

OPINION

The petitioner, Seymore Hayes III, appeals the Hamilton County Criminal Court's summary dismissal of his second petition for post-conviction relief. The petitioner is currently serving a term of life imprisonment in the Tennessee Department of Correction for a conviction of first degree murder. In this appeal, he presents two issues for our review:

1. Whether a jury instruction equating moral certainty with reasonable doubt violated his constitutional rights.
2. Whether the jury instruction given regarding the definition of malice violated his constitutional rights by shifting the burden of proof to him.

Following a review of the record, we affirm the judgment of the lower court pursuant to Rule 20 of the rules of this court.

This is Hayes' second petition for post-conviction relief. In Tennessee, issues which could have been presented in a prior proceeding but were not are presumed waived. Tenn. Code Ann. § 40-30-112(b)(2) (1990) (repealed 1995); House v. State, 911 S.W.2d 705 (Tenn. 1995). Thus, Hayes bears the burden of showing why the issues raised in his second petition could not have been included in his first. He argues the claims in his second petition should not be treated as waived because they are different than those raised in his first petition for post-conviction relief, which was filed on October 2, 1992, and the rights he asserts were not recognized by Tennessee courts until 1994 and 1996.

I

Hayes first contends his conviction is constitutionally infirm because the jury was improperly instructed that moral certainty was the equivalent

of reasonable doubt, requiring reversal of his conviction and a new trial under Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990).¹ Although it is not entirely clear, the appellant apparently believes the decisions of the federal district court in Austin v. Bell, 938 F. Supp. 1308, 1318-19 (M.D. Tenn. 1996) and Rickman v. Dutton, 864 F. Supp. 686, 709 (M.D. Tenn. 1994), established a constitutional right not previously recognized, which prevents his claim from being waived notwithstanding his failure to pursue it in earlier proceedings. This court and the Tennessee Supreme Court have consistently rejected challenges to jury instructions using moral certainty phraseology similar to that complained of here.² See, e.g., State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Sexton, 917 S.W.2d 263 (Tenn. Crim. App. 1995). Unfortunately for Hayes, the contrary federal cases upon which he relies are of no precedential value. This court considers itself bound by the previous ruling of the Tennessee Supreme Court in Nichols despite the adverse holdings of the federal district court. See, e.g., Sexton, 917 S.W.2d at 266. As an inferior appellate court we are bound to follow the precedent of our state's highest court. See Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976).

As the trial court correctly determined, Hayes has failed to show that a constitutional issue which was not recognized at the time of the earlier proceedings has since been recognized by the Tennessee or federal appellate courts. As such, the issue has been waived. Further, the issue is substantively

¹Hayes failed to include the transcript of the jury instructions in the record on appeal, relying solely on excerpts of the instructions as quoted in his pro se petition. The appellant has the burden to prepare a complete record to allow this court to review the issues. See Tenn. R. App. P. 24(g). An appellant who fails to provide an adequate record risks this court being unable to consider the appellate issues on their merits. See State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citations omitted).

²Furthermore, in Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239 (1994), the Supreme Court said moral certainty instructions may pass constitutional scrutiny if used with further modifying instructions that lend meaning to the phrase. The instruction of which Hayes complains combined the moral certainty language with "let the mind rest easily" language. A substantially similar instruction was upheld by our supreme court earlier this year. See State v. Michael Dean Bush, No. 03-S01-9604-CC-00047 (Tenn., Knoxville, Apr. 7, 1997), pet. for cert. filed, (U.S., Apr. 28, 1997); see also State v. Sexton, 917 S.W.2d 263 (Tenn. Crim. App. 1995). But see Austin, 938 F. Supp. at 1318-19; Rickman, 864 F. Supp. at 709.

without merit based on the supreme court's holding in Nichols.

Hayes also claims his conviction is unconstitutional because the jury instruction on malice improperly shifted the burden of proof to him in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979). Sandstrom was adopted by the Tennessee Supreme Court in 1984, see State v. Bolin, 678 S.W.2d 40 (Tenn. 1984), and it was applied retroactively to a Tennessee conviction as early as 1982 by the Sixth Circuit Court of Appeals. See Sands v. State, 903 S.W.2d 297, 302 (Tenn. 1995) (discussing Phillips v. Rose, 690 F.2d 79 (6th Cir. 1982)). Hayes' first post-conviction petition was filed several years later. Thus, the lower court correctly dismissed this claim. Hayes waived it by failing to include it in his first petition for post-conviction relief.

The court below committed no error of law requiring reversal. The judgment is affirmed pursuant to Rule 20, Court of Criminal Appeals Rules.

CURWOOD WITT, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH M. TIPTON, JUDGE