IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	E2010-02385-CCA-R3-PD
v.	)	KNOX COUNTY CRIMINAL
	)	
BILLY RAY IRICK,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE KNOX COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

ROBERT E. COOPER, JR.
Attorney General & Reporter

JAMES E. GAYLORD
Assistant Attorney General
Criminal Justice Division
425 5th Avenue North
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-7356
B.P.R. No. 20755

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QUESTION PRESENTED

Whether the trial court properly exercised its discretion in denying Irick's petition for a writ of error *coram nobis*.

STATEMENT OF THE CASE

Billy Ray Irick ("Irick") was sentenced to death for the felony murder and aggravated rape of a seven-year-old girl in 1986. *See State v. Irick*, 762 S.W.2d 121, 124 (Tenn. 1988). His motion for a new trial was denied by the Criminal Court of Knox County, Tennessee, on December 1 of that year. (*See* Order of 11/10/10, at 1.)

Some twenty-three years later, Irick filed a petition for a writ of error *coram nobis*. (*Id.* at 1, 4.) The trial court conducted a hearing—at which no testimony was presented (Tr. 1)—took judicial notice of all proceedings and records in Irick's case (Order of 11/10/10, at 4), and denied the petition (*id.* at 22). The court concluded that, even if the grounds for relief alleged in the petition were "later arising" for purposes of the statute of limitations, they arose in 1999, and due process did not require that the statute be tolled for a period of eleven years. (*Id.* at 18-20.)

Irick appeals.

STATEMENT OF FACTS

Irick interposed no insanity defense at his trial. At the penalty phase, however, he advanced the testimony of clinical social worker Nina Braswell Lunn in mitigation. *See Irick v. State*, 973 S.W.2d 643, 661 (Tenn. Crim App. 1998). Based upon review of Irick's records and her own interaction with him as a child, Ms. Lunn opined that Irick suffered from "a behavioral disorder, probably unsocialized, aggressive." (Trial Tr. 1020.) In rebuttal, the State called psychiatrist Clifton R. Tennison, Jr. (Trial Tr. 1065); *Irick*, 973 S.W.2d at 661. It was Dr. Tennison's diagnostic impression that Irick had an anti-social personality disorder. (Trial Tr. 1069); *Irick*, 973 S.W.2d at 661.

In 1989, Irick filed a petition for post-conviction relief in which he alleged, among other things, that his trial counsel were ineffective for failing to investigate his personal and medical history, and to obtain adequate expert and investigative assistance. *See Irick*, 973 S.W.2d at 648 (Tenn. Crim App. 1998). In support of this claim, Irick presented the testimony of neuropsychologist Pamela Auble, who testified that Irick had a "serious mixed personality disorder," and that brain damage could not be ruled out. *Id.* In response, lead defense counsel Kenneth Miller testified that the defense team obtained records of Irick's childhood institutionalizations, had him evaluated by a psychiatrist at the Ridgeview Psychiatric Hospital in Oak Ridge, Tennessee, had him examined by psychologist Diana McCoy, and sought a neuropsychological examination. *See id.* at 650. Mr. Miller indicated that a strategic

decision not to call Dr. McCoy or the psychiatrist had been made because they had referred to Irick as a sociopath. *Id.* Irick's petition for post-conviction relief was denied, and he abandoned this aspect of his ineffective assistance of counsel claim on appeal to this Court. *See id.* at 651 (summarizing issues raised on appeal respecting ineffective assistance of counsel).

Following the denial of post-conviction relief in the state courts, Irick requested and was appointed federal counsel in habeas corpus proceedings. (*See, e.g., Irick v. Bell*, No. 3:38-cv-00666 (E.D. Tenn. Jan. 22, 1999) (Docket No. 10, order appointing counsel). In those proceedings, Irick's attorneys sought the appointment of mental health experts. (683-89.) A magistrate judge declined to do so, reasoning on the basis of the state-court record that trial counsel had investigated Irick's psychological condition and determined that it would not be beneficial to introduce the information to the jury. (693.) Irick objected, adducing lay affidavits averring that Irick mumbled to himself, reported hearing voices, and had acted violently toward others in the days leading up to the murder, together with the affidavit of a non-examining psychologist opining that Irick suffered from a dissociative disorder and was probably psychotic at the time of his offense. (697-701.) The district court affirmed the ruling of the magistrate judge, concluding that Irick had defaulted his ineffective assistance of counsel claim relating to mental health issues in state court. (738.)

On March 30, 2001, the district court dismissed Irick's habeas petition, finding, among other things, that Irick had failed to present reliable evidence in support of a gateway claim of actual innocence due to a previously undiagnosed mental condition. *See Irick*, No. 3:38-cv-00666 (Docket No. 146, mem. op. at 56-63.) Simultaneously, the district court entered an order declining to certify any issue for appeal. *See id.* (Docket No. 147, order of 3/30/01, at 1.) The United States Court of Appeals for the Sixth Circuit would later allow Irick to appeal a *Brady* and a prosecutorial misconduct claim, but denied a certificate of appealability as to his actual-innocence-by-reason-of-insanity claim. *See id.* (Docket No. 167, order of 2/1/08, at 4.) Irick filed a petition for a writ of certiorari in the United States Supreme Court as to certain issues as to which a certificate had not issued, including whether he had made a threshold showing of actual innocence on the basis of insanity at the time of the offense. That petition was denied. *Irick v. Bell*, 129 S. Ct. 596 (Nov. 17, 2008).

On May 12, 2009, the Sixth Circuit affirmed the dismissal of Irick's habeas petition. *Irick v. Bell*, 565 F.3d 315, 319 (6th Cir. 2009). The Supreme Court denied Irick's petition for a writ of certiorari, in which he again sought review of his expert-funding and actual-innocence-by-reason-of-insanity claims. *Irick v. Bell*, 130 S.Ct. 1504 (Feb. 22, 2010), *pet. reh'g denied*, 130 S.Ct. 2142 (Apr. 19, 2010).

Following completion of the standard three-tier appeals process, the State moved the Tennessee Supreme Court to set an execution date. *State v. Irick*, No.

M1987-00131-SC-DPE-DD (Tenn. May 10, 2010). Irick opposed the motion, requested a certificate of commutation, and raised a claim of incompetency to be executed. *Irick*, No. M1987-00131-SC-DPE-DD (Tenn. May 27, 2010). In his papers, Irick presented the evidence of insanity that he had filed with the federal district court in 1999; an Initial Classification Psychological Summary from the Riverbend Maximum Security Institution dated December 12, 1986; the affidavit of Clifton Tennison dated February 25, 2010; and the report of psychiatrist Peter Brown dating to April 2010. *Id.* The Psychological Summary reflected that, after being convicted, Irick scored at a high level in the thought disturbance and self-depreciation scales on a psychological screening instrument. (278.) Dr. Tennison's affidavit explained that, in view of the information contained in the 1999 affidavits, "no confidence" should be placed in his 1985 opinion as to Irick's competency, and that he would have recommended that Irick be evaluated on an inpatient basis. (896-99.) Dr. Brown's report indicated that his own examination of Irick had yielded no evidence of a formal thought disorder, but—based largely on the 1999 affidavits—that it was "more likely than not" that Irick was insane at the time of the murder. (907-32.)

On June 28, 2010, while the State's motion to set an execution date was pending, Irick filed a motion to reopen his post-conviction proceedings in the Criminal Court for Knox County. *See Irick v. State*, No. E-2010-01740-CCA-R28-PD, slip op. at 3 (Tenn. Crim. App. Sep. 16, 2010), *perm. app. denied* Nov 17, 2010. That

motion was predicated on Dr. Brown's report which, Irick asserted, amounted to new scientific evidence establishing that he was actually innocent of the offense. *Id.* The trial court denied the motion. *Id.* at 9. This Court denied permission to appeal pursuant to Tenn. Sup. Ct. R. 28(10)(b). *Id.* at 1. The Court found that the 1999 lay affidavits were more appropriately considered the "new" evidence upon which Irick's claims were based, and that the information that they contained "does not constitute 'scientific evidence' making the Petitioner's 'actual innocence' claim an appropriate basis upon which to re-open his prior post-conviction proceedings." *Id.* at 12. Additionally, the Court ruled that, "[b]ecause Dr. Brown's report establishes only a likelihood that the Petitioner suffered from unspecified cognitive and psychotic disorders that could have supported the conclusion that he was insane at the time of the offenses, the report was insufficient as a matter of law to support the re-opening of Petitioner's prior post-conviction proceeding." *Id.*

On July 19, 2010, the Tennessee Supreme Court set an execution date of December 7, 2010, and remanded Irick's competency claim to the Criminal Court of Knox County. *Irick*, No. M1987-00131-SC-DPE-DD (Tenn. July 19, 2010). After Irick filed his petition to determine competency in the trial court, the court ordered an evidentiary hearing and appointed two mental health experts, including Dr. Brown, to evaluate him. *State v. Irick*, 320 S.W.3d 284, 287 (Tenn. 2010). Following the hearing, the trial court found Irick competent by order dated August 20, 2010. *Id.* The Tennessee Supreme Court affirmed on September 22, 2010. *Id.*

On October 14, 2010, Irick filed his petition for a writ of error *coram nobis*. (*See* Order of 11/10/10, at 1.) The petition is based on the same categories of evidence that were presented to the Tennessee Supreme Court in Irick's response to the motion to set an execution date, together with the testimony of Dr. Brown at the competency hearing. (Pet. at 1-2.) In an accompanying affidavit, Irick avers that he has "no knowledge or memory of having done or experienced any of the things described" in the 1999 federal habeas affidavits. (Pet. Ex. 4 ¶ 3.) Irick's state trial and post-conviction counsel also supplied affidavits. (Pet. Exs. 1-3.) While each attorney acknowledges not having interviewed the 1999 affiants, each avers that "we had no information, nor in my opinion, reason to believe, that these individuals had any information" regarding Irick's mental health. (*Id.* ¶ 3.) Each further states that, in his opinion, he "used reasonable diligence and was not negligent in the search for relevant facts . . . ." (*Id.* ¶ 4.)

ARGUMENT

The Trial Court Properly Denied Irick's Petition for a Writ of Error *Coram Nobis*

Coram nobis claims are subject to a one-year statute of limitations, Tenn. Code Ann. § 22-7-103, measured thirty days from the date of entry of an order disposing of a timely filed post-trial motion, *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999). Due process considerations may require tolling of the statute of limitations where a petitioner seeks a writ based on newly discovered evidence of actual innocence. *Workman v. State*, 41 S.W.3d 204, 208 (Tenn. 1992). The due process inquiry follows a three-step analysis:

> (1) determine when the limitations period would normally have begun to run;
>
> (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and
>
> (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

Grounds for relief may "actually arise" after commencement of the limitations period where the prosecution suppresses evidence. *See Workman*, 41 S.W.3d at 103 (allowing tolling where claimant subpoenaed x-ray evidence, but it was not provided); *Harris v. State*, 301 S.W.3d 141, 143, (Tenn. 2010) (considering tolling where claimant alleged that the State had failed to disclose the identity of a purported alibi witness). A petitioner's knowledge of the matter as to which the allegedly suppressed

evidence is addressed may create a factual dispute such that the conduct of an evidentiary hearing is appropriate to resolve the issue whether the grounds are later-arising. *See Harris*, 301 S.W.3d at 145-46 & n.2. Additionally, an intervening change in the law can give rise to new grounds for relief. *See Sands*, 903 S.W.2d at 302 (considering, but rejecting, claim that retroactive application of rule regarding constitutionality of jury instruction was a later-arising ground).

Where grounds are later-arising, petitioners must present their claims within a time period that does not exceed the reasonable opportunity afforded by due process. *See Harris*, 301 S.W.3d at 146. In this regard, the ability to present the new evidence in a related but independent cause of action is, as a matter of law, insufficient to support tolling of the statute of limitations. *See id.* ("No statute in Tennessee nor tolling rule developed at common law provides that the time for filing a cause of action is tolled during the period in which a litigant pursues a related but independent cause of action."). The Tennessee Supreme Court has, moreover, held in such circumstances that delays in seeking *coram nobis* relief of six years and of twenty-one months are unreasonable as a matter of law. *See id.* at 147.

The decision whether to grant or deny a petition for a writ of error *coram nobis* rests within the sound discretion of the trial court. *Id.* at 144. The question whether due process considerations require tolling of the statute of limitations is a mixed one of law and fact that is reviewed de novo. *Id.* at 145.

I. Iricks' Grounds Are Not Later-Arising.

Guided by this Court's determination that the evidence that Irick presented in support of his motion to reopen his post-conviction proceeding was "new" only to the extent that it relied upon the 1999 affidavits, the trial court treated—with evident reluctance—his claim as having arisen then. (*See* Order of 11/10/10, at 17 (stating that "this Court tends to agree with the state that this evidence is not 'new' in the sense that the issue was investigated and considered pretrial," but that the issue was disputed).) While this approach is sensible—since Irick cannot explain an eleven-year delay any better than he can a twenty-three year one—the State cannot concede that the grounds upon which Irick seeks relief "actually arose" subsequent to the commencement of the limitations period.

The only evidence that Irick can assert was earlier unavailable to him as a result of state action is the 1986 Initial Classification Psychological Summary. Because that document was generated after Irick's conviction, it could not have been used in connection with his trial. Even if it could have been, moreover, the record of his competency proceeding reflects that he "has not been treated for mental illness during his incarceration." *State v. Irick*, 320 S.W.3d 284, 295 (Tenn. 2010). Consequently, the Psychological Summary cannot establish Irick's insanity and would not have "resulted in a different judgment . . . had it been presented at the trial." Tenn. Code Ann. § 40-26-105(b).

The remainder of Irick's evidence is addressed to his state of mind at the time of the offense—and it is difficult indeed to understand how any such ground could be "later-arising." In this regard, Irick contends that he "was without the ability to recall or understand" the events recounted in the 1999 affidavits, and hence that he "was unable to inform his attorneys or mental health experts." (Appellant's Br. at 44.) Although Irick's allegation of failing memory is questionable, *see Irick*, 320 S.W.3d at 296 ("Mr. Irick's argument that he is incompetent because he has no memory of the circumstances of the crime is without merit"), even if accepted as true, it fails to show that his grounds actually arose after the entry of judgment. Irick's attorneys knew of the issues surrounding his childhood and mental state both because they investigated them and because they presented them at trial, in some measure, through the testimony of Ms. Lunn. *See, e.g., Irick v. State*, 973 S.W.2d 643, 661 (Tenn. Crim. App. 1998). While Irick disclaims any memory of the events described in the 1999 affidavits, he does not aver a lack of knowledge of the identity of the affiants. (*See* Pet. Ex. 4.) Similarly, his petition lacks any allegation that the affiants were absent, unwilling to speak to counsel, or in any sense unavailable in 1985 and 1986. Absent an allegation of state action, legal change, or some circumstance by which evidence meaningfully can be said to have been unavailable to trial or post-conviction counsel, a reasonable opportunity existed to present the claim in earlier proceedings. Due process requires no tolling in such circumstances. Irick's petition fails to show that his grounds are later-arising.

II. Irick's Delay Is Unreasonable as a Matter of Law.

As Irick must concede, his federal habeas counsel became aware of the information contained in 1999 affidavits "as early as July 1, 1999." (Appellant's Br. at 46.) He nevertheless maintains that the statute of limitations should be tolled a decade because "counsel were diligently pursuing in federal court the necessary funds to procure expert services and testimony because without expert testimony, they lacked the necessary factual basis to reopen state post-conviction proceedings or obtain a writ of error *coram nobis*." (Appellant's Br. at 49.) Any contention that the pursuit of potentially available funding in a collateral federal proceeding furnishes a basis for tolling is foreclosed by *Harris*, in which the Tennessee Supreme Court indicated that "we need not consider" such an attempt. *Harris*, 301 S.W.3d at 146. Just as in *Harris*, "[n]othing prevented" Irick from "filing a separate coram nobis action while his" federal habeas proceeding was pending. *Id.* at 147. In 1999, Irick possessed not merely the lay affidavits, but also the affidavit of a mental health professional, albeit a non-examining one, opining that Irick "suffered at the very least from a dissociative disorder, and probably was schizophrenic or intermittently psychotic." (*See* Appellant's Br. at 26.) Such affidavits advanced in support of a 1999 *coram nobis* petition would sufficiently "explain the materiality of the evidence"—Irick insane at the time of the offense—and Irick certainly could have claimed to "have no knowledge/recollection of the events" just as he does today. (Appellant's Br. at 46-47.) And, just as they did in 2010, Irick's habeas counsel could

have sought a state appointment in connection with a *coram nobis* petition. (*See* Tr. 41 (appointing counsel).)

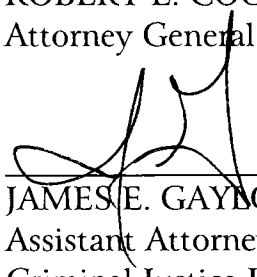
In any event, Irick has been rather less diligent in seeking *coram nobis* relief than he suggests. The federal district court denied Irick funds for a mental health expert in 1999. (738.) Even if the potential availability of federal funding were relevant—and it is not—Irick could not reasonably have delayed a state filing on the hopes that a federal appellate court would grant a permissive appeal on a non-constitutional question that the district court had answered on the ground that Irick had abandoned his claims respecting a mental health defense before this very Court. (*See id.*) The Sixth Circuit declined to certify Irick's claim for appeal—on the ground that reasonable jurists would not debate the point—in 2008. *Irick v. Bell*, No. 3:38-cv-00666 (E.D. Tenn. Feb. 5, 2008) (Docket No. 167). But still Irick delayed. He waited until after this Court had denied his application for permission to appeal the denial of his motion to reopen his post-conviction proceedings, *see Irick v. State*, No. E-2010-01740-CCA-R28-PD (Tenn. Crim. App. Sep. 16, 2010), and he waited until after his competency proceedings before the Tennessee Supreme Court were complete, *see State v. Irick*, 320 S.W.3d 284 (Tenn. 2010). Whatever, the "outer limit of reasonableness for delayed filings" based on later-arising claims may be, *see Harris*, 301 S.W.3d at 146, they have been transgressed in this case. The trial court properly dismissed Irick's petition on statute of limitations grounds.

CONCLUSION

For the reasons stated, the judgment of the criminal court should be affirmed.

Respectfully submitted,

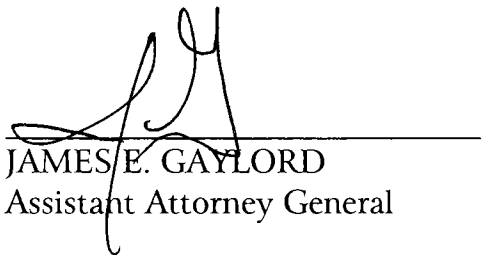
ROBERT E. COOPER, JR.
Attorney General & Reporter



JAMES E. GAYLORD
Assistant Attorney General
Criminal Justice Division
425 5th Avenue North
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-7360
B.P.R. No. 20755

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first-class mail, postage prepaid to C. Eugene Shiles, Jr., 801 Broad Street, Sixth Floor, P.O. Box 1749, Chattanooga, TN 37401-1749, Howell G. Clements, 1010 Market Street, Suite 404, Chattanooga, TN 37402 on this the 24th day of November, 2010.



JAMES E. GAYLORD
Assistant Attorney General