

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

<p><b>FILED</b></p> <p>January 2, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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GARY LYNN SMITH,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 03C01-9503-CR-00085

POLK COUNTY

HON. MAYO MASHBURN,  
JUDGE

(Post-Conviction)

FOR THE APPELLANT:

FOR THE APPELLEE:

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

**REVERSED AND REMANDED**

**JOHN H. PEAY,**  
Judge

## OPINION

The petitioner previously filed a petition for post-conviction relief seeking to set aside his guilty plea to second-degree burglary which was entered on October 12, 1976. This petition was dismissed by the trial court as having been barred by the statute of limitations. This Court remanded the matter to the trial court for the purpose of an evidentiary hearing to determine if the petition was in fact filed prior to the running of the statute. Smith v. State, 873 S.W.2d 5 (Tenn. Crim. App. 1993).

The petitioner has now appealed as of right from a judgment entered by the trial court on December 6, 1994, again dismissing the petition without a hearing. In the order of dismissal, the trial court found that a person acting by "power of attorney" had signed the petition on behalf of the petitioner and that this action invalidated the petition. We disagree.

We find nothing in the record to indicate that some person other than the petitioner signed the petition. Neither do we find anything in our statutes or caselaw requiring that the petitioner personally sign his petition. The statute in effect at the time this petition was filed, T.C.A. § 40-30-104, does not indicate that the petition must be signed by the petitioner.<sup>1</sup>

The State has conceded that this matter should be remanded to the trial court. We therefore again remand this case to the trial court for a hearing in compliance

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<sup>1</sup>This section has now been repealed and replaced by the Post-Conviction Procedure Act adopted by the Public Acts of 1995, ch. 207. This new act is applicable to petitions filed after May 10, 1995.

with our original opinion filed September 21, 1993, and direct the trial court to conduct an evidentiary hearing to determine the actual filing date of the original petition in this cause.

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JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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DAVID G. HAYES, Judge