

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 9, 2022

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Appellate Courts

ROBERT GARNER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Giles County
No. CR-14912 J. Russell Parkes, Judge
Stella Hargrove, Judge

No. M2021-01396-CCA-R3-PC

In this consolidated appeal, the Petitioner, Robert Garner, appeals from the Giles County Circuit Courts' summary denial of his petition for relief pursuant to the Post-Conviction Fingerprint Analysis Act of 2021 (Fingerprint Act) and his petition for a writ of error coram nobis. We affirm the judgments of the post-conviction and coram nobis courts.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which CAMILLE R. McMULLEN and TOM GREENHOLTZ, JJ., joined.

Robert Garner, Clifton, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; T. Michel Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

In 2011, the Petitioner was convicted by a Giles County jury of first degree murder in the perpetration of a felony, aggravated arson, and theft of property valued at more than \$10,000 but less than \$60,000. He received an effective sentence of life in prison plus twenty-five years. The facts from the trial are as follows:

. . . Robert Wayne Garner needed money. Mr. Garner was behind in his rent; his electric bill was due; and his daughter's car needed expensive repairs. His wife had previously pawned her jewelry for needed cash. He earned only \$125 in his last paycheck as a truck driver. Mr. Garner found a

way to get the money he needed. A former tenant of Brenda Wilburn, Garner had visited her only a few days earlier and was familiar with her house. Garner knew Ms. Wilburn kept money in her home, knew she wore expensive jewelry, and knew she lived alone.

The prosecutor's theory of the case was that Garner entered her home on Highway 64 near Pulaski, Tennessee, around 10:00 a.m. on January 19, 2011, and assaulted Ms. Wilburn. He tightly tied her hands behind her back and bound her ankles with electrical wire. Garner placed a plastic bag containing her blood-covered panties over her head. He followed with a second plastic bag, tied securely, effectively smothering Ms. Wilburn. A piece of clothing was found tied around her neck strangling her. Trial testimony revealed Ms. Wilburn probably suffered greatly during the last few minutes of her life.

Garner set fire to the house and fled the premises. Later investigation revealed Ms. Wilburn was already dead when the flames consumed her body. The fire burned for about an hour before a passerby saw smoke and flames coming from the house and called 911.

Firefighters arrived and found a rapidly growing, very hot fire. A quick investigation found Ms. Wilburn's cars still on the premises. Three firemen attempted to enter the dwelling and effectuate a rescue. Firefighters were repelled by the excessive heat and were unable to proceed more than a few feet into the house. Tennessee Bureau of Investigation (TBI) and local police were called to the scene. It took several hours for the fire to cool so debris could be cleared. The intense fire collapsed the two story house into a single mound of smoking embers.

Investigators, sifting the rubble, found the body of Ms. Wilburn located in what was once a walk-in closet. Her body was severely burned. She had first, second, third and fourth degree burns over 90% of her body. Her hands and feet were completely burned off. Clothing protected her head from complete destruction, and the plastic bags on her head were only partially burned. She was nude from the waist down.

The proof showed that while the fire was still burning, Garner had unexplained money. The same day he paid his electrical bill, his rent and offered to make extra payments. That same afternoon he paid cash for the repairs to his daughter's car and payments on his furniture. Garner gave his wife money to pay her probation fees and to go shopping at Walmart. Mrs.

Garner paid probation fees of five times the amount she normally paid each week.

Appellant's wife liked jewelry, and Garner gave her a large two-carat solitaire ring and a diamond necklace. The solitaire ring had a unique flaw that made it positively identifiable as belonging to Ms. Wilburn. The ring appraised for \$12,000, and the necklace for \$750.

The proof showed Mrs. Garner told people Mr. Garner had given her the new jewelry, including the two-carat diamond solitaire ring and the diamond necklace. Garner gave her the jewelry immediately after the incident at Ms. Wilburn's house. Garner also gave her money to redeem her previously pawned jewelry. When Mr. Garner's wife asked him where he got the money and jewelry he responded "you're better off if you don't know." The investigation revealed no credible alternative explanation for Mr. Garner's sudden possession of wealth.

The circumstantial proof continued. Mrs. Garner went to Walmart with a friend and while in the parking lot showed her friend cash totaling \$4,800 in one-hundred dollar bills.

