

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED

October 23, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

GAILE K. OWENS and)	
PERVIS T. PAYNE,)	
)	Appeal No.
Appellants/Appellees,)	02-S-01-9407-CR-00044
)	
v.)	Shelby Criminal
)	
STATE OF TENNESSEE,)	Honorable Arthur Bennett
)	and
Appellee/Appellant.)	Honorable Bernie Weinman

DISSENT

I respectfully dissent from the majority's opinion that Tennessee Code Annotated section 40-14-207(b)(1990) applies to post-conviction cases.

Whether post-conviction petitioners are entitled to expert support services at state expense is primarily a question of statutory interpretation involving three main provisions: (1) Tennessee Code Annotated section 40-30-101, *et seq.*, the Post-Conviction Procedure Act, focusing primarily on Tennessee Code Annotated section 40-30-121(1990), which deals with the determination of indigency and appointment of counsel and court reporters in post-conviction cases; (2) Tennessee Code Annotated section 40-14-201, *et seq.*, dealing with counsel for indigents; and (3) Rule 13 of the Supreme Court of Tennessee, promulgated pursuant to Tennessee Code Annotated section 40-14-206(1990). **Allen v. McWilliams**, 715 S.W.2d 28, 30 (Tenn. 1986).

The natural and ordinary meaning of the language used in the statutes reveals no intention of the General Assembly to provide state subsidized support services to indigent post-conviction petitioners.

Tennessee Code Annotated section 40-30-101, *et seq.* governs post-conviction proceedings. The portion of the Post-Conviction Procedure Act relevant to this issue is section 40-30-121 which provides as follows: "**Determination of indigency - Appointment of counsel and court reporters.** - Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by chapter 14, parts 2 and 3 of this title." The plain language of this section incorporates the counsel and court reporter provisions of chapter 14.

The General Assembly passed Tennessee Code Annotated section 40-14-201, *et seq.* in 1965 following the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963). *Allen*, 715 S.W.2d at 30. Sections 40-14-206 through 40-14-210 relate directly to compensation of counsel for indigent defendants. The primary portion of this part is section 40-14-207(b) which provides:

In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

Tenn. Code Ann. § 40-14-207(b)(1990).

The sole reference made to capital cases denominates the party potentially entitled to support services as the "defendant," not the petitioner. Further, because Tennessee Code Annotated section 40-30-121 specifically incorporates only the counsel and court reporter provisions in chapter 14, the provisions in section 40-14-207(b) are simply additional support services that the General Assembly did not intend to apply to post-conviction cases.

The Supreme Court promulgated Rule 13 pursuant to Tennessee Code Annotated section 40-14-206 which provides that "the supreme court shall prescribe by rule the nature of the expenses" for which the state will allow reimbursement. Tenn. Code Ann. § 40-14-206(1990). The statute specifically limits the authority of the court to prescribe those rules normally required to ensure compliance with the provisions of title 40, chapter 14. **See id.** Rule 13 does not create any right for defendants or petitioners not created by statute. Because neither the Post-Conviction Procedure Act, Tennessee Code Annotated section 40-30-101 *et seq.*, nor title 40, chapter 14, dealing with the rights of defendants, provide for support services at state expense, we cannot consider Rule 13 to grant such authority.

Rule 13 is divided into two parts. The first part deals with the appointment of counsel, and the second deals with the compensation for appointed counsel. Rule 13 defines a capital case for purposes of the Rule and the court as follows:

A case in which an individual is indicted for an offense that is punishable by death and wherein the district attorney general announces to the court at any time, prior to the presentation proof, that the state will insist upon the death penalty. See Tenn. Code Ann. § 40-14-207.

Tenn. S. Ct. R. 13, § 1.

The plain language used in Rule 13 to effectuate the intent of section 40-14-206 instructs us that the court is to apply the rule only to the trial of a criminal defendant, not to collateral proceedings filed after trial, conviction, or sentencing. A post-conviction action is not a "case...wherein the District Attorney General announces...that the state will insist upon the death penalty." **Id.**

Our courts recognize that "[t]he fundamental rule of

statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the legislature as expressed in the statute." **Worrall v. Kroger Co.**, 545 S.W.2d 736, 738 (Tenn. 1977). "[L]egislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without any forced or subtle construction to limit or extend the import of the language." **Id.** The absence of any requirement for the provision of support services at state expense for indigent post-conviction petitioners is dispositive of this issue. Presumably, the legislature would have included a requirement had it intended such an application.

Rule 706(b) of the Tennessee Rules of Evidence specifically provides that the compensation for experts appointed by the court in bench tried issues is payable from "funds which may be provided by law in criminal cases and civil actions and condemnation proceedings." Rule 706(b) does not, by itself, authorize a court to appoint such an expert at state expense. Instead, it requires compensation only if "provided by law."

