

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

FILED

April 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

RALPH DEWAYNE BROCK,	*	C.C.A. # 03C01-9508-CC-00247
Appellant,	*	SULLIVAN COUNTY
VS.	*	Hon. Frank L. Slaughter, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
Appellee.	*	

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OPINION FILED: _____

REVERSED AND REMANDED

GARY R. WADE, JUDGE

OPINION

The petitioner, Ralph Dewayne Brock, appeals the trial court's denial of his petition for post-conviction relief. The issue presented for review is whether the trial court correctly dismissed the petition without an evidentiary hearing on the basis that the claims had either been previously determined or were barred by the statute of limitations.

We reverse the judgment of the trial court.

At trial, the petitioner was identified as having participated in a November 1982 burglary at an apartment occupied by the victim, James Beverly. The victim, who was beaten and stabbed until he lost consciousness, ultimately died due to ligature strangulation. A witness identified the petitioner's car at the crime scene on the night of the murder. There was evidence that the petitioner helped dispose of the victim's car; there was proof that he threw away a bloody pair of gloves and a bloody knife when he learned he was being sought by police. The petitioner admitted that he had received several articles stolen in the robbery shortly after the murder but otherwise denied any participation in this incident. His girlfriend testified on his behalf as an alibi witness. A codefendant, while conceding that he had participated in the killing of the victim, testified at trial that the petitioner was not involved, claiming that the petitioner had merely purchased some of the stolen goods. That codefendant had, however, given a pretrial statement to the TBI implicating the defendant in the murder. Immediately after the murder, the defendant left this jurisdiction and sold several of the stolen items. He was eventually apprehended in Georgia.

On June 30, 1983, the petitioner was convicted of first degree murder.

This court affirmed the conviction on direct appeal. State v. Brock, 678 S.W.2d 486 (Tenn. Crim. App. 1984). Application for permission to appeal to the supreme court was denied on October 9, 1984.

Thereafter, the petitioner filed a post-conviction petition alleging ineffective assistance of counsel. The dismissal of the petition was affirmed by this court in 1986. Ralph DeWayne Brock v. State, No. 695 (Tenn. Crim. App., at Knoxville, January 9, 1986). Application for permission to appeal to the supreme court was denied March 31, 1986. A second post-conviction petition, alleging improper jury instructions and the denial of certain witnesses at his trial, was also dismissed. This court affirmed on appeal. Ralph D. Brock v. State, No. 781 (Tenn. Crim. App., at Knoxville, October 15, 1987). Application for permission to appeal to the supreme court was denied December 28, 1987. A third petition was filed on May 7, 1992. The trial court dismissed the petition on grounds of previous determination and waiver. Tenn. Code Ann. § 40-30-112 (repealed 1995). Alternatively, the trial court found the petition was barred by the statute of limitations. Tenn. Code Ann. § 40-30-102 (repealed 1995). On appeal, the petitioner contended that the statute of limitations was not applicable:

[H]e avers [that] the facts upon which he bases a claim of prosecutorial misconduct were not known to him until April 3, 1992, when he obtained copies of a police file regarding the investigation of the murder upon which he was convicted. The petitioner relies on the case of Burford v. State, 845 S.W.2d 204 (Tenn. 1992), to support his contention that the statute of limitations did not commence to run until that time.

Ralph D. Brock v. State of Tennessee, No. 03C01-9212-CR-00427 (Tenn. Crim. App., at Knoxville, August 23, 1993). This court, however, found that because no new right had arisen due to the discovery, the exception defined in Burford afforded no basis for relief. Application for permission to appeal was denied November 29, 1993.

In his most recent post-conviction petition, filed June 14, 1995, the petitioner asserted two grounds for relief: (1) that the denial of relief without an evidentiary hearing in his third post-conviction petition violated his right to substantive and procedural due process; he claimed that the statutory bar did not apply because the third petition was based upon newly discovered evidence; and (2) that the petitioner was denied the effective assistance of counsel because his counsel failed to use "material evidence" (charts of weather conditions on the night of the murder which might impeach the testimony of Bonnie Day who identified the petitioner at the crime scene "on a fairly clear night ... well lit up"¹) and available exculpatory evidence (a pretrial statement by Ms. Day that she saw someone at the victim's front door and her trial testimony that the petitioner used the back door and other possible contradictions²). The petitioner insists that this fourth petition is founded upon an unsuccessful attempt to present his grounds in the federal courts:

Judge Thomas Hull for the Eastern District Federal Court stated in his memorandum opinion filed May 17, 1995, that I had been denied access to the state courts, by being barred by the statute of limitations, to have the claims heard and [decided], after [being] given a hearing.... Petitioner is now before this Honorable Court to exhaust both grounds as recommended by the federal courts.

