

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1997 SESSION

**FILED**

April 30, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

CHARLES WILEY, )  
 )  
 Appellant, )  
 )  
 VS. )  
 )  
 STATE OF TENNESSEE )  
 )  
 Appellee. )

C.C.A. No. ~~03C01-9603-CC-00095~~  
COCKE COUNTY

Hon. Rex Henry Ogle, Judge

(POST-CONVICTION)  
No. 22,823-III BELOW

FOR THE APPELLANT:

DAVID B. HILL  
301 E. Broadway  
Newport, TN 37821

FOR THE APPELLEE:

JOHN KNOX WALKUP  
Attorney General and Reporter

MICHAEL J. FAHEY, II  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

ALFRED C. SCHMUTZER, JR.  
District Attorney General  
125 Court Avenue, Room 301-E  
Sevierville, TN 37862

JAMES BRUCE DUNN  
Assistant District Attorney General  
339-A E. Main Street  
Newport, TN 37821

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

AFFIRMED

CORNELIA A. CLARK,  
Special Judge

## OPINION

On January 25, 1990, the appellant, Charles Wiley, was convicted by a jury of aggravated rape and aggravated kidnapping. He was sentenced as a Range I standard offender to a term of twenty-two years on each conviction. The sentences were ordered to be served concurrently. This court affirmed petitioner's conviction. State v. Wiley, No. 168 (Tenn. Crim. App., Knoxville, February 12, 1992), perm. app. denied, June 22, 1992.

On August 21, 1992, appellant filed a pro se petition for post-conviction relief. Counsel was appointed and an amended petition was filed February 1, 1993. In that petition appellant contended primarily that he was denied the effective assistance of counsel because trial counsel failed to object to the sign-language interpreter used by the state. That petition was denied by the trial court. This court affirmed. Wiley v. State, No. 03-C-01-9306-CR-00182 (Tenn. Crim. App., Knoxville, March 29, 1994), perm. app. denied, July 18, 1994.

On December 2, 1994, appellant filed this second petition for post-conviction relief. He again asserted the ground of ineffective assistance of counsel. He added allegations that his right to compulsory process was violated, that his right to transcripts and witnesses was violated, that there was an illegal seizure of his guns, and that there was newly-discovered evidence concerning DNA testing. Counsel was appointed and filed an amended petition realleging the same grounds. A hearing in this matter was conducted August 14 and 15, 1995. The trial court dismissed the petition on the grounds that all issues raised had previously been determined or waived. Appellant appeals this dismissal. Upon review, we affirm the judgment of the trial court.

T.C.A. §40-30-112(a)<sup>1</sup> provides in pertinent part that a ground for relief is “previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing”. Id. A full and fair hearing has been defined by the Tennessee Supreme Court to include the holding of an evidentiary hearing where the petitioner is afforded every opportunity to present evidence and argument. House v. State, 911 S.W.2d 705, 711 (Tenn. 1995). The issue of ineffective assistance of counsel was litigated in the first post-conviction petition. Petitioner admits that an evidentiary hearing was provided him at that time. Further, this court has previously affirmed the trial court’s dismissal of that claim. The issue of ineffective assistance of counsel has been previously determined.

Petitioner insists that this petition raises new facts on which to base a finding of ineffective assistance and new allegations of other deficiencies. However, pursuant to T.C.A. §40-30-112, an issue is deemed to be “waived” if it reasonably could have been raised in a prior proceeding, even if it were not. House adopted a broad, objective test for waiver, but also imputed the actions or omissions of counsel to a post-conviction petitioner. A petitioner may not overcome the rebuttable presumption of waiver by alleging that he did not personally waive the ground for relief. House, 911 S.W.2d at 714; State v. Smith, 814 S.W.2d 45, 47-48 (Tenn. 1991). All issues raised in the second petition could have been raised in the first one. Those issues have now been waived.

Petitioner also claims that he received ineffective assistance of counsel in his previous post-conviction petition. Tennessee courts have long held that there is no constitutional or statutory right to effective assistance of counsel in post-conviction proceedings. See House, 911 S.W.2d at 712; State v. Oates, 698 S.W.2d 79, 81 (Tenn. Crim. App. 1985).

The judgment of the trial court dismissing the petition is affirmed.

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<sup>1</sup>This statute was in effect at the time this petition was filed. It was repealed by Acts 1995, ch. 207, effective May 10, 1995. The right to reopen a concluded post-conviction proceeding is now governed by T.C.A. §40-30-202.

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CORNELIA A. CLARK  
SPECIAL JUDGE

CONCUR:

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JOHN H. PEAY  
JUDGE

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PAUL G. SUMMERS  
JUDGE

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**JUDGMENT**

Came the appellant, Charles Wiley, by counsel and also came the attorney general on behalf of the state, and this case was heard on the record on appeal from the Criminal Court of Cocke County; and upon consideration thereof, this court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is AFFIRMED, and the case is remanded to the Criminal Court of Cocke County for execution of the judgment of that court and for collection of costs accrued below.

It appears that the appellant is indigent. Costs of this appeal will be paid by the State of Tennessee.

**PER CURIAM**

John H. Peay, Judge  
Paul G. Summers, Judge  
Cornelia A. Clark, Special Judge