The conclusion that the legislature did not authorize support services for indigent post-conviction petitioner in title 40, chapters 14 or 30 is consistent with prior opinions of the court of criminal appeals, none of which this court reviewed pursuant to Tennessee Rule of Appellate Procedure 11.

The primary case relied on by both the trial court and the court of appeals in deciding the issue in this case was **Teague v. State**, 772 S.W.2d 915 (Tenn. Cr. App. 1988), *cert. denied*, 493 U.S. 874, 110 S. Ct. 210, 107 L. Ed. 2d 163 (1989). In **Teague**, the petitioner retained an attorney and investigator for his trial.

Id. at 927. On two separate occasions during the post-conviction process, his trial attorney moved for the appointment of a second attorney and for an investigator at state expense. The court appointed a second attorney to assist the petitioner, but it denied his request for investigative services. *Id.* The court of criminal appeals affirmed the trial court's denial of an investigator and unanimously held:

A fair reading of T.C.A. Sec. 40-14-207(b) and Rule 13 of the Tennessee Supreme Court, coupled with the fact that T.C.A. Sec. 40-30-121 is silent as to these matters, leads this Court to the conclusion that the provisions of this statute and rule are limited in scope and application to the trial of an accused for a capital offense when the district attorney general has announced his intention to seek the death penalty. The statute and rule do not apply to post-conviction proceedings notwithstanding the fact the petitioner has been sentenced to the extreme penalty of death.

Id. at 927.

Both before and after the decision in *Teague*, the Court of Criminal Appeals held that Tennessee Code Annotated section 40-14-207(b) had no application to post-conviction proceedings. **See** *State v. Laney*, No. 873, 1989 WL 150839, at *4 (Tenn. Cr. App. at Knoxville 14 December 1989); *Caruthers v. State*, No. 1164, 1988 WL 124013, at *6 (Tenn. Cr. App. at Knoxville 22 November 1988).

Neither the Due Process Clause nor the Equal Protection Clause of the United States Constitution requires that the state provide post-conviction petitioners with experts at state expense. Likewise, there is nothing in the Tennessee Constitution which the court can construe to provide post-conviction petitioners with experts at state expense.

A look at the analysis utilized by the United States Supreme Court to determine the extent of process required in indigent post-conviction petitions is instructive in resolving this issue. The

proper starting point is to know that the Constitution does not require post-conviction procedures. *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S. Ct. 1990, 1994, 95 L. Ed. 2d 539, 547 (1987). However, once a state chooses to provide post-conviction remedies, it must do so in a manner that meets constitutional standards. *See id.* In *Finley*, the Supreme Court held that the fundamental rights as mandated by the Due Process Clause do not require states to supply a lawyer in the post-conviction context. *Id.* The court based the decision in *Finley* on its holding in *Ross v. Moffitt*, 417 U.S. 600, 610, 94 S. Ct. 2437, 2443-44, 41 L. Ed. 2d 341, 351 (1974) that the right to appointed counsel extends to the first appeal as of right and no further. This dichotomy between the stages of a criminal proceeding, with the trial and direct appeal as of right on one side and discretionary appeals and collateral attacks on the other, is based upon the change in the position of the parties. Once the defendant becomes the party initiating the legal proceeding, the constitutional considerations are different.

[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "hailed into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determinations of guilt.

Ross, 94 S. Ct. at 2444.

A person's right to counsel ends with the conclusion of the first stage of direct appeal. The *Ross* considerations apply with more force to post-conviction review. *Finley*, 107 S. Ct. at 1994. In *Finley*, the court logically reasoned that "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction [he certainly] has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

Id. at 1993. For the Constitution to require support services for indigent capital post-conviction petitioners, but not to require counsel makes no sense whatsoever. In the absence of a constitutional right to counsel, there can be no constitutional right to support services at state expense.

While this court is always the final arbiter of the Tennessee Constitution and is free to expand the minimum level of protection mandated by the federal constitution, the court noted in *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992) that it has long been its practice to construe article I, section 8 of the Tennessee Constitution synonymously with the fifth and fourteenth amendments of the United States Constitution. The standards of due process followed by the federal courts are sufficient to protect the rights of indigent post-conviction petitioners in Tennessee.

For the foregoing reasons I respectfully dissent from so much of the majority's opinion that holds that indigent post-conviction petitioners who have been convicted with a capital offense and sentenced to death are entitled to state paid, investigative, or expert services.

SAMUEL L. LEWIS, JUDGE

CONCURS:

FRANK F. DROWOTA, III, JUSTICE