It is true that after the petitioner's third petition and before his fourth, he filed a petition in federal court for habeas corpus. Ralph D. Brock v. Ricky J. Bell, Warden, No. CIV-2-94-17 (E.D. Tenn., Northeastern Division, at Greeneville, May 17, 1995). In that cause, the state moved to dismiss the petition on the ground that the petitioner had failed to exhaust available state remedies as to all claims. The

¹The petitioner concedes that other state witnesses described the outside area near the crime scene as "very dark ... not well-lighted."

²The petitioner interpreted the testimony as being inconsistent with the pretrial statement; Ms. Day testified that she saw two people, including the petitioner, in or near the victim's apartment.

state based its action, at least in part, on this court's holding in Robert Lee Sands v. State of Tennessee, No. 03C01-9207-CR-00241 (Tenn. Crim. App., at Knoxville, January 13, 1994). The state, in response to the federal habeas corpus petition, interpreted the opinion in Sands as follows:

The circumstance of newly discovered evidence, such as is alleged by the petitioner, that bears directly on his claims for prosecutorial misconduct and effective assistance of counsel, may fit within the Burford court's category of "later arising grounds" for which the statute would not "afford a reasonable opportunity to have the claimed issue heard and decided." Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992). If so, then the three-year statute might be held not to bar consideration of the petitioner's claim or claims.

In his May 17, 1995, memorandum opinion, Judge Hull of the United States District Court summarized the petitioner's grounds as "prosecutorial misconduct, ineffective assistance of counsel, and a claim that Tennessee's three-year statute of limitations on petitions for post-conviction relief has unconstitutionally precluded him from raising a claim based upon newly discovered evidence." That court concluded as follows:

- (1) Mr. Brock's claims of prosecutorial misconduct have been exhausted;
- (2) Mr. Brock's claims of ineffective assistance of counsel have been exhausted with the following exceptions: his weather records contention, which does not require a dismissal of this case since it is clearly procedurally defaulted; and his contention that his attorneys were ineffective because they had access to the state's files and could have discovered and effectively used the exculpatory evidence not produced by the state in response to his Brady motion.
- (3) That the state's use of the statute of limitations, Tenn. Code Ann. § 40-30-102, as a ground to dismiss, without a hearing, his third petition for post-conviction [relief] violates his constitutional right of access to the courts, etc.; and
- (4) The court is convinced that Mr. Brock's claims regarding exculpatory information in the state's files

which was disclosed in response to his Brady motion and which, arguably, could have been discovered by his attorneys with due diligence, raise a serious question about the fundamental fairness of his trial which must be presented to the state courts. Moreover, the state courts should be allowed to address the question of whether or not Tenn. Code Ann. § 40-30-102 violated his constitutional rights when it was used to bar his claim involving evidence he was unaware of before the statute ran.

(Emphasis added).

On June 26, 1995, a little over one month after Judge Hull's opinion, the Tennessee Supreme Court, while affirming the rule in Burford, modified the holding of the Court of Criminal Appeals in Sands:

After setting forth the applicable constitutional standard, we noted that Burford was prohibited from challenging ... 1976 convictions in Trousdale County until the court, with sole jurisdiction over the matter--the Wilson County Criminal Court--had set aside the convictions; and that, therefore, the "petitioner found himself caught in a procedural trap and unable to initiate litigation in Trousdale County despite the approach of the three-year limitation period." We then concluded that, under the circumstances of the case, the rigid application of the time bar in § 40-30-102 served to deprive Burford of due process of law.

* * *

In assessing the merits of [the Sands] holding, it will be helpful to summarize the basic rule to be derived from Burford: that, in certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar 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 an 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. In applying the Burford rule to specific factual situations, the court should utilize a three-step process: (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 interests in "collaterally attacking constitutional violations occurring during the conviction process," against the state's interest in preventing the litigation of "stale and fraudulent claims."

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995)(citations omitted)(emphasis added).

The supreme court ruled that Sands' claim was not a "later-arising ground" because the type of error alleged (based upon the holding in Sandstrom v. Montana, 442 U.S. 510 (1979)); it held that Sandstrom had been retroactively applied in this state for several years before the statutory period of limitations began to run for Sands in 1986. Id. at 301-02.

