

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

FILED

March 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

ANTHONY SMITH,

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Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

C.C.A. # 03C01-9602-CC-00053

WASHINGTON COUNTY

Hon. Arden L. Hill, Judge

(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Anthony Smith, appeals from the trial court's summary dismissal of his application for post-conviction relief. The single issue presented on review is whether the trial court erred by dismissing the pro se petition without an evidentiary hearing after finding that the statute of limitations had expired.

We affirm the judgment of the trial court.

On May 23, 1986, the petitioner was found guilty of first degree murder and sentenced to life in prison. This court affirmed the conviction. State v. Anthony Glenn Smith, No. 224 (Tenn. Crim. App., at Knoxville, Sept. 15, 1987), app. denied (Tenn., Nov. 30, 1987). On September 23, 1993, the petitioner filed this petition, his first, alleging ineffective assistance of counsel and violations of newly recognized constitutional rights. In the alternative, he sought habeas corpus relief.¹

The petitioner's primary contention was that the trial court had given instructions defining reasonable doubt that failed to comport with constitutional guidelines. He contended that trial counsel was ineffective for failing to object to improper jury instructions and failing to adequately protect his right against self-incrimination. He made several other allegations that he argued qualify as constitutional violations: jury instructions that inaccurately defined intent, malice, and deliberation; written instructions viewed by the jurors that the trial court failed to completely mark out; and a felony murder statute that fails to sufficiently narrow the category of those eligible for the death penalty.

¹ The petitioner consented to the dismissal of his claim for habeas corpus relief. See generally Potts v. State, 833 S.W.2d 60 (Tenn 1992).

The office of the public defender was appointed to represent the petitioner. Several requests for a continuance were granted and a hearing on the petition was scheduled. Without notifying counsel for the petitioner, the state filed a motion to dismiss the petition and, in a hearing in the absence of the public defender's office, the trial judge granted relief. The petitioner then filed a motion to set aside the dismissal of the petition; the motion was denied.

In this appeal, the petitioner concedes that several of his claims were time barred: inadequate instructions defining reasonable doubt; failure by trial counsel to protect the right against self-incrimination; inaccurate instructions defining intent, malice, and deliberation; and inappropriately redacted instructions viewed by the jurors. Two claims, ineffective assistance of counsel and failure to object to the jury charge of "moral certainty," were merged into one issue. The petitioner, who initially argued that the felony murder statute was unconstitutional, now contends there was error when the same felony used for the felony murder conviction was also used to attempt to establish an aggravating circumstance for the death penalty verdict. State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

The Post-Conviction Procedure Act provides that a petition for relief, irrespective of the remedy sought, must be filed "within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken." Tenn. Code Ann. § 40-30-102 (repealed 1995). Obviously, the petitioner failed to do so. The petitioner may bring a claim for relief of a constitutional violation if the claim was not recognized at the time. Tennessee Code Annotated section 40-30-105, repealed since the filing of this petition, provided as follows:

Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United

States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

(emphasis added).

In Burford v. State, 845 S.W.2d 204 (Tenn. 1992), our supreme court carved out a narrow exception to the three-year statute of limitations. Burford had been sentenced as a habitual criminal to a term of life imprisonment based upon five prior robbery convictions. He filed a timely post-conviction petition, alleging that certain of his five prior robbery convictions were constitutionally infirm because he had not been advised of his right against self-incrimination before entering his plea; he was granted post-conviction relief from these convictions. Later, after the three-year statute of limitations had expired, Burford filed a petition to set aside the finding of habitual criminality on the basis that there was no longer a sufficient number of prior felony convictions to qualify him for the enhanced punishment. Our supreme court ruled that the statute of limitations, while generally compliant with constitutional due process, violated Burford's specific due process rights:

If consideration of the petition is barred, Burford will be forced to serve a persistent offender sentence that was enhanced by previous convictions that no longer stand. As a result, Burford will be forced to serve an excessive sentence in violation of his rights under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, which, by definition, are fundamental rights entitled to heightened protection.

