IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

ROBERT GLEN COE,	)	
	)	
Petitioner/Appellant,	)	**SHELBY COUNTY**
	)	**Capital Case**
v.	)	**NO. W2000-0005-CCA-28M-PD**
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent/Appellee.	)	

ON APPLICATION FOR PERMISSION TO APPEAL
FROM THE SHELBY COUNTY CRIMINAL COURT

ANSWER IN OPPOSITION TO APPLICATION FOR PERMISSION TO APPEAL

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II.

Did the trial court abuse its discretion in alternatively concluding that the petition should be dismissed because the petitioner=s allegations, even if taken as true, fail to show that the petitioner is entitled to relief?

III.

Did the trial court abuse its discretion in summarily dismissing the remainder of petitioner=s allegations?

STATEMENT OF THE CASE

The petitioner was convicted of the 1979 kidnapping, rape and murder of Cary Ann Medlin and was sentenced to death and two consecutive life sentences. The convictions and sentences were affirmed by the Tennessee Supreme Court in *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983). The petitioner subsequently filed three post-conviction petitions, and each was denied. *Coe v. State*, 1997 WL 88917; *Coe v. State*, 1991 WL 2873; *Coe v. State*, 1986 WL 14453. The petitioner also filed a federal habeas corpus petition. Although the district court granted petitioner relief, the United States Court of Appeals for the Sixth Circuit reversed and reinstated petitioner=s convictions and sentences. *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998) On October 4, 1999, the United States Supreme Court denied a petition for a writ of certiorari, *Coe v. Bell*, __ U.S. __, 120 S.Ct. 110 (1999), and on November 29, 1999, denied rehearing. *Coe v. Bell*, __ U.S. __, 120 S.Ct. 567 (1999).

On December 9, 1999, the petitioner filed a motion to reopen all three prior post-conviction petitions. Following a hearing on December 17, 1999, the trial court denied the petitioner=s motion to reopen on December 20, 1999. The petitioner filed this application on December 30, 1999.

STATEMENT OF THE FACTS

No evidence was adduced at the December 17, 1999, hearing. To the extent that the evidence at the original trial is relevant, it is accurately summarized by the Tennessee Supreme Court in *State v. Coe*, 655 S.W.2d 903, 905 (Tenn. 1983).

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE MOTION TO REOPEN BECAUSE *STATE V. FERGUSON* DID NOT ESTABLISH A NEW CONSTITUTIONAL RIGHT THAT IS REQUIRED TO BE APPLIED RETROACTIVELY.

The petitioner contends that *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), established a new constitutional right not recognized at the time of trial. He further contends that *Ferguson* satisfies the requirements necessary to allow him to reopen his post-conviction petitions under Tenn. Code Ann. '40-30-217. However, contrary to the petitioner=s assertions that the trial court Aimplicitly@ held that *Ferguson* meets the requirements of Tenn. Code Ann. '40-30-217, the trial court explicitly stated that APetitioner, Robert Glen Coe, has failed to establish a valid statutory basis for granting his motion to reopen.@ (Order, 13) Nevertheless, regardless whether the trial court reached this issue, the claim does not satisfy the prerequisites of Tenn. Code Ann. '40-30-217(c).

Tenn. Code Ann. '40-30-217(a) allows a petitioner to reopen the first post-conviction petition where the claim in the motion:

> is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial, . . . and . . . [i]t appears

> that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside. . . .

Tenn. Code Ann. '40-30-217(a)(1) and (4). In order to satisfy (a)(1), the new appellate ruling must not have been Adictated by precedent existing at the time the petitioner=s conviction became final@ and Aapplication of the rule was susceptible to debate among reasonable minds.@ Tenn. Code Ann. '40-30-222. In addition, a new rule cannot be applied retroactively Aunless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.@ *Id.*

In *State v. Ferguson*, the Tennessee Supreme Court examined Athe factors which should guide the determination of the consequences that flow from the State=s loss or destruction of evidence which the accused contends would be exculpatory.@ *Ferguson*, 2 S.W.3d at 914. The Court rejected the holding of the United States Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988), which required a defendant to demonstrate bad faith by law enforcement in destroying evidence to establish a due process violation. The Tennessee Supreme Court opted instead to allow a trial court to consider factors other than bad faith. *Ferguson*, 2 S.W.3d at 917. Accordingly, Tennessee courts may consider (1) the degree of negligence; (2) the

significance of the lost evidence; and (3) the sufficiency of the remaining evidence to support the conviction. *Id.*

