

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1996

<p>FILED</p> <p>March 20, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

CHARLES WALTON WRIGHT,)
)
 Appellant,)
)
)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
)
 Appellee.)

C.C.A. NO. 01C01-9506-CR-00211
 DAVIDSON COUNTY
 HON. WALTER C. KURTZ
 JUDGE
 (Post-Conviction - Death Penalty)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Charles Walton Wright was convicted of two counts of first degree murder. He was sentenced to life in prison for one murder and to death by electrocution for the other. In this appeal, he challenges the trial court's dismissal of (1) his 1991 petition for post-conviction relief, (2) his motion to vacate the order of dismissal, and (3) his 1995 petition for post-conviction relief.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

In April of 1985, a Davidson County Criminal Court jury found Appellant guilty of the first degree murder of Gerald Mitchell and the first degree murder of Douglas Alexander. For the murder of Mitchell, Appellant was sentenced to life imprisonment. For the murder of Alexander, Appellant was sentenced to death. On direct appeal, the Tennessee Supreme Court affirmed both the convictions and the sentences. See State v. Wright, 756 S.W.2d 669 (Tenn. 1988), cert. denied, 109 S. Ct. 848 (1989). On August 29, 1988, following the denial of a petition to rehear, Appellant's statute of limitations for post-conviction relief began to run. See Tenn. Code Ann. § 40-30-102 (repealed 1995).

On May 16, 1989, with the aid of counsel, Appellant filed his first petition for post-conviction relief. Following a hearing, the trial court denied any relief. On appeal, this Court affirmed the judgment of the trial court. See Wright v.

State, No 01C01-9105-CR-000149, 1994 WL 115955 (Tenn. Crim. App. April 7, 1994).

On August 29, 1991, Appellant, proceeding pro se, filed his second petition for post-conviction relief. The trial court dismissed the petition, characterizing it as “redundant and unnecessary.” Appellant did not appeal this ruling until now.

In January of 1995, with the aid of counsel, Appellant filed both a motion to vacate the order dismissing his second petition for post-conviction relief and a third petition of post-conviction relief. In separate orders, the trial court denied the motion because it was filed over three years after the order was entered and dismissed the petition because it failed to comply with the three-year statute of limitations set out for post-conviction petitions.

II. POST-CONVICTION RELIEF

Appellant alleges that the trial court erred in dismissing his 1991 petition for post-conviction relief, his motion to vacate the order of dismissal, and his 1995 petition for post-conviction relief. In a post-conviction petition, the petitioner must establish his or her allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court are conclusive on appeal unless the evidence preponderates against those findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). In reviewing a denial of collateral relief, this Court is bound by the following well-established rules of appellate review:

(1) this court cannot reweigh or reevaluate the evidence or substitute its inferences for those drawn by the trial judge, (2) questions concerning the credibility of witnesses, weight and value to be given their testimony, and factual issues raised by evidence are resolved by the trial judge, and (3) on appeal, the petitioner has the burden of demonstrating why the evidence contained in the record preponderates against the judgment entered by the trial judge.

Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

According to the Post-Conviction Procedure Act, the scope of a post-conviction hearing encompasses all grounds asserted by the petitioner, except for those grounds which have been previously determined or waived. Tenn. Code Ann. § 40-30-111. A ground for relief is previously determined “if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.” Id. § 40-30-112(a). A ground for relief is waived “if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” Id. § 40-30-112(b)(1).

Furthermore, at the time Appellant filed his petitions, the applicable statute of limitations required him to do so within three years of the date of the final action of the highest state appellate court to which an appeal has been taken. Id. § 40-30-102. However, in Burford v. State, 845 S.W.2d 204 (Tenn. 1992), and Sands v. State, 903 S.W.2d 297 (Tenn. 1995), the Tennessee Supreme Court created an exception to this statute of limitations, commenting as follows:

[I]n certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner’s claim when the grounds

for relief, whether legal or factual, arise after the “final action of the highest state appellate court to which appeal is taken” -- or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run.