The total bills Mr. and Mrs. Garner paid and the money his wife displayed was roughly equal to the amount of money known to be in Ms. Wilburn's possession shortly before her death. Police, canvassing local pawn shops, found pawned jewelry items including a pendant necklace belonging to Mrs. Wilburn. The pawn ticket showed Mrs. Garner pawned the pendant a few days after the murder. Mrs. Garner was questioned by the police, and she wore the unique solitaire ring to the police station for her interview.

A local citizen found a credit card with Ms. Wilburn's name on it lying near a mail box and notified police. Investigators searched along the road from near where Garner lived ending at Ms. Wilburn's house. They found two other credit cards also belonging to Ms. Wilburn, a used condom, pair of shoes and some other items. The shoes were similar to a pair of shoes worn by Mr. Garner previously during a police interview. All items gathered were subjected to tests, and only the credit cards were conclusively tied to the case.

Mr. Garner attempted to establish an alibi. He failed. Garner had served as a police informant for drug related purchases. He called his police contact the afternoon of the fire and asked what the police knew

about the fire. Garner also called Sheena Huntley, a former business associate, and indicated he had an alibi for the time of the fire, even though there was no reason Sheena Huntley should suspect he would need one.

When Garner was arrested, he told police a story of meeting two men. According to Garner, these same two men had previously assaulted Mr. Garner at a motel. Garner insists he met the two men at the same motel and purchased a bag of assorted jewelry from them for \$100. Mr. Garner stated a man (Mr. Gentry) living at the motel was present and could verify his purchase. Upon inquiry by police and in testimony during trial, Mr. Gentry, the man Mr. Garner said would confirm his alibi, vehemently denied ever seeing Mr. Garner at the motel and denied any transaction ever took place in his presence.

State v. Robert Wayne Garner, No. M2011-02581-CCA-R3-CD, 2013 WL 5461099, at *1-3 (Tenn. Crim. App. Sept. 30, 2013), *perm. app. denied* (Tenn. Feb. 12, 2014) (not for citation).

The Petitioner appealed his convictions alleging insufficiency of the evidence and evidentiary errors. *Id. at* *1. This court affirmed the convictions. In 2015, the Petitioner filed a pro se petition for post-conviction relief alleging the ineffective assistance of counsel. After an evidentiary hearing, the post-conviction court denied relief. On appeal, this court dismissed the appeal for lack of jurisdiction because the petition was filed after the one-year statute of limitations expired. *Robert Wayne Garner v. State*, No. M2017-00417-CCA-R3-PC, 2018 WL 5840846 (Tenn. Crim App. Nov. 7, 2018), *perm. app. denied* (Tenn. Mar. 28, 2019). In May 2019, the Petitioner filed a petition for a writ of habeas corpus alleging his murder conviction was void and his sentence illegal. The habeas corpus court denied relief finding the petition failed to state a cognizable claim, and this court affirmed. *Robert Wayne Garner v. Grady Perry, Warden*, No. M2019-01349-CCA-R3-HC, 2020 WL 4719310 (Tenn. Crim. App. Aug. 13, 2020). In August 2021, the Petitioner filed a petition pursuant to the Fingerprint Act and, in January 2022, a petition for a writ of error coram nobis. T.C.A. §§ 40-30-401 to -413 (Supp. 2022) (Fingerprint Act), 27-7-101 to -108 (2017) (Coram Nobis). The post-conviction and the coram nobis courts denied relief, and this consolidated appeal followed.

Post-Conviction Fingerprint Analysis Act of 2021

The Petitioner contends the post-conviction court erred by failing to make specific findings of fact when it reviewed his petition for fingerprint analysis pursuant to the Fingerprint Act and by summarily dismissing the petition. The State contends that the petition does not meet the requirements for fingerprint analysis under the Act because (1) the crime scene was examined previously for fingerprint evidence and none was found

and (2) no reasonable probability exists that the Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis. The State also contends that the post-conviction court's order required no further findings of fact because the court reviewed the record and concluded the Petitioner failed to meet the requirements set forth in the Act. In denying the Petitioner's request for fingerprint analysis, the post-conviction court's order said,

After review of the Post-Conviction Fingerprint Analysis Act of 2021, and after a review of the record[,] the Court finds that the Petition and the record do not demonstrate that there is a reasonable probability that the Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis. None of the factors found in Tenn. Code Ann., Section 40-30-404 or 405 are present. . . .

The Fingerprint Act provides that

. . . any appropriate party may, at any time, file a petition requesting the performance of fingerprint analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in a judgment of conviction and that may contain fingerprint evidence.

