



## OPINION

The petitioner, Terry Stogdill, appeals the Claiborne County Criminal Court's dismissal of his petition for post-conviction relief. Stogdill is currently serving an effective twenty year sentence for convictions of rape of a child and incest. State v. Terry Franklin Stogdill, No. 03C01-9507-CC-00188 (Tenn. Crim. App., Knoxville, June 10, 1998), perm. app. denied (Tenn. 1999) (concurring in results only). He filed a premature, *pro se* petition for post-conviction relief. The trial court held the petition in abeyance until after the Criminal Court of Appeals decided the defendant's direct appeal. Less than 60 days after this court filed an opinion in the petitioner's appeal, the trial court dismissed the petition. Subsequently, the petitioner was denied permission to appeal to the supreme court. In this appeal of the trial court's ruling, the petitioner challenges only that the trial court dismissed the petition on its merits. Using grounds other than those stated by the trial court, we affirm the dismissal.

The petitioner's case was on direct appeal when this petition for post-conviction relief was filed. On July 17, 1997, the petitioner filed a *pro se* petition for post-conviction relief. On August 15, 1997, the trial court held the petition in abeyance because the petitioner's direct appeal was still pending. On June 10, 1998, this court affirmed the rape of a child and incest convictions. On July 30, 1998, the trial court dismissed this petition, although the 60 day period for filing for permission to appeal had not yet run. See Tenn. R. App. P. 11(b). On January 25, 1999, our supreme court denied permission to appeal.

A petition for post-conviction relief may not be maintained while a direct appeal of the same conviction is pending. Jones v. State, 2 Tenn. Crim. App. 284, 453 S.W.2d 433 (Tenn. Crim. App. 1970). In State v. Mixon our supreme

court, in comparing the coram nobis statute of limitation with that of post-conviction, recognized the clear language of the post-conviction statute in which “a petition must be filed ‘within one (1) year of the date of *the final action of the highest state appellate court to which an appeal is taken.*’” State v. Mixon, 983 S.W.2d 661, 670 (Tenn. 1999) (quoting Tenn. Code Ann. § 40-30-202(a) (1997)) (emphasis in original). On the date this petition was dismissed, our supreme court had not ruled on the petitioner's application for review of his direct appeal. Thus, the petition was filed prematurely.

In Jones, our court explained the rationale for not allowing consideration of a petition for post-conviction relief while the direct appeal is pending:

It is generally held that whenever a court has acquired jurisdiction of a case, no other court may . . . interfere with its action in matters concerning which it has acquired jurisdiction. For example, if an appellate court has acquired jurisdiction by virtue of an appeal from a judgment of conviction, no other court may discharge the defendant during the pendency of the appeal. That is to say, a court has no power to grant [relief] pending an appeal to another court from a conviction in a criminal prosecution.

453 S.W.2d at 434 (quoting 39 Am. Jur.2d., Habeas Corpus, § 107).

This court has applied the rationale of Jones to petitions filed after the passage of the new Act. See Green v. State, No. 01C01-9709-CR-00393 (Tenn. Crim. App., Nashville, Oct. 28, 1998); David McClain v. State, No. 02C01-9608-CR-00308, slip op. at 2 (Tenn. Crim. App., Jackson, Nov. 6, 1997). Because the petition was filed prematurely, the petition is dismissed. However, because the trial court's order of dismissal was based upon the determination of issues on the merits, the judgment must be modified to reflect that the basis for the dismissal of the

petition is premature filing. On remand, the trial court shall enter a revised judgment.

In his brief, the petitioner asked for one year to file his petition, or in the alternative, an additional 60 days to amend his petition. However, because one year has not yet passed since the supreme court's January 25, 1999 denial of the petitioner's application for permission to directly appeal his conviction, time still remains for the filing of a petition for post-conviction relief.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE