

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 22, 2009

**EDGAR BAILEY, JR. v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Hamilton County**  
**No. 270239 Rebecca J. Stern, Judge**

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**No. E2009-00203-CCA-R3-PC - Filed November 3, 2009**

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The petitioner, Edgar Bailey, Jr., appeals from the post-conviction court's summarily dismissing his petition for post-conviction relief as time-barred. On appeal, the petitioner argues that his petition was timely and, in the alternative, that due process requires the tolling of the statute of limitations for his post-conviction petition. Discerning no error, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Edgar Bailey, Jr., Clifton, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; and William H. Cox, III, District Attorney General, for the appellee, State of Tennessee.

**OPINION**

In December 2004, a Hamilton County Criminal Court jury convicted the petitioner of first degree premeditated murder, felony murder, three counts of aggravated assault, and setting fire to personal property. The trial court merged the two murder counts and sentenced the petitioner to life imprisonment for the first degree murder conviction, five years for the aggravated assault convictions, and 11 months, 29 days for the setting fire to personal property conviction, all to be served concurrently. The petitioner appealed his convictions, and this court reversed his first degree premeditated murder conviction and upheld his remaining convictions. We remanded the first degree premeditated murder conviction for new trial and remanded his setting fire to personal property conviction for resentencing. *State v. Edgar Bailey, Jr.*, No. E2005-02186-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, Dec. 26, 2006), *perm. app. denied* (Tenn. Apr. 23, 2007). The State subsequently dismissed the first degree premeditated murder charge. On June 29, 2007, the trial court resentenced the defendant to a one-year sentence for his setting fire to personal property conviction.

The petitioner filed a petition for post-conviction relief on November 24, 2008 – one year and seven months after our supreme court’s final disposition of the case. The pro se petition cited as grounds for relief that the petitioner’s convictions were based upon evidence gained pursuant to an unconstitutional search and seizure, that his convictions were based upon evidence obtained pursuant to an unlawful arrest, that his convictions violated his protection against double jeopardy, and that he was denied the effective assistance of counsel. In an attached “Memorandum of Law,” the petitioner alleged as additional grounds that the trial court failed to instruct the jury on the “natural and probable consequences rule,” that “there exists a fatal variance between indictment and proof,” and that the trial court’s instructions for criminal responsibility resulted in “constructive amendment of the indictment.”

The petitioner maintained that he timely petitioned the court for post-conviction relief. The petitioner exhibited to his petition a printout from the digitally-based Tennessee Offender Management Information System (“TOMIS”) that he argued “clearly show[ed] judgment order, last judgement [sic] change– 03/20/2008; Petitioner is within the (1) one year statu[t]e of limitations.” The petitioner based his argument regarding the timeliness of his petition on a data field that reads, “Last Judgment Order Chng [sic] 03/20/2008.”

The post-conviction court summarily dismissed the petition for post-conviction relief in a written order filed December 18, 2008. The post-conviction court found that, despite the TOMIS printouts, the docket for the petitioner’s case did not reflect any alteration in the judgments of conviction on March 20, 2008. Further, the court observed that Tennessee Code Annotated section 40-35-102(a) limits the time for filing a post-conviction petition to one year from the date of final action of the highest state appellate court to which the defendant appeals and concluded, “The petition is therefore untimely under [Code section] 102(a), irrespective of any 20 March 2008 change in judgment . . . .” The post-conviction court further held that strict application of the statute of limitations “would not deny the petitioner a reasonable opportunity to present his claims, all of which predate or coincide with the commencement of the limitation period.” The court lastly found no reason to toll the statute of limitations, and it dismissed the petition as untimely.

The petitioner filed a timely notice of appeal, and we construe the petitioner’s brief to argue that his filing was timely and, in the alternative, that due process principles require acceptance of his late petition. The petitioner again argues that the “last judgment order change date . . . provides proof” that he complied with the limitations period. Without providing any explanation, the petitioner vaguely states that the strict application of the limitations period effectively denied him a reasonable opportunity to assert his claims in a meaningful time and manner. He also argues that the trial court erred in dismissing his petition without an evidentiary hearing or appointment of post-conviction counsel. He argues that the summary dismissal denied him an ability to present “any issue of importance.”

The State argues that the defendant has failed to provide an adequate record for this court’s review. It correctly notes that the petition contains only TOMIS printouts and is devoid of any judgment forms from the trial court. The State also maintains that the post-conviction court correctly dismissed the untimely petition. The State argues that the petitioner failed to show any

grounds justifying the tolling of the statute of limitations and that the court was not required to hold an evidentiary hearing or appoint counsel.

“[A] person in custody . . . must petition for post-conviction relief . . . within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken.” T.C.A. § 40-30-102(a). The post-conviction statute’s language confers jurisdictional import to the timely filing of a petition, and it is essential that the question of timeliness be resolved before any adjudication on the merits of the petitioner’s claims may properly occur. *See* T.C.A. § 40-30-102(b) (2003); *John Parker Roe v. State*, No. W2000-02788-CCA-R3-PC (Tenn. Crim. App., Jackson, Nov. 20, 2002), *perm. app. denied* (Tenn. 2003).

If a petition is not filed within the one year statute of limitations, it nevertheless may be considered if its allegations fall within three rather narrow exceptions:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

T.C.A. § 40-30-102(b)(1)-(3) (2003). Additionally, due process principles may, in very limited circumstances, require tolling of the post-conviction statute of limitations. *See generally Seals v. State*, 23 S.W.3d 272 (Tenn. 2000); *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992).

We agree with the post-conviction court that the petition was untimely. The post-conviction statute clearly states that the petition must be filed within a year of “the final action of the highest state appellate court to which an appeal is taken.” T.C.A. § 40-30-102(a). Regardless of any administrative alteration of the judgment within the TOMIS system, the petitioner’s application for permission to appeal was denied by our supreme court on April 23, 2007. Thus, the

statute clearly mandates that any filing past April 23, 2008, is untimely.<sup>1</sup> Further, the petition presents no arguments that would lead this court to excuse the late-filing of the petition. The petitioner's alleged grounds for post-conviction relief largely address issues disposed of on direct appeal of his criminal case. The original petition contains no argument that suggests the petitioner's due process rights were violated and does not set forth any grounds that would statutorily allow the post-conviction court to consider his late petition. We disagree with the petitioner that the post-conviction court erred by failing to hold a hearing or appoint counsel. The post-conviction court had no jurisdiction to hear the petition, and it correctly ordered a summary dismissal.

In light of this, we conclude that the post-conviction court did not err in summarily dismissing the petition for post-conviction relief, and we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

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<sup>1</sup>At this point we note that the petition is not entirely clear as to whether the petitioner challenges only his felony murder conviction or his other convictions as well. Although he lists all convictions in his standard, form petition, a "Memorandum of Law" incorporated into his petition requests "setting aside petitioner's conviction of Felony Murder." We note this only because the final action on the petitioner's setting fire to personal property conviction occurred on June 29, 2007. For that conviction, any post-conviction filing past June 29, 2008, would also be time-barred.