T.C.A. § 40-30-403. Section 404 of the Act sets forth conditions under which the court shall order a fingerprint analysis, and Section 405 sets forth conditions under which the court may order a fingerprint analysis.

Section 404 provides:

. . . the court shall order fingerprint analysis if it finds that:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis;

(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;

(3) The evidence was never previously subjected to fingerprint analysis, was not subjected to the analysis that is being requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion

under this part requests analysis that uses a new method or technology that is substantially more probative than the prior analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Section 405 provides:

. . . the court may order fingerprint analysis if it finds that:

(1) A reasonable probability exists that analysis of the evidence will produce fingerprint results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction.

(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;

(3) The evidence was not previously subjected to fingerprint analysis, was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

The Petitioner contends he is entitled to relief under both sections because the "evidence collected at the crime scene was never tested for fingerprints." However, this court, in the appeal from the post-conviction proceedings, noted that Brad Elliott, a retired Tennessee Bureau of Investigation agent, testified on cross-examination that there was no DNA or fingerprint evidence found at the crime scene because heat and water destroyed it. *See Garner*, 2018 WL 5840846, at *6. Because the crime scene was previously examined for fingerprint evidence and none was found, the Petitioner is not entitled to fingerprint analysis pursuant to either Section 404 or 405.

Even if fingerprint analysis were possible in this case, the record reflects that there is no outcome that would result in a reasonable probability that the Petitioner would not have been prosecuted or convicted pursuant to Section 404(1) or that a fingerprint

analysis would have rendered a more favorable verdict or sentence pursuant to Section 405(1). As this court determined in a previous appeal, “the evidence of theft and arson [was] overwhelming” and was “adequate to support [the Petitioner’s] convictions beyond a reasonable doubt.” *Id.* at *4-5.

The evidence established that the Petitioner was familiar with the victim and her home, that the Petitioner was in possession of unexplained large amounts of cash and the victim’s jewelry immediately after the murder, that the Petitioner’s wife wore a unique solitaire ring belonging to the victim subsequent to the murder, that the Petitioner’s wife pawned a necklace belonging to the victim only days after the murder, and that the Petitioner had no alibi. *Id.* at *1-3.

The Petitioner asserts the post-conviction court was required to state findings of fact and conclusions of law in its dismissal order pursuant to Code section 40-30-111(b). However, this requirement specifically applies to petitions filed under the Post-Conviction Procedure Act and not to petitions filed under the Fingerprint Act. *See* T.C.A. §§ 40-30-101 to -122 (2018) (Post-Conviction Procedure); Tenn. Sup. Ct. R. 28. In this case, the court summarily dismissed the petition after the court’s review of the record and its determination that “there is no reasonable probability that the Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis.” *See id.* § 40-30-404(1).

As the Petitioner failed to meet the statutory requirements for fingerprint analysis, we conclude that the post-conviction court did not err in summarily dismissing the petition.

Writ of Error Coram Nobis

The Petitioner filed a petition in January 2022 seeking a writ of error coram nobis, contending that he is entitled to relief because the jury in his 2011 trial deliberated in a room in the Giles County courthouse that is maintained by the United Daughters of the Confederacy and contains Confederate memorabilia which exposed the jury to extraneous information in violation of his Sixth Amendment right to an impartial jury and in violation of due process. U.S. Const. amend. VI, XIV; Tenn. Const. art. I, § 9; *see State v. Tim Gilbert*, No. M2020-01241-CCA-R3-CD, 2021 WL 5755018, (Tenn. Crim. App. Dec. 3, 2021), *perm. app. denied*, (Tenn. May 18, 2022) (not for citation). *But see State v. Barry Jamal Martin*, No. M2021-00667-CCA-R3-CD, 2022 WL 3364793 (Tenn. Crim. App. Aug. 16, 2022) *perm. app. filed* (Tenn. Oct. 17, 2022). The coram nobis court found that the petition was time-barred by the statute of limitations and that the grounds alleged in the petition “d[id] not rise to newly discovered evidence [as] contemplated by error coram nobis. Therefore, the one-year statute is not tolled.”

The Petitioner contends on appeal that the coram nobis court abused its discretion when it dismissed the petition. The State responds that the Petitioner has offered no new evidence in support of his petition, that the Petitioner failed to show how the result of the trial might have been different had the jury room information been presented at the trial, and that the statute of limitations bars relief.

