

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1995 SESSION

FILED
February 14, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

LAWRENCE MOORE,)
)
 Appellant)
)
 V.)
)
 STATE OF TENNESSEE,)
)
 Appellee)

NO. 03C01-9504-CR-00122
KNOX COUNTY
HON. RAY L. JENKINS, JUDGE
Habeas Corpus/Post-Conviction
(Robbery and Kidnapping)

FOR THE APPELLANT:

Mark E. Stephens
District Public Defender

David Gall
Assistant Public Defender
1209 Euclid Avenue
Knoxville, Tennessee 37921

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Hunt S. Brown
Assistant Atty. Gen. & Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Randall E. Nichols
District Attorney General

Zane Scarlett
Assistant District Attorney General
City-County Building
Knoxville, Tennessee 37902

OPINION FILED: _____

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

This is an appeal as of right by the appellant, Lawrence Moore, from a judgment entered in the Knox County Criminal Court dismissing his petition entitled "Petition for Writ of Habeas Corpus Without Application to Tenn. Code Ann. § 29-21-104." Although styled as a petition for writ of habeas corpus, the trial court treated the petition as one seeking post-conviction relief, and upon motion of the State, dismissed the petition as being time-barred pursuant to Tennessee Code Annotated section 40-30-102.

In his brief filed in this Court, the appellant, by counsel, concedes that the trial court acted properly in treating his petition as one seeking post-conviction relief rather than as a petition for habeas corpus. The sole issue presented by this appeal is whether the trial court erred in finding that the petition was barred by the three-year statute of limitation governing post-conviction relief petitions.

We reverse the trial court and remand the case for further proceedings.

The sparse record in this case reflects that the appellant was convicted on May 13, 1983, of the offenses of robbery and kidnapping. Apparently there was no motion for new trial or appeal following his conviction.

The appellant, acting pro se, filed his post-conviction petition on June 27, 1994, collaterally attacking his conviction for the offense of kidnapping; he does not complain of his robbery conviction. In his unartfully drawn pro se petition, the appellant alleged that:

[t]he facts of the offense that petitioner committed were, admittedly, 'robbery' ONLY. The facts are that the victim was walking down the street and the petitioner approached him and pulled out a razor and robbed and let him go his way. ...Petitioner is not even guilty of a misdemeanor because there was no 'removing' or 'confining' of the victim."

In other words, the appellant contends that the kidnapping was incidental to the robbery, and in accord with our Supreme Court's holding in State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), the kidnapping conviction is unconstitutional. In Anthony,

our Supreme Court held that the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the Tennessee Constitution, prohibit a conviction for kidnapping as a separate offense when the confinement, movement or detention of the alleged victim is essentially incidental to another felony. In so ruling, the Court said that "every robbery, by definition, involves some detention against the will of the victim, if only long enough to take goods or money from. . .the victim. This does not mean that the legislature intended that every robbery should also constitute a kidnapping. . . ." Id. at 306.

In considering whether a post-conviction petition states a ground for relief, we are bound to consider the allegations in the petition as true. Skinner v. State, 472 S.W.2d 903, 904 (Tenn. Crim. App. 1971). As such, the allegations contained in the petition lead to the conclusion that the kidnapping was indeed incidental to the robbery. At the heart of the appellant's claim, however, is that the three-year statute of limitation which governs post-conviction petitions should not be applied in this case.¹ The appellant urges this court to find that the statute of limitation does not apply in this case pursuant to Burford v. State, 845 S.W.2d 204 (Tenn. 1992). In Burford, our Supreme Court held that petitions for post-conviction relief may not be dismissed for failure to comply with the three-year statute of limitation if the claimant has not had a reasonable opportunity to have his or her constitutional claim heard and determined. Id. at 208.

Whether the appellant has stated a Burford claim depends preliminarily on whether State v. Anthony, supra, announced a new constitutional rule and, if so, whether it should be retroactively applied. In Meadows v. State, 849 S.W.2d 748, 751 (Tenn. 1993), our Supreme Court, quoting with approval from Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed. 2d 334, 349 (1989), held:

¹The appellant's kidnapping conviction occurred in 1983. In Abston v. State, 749 S.W.2d 487 (Tenn. Crim. App. 1988), our Court held that claims governed by T.C.A. § 40-30-102, but arising before July 1, 1986, could be judicially reviewed if filed before July 1, 1989.

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

A careful review of the opinion in State v. Anthony, and the Court's observation that there was "virtually no relevant precedent" in Tennessee, leads us to the conclusion that the Supreme Court did announce a new rule of constitutional law in that case. See State v. Claude Copeland, No. 01C01-9410-CR-00366 (Tenn. Crim. App. at Nashville, September 27, 1995) perm. to appeal filed November 27, 1995.