Sands, 903 S.W.2d at 301. The Supreme Court then established the following three-step process for applying the Burford rule to specific factual situations:

(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 if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. In making this final determination, courts should carefully weigh the petitioner's liberty interest in “collaterally attacking constitutional violations occurring during the conviction process,” against the State's interest in preventing the litigation of “stale and fraudulent claims.”

Id. (citations and footnotes omitted). Given this legal and factual background, we will review Appellant's claims seriatim.

A. 1991 POST-CONVICTION PETITION

Appellant first argues that the trial court erred in dismissing his 1991 post-conviction petition. Appellant, who concedes that he failed to file a timely notice of appeal, contends that this requirement should be waived “in the interests of justice,” citing both Rule 4(a) of the Tennessee Rules of Appellate Procedure and Laney v. State, 826 S.W.2d 117 (Tenn. 1992).

Appellant filed his second post-conviction petition on April 29, 1991, was denied relief, and, for whatever reason, failed to appeal the judgment within the statutorily-mandated thirty-day period. See Tenn. R. App. P. 4(a). Now, over three years later, Appellant seeks to have the requirement for a timely

appeal waived. Given the excessive delay and the lack of any evidence that Appellant's attorney, who drafted both the first and third petitions, was unaware of the filing of the second petition, we are not inclined to waive the timeliness requirement. In any event, it appears that all issues proffered in the second petition have been either previously determined, waived, or are repeated in the third petition, which we address infra. Thus, we conclude that the trial court's dismissal of Appellant's 1991 post-conviction petition was proper.

B. MOTION TO VACATE

Appellant also argues that the trial court erred in denying his motion to vacate the order dismissing his 1991 post-conviction petition. Appellant asserts that, because of his lack of representation, his unfamiliarity with the law and appellate procedure, and the fact that he has been sentenced to death, the trial court should have granted his motion to vacate the original order of dismissal, entered a new order, and allowed him the opportunity to then file timely notice of appeal.

The trial court issued its order dismissing Appellant's second petition on September 3, 1991. Appellant filed his motion to vacate that order in January of 1995, over three years later. For the reasons discussed previously, we do not believe that the trial court abused its discretion in denying the motion to vacate, and that decision is affirmed.

C. 1995 POST-CONVICTION PETITION

Appellant next argues that the trial court erred in dismissing his 1995 post-conviction petition. In support of this argument, Appellant maintains that the trial court failed to provide factual and legal reasons for denying relief, to consider the record of all prior proceedings, to conduct an evidentiary hearing, to provide funds for investigative and expert assistance, and to address his request for the disclosure of exculpatory evidence. In light of these alleged errors, Appellant seeks a remand for further proceedings or relief on the following grounds:

- (1) there was insufficient evidence of premeditation and deliberation to support his convictions;
- (2) the prosecution withheld exculpatory evidence and misled the jury;
- (3) the jury instruction on reasonable doubt was unconstitutional;
- (4) the trial court erred in refusing to give jury instructions on certain non-statutory mitigating factors;
- (5) the trial court presented the jury instructions in such a way that prevented adequate consideration to the self-defense claim;
- (6) the trial court presented the jury instructions in such a way that interfered with the assessment of witness credibility;
- (7) the jury instruction on malice was unconstitutional;
- (8) the prosecution engaged in various forms of misconduct during closing argument of the penalty phase of the trial;
- (9) the prosecution improperly changed its aggravating factor theory from murder committed in the course of a robbery to murder committed in the course of a murder;
- (10) the deposition of Jackie King was improperly taken;
- (11) there was insufficient evidence to support the aggravating factor of murder committed in the course of a murder;
- (12) the jury was tainted by irrelevant and extraneous influences;
- (13) the death sentence impinges upon a fundamental right to life and fails to promote a compelling state interest;

(14) the prosecution improperly burdened his right to trial by offering a life sentence in exchange for a guilty plea before trial and then seeking a death sentence at trial;

(15) the trial court erred in failing to inform the jury that, by imposing a second life sentence rather than a death sentence, he would not be eligible for parole until the age of ninety;

(16) both trial and appellate counsel provided ineffective assistance; and

(17) the trial court erred in allowing Dr. Charles Harlan to testify as to the order of the shots fired on the night in question.