A writ of error coram nobis lies “for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.” T.C.A. § 40-26-105(b) (2012); *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995); see *Cole v. State*, 589 S.W.2d 941 (Tenn. Crim. App. 1979). The purpose of a coram nobis proceeding “is to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment.” *State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (Tenn. 1966). The decision to grant or deny such a writ rests within the sound discretion of the court. *Jones v. State*, 519 S.W.2d 398, 400 (Tenn. Crim. App. 1974); see *Teague v. State*, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988), *overruled on other grounds by State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999). A petition for a writ of coram nobis must be filed within one year of the judgment becoming final in the trial court. *Mixon*, 983 S.W.2d at 670. A judgment becomes final “thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion.” *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010). “[T]he statute of limitations . . . is not an affirmative defense that must be specifically raised by the State in error coram nobis cases; instead, the . . . petition must show on its face that it is timely filed.” *Nunley v. State*, 552 S.W.3d 800, 828 (Tenn. 2018). A limited exception to the statute of limitations exists when due process requires tolling. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001).

Our supreme court has determined that “compliance with the timely filing requirement . . . is an essential element of a coram nobis claim.” *Nunley* at 828. However, a petitioner can request equitable tolling of the limitations period.

To be entitled to equitable tolling, a prisoner must demonstrate with particularity in the petition: (1) that the ground or grounds upon which the prisoner is seeking relief are “later arising” grounds, that is grounds that arose after the point in time when the applicable statute of limitations normally would have started to run; [and] (2) that, based on the facts of the case, the strict application of the statute of limitations would effectively deny the prisoner a reasonable opportunity to present his or her claims A prisoner is not entitled to equitable tolling to pursue a patently non-meritorious ground for relief.

Id. at 829 (internal citation omitted). Likewise, “the coram nobis petition must be filed within a time period that ‘does not exceed the reasonable opportunity afforded by due process.’” *Id.* at 830 (quoting *Sample v. State*, 82 S.W.3d 267, 275 (Tenn. 2002)); see *Workman*, 41 S.W.3d at 103. “[A]t no point during the evolution of the writ of error coram nobis in Tennessee have the appellate courts held that trial courts cannot dismiss a petition for writ of error coram nobis without first holding an evidentiary hearing. . . . [t]rial courts need only conduct evidentiary hearings when they are essential.” *Harris*, 301 S.W.3d at 153-54.

“When a petitioner seeks a writ of error coram nobis based on newly discovered evidence of actual innocence, due process considerations may require tolling of the statute of limitations.” *Harris*, 301 S.W.3d at 145 (citing *Workman*, 41 S.W.3d at 101). “[B]efore a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992); see *Workman*, 41 S.W.3d at 102. However, a petitioner “must exercise due diligence in presenting the claim.” *Harris*, 301 S.W.3d at 144. Whether due process principles require tolling the statute of limitations is a mixed question of law and fact and is reviewed de novo with no presumption of correctness. See *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006), *abrogated on other grounds by Brown v. Jordan*, 563 S.W.3d 196, 202 (Tenn. 2018).

The Petitioner failed to state any facts in his petition to show that his petition was timely filed. A petition for a writ of coram nobis must be filed within one year of a judgment becoming final in the trial court or upon entry of an order disposing of a timely filed, post-trial motion. The judgments were entered August 13, 2011. This petition was filed more than ten years after the entry of the judgments. The record does not reflect the disposition of any post-trial motions, and the case was affirmed on appeal September 30, 2013.

The Petitioner contends that due process requires that the statute of limitations must be tolled. To be entitled to equitable tolling of the limitations period, the Petitioner must “demonstrate with particularity in the petition” that the grounds upon which the petitioner is seeking relief arose after the point in time when the statute of limitations normally would have started to run. *Nunley*, 552 S.W.3d at 829 (citations omitted). Although the Petitioner contends the Confederate memorabilia in the jury room of the courthouse at the time of his trial violated due process, this is not a “later arising” ground for relief. The fact that the Petitioner was not aware of the Confederate memorabilia at the time of trial is not persuasive, as a petitioner must exercise due diligence in presenting a claim. *Harris*, 301 S.W.3d at 144. Further, the record does not reflect that the

Confederate memorabilia in the jury room constitutes new evidence of actual innocence. *See Nunley*, 552 S.W.3d at 828-29. The Petitioner is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgments of the post-conviction and coram nobis courts are affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE