

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

**FILED**

July 11, 1996

**Cecil Crowson, Jr.**  
Appellate Court Clerk

ARNOLD CARTER, \* C.C.A. # 03C01-9509-CC-00270  
APPELLANT, \* MONROE COUNTY  
VS. \* Hon. R. Steven Bebb, Judge  
STATE OF TENNESSEE, \* (Post-Conviction)  
APPELLEE. \*

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

REVERSED & REMANDED

Gary R. Wade, Judge

## OPINION

The petitioner, Arnold Carter, has filed a pro se appeal of the trial court's dismissal of his petition for post-conviction relief. The single issue presented for review is whether the petition was barred by the statute of limitations.

We reverse the judgment of the trial court.

In 1972, the defendant was convicted of first degree murder and sentenced to death by electrocution. Prior to appellate review, the Governor commuted the death sentence to a 99-year term in the penitentiary. This court affirmed the conviction and the supreme court denied certiorari. Arnold Carter and Danny Barnes v. State, No. 23 (Tenn. Crim. App., at Knoxville, May 9, 1973). Later, the petitioner filed two unsuccessful petitions for post-conviction relief. This court affirmed the denial of relief in each case. Arnold Carter v. State, 600 S.W.2d 750 (Tenn. Crim. App. 1980), and Arnold Carter v. State, No. 88 (Tenn. Crim. App., at Knoxville, March 1, 1985), perm. to appeal denied concurring in results only, (Tenn. 1985).

In this, his third petition for post-conviction relief filed in July of 1995, the petitioner claimed the ineffective assistance of counsel and state violations of discovery guidelines of which he claims he only recently became aware. In the trial court, the state, relying upon the recently repealed post-conviction act found at Tenn. Code Ann. § 40-30-101 through -124, argued that the petition was barred by the three-year statute of limitations and the doctrines of previous determination and waiver. See Tenn. Code Ann. § 40-30-102 and -112. The trial court entered an order dismissing the petition as barred by the statute of limitations.

The state now concedes that the new Post-Conviction Procedure Act,

which replaced the prior act in its entirety and became effective on May 10, 1995, applies. See 1995 Tenn. Pub. Act 207, §§ 1 and 3. The state nonetheless contends that the petition is barred under the new act. Under more recent legislation, there is a one-year statute of limitations with limited exceptions:

(a) ...[A] person in custody under a sentence of a court of this state must petition for post-conviction relief under this chapter within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason.

(b) Consideration of a petition filed after such time shall be barred unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United State [S]upreme [C]ourt establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

Tenn. Code Ann. § 40-30-202 (Supp. 1995).

At first glance, it would appear that the petition was properly dismissed as barred because it was filed more than one year after the date of final judgment for his conviction and the grounds raised did not fall within one of the listed exceptions. Upon examining the remainder of the act and the applicable rule,

however, we have determined that the petition should not have been dismissed.

The 1995 Act provides as follows:

This act shall take effect upon becoming a law, the public welfare requiring it and shall govern all petitions for post-conviction relief filed after this date, and any motions which may be filed after this date to reopen petitions for post-conviction relief which were concluded prior to the effective date of this act. Notwithstanding any other provision of this act to the contrary, any person having a ground for relief recognized under this act shall have at least one (1) year from the effective date of this act to file a petition or a motion to reopen under this act.

1995 Tenn. Pub. Act 207, § 3 (emphasis added).

Thus, the newer statute provides a one-year window in which a petitioner may seek relief under the new act. The procedures to be followed under the act are specific. In November of 1995, our supreme court adopted Rule 28; the form petition and motion to reopen are included in the rule. Section 6(B)(4)(b) of Rule 28 specifies that "No pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel."

Here, the petitioner did not have the benefit of counsel. Although he may not be entitled to any relief, he was entitled to counsel and the opportunity to amend. Under these circumstances, the judgment must be reversed. The cause is remanded to the trial court for further proceedings consistent with the 1995 Act and Tenn. S. Ct. R. 28.

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Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

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William M. Barker, Judge