Burford, 845 S.W.2d at 209.

In Sands v. State, 903 S.W.2d 297 (Tenn. 1995), our supreme court further defined how to apply the Burford test. A court must:

(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. In making this final determination, courts should carefully weigh the petitioner's liberty interest in "collaterally attacking constitutional violations occurring during the conviction process," against the State's interest in preventing the litigation of "stale and fraudulent claims."

Sands, 903 S.W.2d at 301 (citations omitted) (quoting Burford, 845 S.W.2d at 207, 208).

By the use of these guidelines, we have first determined that the statute of limitations for this petitioner's convictions expired in 1990. In Eanos Earl Hunt v. State, No. 03C01-9308-CR-00266, slip op. at 4-5 (Tenn. Crim. App., at Knoxville, Feb. 3, 1994), this court held that the phrase "moral certainty" in a jury instruction, when utilized in proper context, does not violate constitutional principles; thus, the petitioner's reliance on Cage v. Louisiana, 498 U.S. 39 (1990), is misplaced.²

The petitioner also claims that he suffered a constitutional violation

²After the decision in Cage v. Louisiana, 498 U.S. 39 (1990), the supreme court again reviewed the issue of an instruction containing "moral certainty." In Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), the Court reviewed an instruction identical in substance to the instruction in Cage. The court stated that the right to proof beyond a reasonable doubt, outlined in the fifth amendment, and the right to a jury verdict, outlined in the sixth amendment, were interrelated. Id. at 2081. It reached the decision that a defendant has a fundamental right to be found guilty beyond a reasonable doubt by a jury. A court may never substitute its verdict for one by a jury, when the verdict is against the defendant, regardless of how compelling the evidence. Id. at 2080, 2082. When an appellate court reviews a jury verdict where an instruction defines a standard less than that of reasonable doubt, the court cannot say that the jury would have reached the same verdict. Id. at 2082. The appellate court can only determine that the jury could have reached the same verdict. Id. When on appeal, a court must determine whether or not this standard was harmless beyond a reasonable doubt, thus, "the wrong entity judge[s] the defendant guilty." Id. at 2082 (quoting Rose v. Clark, 478 U.S. 570, 578 (1986)). This denies the defendant a fundamental right to a jury verdict based on proof beyond a reasonable doubt. Therefore, this error can never be found to be harmless.

One year later, in Victor v. Nebraska, 114 S. Ct. 1239 (1994), the Court distinguished the instruction in Cage and Sullivan from a similar instruction in Victor. The court held that an instruction that does not rely solely on the phrase "moral certainty" for a conviction, but also includes language that requires the jury to review and compare all the evidence in the case, was acceptable. Id. at 1251. In conclusion, the Supreme Court determined that the phrase "moral certainty" did not automatically render the verdict unconstitutional. Id.

when at the sentencing phase of the trial, the same felony used to convict him was used as an enhancing factor to qualify him for the death penalty. This rule was first expressed in State v. Middlebrooks, 840 S.W.2d at 346. The rule was applied retroactively in State v. Barber, 889 S.W.2d 185, 186-87 (Tenn. 1994), because it "materially enhances the integrity and reliability of the fact finding process of the trial." This issue meets the second requirement of Burford in that it is later arising.

Our supreme court has held, however, that an error under Middlebrooks can be found to be harmless. State v. Howell, 868 S.W.2d 238 (Tenn. 1993). Here, the petitioner did not receive the death penalty. Thus, any errors in the instructions at the punishment phase of the trial were clearly harmless beyond a reasonable doubt.

There is no basis for the tolling of the statute of limitations. See Tenn. Code Ann. § 40-30-102 (repealed 1995). The trial court correctly ruled that it can be conclusively determined that the petitioner is not entitled to relief. See Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988).

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

William M. Barker, Judge

Curwood Witt, Judge