

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs May 6, 2014

**KEVIN WOMACK v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Madison County**  
**No. C-13-224 Donald H. Allen, Judge**

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**No. W2013-02288-CCA-R3-PC - Filed October 31, 2014**

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On July 26, 2012, this court affirmed judgments regarding the petitioner, Kevin Womack, for possession of cocaine with intent to sell, possession of cocaine with intent to deliver, possession of a firearm with intent to employ in the commission of a dangerous felony, possession of drug paraphernalia, theft of property over \$500, and tampering with evidence, reducing the theft conviction from a Class E felony to a Class A misdemeanor. State v. Kevin Womack, No. W2011-01827-CCA-R3-CD, 2012 WL 3055773, at \*1 (Tenn. Crim. App. July 26, 2012). No application for permission to appeal was filed. On August 8, 2013, he filed a pro se petition for post-conviction relief, asserting that he did not file a Rule 11 application because his trial counsel had filed a motion to withdraw, “informing the petitioner his application [for permission to appeal] must [be] filed by September 24, 2012.” He argued that his post-conviction petition was timely because it was filed within one year of this date. The State responded that the petition was untimely, and the post-conviction court agreed, dismissing the petition for this reason. On October 15, 2013, the petitioner filed his notice of appeal regarding that dismissal. Following our review, we affirm the judgment of the post-conviction court’s dismissal of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the Court, in which CAMILLE R. MCMULLEN, J., joined. JOSEPH M. TIPTON, J., Not Participating.

Kevin Womack, Tiptonville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; James G. Woodall, District Attorney General; and Shaun A. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### FACTS

The petitioner explained in his post-conviction petition that “the statute of limitations does not bar his claim, because his claim [was] filed within one year after the September 24, 2012 Rule 11 application had expired.” After the State responded to the petition, the post-conviction court entered an order dismissing the petition, finding that the final action regarding the petitioner’s convictions occurred on July 26, 2012, when this court affirmed the judgments of conviction, as we have set out. Since the petitioner did not then file an application for permission to appeal, his August 8, 2013 petition for post-conviction relief was untimely. On appeal, he argues that “since the 60 days to file[] an application for permission to appeal[] to the Tennessee Supreme Court toll [sic] the Court of Criminal Appeals July 26, 2012 Order, until September 25, 2012, and the failure of his trial counsel to timely file[] the application on September 25, 2012, than [sic] the one year[] to file the post conviction petition should start from September 25, 2012, thereby the petitioner[’s] post conviction petition on August 8, 2013 should be consider[ed] timely filed.”

Post-conviction relief is warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. Tenn. Code Ann. § 40-30-103 (2012). The burden in a post-conviction proceeding is on the petitioner to prove the factual allegations in support of his or her grounds for relief by clear and convincing evidence. Id. § 40-30-110(f); Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). On appeal, we are bound by the post-conviction court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). A post-conviction court’s conclusions of law, however, are subject to de novo review with no presumption of correctness. Id. at 457.

Under the Post-Conviction Procedure Act, a claim for post-conviction relief 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 or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.” Tenn. Code Ann. § 40-30-102(a) (2012).

The post-conviction statute contains a specific anti-tolling provision:

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to

reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

Id.

Subsection (b) of the statute sets forth the three narrow exceptions under which an untimely petition may be considered, none of which apply in this case. See id. § 40-30-102(b). However, in addition to the three narrow exceptions listed in the statute, principles of due process may allow for the tolling of the statute of limitations in limited circumstances. See Seals v. State, 23 S.W.3d 272, 279 (Tenn. 2000) (“[W]e conclude that while the one-year statute of limitations set forth in Tenn. Code Ann. § 40-30-202(a) does not violate due process on its face, application of the statute must not deny a petitioner a reasonable opportunity to raise a claim in a meaningful time and manner.”); see also Williams v. State, 44 S.W.3d 464, 468 (Tenn. 2001); Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992).

In the post-conviction court, the petitioner neither claimed that due process required tolling of the statute of limitations nor that one of the exceptions applied. The petitioner’s possible misunderstanding of the date when the statute began to run does not excuse the untimely filing of his petition. See Barry N. Waddell v. State, No. M2001-00096-CCA-R3-PC, 2001 WL 1246393, at \*3 (Tenn. Crim. App. Oct. 17, 2001), perm. app. denied (Tenn. Apr. 8, 2002). Accordingly, we affirm the summary dismissal of the petition.

**CONCLUSION**

Based upon the following authorities and reasoning, we conclude that we are without jurisdiction to consider the untimely petition and affirm the dismissal by the post-conviction court.

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ALAN E. GLENN, JUDGE