



The petitioner, Scott L. Deem, appeals from the trial court's denial of his second petition for post-conviction relief. The single issue presented for review is whether the trial court properly dismissed the petition without an evidentiary hearing. We affirm.

On July 9, 1987, petitioner entered best interest guilty pleas to two counts of aggravated rape, one count of aggravated kidnapping, and one count of a crime against nature. The trial court imposed an effective sixty-year sentence. This court affirmed his sentences in Scott L. Deem v. State, No. 87-277-III, Montgomery Co. (Tenn. Crim. App. May 24, 1988). In 1989, petitioner filed a pro se petition for post-conviction relief alleging that he had not knowingly and intelligently entered his guilty pleas. The trial court appointed counsel and, after an evidentiary hearing, found that petitioner's guilty pleas were knowingly and voluntarily entered. Accordingly, the trial judge dismissed the petition. The dismissal was affirmed on appeal. Scott L. Deem v. State, No. 01C01-9005-CC-00127, Montgomery Co. (Tenn. Crim. App. March 7, 1991).

On September 22, 1993, petitioner filed a second application for post-conviction relief. This pro se petition raised a number of issues including double jeopardy and ineffective assistance of both trial and post-conviction counsel. The trial judge<sup>1</sup> appointed counsel to represent petitioner. After hearing the arguments of counsel, the trial court found that the issues in the second petition had been waived and that the petition was barred by the statute of limitations. He granted the state's motion to dismiss the petition without an evidentiary hearing.

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<sup>1</sup> Judge John H. Peay accepted petitioner's guilty pleas. Since Judge Peay was appointed to the Court of Criminal Appeals in 1990, Judge Robert Wedemeyer heard the petitions for post-conviction relief.

In this appeal, petitioner concedes that his petition was filed outside the statutory period.<sup>2</sup> He contends, however, that the errors of post-conviction counsel in the first post-conviction proceeding justifies holding an evidentiary hearing in the second. In essence, petitioner argues that he should have the opportunity to call the previous post-conviction counsel to determine why the issues raised in the second petition were not previously addressed. He contends that counsel's failure to raise these issues creates an exception to the three-year statute of limitations.

In this argument, petitioner relies on the holding of Burford v. State, 845 S.W.2d 204 (Tenn. 1992). In Burford, the Tennessee Supreme Court held that the due process clauses of the state and federal constitutions require that the claimant be given "a reasonable opportunity to have the claimed issue heard and determined," and that where such an opportunity did not exist, a rigid application of the time-bar would deprive a petitioner of due process of law. Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995); Burford, 845 S.W.2d at 208. In Sands, the supreme court set forth a three-step process for determining whether the Burford rule applied in a given factual situation:

1. determine when the limitations period would normally have begun to run;
2. determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and
3. if the grounds are "later-arising," determine whether a strict application of the limitations period would effectively deprive the petitioner of a reasonable opportunity to present the claim.

Sands, 903 S.W.2d at 301.

Petitioner may not rely upon a Burford exception in this case. None of the grounds presented in the second petition arose after May 24, 1991, the date on which the statutory period expired. All of the grounds in the second petition were available at

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<sup>2</sup> For petitioner, the statutory period expired on May 24, 1991. See T.C.A. § 40-30-102 (1990 Repl.) (repealed 1995).

the time of the first except one. Petitioner's allegation of ineffective assistance of post-conviction counsel obviously did not exist at the time of the first petition. However, ineffective assistance of counsel in a post-conviction proceeding is not a constitutional violation and is not cognizable as a ground for post-conviction relief. House v. State, 911 S.W.2d 705, 712 (Tenn. 1995); State v. Garrard, 693 S.W.2d 921, 922 (Tenn. Crim. App. 1988). In his first post-conviction petition, the trial court appointed counsel and held a full evidentiary hearing. Petitioner had a reasonable opportunity to have all issues heard and determined. This petition is barred by the statute of limitations.

Even if petitioner had timely filed his second petition, the trial court could not have considered the issues. Petitioner waived his right to present them when he failed to raise them in his first petition. See T.C.A. § 40-30-111 (1990 Repl.) (repealed 1995). A ground for relief is waived if a petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which petitioner could have presented the issue. T.C.A. § 40-30-112(1) (repealed 1995). The statute creates a rebuttable presumption that a ground for relief not raised in a prior proceeding was waived. T.C.A. § 40-30-112(2) (repealed 1995).

A "full and fair hearing" occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. House, 911 S.W.2d at 714. Waiver is determined by an objective standard under which a petitioner is bound by the action or inaction of counsel. Id. A petitioner may not overcome the rebuttable presumption of waiver by alleging that petitioner did not personally waive the ground for relief. House, 911 S.W.2d at 814; State v. Smith, 814 S.W.2d 45, 47-48 (Tenn. 1991). In this instance, the trial court held a full and fair hearing on the issues petitioner raised in the first post-conviction proceeding. He cannot now claim that he did not "knowingly and understandingly" waive the grounds raised in the second petition.

Petitioner filed his second petition for post-conviction relief after the statutory period expired. Moreover, he has not overcome the presumption that all grounds not raised in the first petition are waived. The trial court did not err in dismissing the second petition without an evidentiary hearing.

The judgment of the trial court is affirmed.

PER CURIAM

(Tipton and Welles, JJ.;  
Bevil, Sp. J., not participating)