

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST, 1997 SESSION

FILED

September 30, 1997

Cecil W. Crowson
Appellate Court Clerk

ROBERT FINNEY, JR.

Appellant,

vs.

STATE OF TENNESSEE,

Appellee.

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No. 01CO1-9610-CR-00417

Davidson County

Honorable Thomas H. Shriver, Judge

(Post Conviction)

FOR THE APPELLANT:

On appeal (Pro Se)
ROBERT FINNEY, JR.
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At the hearing:
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OPINION FILED: _____

APPEAL DISMISSED

CURWOOD WITT
JUDGE

OPINION

The petitioner, Robert Finney, Jr., appeals pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure from the Davidson County Criminal Court's alleged dismissal of his petition for post-conviction relief. The petitioner was convicted in 1985 of felony-murder, first degree burglary, aggravated assault, assault with the intent to commit first degree murder, and malicious shooting. He received a life sentence for the murder conviction and five-year and two-year sentences for the other convictions. All sentences run concurrently.

His convictions were affirmed on direct appeal to this Court. State v. Robert Finney, Jr., No. 86-146-III (Tenn. Crim. App., Nashville, Dec. 12, 1986). Finney filed his first petition for post-conviction relief on January 21, 1993. The trial court found that the petition was barred by statute of limitations and dismissed the petition. This court affirmed the dismissal in Robert Finney, Jr. v. State, No. 01CO1-9309-CR-00313 (Tenn. Crim. App., Nashville, June 28, 1995).

The petitioner filed his second post-conviction petition on January 3, 1996, alleging that his convictions were constitutionally infirm because the jury instruction on reasonable doubt contained language found to be unconstitutional in Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn., 1994). The pro se petitioner now contends that the trial court erred in denying him the opportunity to amend his petition and by dismissing his petition without determining the issue on its merits.

We have carefully examined the record on appeal and find that we have no jurisdiction to consider the issues appellant has raised. Therefore, this appeal must be dismissed.¹

The record clearly shows that, on May 28, 1996, the petitioner and his counsel appeared in open court. Defense counsel advised the court that he had explained to the petitioner that the holding in Rickman v. Dutton would not be applicable to his case and that the petitioner was going “to strike” his petition. The trial court then addressed the petitioner directly and explained that the petitioner could file a new post-conviction petition only if new evidence were discovered or if the Supreme Court changed the constitutionality of some law relevant to his convictions. The trial judge then asked, “Well, Mr. Finney, do you want to withdraw this petition, then, and -- uh -- understanding that if something develops you can always file again.” Apparently the petitioner nodded his head or gave some other silent assent because the trial judge then said, “All right,” and the proceedings were concluded. The state voiced no objection to the trial court’s action. However, the technical record contains no order disposing of the petition, through withdrawal or otherwise.

The new Post-Conviction Procedure Act, which became effective on May 10, 1995, provides that “[t]he petitioner may withdraw a petition at any time prior to the hearing without prejudice to any right to refile, but the withdrawn petition shall not toll the statute of limitations set forth in § 40-35-202.” Tenn. Code Ann. § 40-30-209 (c) (Supp. 1996). We are unable to determine from the record the nature

¹ The petitioner raises several other issues in this pro se appeal. Because of our disposition of this appeal, we need not discuss them further. We note, however, that all of these issues were either previously determined or waived. See Tenn. Code Ann. §§ 40-30-206(g), (h) (Supp.1996).

of the proceeding at which the trial court granted defense counsel's motion to withdraw the petition. However, it is clear that the petitioner assented to the withdrawal of the petition and that the state had no objection to its withdrawal.²

The petitioner appeals the alleged dismissal of his post-conviction petition; however, there is no order or judgment which dismisses the petition. Tenn. Code Ann. section 40-30-211(b) requires that the trial court enter a final order “[u]pon the final disposition of every [post-conviction] petition” Tenn. Code Ann. § 40-30-211(b) (Supp. 1996). This was not done. Therefore we cannot conclude that any final disposition was made. Furthermore, the petitioner's right to appeal from the trial court's disposition of a post-conviction proceeding is predicated upon the entry of an order by the trial court. Tenn. R. App. P. 3(b). In the absence of such an order, this court has no jurisdiction to entertain the appeal.³

Therefore, this appeal must be dismissed.

CURWOOD WITT, Judge

JOE G. RILEY, Judge

² A written order granting the withdrawal of the petition would have facilitated our review. However, we find nothing in the statutes that requires a post-conviction court to prepare a written order when the petitioner voluntarily withdraws a petition. Tennessee Code Annotated section 40-30-214 (b) requires the entry of an order and a written memorandum of findings of fact and conclusions of law only upon the “final disposition” of a post-conviction petition.

³ See n.2, supra. Because of the disposition of this appeal which we herein make, we need not determine if a withdrawal of a post-conviction petition pursuant to Tenn. Code Ann. section 40-30-209(c) must be effectuated through the entry of an order. We note, however, that even if no order is required, the petitioner may not appeal from a voluntary withdrawal of his petition. See Tenn. R. App. P. 3(b), 36(a).

JOSEPH H. WALKER, III, Special Judge