IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9902-CC-00082
	)	
	)	Cocke County
v.	)	
	)	Honorable Rex Henry Ogle, Judge
	)	
RALPH DEAN PURKEY,	)	(Post-conviction: Habitual criminal)
	)	
Appellant.	)	

For the Appellant:

Ralph Dean Purkey #110256
STSRCF, Unit #6
Route 4, Box 600
Pikeville, TN 37367
PRO SE

For the Appellee:

Paul G. Summers
Attorney General of Tennessee
and
Erik W. Daab
Assistant Attorney General of Tennessee
425 Fifth Avenue North
Nashville, TN 37243

Alfred C. Schmutzer, Jr.
District Attorney General
and
James B. Dunn
Assistant District Attorney
339A East Main Street
Newport, TN 37821

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The petitioner, Ralph Dean Purkey, appeals as of right from the order of the Cocke County Circuit Court holding that his petition for post-conviction relief was barred by the statute of limitations and dismissing the petition without appointing counsel or holding an evidentiary hearing. The petitioner is seeking relief from his 1986 convictions for grand larceny and concealing stolen property and his resulting sentence of life imprisonment as a habitual criminal. The petitioner contends the following:

> (1) the statute of limitations is tolled pursuant to Tenn. Code Ann. § 28-1-106 because of the petitioner's mental illness;
>
> (2) the trial court should have appointed counsel and conducted an evidentiary hearing; and
>
> (3) the trial court should have ruled on each ground presented by the petitioner, making findings of fact and conclusions of law pursuant to Tenn. Code Ann. § 40-30-211(b).

We affirm the trial court.

Preliminarily, the state notes that the petitioner did not file the notice of appeal in a timely fashion. The petitioner replies that he initially sent the notice of appeal to the return address on the envelope containing the dismissal order in this case. He states that he later determined that he sent the notice to the trial judge's chambers and that it was not forwarded to the trial court clerk. He then sent a notice to the clerk. In the interest of justice, we waive the time of filing of the notice of appeal.

The record reflects that on September 26, 1986, the petitioner was convicted of grand larceny and concealing stolen property worth over two hundred dollars. On October 31, 1986, the trial court dismissed the petitioner's motion for new trial because of the petitioner's escape status. No direct appeal was taken. Since the petitioner's return to custody, he has filed three pro se petitions for habeas corpus or post-conviction relief. The trial court summarily dismissed each of these petitions as

not justifiable and falling outside the applicable statute of limitations. The petitioner appealed the last dismissal with the benefit of counsel, but the dismissal was affirmed. Ralph Dean Purkey v. State, No. 03C01-9607-CC-00257, Cocke County (Tenn. Crim. App. Oct. 8, 1997).

As a starting point, we note that if the relevant statute of limitations for the post-conviction petition has not been tolled, then the petitioner is not entitled to the appointment of counsel, an evidentiary hearing, or a ruling by the trial court on each ground for relief raised by the petitioner. See Watkins v. State, 903 S.W.2d 302, 304 (Tenn. 1995). Those statutory rights only come into play if the petitioner has alleged facts that would entitle him to relief. See Blair v. State, 969 S.W.2d 423, 425 (Tenn. Crim. App. 1997). However, if it plainly appears from the petition and other relevant case proceedings available to the trial court that the statute of limitations has run, the trial court is required to enter an order that dismisses the petition and provides the reasons and facts that support the dismissal. See Tenn. Code Ann. § 40-30-206(b); Tenn. S. Ct. R. 28 § 6(B)(4). Thus, the statutory rights claimed by the petitioner in this case would not be triggered.

Based upon the face of the petition and the court records contained in the record on appeal, the statute of limitations ran long before the filing of the petition. However, the petitioner contends that application of the statute of limitations to bar post-conviction relief to a mentally incompetent petitioner who has been unable to file a petition timely violates due process. He relies upon Watkins, in which our supreme court held that "because a petitioner who was incompetent throughout the limitations period would be denied the opportunity to challenge his conviction in a meaningful manner, the failure to toll the limitations period would deny such a petitioner a fair and reasonable opportunity for the bringing of the petition, and thus, would violate due process." 903 S.W.2d at 307.

In response, the state asserts that Watkins does not apply to the 1995 Post-Conviction Procedure Act, which provides that a court is without jurisdiction to consider a post-conviction petition that is filed outside the statute of limitations. See Tenn. Code Ann. § 40-30-202. We also note that subsection 202(a) provides that the statute of limitations "shall not be tolled for any reason . . . ." As the state concedes, though, this court has previously held that due process mandates the tolling of the statute of limitations under the 1995 Act during periods of mental incompetence. See John Paul Seals v. State, No. 03C01-9802-CC-00050, Hamblen County (Tenn. Crim. App. Jan. 6, 1999), app. granted (Tenn. July 12, 1999); Vicky Lynn Spellman v. State, No. 02C01-9801-CC-00036, Tipton County (Tenn Crim. App. Aug. 21, 1998), app. granted (Tenn. Mar. 15, 1999).