For the purpose of post-conviction relief, Appellant's statute of limitations expired on August 29, 1991. Nevertheless, mindful of Burford and Sands, we will address Appellant's claims in greater detail.

1. SUFFICIENCY OF THE EVIDENCE

Appellant first maintains that the evidence of premeditation and deliberation was insufficient to support his convictions. He argues that this claim is not barred by the statute of limitations because of the later-arising legal grounds set out in State v. Brown, 836 S.W.2d 530 (Tenn. 1992). However, this Court has previously held that Brown did not create a new constitutional rule relative to the sufficiency of the evidence in a first degree murder case. See Miller v. State, No. 03C01-9409-CR-00336, 1995 WL 395842, at *3 (Tenn. Crim. App. July 6, 1995). Since this claim is not "later-arising," it fails to qualify as a Burford exception and is therefore barred by the statute of limitations.

2. WITHHOLDING OF EXCULPATORY EVIDENCE

Appellant next contends that the prosecution withheld exculpatory evidence and misled the jury. He argues that this claim is not barred by the statute of limitations because he could not gain access to the prosecution's files pursuant to the Tennessee Public Records Act until after Capital Case Resource Center v. Woodall, No. 01A01-9104-CH-00150, 1992 WL 12217 (Tenn. App. Jan. 29, 1992). Nashville). In Woodall, the Tennessee Court of Appeals held that police investigative records concerning a case under collateral attack were not exempt from disclosure under the Tennessee Public Records Law. Specifically, Appellant alleges that the following exculpatory evidence was improperly withheld by the State:

- (1) that Appellant did not kill Alexander and shot Mitchell in the heat of passion;
- (2) that the victims were homosexual lovers engaged in drug trafficking; and
- (3) that the victims were engaged in a drug deal with Netta Broyles and/or Jonetta Miles at the time of the shooting.

However, Appellant fails to offer any explanation as to why it has taken three years from the issuance of Woodall to bring this claim. We do not believe that, under the facts of this case, a delay of three years is justified under Burford and Sands. Appellant had ample opportunity to present this claim since the Woodall decision. Thus, we conclude that, in balancing Appellant's interest in collaterally attacking constitutional violations against the State's interest in preventing the litigation of stale and fraudulent claims, Appellant has failed to satisfactorily carry his burden.

3. REASONABLE DOUBT INSTRUCTION

Appellant maintains that the trial court's jury instruction on reasonable doubt was unconstitutional because of a reference to "moral certainty." He argues that this claim is not barred by the statute of limitations because of the later-arising legal grounds set out in Victor v. Nebraska, 511 U.S. 1 (1994). In Victor, the United States Supreme Court analyzed the relationship of reasonable doubt to the "moral certainty" phrase, recognizing that a modern jury, unaware of the historical meaning, might understand the phrase, in the abstract, to mean something less than the very high level of determination constitutionally required in criminal cases. However, this Court while critical of the use of "moral certainty" in a reasonable doubt jury instruction, has previously concluded that, Victor does not stand for the proposition that such a reference is per se unconstitutional. See Pettyjohn v. State, 885 S.W.2d 364, 366 (Tenn. Crim. App. 1994). We do not believe that Victor creates a new constitutional rule. As a result, this claim fails to qualify as a Burford exception and is therefore barred by the statute of limitations.

4. NON-STATUTORY MITIGATING FACTORS INSTRUCTION

Appellant asserts that the trial court erred in refusing to instruct the jury on certain non-statutory mitigating factors. He argues that this claim is not barred by the statute of limitations because of the later-arising legal ground set out in Delo v. Lashley, 507 U.S. 272 (1993). In Delo, the United States Supreme Court emphasized that a trial court must give a mitigating factor instruction only if there is evidence on the record to support such a finding, relying on earlier cases such as Hopper v. Evans, 456 U.S. 605 (1982), and Walton v. Arizona, 497 U.S. 639 (1990) to support its proposition. We do not believe that Delo creates a new constitutional rule but rather simply re-affirms

prior holdings. Consequently, this claim fails to qualify as a Burford exception and is therefore barred by the statute of limitations.

