

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 24, 2006

DON C. LEE v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Knox County
No. 84016 Ray L. Jenkins, Judge

No. E2006-00844-CCA-R3-PC - Filed August 14, 2007

The petitioner, Don C. Lee, appeals the trial court's summary dismissal of his second post-conviction relief petition as barred by the statute of limitations. After review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Don C. Lee, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; and Randall Eugene Nichols, District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted in August 1995 of felony murder, robbery, reckless endangerment, aggravated assault, and vehicular homicide. He received an effective sentence of life plus thirty-three years in the Department of Correction. His direct appeal affirmed his convictions and sentences, and the Tennessee Supreme Court denied his application for permission to appeal on March 2, 1998. State v. Lee, 969 S.W.2d 414 (Tenn. Crim. App. 1997).

The petitioner filed his first petition for post-conviction relief on March 9, 1999, and it was summarily dismissed as barred by the statute of limitations on April 12, 1999. The petitioner, on March 10, 2006, filed a second petition for post-conviction relief which is the subject of this appeal. The trial court, again, summarily dismissed the second petition as barred by the statute of limitations.

Tennessee Code Annotated section 40-30-102(a) provides that a person in custody under a sentence of a court of this state must petition for post-conviction relief within one year of the final

action of the highest appellate court to which an appeal is taken or, if no appeal is taken, within one year of the date on which the judgment becomes final.

Tennessee Code Annotated section 40-30-102(b) provides that no court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless one of three conditions is met: 1) The claim is based upon a final ruling of an appellate court establishing a constitutional right not recognized as existing at the time of trial, if retrospective application of that right is required; 2) The claim is based upon new scientific evidence establishing that the petitioner is innocent; or 3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction which has subsequently been invalidated.

The petitioner has not shown that any of these three exceptions exist and, therefore, the trial court is without jurisdiction to consider a petition filed after the expiration of the limitation period.

The petitioner does claim that at the time of his conviction he was unable to read or understand his rights due to the injuries he suffered in the events that gave rise to his convictions. The petitioner essentially asserts a due process argument with regard to his right to an appeal of his first post-conviction petition. We look to our Supreme Court's opinion in Watkins v. State, 903 S.W.2d 302 (Tenn. 1995), in which a post-conviction petition was filed outside the statute of limitations and was subsequently dismissed by the trial court. Our Supreme Court vacated the trial court's decision and remanded the matter for further proceedings reasoning that due process considerations barred summary dismissal because, if the petitioner truly was incompetent, the application of the statute of limitations would effectively deprive him of an opportunity to challenge his conviction in a meaningful time and manner. Watkins, 903 S.W.2d at 306. This court has previously distinguished the holding in Watkins with a set of circumstances similar in fact to those in the underlying case. In Nix v. State, 40 S.W.3d 459, 462 (Tenn. 2001), the court concluded that the Post-Conviction Act as codified eliminated tolling provisions such as the savings statute at issue in Watkins and further concluded that the Act could not eliminate constitutionally required tolling provisions like incompetence. Id. To clarify, incompetence can toll the statute of limitations under constitutional due process. Id.

However, in the instant case, as in Nix, we do not conclude that the petitioner has alleged a sufficient basis to warrant a conclusion that he was mentally incompetent so as to prevent him from filing a post-conviction claim at all times material to the statute of limitations. The petitioner was capable of filing the first petition himself or with the assistance of a fellow inmate; therefore, he was capable of filing an appeal after the summary dismissal of the first petition. It may be that a proper appeal of the first petition would have resulted in relief from the summary dismissal based on the statute of limitations for that petition. However, because we have no jurisdiction, we are unable to grant relief.

The petitioner also alleges in his petition that he never received a competency evaluation to determine whether he was competent to stand trial. However, the petitioner's allegations do not show the existence of mental incompetence over the period of time to make his present petition

viable. Similarly to Nix, we view these claims to be mere conclusions that are not supported with any proof, save the declaration of a fellow inmate who claims to have known the petitioner since they were teenagers.

We note that, in the petitioner's brief, he contends that the first petition was wrongfully dismissed. He contends that the statute of limitations did not apply to his first petition in that he complied with the "mail box rule." The petitioner requests a waiver of the notice of appeal regarding his first petition's dismissal. We conclude that the petitioner offers no satisfactory explanation for his nearly nine-year delay in filing his notice of appeal. Therefore, we affirm the post-conviction court's dismissal of the petition.

Conclusion

Accordingly, we affirm the post-conviction court's dismissal of the petition for post-conviction relief.

JOHN EVERETT WILLIAMS, JUDGE