Although based on constitutional law, *Ferguson* did not announce a new rule of constitutional criminal law. The Court simply holds that factors, including bad faith, may be considered by a trial court. *Ferguson*, 2 S.W.3d at 917. In fact, the Court explicitly stated that it is considering only the Afactors which should guide the determination of the consequences@ of the State=s loss of evidence. *Id.* It did not state a rule of when a due process violation occurs, nor did it state a rule of when a trial without the evidence is fundamentally unfair. Moreover, the Court did not impose any new duties on the State in preserving evidence, nor did it recommend any guidelines for the preservation of evidence. The decision also does not give a defendant any right to a specific consequence from the State=s loss of allegedly exculpatory evidence, such as a right to a jury instruction or to dismissal of the charges.

In addition, the underlying rule discussed in *Ferguson* is that the State has a duty to preserve evidence. However, this rule predates *Ferguson*, and is certainly not a Anew rule.@ See, Tenn. R. Crim. P. 16. As previously noted, *Ferguson* simply lists factors a court may consider when considering what consequences, if any, arise from the failure to preserve evidence.

Finally, the petitioner also failed to demonstrate that *Ferguson* was required to be applied retroactively. Tenn. Code Ann. '40-30-217(a). The Tennessee Supreme Court did not indicate that *Ferguson* was to be applied retroactively. In addition, a new rule cannot be applied retroactively Aunless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.@ Tenn. Code Ann. '40-30-222. *Ferguson* does not decriminalize formerly illegal conduct. The holding is also not Aimplicit in the concept of ordered liberty@ as many jurisdictions, including the federal system, do not even consider the *Ferguson* factors. Accordingly, retroactivity is not required, and the trial court correctly concluded that the petitioner failed to establish a valid statutory basis for granting the motion to reopen.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUMMARILY DISMISSING THE PETITIONER=S MOTION BECAUSE THE ALLEGATIONS, EVEN IF TRUE, FAIL TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE PETITIONER IS ENTITLED TO RELIEF.

Tenn. Code Ann. '40-30-217(b) provides that a motion to reopen shall be denied unless the factual allegations meet the requirements of Tenn. Code Ann. '40-30-217(a). Therefore, the motion must be dismissed unless, in addition to satisfying certain legal criteria, Athe facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.@ Tenn. Code Ann. '40-30-217(a)(4).

In its order, the trial court accepted petitioner=s primary factual allegations as true. The court accepted that Donald Gant was a suspect in Cary Ann Medlin=s murder, that he was interrogated by police, that his clothing and bedding were seized, that this evidence was sent to the Tennessee Bureau of Investigation, and that it was subsequently lost[1]. (Order, 6) The court further accepted petitioner=s legal argument under *Ferguson*, 2 S.W.2d 912 (Tenn. 1998), that the State had a duty to preserve this evidence, and that the State breached this duty. (Order, 6) The court also assumed that the

[1]The petitioner states that Athe State has not disputed that the bloody clothing and bedding was lost. . . .@ For purposes of this appeal, the State accepts petitioner=s allegations as true. However, the State neither concedes nor waives this issue.

clothing in question would have inculpated Gant. (Order, 7) However, the Court found that even if the clothing inculpates Gant, Ait does not follow that Coe would have been exonerated of the crime.@ (Order, 7) The court also examined the overwhelming evidence of the petitioner=s guilt, including his detailed confession, and found that he Aexperienced no measurable disadvantage because of the unavailability of the clothing and bedding.@ (Order, 8) Because the trial court accepted the petitioner=s factual allegations as true, and concluded that the petitioner is not entitled to relief, the court was required to dismiss the motion to reopen under Tenn. Code Ann. 40-30-217(4).[2]

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[2]Although the petitioner alleges that *Hayes v. State* 1997) requires an evidentiary hearing, *Hayes* hearing is not necessary under *Ferguson* =s claim is based on. In , the petition alleged facts that could prove that petitioner= but was dismissed without any hearing. This Court held that the petitioner was entitled to a hearing, even if every single allegation is proved false. By contrast, in the current case, =s allegations are accepted as true, i.e., that the State lost evidence

trial court indicated based on its review of the *Ferguson*

distinguishable in that it involved an initial petition for post-conviction relief, and not a motion to reopen.

Moreover, an evidentiary hearing would be of no value on any of the factors listed in *State v. Ferguson,* 2 S.W.2d 912 (Tenn. 1999). Regarding the degree of negligence, the agent responsible for the clothing is deceased, and other agents were extensively questioned on this issue during the petitioner=s habeas corpus proceeding but could offer nothing concerning why the clothing was lost. Furthermore, the petitioner is precluded from alleging bad faith on the part of the TBI in this proceeding because he could have brought a bad faith claim under *Arizona v. Youngblood, supra*, in 1988. If the petitioner alleges that the TBI intentionally destroyed Gant=s clothing in bad faith, the claim is not Abased upon@ *Ferguson*, but rather *Youngblood*, which obviously was decided more than one year ago, and which would no longer meet the one year limitation of Tenn. Code Ann. '40-30-217(a)(1).

Regarding the significance of the destroyed evidence, the evidence is completely insignificant in light of the overwhelming evidence against the petitioner, including his detailed confession. Furthermore, as the record clearly indicates, Gant had two alibis. Agent Daniels= report also indicates that the clothing in question produced Anegative results,@ and accordingly, Gant was released. (See attached Report of Agent Daniels, 6) Finally, although the petitioner alleges that the jury may have returned a life sentence had it known

an evidentiary hearing.

Finally, regarding the sufficiency of the convicting evidence, the

s guilt is clear from the record, and an evidentiary

The trial court did not abuse its discretion in dismissing the petitioner motion to reopen his post-conviction petition. Even if the petitioner allegations are accepted as true, he is not entitled to relief. In addition, an evidentiary hearing would accomplish nothing relative to the factors listed in . Therefore, the trial court correctly dismissed the motion.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PETITIONER=S REMAINING CLAIMS.

Petitioner also raises four other issues in his brief to this Court. However, he failed to include any argument on any of the remaining four issues, and accordingly, he has waived consideration of those issues. Rule 10(b), Rules of the Court of Criminal Appeals. Nevertheless, the State will address the remaining issues.

Petitioner=s second claim is that his death sentence Awas tainted by an unconstitutional and improper finding@ of the heinous, atrocious or cruel aggravating circumstance, Tenn. Code Ann. '39-2404(i)(5). In support of this claim he cites to *State v. Harris*, 989 S.W.2d 307 (Tenn. 1999).

In order for the *Harris* case to afford any basis for relief, that case must have established a new constitutional right. Tenn. Code Ann. '40-30-217(a)(1). But *Harris* did not announce a new constitutional right requiring retrospective application. In *Harris*, Athe verdict form indicated that the jury found only that >[t]he murder was especially heinous and atrocious.=@ *Harris*, 989 S.W.2d at 313. Although *Harris* was a life without the possibility of parole case, the Court noted in dicta that, Ain the death penalty context, jury findings of statutory aggravating circumstances similar to the jury=s findings in this case have been held to be unconstitutionally vague.@ *Id.* at 315-16 and n.9 (citing *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372

(1988) and 446 U.S. 420, 428-29, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980)). This statement certainly does not establish a new constitutional right; rather, it merely notes that such verdicts might be

Further, any constitutional error in the application of this aggravating circumstance would not entitle the petitioner to have the conviction set aside [4] In his federal habeas corpus proceeding, petitioner

unconstitutionally vague. The Sixth Circuit agreed, but found the error to be harmless and upheld Coe s death sentence. *Coe v. Bell,*

(6th Cir. 1998), *cert. denied,* *reh=g denied,* 1999 WL

invalid, the petitioner= Atainted.

In petitioner= A5. The murder was especially @

[4] acknowledging the Sixth Circuit= *Coe*, our Supreme Court has consistently *See, State v. Middlebrooks*, 995 S.W.2d 550, 557 n.7

Petitioner=s third claim is that there was discrimination in the selection of the grand jury foreperson. He cites *Campbell v. Louisiana*, 532 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), as authority. *Campbell* also fails to satisfy the statutory criteria of Tenn. Code Ann. '40-30-217(a) for two reasons: First, *Campbell* was decided on April 21, 1998. Section 40-30-217(a) requires that a motion to reopen must be filed within one year of the ruling establishing a new constitutional right requiring retrospective application. Petitioner=s motion to reopen was not filed until December 9, 1999. Therefore, any claim under *Campbell* is untimely.

Second, *Campbell* did not establish a new constitutional right requiring retrospective application. *Campbell* held that a white criminal defendant has standing to challenge exclusion of blacks from a grand jury under both equal protection and due process theories, even though he is not a member of the excluded class. *Campbell,* 118 S.Ct. at 1424-25. There was nothing in *Campbell* directing retrospective application of the rule it announced. When faced with this issue in petitioner=s federal habeas corpus appeal, the Sixth Circuit held that A*Teague*[5] bars us from applying *Campbell* retroactively. . . .@ *Coe v. Bell,* 161 F.3d at 355.[6] A similar claim has been rejected by this Court,

[5]*Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[6]*See Coe v. Bell,* 161 F.3d at 352-55, for the 6th Circuit=s rationale behind its holding that *Campbell* would not be given retrospective application.

See Duncan v. State,

Sumner County, C.C.A. No. 01C01-9905-CR-00167, Order filed July 7, 1999,

perm. to appeal denied (copies attached).

:s fourth claim is that the length of time he has remained on

he cites satisfies the criteria of Tenn. Code Ann. '

variety of reasons.

The United States Supreme Court opinions that he cites are memoranda

only has that Court repeatedly refused to review the issue, no American court has ever accepted such an Eighth Amendment claim. , *Knight v. Florida,* U.S. __, 120 S.Ct. 459 (1999)(Thomas, J. concurring in denial of certiorari).

Conveniently absent from petitioner s argument is the fact that during the entire period he laments he has been cruelly and unusually@

row, he has been pursuing state and federal appeals in an effort to overturn his conviction and sentence or, at a minimum, to secure its almost-indefinite

> It is a mockery of our system of justice, and an affront to law abiding citizens who are already
>
> convicted murderer, who, through his own interminable efforts of delay and systemic abuse has

> sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional. This is the crowning argument on behalf of those who have politicized capital punishment even within the judiciary. With this argument, we have indeed entered the theater of the absurd, where politics disguised as Aintellectualism@ occupies center stage, no argument is acknowledged to be frivolous, and common sense and judgment play no role. And while this predictable plot unfolds with our acquiescence, if not our participation, we lament the continuing decline in respect for the courts and for the law.

Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995).

Petitioner has been accorded every possible opportunity to test the legitimacy of his conviction and sentence. The delay of which he now complains is a direct consequence of his own litigation strategy, abetted by the broad leeway allowed him by the courts to challenge his conviction and sentence repetitively.

Petitioner=s fifth and final claim is that his jury was not allowed to consider life without parole as Aan alternative punishment.@ However, the only two punishments authorized for first-degree murder at the time petitioner kidnaped and brutally and savagely raped and murdered Cary Ann Medlin were death and life imprisonment. *See* Tenn Code Ann. '39-2402. Life without parole did not become an authorized punishment until July 1, 1993. Acts 1993, Ch. 473 '16. Respondent knows of no authority, and

petitioner cites none, that would have allowed the judge to instruct and/or the

Furthermore, the petitioner cites no authority satisfying the criteria of Tenn. Code Ann. 40-30-217(a)(1). The one United States Supreme Court case he does cite, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 130 (1994), not only fails to support his claim, but would make it

In *Simmons,*

argued that the death penalty was appropriate based on the defendant: dangerousness, it was a denial of due process not to allow the jury to know that the defendant would not be eligible for parole under state law if sentenced to

Simmons, 512 U.S. at 161. This makes readily distinguishable from petitioner s case. Furthermore, notwithstanding the untimeliness of this claim under the rule announced in *Simmons* not been given retroactive application. *Spreitzer v. Peters,* (7th Cir. 1997); *O Dell v. Netherland,* 95 F.3d 1214, 1224-38 (4th Cir. 1996) *en banc*); 68 F.3d 106, 111 n. 11 (5th Cir. 1995).

CONCLUSION

For the reasons stated, the application for permission to appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on counsel for appellant by first class mail, postage paid, to Robert L. Hutton, GLANKLER BROWN, PLLC, 1700 One Commerce Square, Memphis, Tennessee 38103 on this the ___ day of January, 2000.

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