5. SELF-DEFENSE

Appellant submits that the trial court erred by presenting the jury instructions in such a way that prevented adequate consideration of his self-defense claim. He argues that this claim is not barred by the statute of limitations because of the later-arising legal ground set out in Gilmore v. Taylor, 508 U.S. 333 (1993). In Gilmore, the United States Supreme Court addressed a jury instruction requirement set out in Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), which required instruction's that a jury could not return a murder conviction if it found that the defendant possessed a mitigated mental state. The Court in Gilmore concluded that the Falconer rule failed to provide a basis for federal habeas relief. Id. at 345-46. Because the Falconer opinion was issued in 1990, well-within Appellant's statute of limitations, we do not believe that it qualifies as a "later-arising" ground for statute of limitations purposes. Furthermore, while Gilmore was issued after Appellant's statute of limitations had run, it simply addresses the substantive law set out earlier in Falconer and creates no new constitutional rule. As a result, this claim fails to qualify as a Burford exception and is therefore barred by the statute of limitations.

6. WITNESS CREDIBILITY

Appellant maintains that the trial court erred by presenting the jury instructions in such a way that interfered with the assessment of witness

credibility. However, he fails to assert any later-arising legal or factual ground that would make this claim a Burford exception to the statute of limitations.

7. MALICE INSTRUCTION

Appellant asserts that the trial court's jury instruction on malice was unconstitutional. While making a due process argument in his reply brief, Appellant fails to specifically assert any later-arising legal or factual ground that would make this claim a Burford exception to the statute of limitations.

8. PROSECUTORIAL MISCONDUCT

Appellant contends that the prosecution engaged in improper and prejudicial argument during the sentencing phase of the trial. However, as Appellant concedes, all but one of the specific instances of alleged prosecutorial misconduct were previously determined on direct appeal or in Appellant's first post-conviction petition. Appellant argues that the only remaining issue, whether it was improper for the prosecution to argue that the death penalty was appropriate because Appellant had committed two murders, is not barred by the statute of limitations because of the later-arising legal ground set out in State v. Smith, 857 S.W.2d 1 (Tenn. 1993). In Smith, the Tennessee Supreme Court found unconstitutional the introduction of evidence of an earlier sentence for murder into a sentencing hearing for first degree murder. Id. at 24-25. Because Appellant's claim does not involve the introduction of evidence of an earlier sentence, we do not believe that Smith has any application to Appellant's claim that it creates a later-arising legal ground. Thus, the claim is barred by the statute of limitations.

9. AGGRAVATING FACTOR THEORY

Appellant claims that the prosecution improperly changed its aggravating factor theory from murder committed in the course of a robbery to murder committed in the course of a murder. However, he fails to assert any later-arising legal or factual ground that would save this claim from the statute of limitations.

10. JACKIE KING DEPOSITION

Appellant contends that the deposition of Jackie King was improperly taken, arguing that he was denied his right to be present at the deposition and to confront the witness. As Appellant concedes in his reply brief, this claim was previously determined.

11. AGGRAVATING FACTOR SUFFICIENCY

Appellant asserts that there was insufficient evidence to support the aggravating factor of murder committed in the course of a murder. He argues that this claim is not barred by the statute of limitations because of the later-arising legal ground set out in Schiro v. Farley, 510 U.S. 222 (1994), and in State v. Brown, 836 S.W.2d 530 (Tenn. 1992). In Schiro, the United States Supreme Court applied certain long-standing due process principles to an aggravating factor sufficiency claim. In Brown, the Tennessee Supreme Court addressed the premeditation and deliberation elements of first degree murder. Neither case qualifies as a later-arising ground relative to an aggravating factor sufficiency claim; therefore, the claim is barred by the statute of limitations.