In Caldwell v. State, 917 S.W.2d 662 (Tenn. 1996), cert. denied, 117 S. Ct. 148 (1996), our supreme court revisited the principles considered in Burford and Sands. The court concluded, "after carefully balancing the legitimate state interests of precluding stale claims and limiting excessive costs with the petitioner's interest in litigating this particular constitutional claim ... that the state's interests are weightier." Id. at 668. It determined that the "strict enforcement of the limitations period does not serve to deprive the petitioner of a reasonable opportunity to litigate his claim...." Id. In so ruling, the supreme court reversed the decision of this court in Richard Caldwell v. State, No. 02C01-9405-CC-00099 (Tenn. Crim. App., at Jackson, December 28, 1994).

This history of law development on the Burford rule may, in part, explain why the state took the position in September of 1994 that the petitioner had not exhausted his remedies in the state courts and now insists that all of petitioner's claims have been previously determined, waived, or otherwise barred by the statute

of limitations. We must consider each of the claims of the petitioner in the context of the defenses claimed by the state.

The first consideration is whether the statute of limitations is a bar. Effective May 10, 1995, the new Post-Conviction Procedure Act replaced the prior act in its entirety. See 1995 Tenn. Pub. Act 207, §§ 1 and 3. Because this petition was filed in June of 1995, the most recent legislation replaced a three-year with a one-year limitation:

(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. 1996).

Because the conviction in this case became final in 1984, this petitioner appears to have been bound not only by the current one-year statute of limitations but also the former three-year statute. Moreover, the grounds raised do not appear to fall within any of the exceptions set out in Tenn. Code Ann. § 40-30-202(b)(1), (2), or (3)(Supp. 1996). The 1995 Act is, however, unequivocal in its terms:

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).

In Arnold Carter v. State, No. 03C01-9509-CC-0020 (Tenn. Crim. App., at Knoxville, July 11, 1996), this panel, by a two to one margin, ruled that the literal terms of the new statute created a one-year window during which post-conviction petitions may be filed, notwithstanding the date of the judgment. This majority found no ambiguities in the terminology of the statute despite the reasonable argument by the dissent to the contrary.³

The procedure under the new Act is specific. Rule 28, adopted by the Supreme Court, provides 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 an attorney. By all appearances, the rule

³The state has filed an application for permission to appeal in Carter. We recommend that here as well and further suggest a request to consolidate.

entitles him to that.

That does not end our inquiry. While the petitioner may have come within that one-year window of opportunity, that only means that the statute of limitations does not apply. There are other procedural bars to a petition for post-conviction relief.

The petitioner's claim that he received ineffective assistance of counsel has been, in our view, previously determined in part and waived in part. He asserted that his counsel was ineffective because of a failure to discover and use at trial available evidence, including Brady material. The petitioner alleged ineffective assistance of counsel in the first post-conviction petition he filed. See Ralph DeWayne Brock, No. 695 (Tenn. Crim. App., at Knoxville, Jan. 9, 1986). After an evidentiary hearing, the trial court concluded trial counsel met the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), noting counsel "thoroughly investigated the case, interviewed numerous witnesses, and made responsible judgments in his client's behalf." Ralph DeWayne Brock, No. 695, slip op. at 2. That determination was confirmed on direct appeal to our court. Id. Thus, this ground for relief has been previously determined:

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 call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-206(h)(Supp. 1996) . Here, petitioner was afforded a "full and fair hearing" and the trial court, as well as our court, "ruled on the merits" and found the petitioner had received effective assistance of counsel.

To the extent that the petitioner wishes to litigate additional new

grounds for ineffective assistance of counsel, we must conclude those grounds have been waived:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-206(g)(Supp. 1996). The petitioner could have presented the additional grounds for relief in his direct appeal or in his first post-conviction petition, for which he was granted a hearing. Yet he failed to do so. Accordingly, additional grounds for relief on account of ineffective assistance of counsel are waived. See House v. State, 911 S.W.2d 705 (Tenn. 1995).

The only issues left are constitutional claims based upon any new evidence the petitioner claims was discovered on or about April 3, 1992, upon the release of police files, which would preclude the application of previous determination or waiver. If, after the appointment of counsel and any amended pleadings, the petitioner is able to establish that the prosecution withheld material evidence which, if available and not discovered, would have likely altered the results of this trial, he may be entitled to relief.

We therefore reverse and remand for the appointment of counsel. It is only if the amended pleading precluded any possibility of relief that a summary dismissal is warranted. See Tenn. Code Ann. §§ 40-30-209 and -210 (Supp. 1996).

Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

William M. Barker, Judge