The state suggests that the decision in this case await the outcome of the supreme court's review of Seals and Spellman. We do not believe a delay is necessary. Due process principles still require that a mentally incompetent petitioner be given an opportunity to obtain post-conviction relief in our state courts unhindered by a statute of limitations that runs regardless of the petitioner's mental status. In this respect, the reasoning in Watkins still applies relative to the 1995 Act.

However, we do not believe that the petitioner has alleged sufficient facts in the present case that, taken as true, warrant a legal conclusion that the petitioner was mentally incompetent to file a post-conviction claim at all times material to the statute of limitations issue. The petition purports to be signed by the petitioner but prepared by another inmate as "next friend" of the petitioner. In pertinent part, the petition states the following relative to the petitioner's claimed inability to file:

> 21. Petitioner is suffering from psychological dysfunction and illness as a result of apparent psychological and neurological brain damage. Among other things, Petitioner has a family history of hypoglycemia. Petitioner is now and has continued to experience radical mood swings, extreme depression, loss of memory, experiences an inability to recall even with recent

> events, displays poor judgment, and has difficulty thinking abstractly.
>
> 22. Petitioner Purkey is therefore of unsound mind by reason of apparent psychological impairment and is incompetent and thus incapable of maintaining these proceedings themself or of protecting his own constitutional rights in this cause.
>
> . . . .
>
> 26. . . . Petitioner has never been and is not currently competent in this case to raise or waive any of his claims for relief, nor was petitioner psychologically sound at the time of his conviction and sentence. Petitioner has a documented history of psychological illness, and a proper evaluation would reveal this. This evidence is a matter of record and located at, among others, STSRCF, Rt. 4, Box 600 Pikeville, Tennessee 37367.
>
> 27. Petitioner's psychological disability and incompetency in fact tolled the statute of limitations concerning the raising of any of his claims for relief in this cause.

The petition also alleges that the petitioner has never received an adequate psychological evaluation.

The standard for mental incompetence that tolls a statute of limitations in civil cases under Tennessee's disability statute, Tenn. Code Ann. § 28-1-106, stems from Porter v. Porter, 22 Tenn. 586 (1842), in which the supreme court stated about the deceased in question, "from her extreme old age and mental imbecility . . . [the deceased] was incapable of attending to any business, or of taking care of herself, and had to break up keeping house and remove to the house of a relative to be taken care of by a friend." Id. at 589. The court concluded that there was no doubt that she was "non-compos mentis." Id.; see Doe v. Coffey County Bd. of Educ., 852 S.W.2d 899, 905 (Tenn. Ct. App. 1992) (noting that the Porter formulation "is generally consistent with the common understanding of 'unsound mind'"). In this respect, one treatise states that the condition of the mind that tolls a statute of limitations must be "of such a nature as to show him unable to manage his personal affairs or estate, or to comprehend his legal rights or liabilities." C. S. Patrinelis, Annotation, Proof of Unadjudged Incompetency Which Prevents Running of Statute of Limitations, 9 A.L.R. 2d 964, 965

(1950). We believe the civil standard is the standard to be used in post-conviction cases, as well.

Mental incompetence for tolling purposes does not simply equate with mental illness. In Seaton v. Seaton, 971 F. Supp. 1188, 1195 (E. D. Tenn. 1997), the court noted that although a psychological evaluation reflected that the plaintiff had severe depression with psychotic symptoms, "it in no way states that she was so incompetent as to be unaware of the injuries she allegedly sustained through her husband's actions." Similarly, we do not believe that the petitioner's claim of radical mood swings, extreme depression, loss of memory, poor judgment, and difficulty with thinking abstractly shows that he has not had the capacity to handle his affairs or to understand his legal rights and circumstances.

Moreover, the petitioner's allegations do not show the existence of mental incompetence over the period of time needed to make his present petition viable. We acknowledge that the petitioner has alleged that he "has never been and is not currently competent" and is mentally disabled. However, we view these allegations, in context, to be nothing other than conclusory claims that are not otherwise supported by the petitioner's remaining allegations. Thus, we hold that the trial court properly dismissed the petition as time-barred.

In consideration of the foregoing and the record as a whole, we affirm the trial court.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
John Everett Williams, Judge

_____
Alan E. Glenn, Judge