

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
OCTOBER 1999 SESSION**

FILED
December 7, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM LEE DRUMBARGER,

Appellant,
M1999 01444 CCA R3PC

vs.

STATE OF TENNESSEE,

Appellee.

)
) C.C.A. No.

) Davidson County

) Hon. J. Randall Wyatt, Jr., Judge

) (Post-conviction)

FOR THE APPELLANT:
DAVID BORDENKIRCHER
Attorney at Law
500 Paragon Mills Rd., Ste. G-6
Nashville, TN 37211-3734

FOR THE APPELLEE:
PAUL G. SUMMERS
Attorney General & Reporter

ELIZABETH T. RYAN
Assistant Attorney General
425 Fifth Ave. North
2d Floor, Cordell Hull Bldg.
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General
222 Second Ave. North, Ste. 500
Nashville, TN 37201-1649

OPINION FILED: _____

APPEAL DISMISSED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The petitioner, William Lee Drumbarger, purports to appeal from the trial court's dismissal of his motion to reopen his post-conviction petition. See Tenn. Code Ann. § 40-30-217 (1997). The petitioner is presently serving five life sentences and a 35-year sentence, all concurrently, for his 1983 convictions of five counts of aggravated rape and one count of aggravated sexual battery. See William Lee Drumbarger v. State, No. 01C01-9105-CR-00142 (Tenn. Crim. App., Nashville, Nov. 21, 1991), perm. app. denied (Tenn. 1992). In this action, he seeks to reopen a post-conviction petition that was dismissed by the Davidson County Criminal Court in June 1997. He raises various allegations, including allegedly deficient reasonable doubt jury instructions, ineffective assistance of counsel, insufficient indictments, and exemption from the statute of limitations. Upon review, we find that the defendant failed to follow the proper procedure for seeking appellate review of the lower court's denial of the motion to reopen. Accordingly, we dismiss this appeal as not properly before the court.

The Post-Conviction Procedure Act provides

If the motion [to reopen] is denied, the petitioner shall have ten (10) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion. The state shall have ten (10) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. If it determines that the trial court did so abuse its discretion, the court of criminal appeals shall remand the matter to the trial court for further proceedings.

Tenn. Code Ann. § 40-30-217(c) (1997) (emphasis added). This court has “no authority to ignore the statutory limit of ten days for filing an application seeking permission to appeal a denial of a motion to reopen.”¹ Denver Joe McMath, Sr. v. State, No. 03C01-9712-CR-00525, slip op. at 3 (Tenn. Crim. App., Knoxville, Feb.

¹We acknowledge that the Rules of Appellate Procedure provide that a “notice of appeal” document is not jurisdictional in criminal cases, and this court may waive the timely filing of such document in the interest of justice. Tenn. R. App. P. 4(a). However, appellate scrutiny of a trial court's denial of a motion to reopen is initiated by the statutory guidelines of the Post-Conviction Procedure Act, not by notice of appeal as prescribed by the Rules of Appellate Procedure. Thus, Rule 4(a) does not provide us an avenue for waiving the Act's requirements in the interest of justice. But cf. Maurice Donaldson v. State, No. 01C01-9611-CR-00463 (Tenn. Crim. App., Nashville, Feb. 18, 1998) (although petitioner failed to follow procedure of Code section 40-30-217(c), appellate court reviewed case on its merits), perm. app. denied (Tenn. 1998).

9, 1999).

The petitioner in the case at bar did not follow the application for appeal procedure of section 40-30-217(c). The trial court dismissed his motion to reopen on December 15, 1998, and he filed a notice of appeal in the trial court on January 14, 1999. The notice of appeal was filed with the clerk of the appellate courts on January 15, 1999. Its wording is that typical of an appeal as of right, see Tenn. R. App. P. 3, and it wholly fails to indicate that the petitioner is applying for review of the trial court's denial of his motion to reopen. None of the required documents prescribed by section 40-30-217(c) are attached. Perhaps most significantly, the filing was not within the ten days prescribed by the statute.

The petitioner's case is not properly before the court. See, e.g., Jimmy Wayne Wilson v. State, No. 03C01-9611-CR-00409, slip op. at 6-7 (Tenn. Crim. App., Knoxville, Oct. 30, 1997); Daniel Villers v. State, No. 01C01-9704-CR-00129 (Tenn. Crim. App., Nashville, Nov. 4, 1997) (order), perm. app. denied (Tenn. 1998). Accordingly, the appeal is dismissed.

JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

JOE G. RILEY, JUDGE

THOMAS T. WOODALL, JUDGE