intent to limit the availability of post-conviction relief on the basis of newly discovered evidence. In the appellant's case, the judgment of conviction became final on October 26, 1992. Therefore, the statute of limitations ran on October 26, 1993, and this remedy is unavailable to the appellant.

We note in passing that the rationale underlying Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992), in which our supreme court held that the application of a statute of limitations in the context of post-conviction proceedings may violate due process of law, would not apply in the context of *coram nobis* proceedings. In Burford, the supreme court was balancing the government's interest in administrative efficiency and economy and the appellant's interest against an excessive sentence in violation of his constitutional rights. Id. at 209. Again, newly discovered evidence, alone, does not implicate constitutional rights. Herrera, 506 U.S. at 404, 113 S.Ct. at 862.

William M. Barker, Judge

Jerry L. Smith, Judge

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