12. JURY TAINT

Appellant maintains that the jury was tainted by irrelevant and extraneous influences. However, he fails to assert any later-arising legal or factual ground that would save this claim from the statute of limitations.

13. DEATH PENALTY

Appellant submits that the death sentence impinges upon a fundamental right to life and fails to promote a compelling state interest. In his reply brief, he argues that this claim is not barred by the statute of limitations because of the later-arising legal ground set out in Archer v. State, 851 S.W.2d 157 (Tenn. 1993), and Barber v. State, 889 S.W.2d 185 (Tenn. 1994). In Archer, the Tennessee Supreme Court held that the petition in question did not allege proper grounds for habeas corpus relief and was time barred under the post-conviction statute of limitations. In Barber, the Court addressed the retroactive application of State v. Middlebrooks, 840 S.W.2d 317 (Tenn.1992), which held that, when a defendant is convicted of first degree murder solely on the basis of felony murder, the felony murder aggravating factor fails to sufficiently narrow the class of death-eligible murderers and is thus unconstitutional. However, Middlebrooks is inapplicable to Appellant's claim because he was convicted of the deliberate and premeditated murder of Alexander and his death sentence was predicated upon the fact that the murder of Alexander was committed during the commission of the murder of Mitchell, an aggravating factor that survives constitutional scrutiny and is currently codified at Tennessee Code Annotated Section 39-13-204(i)(7). Neither Archer nor Barber qualify as a later-arising legal ground relative to

Appellant's death penalty claim. Consequently, the claim is barred by the statute of limitations.

14. RIGHT TO TRIAL

Appellant claims that the prosecution improperly burdened his right to trial by offering a life sentence in exchange for a guilty plea before trial and then seeking a death sentence at trial. However, he fails to assert any later-arising legal or factual ground that would save this claim from the statute of limitations.

15. PAROLE INSTRUCTION

Appellant asserts that the trial court erred in failing to inform the jury that, by imposing a second life sentence rather than a death sentence, he would not be eligible for parole until the age of ninety. He argues that this claim is not barred by the statute of limitations because of the later-arising legal ground set out in Simmons v. South Carolina, 114 S. Ct. 2187 (1994). In Simmons, the United States Supreme Court determined that the trial court's refusal to instruct the jury that life imprisonment meant no possibility of parole violated due process. Id. at 2193. However, in the concurrence, three Justices reasoned that, in states where parole from a life sentence is possible, of which Tennessee is one, see Tenn. Code Ann. 39-13-204, due process does not require such jury consideration. Id. at 2200 (O'Connor, J. concurring). In the dissent, two Justices concluded that the trial court need not inform the jury of parole possibilities under any circumstances. Id. at 2201-2204 (Scalia, J. dissenting). Given this lack of a majority, we do not believe that the Court established a new constitutional rule on the issue

advanced by Appellant. Thus, the claim fails to qualify as a Burford exception and is barred by the statute of limitations.

16. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant contends that both his trial and his appellate counsel provided ineffective assistance. He argues that this claim is not barred by the statute of limitations because of the later-arising legal ground set out in Owens v. State, 908 S.W.2d 923 (Tenn. 1995). In Owens, the Tennessee Supreme Court established a right to funds for expert and investigative services in certain post-conviction cases. Id. at 928. However, nothing in Owens suggests a new constitutional rule as anticipated by Burford or retroactive application to all prior post-conviction actions. We conclude that Owens fails to qualify as a later-arising legal ground for the purpose of Appellant's ineffective assistance claim. Therefore, the claim is barred by the statute of limitations.

17. EXPERT TESTIMONY

Finally, Appellant maintains that the trial court erred in allowing Dr. Charles Harlan to testify regarding the order of the shots fired on the night in question. As Appellant concedes in his reply brief, this claim was previously determined.

Because all the claims proffered in Appellant's 1995 post-conviction petition are either barred by the statute of limitations or were previously determined or waived, he is due no post-conviction relief. Thus, we conclude that the trial court's dismissal of Appellant's 1995 post-conviction petition was proper.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

WILLIAM M. BARKER, JUDGE