

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED

April 1, 1997

Cecil Crowson, Jr.

Appellate Court Clerk

**BENJAMIN
WOLFENBARGER,**

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 03C01-9603-CC-00124

HAMBLLEN COUNTY

**HON. JAMES E. BECKNER
JUDGE**

(Post-Conviction)

**ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF HAMBLLEN COUNTY**

FOR THE APPELLANT:

BENJAMIN WOLFENBARGER
Pro se

FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant filed his pro se "Two-Headed Petition" on October 20, 1995. The petition sought either post-conviction relief or habeas corpus relief. The trial court treated the petition as one for post-conviction relief and summarily dismissed it as barred by the statute of limitations. It is from the order of dismissal that the Defendant appeals. We affirm the judgment of the trial court.

The Defendant was convicted of being an habitual criminal and other crimes in 1985 and was sentenced to life in prison. This Court affirmed his conviction and the Tennessee Supreme Court denied his application for permission to appeal in 1987.¹ On October 20, 1995, the Defendant filed a petition seeking post-conviction relief and/or habeas corpus relief. The trial judge subsequently dismissed the petition as being barred by the three-year statute of limitations.

We first note that the issues presented by the Defendant in his petition for a writ of habeas corpus are not issues which may give rise to habeas corpus relief. Even if true, the allegations do not demonstrate that the Defendant's judgments of conviction are void, nor do they demonstrate that he is being held after his term of imprisonment has expired. The Defendant is not entitled to habeas corpus relief. See Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992).

¹State v. Benjamin L. Wolfenbarger, C.C.A. No. 220, Hamblen County (Tenn. Crim. App., Knoxville, Feb. 11, 1987), perm. to appeal denied (Tenn. 1987).

On this appeal, the Defendant argues that the trial judge erred when he determined that the Defendant's petition for post-conviction relief was barred by the statute of limitations. At the time the Defendant's convictions became final, the statute of limitations applicable to post-conviction proceedings was three years. Tenn. Code Ann. § 40-30-102 (repealed 1995). It is clear that this petition was filed some five years after the expiration of the three-year statute of limitations. The petition alleges violations of the Defendant's constitutional rights to protection from double jeopardy and to the effective assistance of counsel. Although the inartfully drafted petition apparently asserts that the application of the three-year statute of limitations would violate the Defendant's due process rights as set forth in Burford v. State, 845 S.W.2d 204 (Tenn. 1992), we conclude that the Defendant's Burford arguments are without merit.

The Defendant's primary argument on appeal is that he was granted an additional one-year period within which to bring a post-conviction petition by the provisions of the new Post-Conviction Procedure Act.²

We acknowledge that the new Post-Conviction Procedure Act is applicable to this petition and all petitions filed after May 10, 1995.³ This Act provides, in pertinent part, that "notwithstanding any other provision of this part to the contrary, any person having ground for relief recognized under this part shall have at least one (1) year from May 10, 1995, to file a petition or a motion to reopen a petition under this part." Compiler's Notes to Tenn. Code Ann. §40-30-201 (Supp. 1996) referring to Acts 1995, ch. 207, § 3. Another panel of this Court

²Tenn. Code Ann. § 40-30-201 et. seq. (Supp. 1996).

³Tenn. Code Ann. § 40-30-201 et seq. (Supp. 1996). See 1995 Tenn. Pub. Acts ch. 207, § 3.

has held, with one member dissenting, that the new Post-Conviction Procedure Act provides “a one-year window” during which each and every defendant may file a petition. Arnold Carter v. State, C.C.A. No. 03C01-9509-CC-00270, Monroe County (Tenn. Crim. App., Knoxville, July 11, 1996), perm. to appeal granted (Tenn. 1996). That case holds that the one-year window is available even if the petition would have been long ago barred by the three-year statute provided under the previous act.

Other panels of this court have followed the reasoning of the dissent in Arnold Carter v. State, and held that the 1995 Act did not provide previously barred defendants with a new one-year period during which to petition for post-conviction relief. Doyle Carter v. State, C.C.A. No. 01C01-9511-CC-00398, Davidson County (Tenn. Crim. App., Nashville, Feb. 12, 1997); Eric C. Pendleton v. State, C.C.A. No. 01C01-9604-CR-00158, Davidson County (Tenn. Crim. App., Nashville, Feb. 12, 1997); Wallace Butler v. Ricky Bell, Warden, C.C.A. No. 02C01-9510-CC-00297, Fayette County (Tenn. Crim. App., Jackson, Nov. 19, 1996); Johnny L. Butler v. State, C.C.A. No. 02C01-9509-CR-00289, Shelby County (Tenn. Crim. App., Jackson, Dec. 2, 1996); Stephen Koprowski v. State, C.C.A. No. 03C01-9511-CC-00365, Anderson County (Tenn. Crim. App., Knoxville, Jan. 28, 1997); Steve Koprowski v. State, C.C.A. No. 03C01-9511-CR-00378, Knox County (Tenn. Crim. App., Knoxville, Jan. 28, 1997). We likewise do not believe that the 1995 Post-Conviction Act revives any previously time-barred post-conviction relief claims, and we so hold.

For the reasons stated in this opinion, we conclude that the trial court did not err in dismissing the Defendant's petition. The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

THOMAS T. WOODALL, JUDGE