

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER SESSION, 1995

**FILED**  
  
January 31, 1996  
C.C.A. NO. 02C01-9507-CC-00180  
Cecil Crowson, Jr.  
Appellate Court Clerk

LEO DREW, )  
 )  
Appellant, )  
 )  
 )  
VS. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellee. )

C.C.A. NO. 02C01-9507-CC-00180  
  
FAYETTE COUNTY  
  
HON. JON KERRY BLACKWOOD  
JUDGE  
  
(Post-Conviction)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF FAYETTE COUNTY

FOR THE APPELLANT:

SHANA MCCOY-JOHNSON  
Senior Assistant District  
Public Defender  
P.O. Box 700  
Somerville, TN 38068-0700

FOR THE APPELLEE:

CHARLES W. BURSON  
Attorney General and Reporter

EUGENE J. HONEA  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

ELIZABETH RICE  
District Attorney General

CHRISTOPHER S. MARSHBURN  
Assistant District Attorney General  
302 Market Street  
Somerville, TN 38068

OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Petitioner appeals pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure the trial court's denial of his petition for post-conviction relief. The trial court dismissed the petition because it was barred by the statute of limitations. We affirm the decision of the trial court.

The Petitioner was convicted of armed robbery and first degree murder in two separate cases in 1981. He appealed each of these cases and this court affirmed his convictions in 1982. State v. Drew and Jones, No. 10, Fayette County (Tenn. Crim. App., Jackson, filed Oct. 7, 1982); State v. Jones, Drew, and Drew, No. 6, Fayette County (Tenn. Crim. App., Jackson, filed June 10, 1982). The supreme court denied permission to appeal in both these cases in 1982. The Petitioner has filed three previous petitions for post-conviction relief in 1984, 1987, and 1991. All were dismissed.

On its face, the petition is time barred. For the Petitioner's argument to be successful it must fit within one of two exceptions to the application of the three-year statute of limitations.<sup>1</sup> The first exception is if the imposition of the statute of limitations violates due process, such as in the case of a procedural trap, Burford v. State, 845 S.W.2d 204, 210 (Tenn. 1992), and the second is if a new rule of law has been created and applied retroactively, see Tenn. Code Ann. § 40-30-105; Rudy Wendell Myers v. State, No. 01-C-01-9308-CC-00270, Franklin County, 2-3 n.5 (Tenn. Crim. App., Nashville, filed Jan. 20), perm. to appeal denied, (Tenn. 1994); Robert Lee Sands v. State, No. 03C01-9207-CR-00241 Union County, (Tenn. Crim. App., Knoxville, filed Jan. 13), perm. to appeal granted, (Tenn. 1994); Julius Fate Branam v. State, No. 03-

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<sup>1</sup>Tenn. Code Ann. § 40-30-102 (repealed 1995) is the statute of limitations applicable to this action.

C-01-9204-CR-00066, Bradley County, (Tenn. Crim. App., Knoxville, filed Aug. 12, 1993); see also Laney v. State, 826 S.W.2d 117 (Tenn. 1992).

The Petitioner argues that his petition for post-conviction relief should not be barred under the statute of limitations because of the Tennessee Supreme Court's decision in State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

Brown, and a later case, State v. West, 844 S.W.2d 144 (Tenn. 1992), ruled that the concepts of deliberation and premeditation had, in many prior instances, been wrongly commingled. Those decisions separated deliberation, an act done with cool purpose and undertaken after the exercise of reflection and judgment, and premeditation, which was defined as the process of thinking about the murder before committing it. The precise holding in Brown involves a confusing jury instruction.

This court has previously ruled in a number of cases that Brown is not to be applied retroactively. State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993); State v. David Lee Richards, No. 03C01-9207-CR-230, Hamilton County, (Tenn. Crim. App., Knoxville, filed Mar. 23, 1993), perm. to appeal denied, (Tenn. 1993); State v. Willie Bacon, Jr., No. 1164, Hamilton County, (Tenn. Crim. App., Knoxville, filed Aug. 4, 1992), perm. to appeal denied, (Tenn. 1992).

Furthermore, the fact that such a jury instruction has been abandoned because it is confusing does not mean that its use was error of a constitutional magnitude. Lofton v. State, 898 S.W.2d 246 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995); State v. John Wayne Slate, No. 03C01-9201-CR-00014, Sevier County, slip. op. at 8 (Tenn. Crim. App., Knoxville, filed Apr. 27), perm. to appeal denied, (Tenn. 1994).

The Petitioner argues that the retroactive application of Brown in post-conviction proceedings should be considered on a case by case basis. We do not agree. As stated above, we have held and continue to hold that Brown is not to be applied retroactively.

Therefore, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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WILLIAM M. BARKER, JUDGE