Having concluded that State v. Anthony, which was decided on September 23, 1991, did announce a new constitutional rule of law, we must next determine whether that rule should be applied retroactively in post-conviction cases. See Gregory Hedges v. State, No. 03C01-9112-CR-00379 (Tenn. Crim. App. at Knoxville, March 10, 1993) perm. to appeal denied, (Tenn. 1993) (specifically reserving the issue of retroactive application of Anthony). In Meadows, supra, our Supreme Court held that "a new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial." State v. Meadows at 755.

Applying the Meadows standard to the present case, we conclude that Anthony should be applied retroactively because the rule announced therein does materially enhance the integrity and reliability of the fact-finding process. In reaching this conclusion, we are guided by the rationale expressed by our Supreme Court in Barber v. State, 889 S.W.2d 185 (Tenn. 1994) cert. denied, ___ U.S. ___, 115 S.Ct. 1177, 130 L. Ed. 2d 1129 (1995). In that case, the Court applied the Meadows rule and held that the new constitutional rule announced in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) cert. dismissed as improvidently granted, ___ U.S. ___, 114 S.Ct. 651, 126 L. Ed. 2d 555 (1993), should be given retroactive application in post-conviction cases. In reaching that conclusion, the Court stated:

[In Middlebrooks], the felony murder aggravating circumstance duplicates the crime of felony murder and thereby makes all felony murderers susceptible to the death penalty. This Court found that such a result violates the Eighth Amendment to the United States Constitution, as well as Article I, Section 16 of the Tennessee Constitution. . . . When an aggravating circumstance is improperly injected into the process by which the jurors must weigh aggravating and mitigating circumstances to determine a sentence, the integrity and reliability of the sentencing process is jeopardized because the death penalty may not be reserved for only the most culpable defendants. For this reason, we apply Middlebrooks retroactively under the Meadows rule.

Barber v. State, at 187.

The rule in Anthony ensures that an accused will not be convicted of multiple crimes where a kidnapping is "incidental" to a robbery. The question of whether such a crime was "incidental" necessarily focuses on the specific facts of the case. See, e.g., State v. Coleman. 865 S.W.2d 455 (Tenn. 1993). As stated in Anthony, supra, the resolution of this question depends upon "whether the defendant's conduct 'substantially increased [the] risk of harm over and above that necessarily present in the crime of robbery itself.'" Id. at 306 (quoting, State v. Rollins, 605 S.W.2d 828, 830 (Tenn. Crim. App. 1980)).

Thus, it is clear that the rule in Anthony is central to the fact-finding process and, in our opinion, a rule that enhances the integrity and reliability of that process. As such, if it is properly raised (as in this case), and otherwise capable of review, it is deserving of retroactive application in post-conviction cases. See Thomas Ray Tarpley v. State, No. 03C01-9303-CR-00067 (Tenn. Crim. App. at Knoxville, Dec. 20, 1993) perm. to appeal denied, (Tenn. 1994) (applied in post-conviction case without analysis).

Having found that State v. Anthony did indeed announce a new constitutional rule, and that the new rule should be applied retroactively in post-conviction cases, the remaining issue is more problematic; that is, would application of the three-year statute of limitation under these circumstances constitute a denial of due process as it

applies to the appellant. Our Supreme Court was confronted with a similar situation in Burford v. State, 845 S.W.2d 204 (Tenn. 1992). In 1976, Burford pled guilty to and was convicted of five counts of armed robbery. In 1984, Burford was again convicted of robbery. At his sentencing hearing, his five robbery convictions from 1976 were used to establish his status as an habitual criminal. Accordingly, Burford was sentenced to life in prison. In 1985, Burford again was convicted of robbery with a deadly weapon and his five 1976 convictions were used to have him sentenced as a persistent offender. Our Court affirmed that conviction and sentence, and the Supreme Court denied Burford's application for permission to appeal on August 4, 1986.

In 1988, Burford filed a post-conviction petition contending that his 1976 robbery convictions were invalid because he had been denied his constitutional right to be advised of his right against self-incrimination before pleading guilty to those offenses. The trial court agreed and invalidated four of the five 1976 convictions. Accordingly, the trial court reduced the 1984 life sentence to a term of forty years.

In 1990, Burford filed a second post-conviction petition alleging that his 1985 persistent offender sentence was excessive in light of the fact that four of the 1976 convictions used to enhance his 1985 sentence had been set aside. The trial court and our Court held that Burford's 1990 post-conviction petition was time-barred and subject to dismissal.

In considering Burford's appeal, our Supreme Court held that while the three-year statute of limitation was valid on its face, the due process clauses of the state and federal constitutions require that the claimant be given "a reasonable opportunity to have the claimed issue heard and determined" before it is terminated for failure to comply with a statute of limitation. Burford, 845 S.W.2d at 208. In reaching its conclusion, the Court weighed the valid State interest in preventing prisoners from asserting claims so long after their convictions that witnesses are no longer available,

or their memory of the criminal events is affected, against a petitioner's right to be provided a reasonable opportunity to have his or her claim heard and determined. In weighing those competing interests in Burford's case, the Court concluded that his interests outweighed the government's interests because if his petition was time-barred he would be forced to serve a persistent offender sentence that was enhanced by previous convictions that no longer stood. As a result, he would be forced to serve an excessive sentence in violation of his rights under the Eighth Amendment to the United States Constitution and Article I, Section 16, of the Tennessee Constitution. In reaching that conclusion, the Court emphasized that the trial court would only have to examine the records from the 1988 proceedings in Wilson County reflecting that four of Burford's 1976 convictions had been invalidated. No witnesses from the past would be needed for a proper adjudication of Burford's claim.

The rule from Burford was later clarified in Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995):

[I]n certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner's claim when the grounds, whether legal or factual, arise after the "final action of the highest state appellate court to which an appeal is taken"--or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run.

In applying the rule, the Court adopted a three step analysis: "(1) determine when the limitation 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.

Here, the limitation period began to run on July 1, 1986, the effective date of Tennessee Code Annotated section 40-30-102. The period expired on July 1, 1989. Abston v. State, 749 S.W.2d at 488. The decision in Anthony was released on

September 23, 1991; thus, it became a legal ground for relief well after the limitation period had run. The appellant certainly did not have a "reasonable opportunity" to raise the issue prior to the expiration of the statute of limitation.

This does not, however, end our analysis. Although the appellant could not have raised the Anthony issue before the statute ran, he waited some two years and ten months after the decision to raise it in post-conviction. As noted in Burford, the post-conviction act governing this case does not contain a limitation period for raising claims that arose after the three year period in section 40-30-102 has expired. The Court noted, in fact, that "it would be helpful in such instances for the legislature to adopt a shorter statute of limitations for later arising grounds. . . ." Burford, 845 S.W.2d at 208 (emphasis added). In response, the legislature has since enacted a one year period for raising claims based on retroactive application of a constitutional right that did not exist at the time of the trial. See Tenn. Code Ann. § 40-30-202(b)(1) (1995 Supp.). Thus, were the appellant subject to the new act, his claim would be time barred.

The only time period noted in the act governing the appellant's petition, however, is the three years set forth in section 40-30-102. In Justice Daughtrey's concurrence in Burford, it was noted:

[T]he legislature could adopt a shorter statute of limitations for later-arising grounds. Perhaps as a matter of policy the petitioner should be restricted to one year- or to even less than one year In order to square such an abbreviated limitation with the requirements of due process, however, the petitioner has to have had adequate notice of the shortened period.

Burford, 845 S.W.2d at 210 (emphasis added). The concurring opinion then noted that "the only notice provision imposed by the legislature" under the former act was the three year period contained in section 40-30-102. Id. at 211. Thus, notwithstanding the appellant's lengthy delay in seeking relief under Anthony, his petition was filed within three years of Anthony, and we deem it timely under the

circumstances. See also O'Donnell v. State, 905 S.W.2d 951 (Tenn. Crim. App. 1993) (claim arising after the statute of limitations expired was time barred where petition was filed more than three (3) years after the claim arose).

We conclude, therefore, that this case must be remanded to the trial court for further proceedings. In doing so, we must note the entirely inadequate record on appeal before us at this time. For example, we are unable to determine from the record whether the appellant was convicted in 1983 by way of a guilty plea or a jury trial. The sworn petition alleged that the kidnapping and robbery convictions stemmed from guilty pleas; however, when counsel attempted to procure a transcript of a guilty plea submission hearing, he was informed that one did not exist. Moreover, in its argument before the trial court on its motion to dismiss the petition, the State advised that the conviction was by a jury following a two day trial. It is clear that appellant's counsel acquiesced in that statement.

The Post-Conviction Act in effect at the time the appellant's petition was filed required the District Attorney General to obtain and file the record or transcripts, or parts thereof, that were material for the questions raised by the petition. Tenn. Code Ann. § 40-30-114(b) (1990 Repl.). Thus, upon remand, those portions of the record necessary to review this issue, including any trial transcripts, must be obtained and assembled for the court's review. Upon compliance with these statutory requirements, the trial court will then be able to address the Anthony issue whether in the context of the guilty plea or the jury trial.

For all of the foregoing reasons, the judgment is reversed, and this case is remanded to the trial court for further proceedings.

WILLIAM M. BARKER

CONCUR:

DAVID G. HAYES, JUDGE

JERRY L. SMITH, JUDGE