

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

<p>FILED</p> <p>February 29, 1996</p> <p>Cecil Crowson, Jr.</p> <p>Appellate Court Clerk</p>
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LARRY D. RUSSELL,	*	C.C.A. # 02C01-9505-CR-00138
Appellant,	*	SHELBY COUNTY
VS.	*	Hon. Joseph B. Dailey, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
Appellee.	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Larry D. Russell, appeals from the trial court's dismissal of his pro se petition for post-conviction relief. The single issue presented for our review is whether the trial court properly dismissed the petition as barred by the three-year statute of limitations without the appointment of counsel or an evidentiary hearing. Because we have been able to conclusively determine that the petitioner is not entitled to relief, the judgment is affirmed.

The record on appeal is sparse. It may have been helpful for the trial court to have appointed counsel to review the accuracy of the pleadings, filed any appropriate amendments, and argued the merits on behalf of the petitioner. In Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988), our supreme court adopted a general policy against a dismissal on technical grounds of a pro se petition for post-conviction relief:

This Court has previously held that a pro se petition under the Act is "held to less stringent standards than formal pleadings drafted by lawyers, and the test is whether it appears beyond doubt that the [petitioner] can prove no set of facts in support of his claim which would entitle him to relief." Furthermore, when a colorable claim is presented in a pro se petition, dismissal without appointment of counsel to draft a competent petition is rarely proper. If the availability of relief cannot be conclusively determined from a pro se petition and the accompanying records, the petitioner must be given the aid of counsel.

(Citations omitted).

It appears, however, that on June 4, 1984, the

petitioner was convicted of rape. The trial court imposed an 18-year sentence. Because the petitioner had been convicted previously of other crimes, he was adjudged to be a persistent offender:

Persistent offender.--(a) A "persistent offender" is a defendant who has received:

(1) Two (2) or more prior felony convictions for offenses the convictions for which occurred within five (5) years immediately preceding the commission of the instant offense; or

(2) Four (4) or more prior felony convictions for offenses the convictions for which occurred within ten (10) years immediately preceding the commission of the instant offense.

Tenn. Code Ann. § 40-35-106(a) (1982).

This court affirmed the rape conviction on direct appeal. State v. Larry Darnell Russell, No. 78 (Tenn. Crim. App., at Jackson, April 30, 1986), perm. to app. denied (Tenn. 1986).

In this action, the petitioner challenges a June 13, 1983, conviction for receiving stolen property under \$200.00. The pleadings suggest that the conviction was one which was used to qualify the petitioner for persistent offender status in his subsequent conviction for the rape. The petitioner claims that he is not barred by Tenn. Code Ann. § 40-30-102, the three-year statute of limitations, due to the ruling in Burford v. State, 845 S.W.2d 204 (Tenn. 1992). The petitioner asserts that his "old sentence has been repealed," apparently basing his claim for relief on the fact that receiving stolen property is no longer an offense under the 1989 Act. The petitioner insists that he "will be forced to serve a

persistent offender sentence that was enhanced by previous convictions that no longer stand."

The problem, of course, is that the 1989 Act did not invalidate prior criminal convictions and petitioner has not otherwise alleged that his 1983 receiving stolen property conviction has been set aside. In fact, there is nothing in the record that indicates that it has been set aside; that would be a prerequisite for relief under the Burford rationale.

In Burford, our supreme court carved out a narrow exception to the three-year statute of limitations. Burford had been sentenced as a habitual criminal to a term of life imprisonment based upon five prior robbery convictions. He filed a timely post-conviction petition alleging that certain of his five prior robbery convictions were constitutionally infirm because he had not been advised of his right against self-incrimination before entering his plea. He was granted relief from those convictions. Later, after the three-year statute of limitations had expired, Burford filed a petition to set aside the finding of habitual criminality on the basis that there was no longer a sufficient number of prior felony convictions to qualify him for the enhanced punishment. The supreme court ruled that the statute of limitations, while generally compliant with constitutional due process, violated Burford's specific due process rights:

If consideration of the petition is barred, Burford will be forced to serve a persistent offender sentence that was enhanced by previous convictions that no

longer stand. As a result, Burford will be forced to serve an excessive sentence in violation of his rights under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, which, by definition, are fundamental rights entitled to heightened protection.

Burford v. State, 845 S.W.2d at 209.

This case is distinguishable from the ruling in Burford. Because the petitioner had not alleged that any of his prior convictions had been set aside, the petitioner would not merit relief from the enhanced, persistent offender sentence. The burden is on the pro se petitioner to present at least a colorable claim before he is entitled to the appointment of counsel. In State v. Smith, 814 S.W.2d 45, 49 (Tenn. 1991), our supreme court ruled that even in the pro se petition, the "issues which may be litigated in a case are limited by the pleadings."

Here, the defendant does not allege that his constitutional rights were violated by his prior conviction for receiving stolen property. He makes no mention in the petition of any of the other convictions which qualified him as a persistent offender. Grounds for relief are limited to "when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of trial if either constitution requires retrospective application of that right." Tenn. Code Ann. § 40-30-105. Thus, there was no basis in the pleadings for the

tolling of the statute of limitations, even under the Burford exception. See Tenn. Code Ann. § 40-30-102. In consequence, this is one of those limited circumstances in which it can be conclusively determined from the petition and the available record that the petitioner is not entitled to relief. Swanson v. State, 749 S.W.2d at 734.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

John H. Peay, Judge

David H. Welles, Judge