

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1997 SESSION

JIMMY EARL LOFTON,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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NO. 02C01-9603-CR-00073

SHELBY COUNTY

Hon. Arthur T. Bennett, Judge

(Post-Conviction Relief Petition)

FOR THE APPELLANT:

JIMMY EARL LOFTON, *pro se*
CCA - South Central Corr. Center
P.O. Box 279
Clifton, TN 38425-0279

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ELLEN H. POLLACK
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JOHN W. PIEROTTI
District Attorney General

TOM HENDERSON
Assistant District Attorney General
201 Poplar Avenue
Third Floor
Memphis, TN 38103

OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

Jimmy Earl Lofton appeals the judgment of the Shelby County Criminal Court denying his petition for post-conviction relief. He was declared an habitual criminal at a trial in 1985. In 1995, one of the underlying convictions was set aside. He now contends that the habitual criminal finding should be set aside. The trial court denied post-conviction relief without a hearing. On appeal, Lofton presents two issues for our review: (1) whether he was denied the right to a fair trial by the use of a 1970 conviction which was subsequently vacated; and (2) whether the reasonable doubt jury instruction violated due process. We affirm the judgment of the trial court.

PROCEDURAL BACKGROUND

In 1985, Lofton was convicted by a jury of the offenses of larceny from the person, armed robbery and assault with the intent to commit first degree murder. He was also found to be an habitual criminal based upon convictions resulting from guilty pleas in 1970 for third degree burglary and in 1982 for (1) attempted third degree burglary; (2) receiving stolen property under the value of \$200; (3) two counts of forgery over the value of \$200; and (4) forgery under the value of \$200. He was sentenced to three (3) life sentences, two (2) of which were to be served consecutively. The convictions and the sentences were affirmed on appeal. State v. James Earl Lofton, No. 39, Shelby County (Tenn. Crim. App. filed Feb. 5, 1986, at Jackson), *per. app. denied* (Tenn. April 28, 1986).

In January 1995, this Court vacated the 1970 burglary conviction. The Court reasoned that when Lofton pled guilty to this offense, his guilty plea was not knowingly entered. However, the Court found that, even after voiding the 1970 conviction, there was sufficient evidence to sustain his status as an habitual criminal. James Earl Lofton v. State, C.C.A. No. 02C01-9306-CR-00111 (Tenn. Crim. App. filed Jan. 11, 1995, at Jackson), *per. app. denied* (Tenn. June 12, 1995).

Lofton filed the present petition in November 1995. In his petition he asserted that his habitual criminal status is invalid. He bases this claim on the fact that the Court of Criminal Appeals vacated the 1970 burglary conviction. The trial court dismissed his petition without a hearing.

HABITUAL CRIMINAL STATUS

Lofton's main contention is that he was improperly convicted as an habitual criminal on the basis on an invalid underlying conviction. This issue has been previously determined in the appeal from his first post-conviction petition. James Earl Lofton v. State, *supra*. Under the new Post-Conviction Procedure Act, a ground for relief is previously determined if "a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity" to present evidence. T.C.A. § 40-30-206(h) (Supp. 1996); see Workman v. State, 868 S.W.2d 705, 708 (Tenn. Crim. App. 1993); Caruthers v. State, 814 S.W.2d 64, 70 (Tenn. Crim. App. 1991). Lofton was allowed to present evidence at the evidentiary hearing in 1991. On appeal, this Court specifically found that his sentencing as an habitual criminal would not be affected by the voiding of the 1970 conviction. Therefore, as this issue has been previously determined, it has no merit.

REASONABLE DOUBT JURY INSTRUCTION

Lofton also argues that the jury instruction given at trial on "reasonable doubt" is constitutionally infirm as it violates due process. There is no mention of this issue in the post-conviction petition. This court has appellate jurisdiction only. T.C.A. § 16-5-108(a). Issues not raised in the petition for post-conviction relief cannot be raised for the first time on appeal. A post-conviction petition "must necessarily rest upon and be determined by the factual allegations it contains." Long v. State, 510 S.W.2d 83, 85 (Tenn. Crim. App. 1974). This issue is,

therefore, waived.

Secondly, any relief has been barred by the three-year statute of limitations for post-conviction relief under T.C.A. § 40-30-102 (repealed by 1995 Tenn. Pub. Act 207, § 1). Petitioner's convictions were affirmed on February 5, 1986, and the Tennessee Supreme Court denied permission to appeal on April 28, 1986. This post-conviction petition was filed on November 20, 1995. The statute of limitations for post-conviction relief expired on July 1, 1989. See Abston v. State, 749 S.W.2d 487 (Tenn. Crim. App. 1988).

The new Post-Conviction Procedure Act, T.C.A. § 40-30-201 et. seq. (Supp. 1996), reduced the statute of limitations for post-conviction relief to one (1) year. The Act also provides for a one (1) year grace period from May 10, 1995, to file a petition or reopen a petition for post-conviction relief. The grace period does not apply in this instance because post-conviction relief was already barred by the statute of limitations when the legislation was enacted. The new Post-Conviction Procedure Act was not meant to revive previously barred claims. See Johnny L. Butler v. State, C.C.A. No. 02C01-9509-CR-00289, Shelby County (Tenn. Crim. App. filed December 2, 1996, at Jackson); *but see* Arnold Carter v. State, C.C.A. No. 03C01-9509-CC-00270, Monroe County (Tenn. Crim. App. filed July 11, 1996, at Knoxville). As a result, any post-conviction relief is time-barred.

Furthermore, the issue has no merit. Lofton argues that the jury instruction defining "reasonable doubt" violates due process of law by lowering the burden on the state to prove guilt. We are unable to ascertain what instruction was actually given to the jury because this was not included as part of the record. However, Tennessee courts have consistently held that using the phrase "moral certainty" in conjunction with an instruction that "reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt" is a valid instruction on reasonable doubt. Nichols v. State, 877 S.W.2d 722, 734 (Tenn. 1994); State v. Sexton, 917 S.W.2d 263, 266 (Tenn. Crim. App. 1995); Pettyjohn v. State, 885 S.W.2d 364, 366 (Tenn. Crim. App. 1994); State v. Hallock, 875 S.W.2d 285, 294

(Tenn. Crim. App. 1993). Therefore, this issue is without merit.

DISMISSAL WITHOUT A HEARING

Lofton claims that the trial court erred in not conducting an evidentiary hearing on the petition. If it appears on the face of the petition, any exhibits or prior proceedings in the case that the petition was not filed within the statute of limitations or that a prior petition attacking the conviction was resolved on the merits, the trial court may summarily dismiss the petition. T.C.A. § 40-30-206(b) (Supp. 1996). Accordingly, we find that the trial court acted appropriately and affirm the judgment.

JOE G. RILEY, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

JOHN H. PEAY, JUDGE