

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 6, 2006

LONIEL THEOPLIS MORTON v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Rutherford County
No. F54601 Don Ash, Judge**

No. M2004-02338-CCA-R3-PC - Filed September 19, 2006

The petitioner, Loniel Theoplis Morton, appeals the circuit court's denial of his motion to reopen his post-conviction petition. He contends the court erred in concluding that his petition was time barred. Upon review, we affirm the decision of the circuit court and dismiss the appeal.

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

J.C. MCLIN, J., delivered the opinion of the court, in which DAVID H. WELLES, J, joined. GARY R. WADE, P.J., not participating.

John Green, Murfreesboro, Tennessee, for the appellant, Loniel Theoplis Morton.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; and William C. Whitesell, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

On October 18, 2002, the petitioner pled guilty to one count of aggravated sexual battery and one count of aggravated robbery. For these offenses, the petitioner received an effective sentence of fifteen years as a multiple violent offender. The factual basis underlying the petitioner's guilty pleas is as follows:

[O]n the 15th, of September 2001, . . . officers . . . responded to an address . . . in Murfreesboro. The complaint was that an aggravated robbery had taken place. Officers arrived and when they arrived they came into contact with a . . . 14 year old female. She related to them the events that had taken place and stated that she had been taking a shower and had gotten out of the shower, saw a vehicle outside the house that she was not familiar with and saw a person walking

towards the house with a red shirt over their head. She went out of the bathroom . . . into the hall to the top of the steps where two black males were in the house, one approached her on the steps, they were both armed. They made demands about . . . money. At that point the young lady took them into a bedroom that belonged to her mother. There was a fire safe in there that had some coins in it. And there was also some money that was located in a jewelry box in that room.

At some point, [the petitioner] left that bedroom and went back to the young lady's bedroom and at that point forced her to engage in oral sex. One of the other defendants . . . came into the room and told [the petitioner] to come on, they didn't have time for that and at that time they left and she called 911.

On September 19, 2003, the petitioner filed a pro se petition for post-conviction relief. Thereafter, post-conviction counsel was appointed, and a hearing was held on February 13, 2004. During the hearing, the petitioner apparently voluntarily moved to withdraw his petition, and the trial court granted the motion on February 18, 2004.¹ On July 9, 2004, the petitioner filed a motion to reopen his post-conviction petition. In the motion, the petitioner alleged that his original post-conviction counsel told him to withdraw his post-conviction petition and file a "Motion for Reduction of Sentence," which was ultimately denied. The petitioner also alleged that he received the ineffective assistance of counsel which caused him to enter unknowing and involuntary guilty pleas, and the state failed to disclose to the petitioner DNA evidence which would have been favorable to the defense. On September 7, 2004, the circuit court denied the petitioner's motion to reopen the post-conviction petition, finding that the one year statute of limitations had expired on the petitioner's original post-conviction claims and the petitioner had failed to allege any grounds justifying the tolling of the statute of limitations for post-conviction relief.

ANALYSIS

On appeal, the petitioner contends that the circuit court erred by denying his motion to reopen his post-conviction petition. The crux of the petitioner's argument is that the withdrawal of his original post-conviction petition was based upon inaccurate advice of post-conviction counsel. The petitioner also asserts that the allegations in his original post-conviction petition are exceptions to the one year statute of limitations; therefore, his motion to reopen should have been granted.

We begin our review by noting that a petition for post-conviction relief must be filed within one year of the final action of the highest state appellate court to which an appeal is taken, or, if no appeal is taken, within one year of the date on which the judgment became final, or consideration of the petition is barred. Tenn. Code Ann. § 40-30-102(a). Time is of the essence in requesting post-conviction relief, and compliance with the one-year statute is an element of the right to file a petition. *Id.* Although a post-conviction petition may be withdrawn at any time

¹ It appears from the available record before us that the post-conviction hearing was not completed. Also, the petitioner's motion to withdraw his petition is not found in the record. However, the court's order granting the petitioner's motion to withdraw is present in the record. Additionally, the petitioner's motion to withdraw is corroborated by reference in the petitioner's motion to reopen his post-conviction petition.

prior to the hearing without prejudice, the withdrawn petition does not toll the statute of limitations. *Id.* § 40-30-109.

In the instant case, it appears that the petitioner sought the withdrawal of his petition during the post-conviction hearing. Although it is unclear whether Tennessee Code Annotated section 40-30-109 allows a petitioner to withdraw his petition *during* a post-conviction hearing, we note that dismissal of a petition without prejudice is appropriate if the petitioner is not acting in bad faith or otherwise abusing the post-conviction process. *See Williams v. State*, 831 S.W.2d 281, 282-83 (Tenn. 1992) (“waiver under the post-conviction statute does not occur until there has been a hearing on the merits and the issues raised in the petition have been ‘adjudicated.’”). As there is no indication of abuse of the post-conviction process, we determine that the circuit court properly permitted the petitioner to voluntarily withdraw his petition. However, the one year statute of limitations began when the petitioner’s guilty plea became final on November 18, 2002. As such, the petitioner’s ability to refile any post-conviction petition was barred by the expiration of the one year statute of limitations.

In addition, notwithstanding the fact that the petitioner had no filed petition available upon which to reopen, we note that the petitioner’s motion to reopen did not allege a ground under which a petition may be reopened. Tennessee Code Annotated section 40-30-117 governs motions to reopen a post-conviction petition. Pursuant to this statute, a motion to reopen a prior post-conviction petition may only be filed if the petitioner claims that: (1) a final ruling of an appellate court establishes a constitutional right that was not recognized as existing at the time of trial and retrospective application of the right is required; or (2) new scientific evidence exists establishing that the petitioner is actually innocent of the convicted offenses; or (3) the petitioner’s sentence was enhanced based upon a prior conviction which has subsequently been found invalid. Tenn. Code Annotated § 40-30-117(a)(1-3). Though not entirely clear from the petitioner’s motion to reopen and affidavit, the petitioner appears to argue the following: (1) his convictions were based on a coerced confession, (2) his constitutional rights were violated by the state prosecutor’s failure to turn over DNA evidence, and (3) he received ineffective assistance of post-conviction counsel. Here, the petitioner does not assert any ground which would entitle him to reopen a petition for post-conviction relief, nor does his petition raise the appropriate grounds that would toll the statute of limitations. *See id.* §§ 40-30-102, -117. *See also Fletcher v. State*, 951 S.W.2d 378 (Tenn. 1997). Accordingly, we affirm the circuit court’s order denying the petitioner’s motion to reopen his post-conviction petition.

J.C. McLIN, JUDGE