

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

<p>FILED</p> <p>April 17, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

JOHN DERRICK COLEMAN,)
)
 APPELLANT,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 APPELLEE.)

No. 02-C-01-9505-CC-00122

Humboldt Law, Gibson County

Dick Jerman, Jr., Judge

(Post-Conviction)

FOR THE APPELLANT:

John Derrick Coleman, Pro Se
P.O. Box 1050 WTHSF
Henning, TN 38041

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0495

William David Bridgers
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

OPINION FILED: _____

REVERSED AND REMANDED

Joe B. Jones, Presiding Judge

OPINION

The appellant, John Derrick Coleman, appeals as of right from a judgment of the trial court summarily dismissing his action for post-conviction relief. The trial court did not give a reason for the sua sponte summary dismissal. The appellant contends that he was entitled to the appointment of counsel, the right to amend his petition, and an evidentiary hearing to present evidence to support the grounds alleged in his petition. The State of Tennessee admits in its brief that the trial court committed error in summarily dismissing the appellant's post-conviction action sua sponte. This Court is of the opinion that the judgment of the trial court should be reversed, this case remanded to the trial court for the appointment of counsel and the opportunity to amend the petition, and, if the grounds alleged in the amended petition justify the granting of an evidentiary hearing, a hearing on the merits of the petition.

The appellant filed an action for post-conviction relief with the clerk of the trial court on September 30, 1994. The trial court did not appoint counsel to represent the petitioner. In addition, the State of Tennessee did not file a responsive pleading to the petition. The trial court sua sponte summarily dismissed the appellant's action. The order entered by the trial court states:

This case came on this 24th day of October, 1994, before the Honorable Dick Jerman, Jr., Judge of the Humboldt Law Court of the Twenty-Eighth Judicial District of Gibson County, Tennessee, at Humboldt, and came the District Attorney General who prosecutes for the State, upon the Petition for Post Conviction Relief filed, and it appears to the Court that the Petition should be dismissed without evidentiary hearing.

It is, therefore, ORDERED that the Petition for Post Conviction Relief is hereby dismissed, without an evidentiary hearing.

This the 26th day of December, 1994, and enter nunc pro tunc for the 24th day of October, 1994.

Copies of this order were not forwarded to the parties until January 16, 1995.

The State of Tennessee filed a Motion to Dismiss and Answer on February 23, 1995. The appellant had filed his notice of appeal with the clerk of the trial court on the 26th day of January, 1995. Thus, it is questionable whether the District Attorney General

precipitated or participated in the summary dismissal of the action as indicated in the order entered by the trial court.

It appears that this is the first post-conviction action filed by the appellant. Furthermore, the petition appears to have been filed within the time constraints set forth in the Post-Conviction Procedure Act. One of the grounds alleged in the petition is a colorable constitutional claim of ineffective assistance of counsel. Therefore, the trial court was obligated by law to appoint counsel to represent the petitioner, permit counsel to amend the petition, if necessary, and afford the petitioner an evidentiary hearing on all of the grounds that are cognizable in a post-conviction action.

The cases that address the very issue presented for review in this case are legion. See Tenn. Code Ann. § 40-30-112 (1990). This Court has consistently reversed the judgments such as the one below and granted the relief sought in this case. Moreover, the Supreme Court has also addressed this issue and granted the same relief. See Allen v. State, 854 S.W.2d 873, 876 (Tenn. 1993).

JOE B. JONES, PRESIDING JUDGE

CONCUR:

GARY R. WADE, JUDGE

JERRY L. SMITH, JUDGE