

OPINION

_____The appellant, David H. McClain, appeals the Shelby County Criminal Court's dismissal of his petition for post-conviction relief. On November 20, 1995, the appellant filed a *pro se* petition for post-conviction relief challenging the voluntariness of his guilty plea based upon ineffective assistance of counsel. The petition was dismissed without an evidentiary hearing. The trial court, in its ruling, found that the appellant's petition was prematurely filed in view of the fact that the appellant's appeal of its sentencing decision was still pending at the time.¹ The appellant now appeals from this decision.

This court has held that a petition for post-conviction relief may not be maintained while a direct appeal of the same sentence and conviction is pending. See Tenn. Code Ann. § 40-30-202(a) and (c) (1996 Supp.). See also Kindall v. State, No. 01C01-9605-CR-00178 (Tenn. Crim. App. at Nashville, Mar. 13, 1997); Denami v. State, No. 01C01-9603-CR-00121 (Tenn. Crim. App. at Nashville, Aug. 1, 1996); Denami v. State, No. 01C01-9507-CR-00224 (Tenn. Crim. App. at Nashville, July 5, 1996); see Jones v. State, No. 02C01-9103-CR-00038 (Tenn. Crim. App. at Jackson, Dec. 11, 1991) perm. to appeal denied, (Tenn. Dec. 30, 1991).² Therefore, the appellant's issue is without merit.

The Post-Conviction Procedure Act provides that:

a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which

¹This court has since rendered its opinion concerning the appellant's direct appeal. See State v. McClain, No. 02C01-9601-CR-00042 (Tenn. Crim. App. at Jackson, Mar. 19, 1997).

²While the above cases construe the repealed post-conviction statute, Tenn. Code Ann. § 40-30-102 (repealed 1995), the language contained in the new Act, Tenn. Code Ann. § 40-30-202(a), is virtually identical to the repealed provision, except for the narrowing of the time for the filing of a petition for post-conviction relief from three years to one year. Thus, these cases retain precedential value under the new Act.

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 a petition *shall be barred*.

Tenn. Code Ann. § 40-30-202(a) (1997) (emphasis added). On the date this petition was dismissed, December 6, 1995, this court had not rendered its judgment concerning the appellant's direct appeal. Thus, the appellant's conviction was not "final." The trial court's dismissal of the petition was based upon the premature filing of the petition in this case. Accordingly, the dismissal was without prejudice. The appellant has one year in which to appeal a judgment after the highest court to which the appeal is taken has rendered its final judgment.

The judgment of the trial court is affirmed pursuant to Rule 20, Tenn. Ct. Crim. App. R.

DAVID G. HAYES, Judge

CONCUR:

JOHN H. PEAY, Judge

PAUL G. SUMMERS, Judge