

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

**FILED**  
**June 28, 1996**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

TERRY D. BARBER, )  
 )  
 APPELLANT, )  
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 )  
 v. )  
 )  
 )  
 STATE OF TENNESSEE, )  
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 )  
 APPELLEE. )

No. 02-C-01-9508-CC-00210

Lake County

Joe G. Riley, Jr., Judge

(Post-Conviction Relief)

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

AFFIRMED

Joe B. Jones, Presiding Judge

**OPINION**

The appellant, Terry D. Barber, appeals as of right from a judgment of the trial court summarily dismissing his suit for post-conviction relief. The trial court found that the suit was barred by the statute of limitations. However, the trial court also considered the grounds raised in the petition, as amended, and found that the each ground alleged had either been previously determined or waived. This Court finds that the suit was not barred by the statute of limitations, but the grounds raised by the appellant have been either previously determined or waived. Therefore, the judgment of the trial court is affirmed.

### **HISTORY OF PRIOR PROCEEDINGS**

On August 18, 1986, the appellant was convicted of felony murder. The jury found two aggravating circumstances, (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, and (2) the murder was committed while the defendant was engaged in committing the offense of larceny. The jury returned a death sentence. He was also convicted of first degree burglary and sentenced to confinement for fifteen (15) years in the Department of Correction. He was also convicted of robbery by the use of a deadly weapon and sentenced to confinement for life in the Department of Correction. The sentences for burglary and robbery are to be served concurrently. However, these sentences are to be served consecutively to the death sentence imposed by the jury. The Tennessee Supreme Court affirmed the appellant's convictions and sentences. State v. Barber, 753 S.W.2d 659 (Tenn.), cert. denied, 488 U.S. 900, 109 S.Ct. 248, 102 L.Ed.2d 236 (1988).

The appellant filed a suit for post-conviction relief on January 17, 1989. The trial court denied the relief sought. He appealed as of right to this Court. On May 13, 1992, this Court affirmed the judgment of the trial court. Terry D. Barber v. State, Lake County No. 2, (Tenn. Crim. App., Jackson, May 13, 1992). The Tennessee Supreme Court granted the appellant's application for permission to appeal for the purpose of reviewing the Middlebrooks<sup>1</sup> issue, using the same felony to elevate the offense to capital murder

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<sup>1</sup>State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

and again as an aggravating circumstance. The Court held that this error was harmless beyond a reasonable doubt. Barber v. State, 889 S.W.2d 185, 190 (Tenn. 1994), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995).

The present action for post-conviction relief was filed on May 23, 1991. After the latest amendment to this petition on April 3, 1995, the trial court summarily dismissed this suit without an evidentiary hearing. The appellant subsequently appealed as of right to this Court.

### **STATUTE OF LIMITATIONS**

The appellant contends this, his second action for post-conviction relief, is not barred by the statute of limitations. See Tenn. Code Ann. § 40-30-102. The State of Tennessee concedes that the suit is not barred by the statute of limitations.

The Tennessee Supreme Court affirmed the appellant's convictions and sentences in an opinion released March 21, 1988. The appellant filed a petition to rehear. The Supreme Court denied the petition on May 23, 1988.

The appellant filed this, his second suit for post-conviction relief, on May 23, 1991. Thus, the initial petition was timely given the manner in which the statute of limitations is computed, namely, exclude the first day and include the last day. This document was entitled "Verified Successor Petition for Post-Conviction Relief." On August 29, 1991, the appellant filed a document entitled "Verified Amended Successor Petition for Post-Conviction Relief." On February 19, 1992, the appellant filed a document entitled "Verified Superceding [sic] Amended Successor Petition for Post-Conviction Relief." On April 3, 1995, the appellant filed a document entitled "Amendment to Verified Superseding Amended Successor Petition for Post-Conviction Relief."

The trial court held that the initial suit was filed within the allotted three years. However, the trial court ruled: "The amended successor petition filed on February 19, 1992, and the amendment filed on April 3, 1995, were untimely. Accordingly, the petitions must be dismissed."

As this Court views the matter, the initial petition was filed in a timely fashion. The

ensuing petitions were simply amendments to the original petition. The petitions in question have the word “amended” contained in the caption albeit the petitions appear to be completely new. These amendments relate back to the initial petition that was timely filed. Consequently, the petitions in question were not barred by the statute of limitations.

The dismissal of the petitions does not hinder this Court’s ability to review the grounds raised on the merits. The trial court considered each ground raised and found that all of the grounds were either previously determined or waived.

### **KNOWING USE OF PERJURED TESTIMONY**

The appellant contends that his conviction violates due process because Wesley D. McClure gave perjured testimony and the state knew the testimony was perjured. He predicates his claim upon the failure of the state to reveal “deals” made between the state and Mr. McClure.

The appellant litigated the issue of “deals” in the first post-conviction proceeding, and the issue was raised on appeal. A review of this Court’s unreported opinion following the first post-conviction proceeding reveals that the issue was in fact raised and constituted an issue on appeal.

This issue has been previously determined. Any portion of the issue not previously determined has been waived for failure to include it in the first post-conviction action. There is no allegation that this information was just discovered and that it could not have been discovered prior to the first post-conviction action. Reliance on this Court’s opinion in House v. State is misplaced. The Supreme Court subsequently reversed this opinion. See House v. State, 911 S.W.2d 705 (Tenn. 1996).

This issue is without merit.

### **APPLICATION OF FELONY MURDER AGGRAVATOR**

As previously indicated, the appellant was convicted of felony murder. The felony used to support the felony murder was also used as an aggravating circumstance. This

issue was considered by the Supreme Court in Barber v. State, 889 S.W.2d 185 (Tenn. 1994). The Supreme Court held that the improper use of this aggravating circumstance was harmless beyond a reasonable doubt.

This issue has been previously determined. Consequently, this issue is without merit.

#### **FAILURE TO CHARGE MALICE IN FELONY MURDER CONVICTION**

It is a well-established rule that malice is not an element of felony-murder. Consequently, the appellant was not entitled to an instruction on malice. Moreover, the appellant does not allege any reason why this issue was not raised on direct appeal or in the first post-conviction action.

This issue is without merit.

#### **FAILURE TO GRANT AN EVIDENTIARY HEARING**

The appellant claims the trial court erred in dismissing this petition without a hearing. However, appellant's argument is based on this Court's opinion in House which has been reversed by the Tennessee Supreme Court. Therefore, the fact that appellant was not subjectively aware of the "facts and law" in support of his claim does not rebut the presumption of waiver. House, 911 S.W.2d at 714.

The issues raised in the petition have either been previously determined or waived. The issues that are waived could have been raised on direct appeal or in the first post-conviction action. The reasons given for failing to raise these issues are insufficient, as a matter of law, to rebut the presumption of waiver. See House v. State, 911 S.W.2d 705, 714 (Tenn. 1995).

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE