

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

<p>FILED</p> <p>April 3, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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JOE HENRY MOORE,)
)
 Appellant,)
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 vs)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

C.C.A. No. 01CO1-9601-CR-00009
 DAVIDSON COUNTY
 HON. SETH NORMAN, JUDGE
 (Post-Conviction Relief Petition)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

J. STEVEN STAFFORD,
SPECIAL JUDGE

O P I N I O N

Appellant, Joe Henry Moore, appeals the judgment of the Criminal Court of Davidson County dismissing his third petition for post-conviction relief. The sole issue is whether he is entitled to a delayed appeal of his first post-conviction petition which was dismissed several years earlier. We affirm the dismissal of the petition.

PROCEDURAL BACKGROUND

Moore was convicted in 1986 of first degree murder and sentenced to life imprisonment. His conviction was affirmed by this Court in 1987, and the Tennessee Supreme Court denied application for permission to appeal in 1988.

Moore filed his first petition for post-conviction relief on January 3, 1989. After an evidentiary hearing, the court denied relief on April 10, 1990. No appeal was taken. It was the alleged failure of his attorney to appeal this dismissal or otherwise notify Moore of the dismissal that is the basis of the present petition.

Moore filed his second petition for post-conviction relief on May 20, 1993, requesting a delayed appeal of the denial of his first post-conviction petition. The petition was based upon the alleged failure of his attorney to notify him that his first petition had been dismissed or to otherwise file an appeal on Moore's behalf. This second petition was dismissed on November 19, 1993, for failure to state a claim and filing beyond the statute of limitations. Counsel was never appointed. Moore did not seek an appeal of this dismissal.

Moore's present petition for post-conviction relief, his third, was filed on October 3, 1994, again requesting a delayed appeal of the dismissal of his first post-conviction relief petition. The trial court found that the present petition related to the same subject matter contained in the 1993 petition which was dismissed with no appeal being taken by Moore. The trial court, therefore, dismissed the present petition in light of Moore's failure to appeal the dismissal of his second petition.

FAILURE TO APPEAL

Moore contends that he was not timely advised of the dismissal of his first post-conviction relief petition in 1990. He contends he was unaware of the dismissal until July 1992. This led to the filing of the second petition for post-conviction relief in May 1993 seeking a delayed appeal of the denial of his first petition. This second petition was dismissed with no appeal being taken by Moore.

We need not reach the issues as to whether there is a constitutional right to a post-conviction appeal, nor whether the statute of limitations bars the present petition. Moore's failure to appeal the denial of his second petition was fatal to the present petition seeking the same relief. By failing to appeal, this issue was "waived" within the meaning of T.C.A. § 40-30-112(b)(1) [repealed; now T. C. A. § 40-30-206(g)(1995 Supp.)]. A petitioner may not be permitted to litigate an issue in a post-conviction proceeding that was waived by the failure to timely raise it when procedural law prescribes it should be raised. Doyle v. State, 458 S.W.2d 637 (Tenn. Crim. App. 1970); Phillips v. State, 458 S.W.2d 642 (Tenn. Crim. App. 1970). See generally House v. State, 911 S.W.2d 705 (Tenn. 1995). Otherwise, a petitioner who was not successful in the trial court and failed to appeal could continually re-file in the trial court seeking the same relief. A judgment of dismissal by a trial court is binding on one who fails to appeal.

We are not unsympathetic to Moore's plight. It may well be that Moore has been caught in a legal quagmire which began when his first post-conviction counsel did not advise him of his right to appeal the dismissal of his petition. He then proceeded *pro se* to seek relief by filing his second petition in 1993. The trial court may or may not have been correct in dismissing this petition; however, Moore was required to appeal the dismissal if he felt aggrieved. The fact that the trial court did not appoint an attorney prior to or after the dismissal of the second post-conviction relief petition does not relieve Moore of his obligation to appeal. Regardless, finality of judgments is "[o]ne of the law's very objects." McCleskey v. Zant, 499 U.S. 467, 491 (1991).

The judgment of the trial court is affirmed.

J. STEVEN STAFFORD,
SPECIAL JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

WILLIAM M. BARKER, JUDGE