

IN THE CRIMINAL COURT OF TENNESSEE  
THIRTIETH JUDICIAL DISTRICT  
AT MEMPHIS  
DIVISION X

GARY BRADFORD CONE,  
PETITIONER

VS.

P-06874

STATE OF TENNESSEE,  
RESPONDENT

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MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This is Petitioner, Gary Bradford Cone's Second Petition for Post Conviction Relief. The first Petition was denied by the Criminal Court of Appeals November 4, 1987. See: e.g. 747 SW 2d 353 (Tenn. Crim. App. 1987) permission to appeal denied March 14, 1988, cert. denied U. S. Supreme Court October 3, 1988. Cone was convicted in 1982 of Murder in the First Degree and Murder in the Perpetration of a Burglary in connection with the homicides of an elderly couple, Shipley O. Todd and his wife, Cleopatra Todd, in Memphis on August 10, 1980. He was also convicted of three charges of assault with intent to commit Murder in the First Degree upon three other persons and of robbery by use of deadly force upon a fourth. He was sentenced to death by the jury in the Murder First Degree cases. Numerous issues were presented on appeal by counsel for appellant John Dice and April Ferguson who were also Cone's counsel at the trial. The death sentences were affirmed by the Tenn. Supreme Court January 23, 1984 See: e.g. State vs. Cone, 665 SW 2d 87,89 (Tenn. 1984). This petition sub judice was filed pro se on June 20, 1989. Subsequently Cone filed a well stated amended petition pro se July 5, 1989. The petition was summarily dismissed by the hearing Court without appointment of counsel. May 15, 1991 the Court of Criminal Appeals reversed and remanded the case for hearing on the presumption of waiver issue and subsequently this Court was assigned by the Chief Justice to hear the case to conclusion. Present counsel for petitioner, Kemper Durand and Stephen Glassrock, appointed by the prior hearing court and Asst. District Attorney, John McFarland, appeared for oral argument to this Court on December 10, 1993 upon the sole issue of

the presumption of waiver mandated by order of procedendo by the Court of Criminal Appeals dated May 15, 1991. The State relied upon its motion to dismiss without evidentiary hearing and its brief in support thereof. Counsel for petitioner like wise submitted their case upon this petition as amended and their supporting affidavits and brief. Additionally, petitioner's counsel argued that the petitioner should be present at the hearing. This motion was denied by the Court. The Court finds, after a careful and thorough review based upon the entire record including the direct appeal and the first Petition for Post Conviction Relief and the pleadings, affidavits, and briefs of respective counsel that the Second Petition for Post Conviction Relief as amended must be dismissed because the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law.

The petition fails to state any new grounds that have not already been decided on direct appeal or the First Petition for Post-Conviction Relief. A distinction should be noted between a "ground" and a "factual claim" to support the ground. T.C.A. 40-30-105 states, to wit:

"Grounds for relief - Relief under this chapter shall be granted when the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."

T. C.A. 40-30-111 states, to wit: "Scope of hearings" - the scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds shall be excluded because they have been waived or previously determined, as herein defined." (Emphasis added)

It is, then, clear that a "ground" is a constitutional right. "Facts" are alleged by the petitioner to support the "grounds". Facts that are merely cumulative or conclusory in nature are non-supportive and will be disregarded.

In the Second Petition sub judice the petitioner employs the word "claim" to describe either a ground or a fact in support of the ground. This is somewhat confusing but obviously an alleged fact is not a constitutional right and there should be a distinction made in the manner in which the petition is drawn.

T.C.A. 40-30-112 states, to wit:

"When ground for relief is "previously determined" or "waived", -

(a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

"(b) (1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented..

(2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived."

T.C.A. 40-30-118 states, to wit:

"Final disposition of petition -

(a) If the Court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the Court shall vacate and set aside the judgment or order a delayed appeal as hereinafter provided and - - - -

(b) shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground." Emphasis added.

(c) - - - -

Petitioner's grounds stated in the Second Petition for Post Conviction Relief sub judice as amended by Cone, then Glassroth then twice by Glassroth states at the bottom of page 2 and the top of page 3 of a certain document entitled "Second Amended Petition for Post Conviction Relief"..."This document constitutes Petitioner's Amended Petition in support of post-conviction relief." Accordingly the grounds beginning at page 4 thereof, paragraph 15 are to wit:

(15, 16) Ineffective assistance of counsel. This ground was previously denied on direct appeal and the First Petition for Post Conviction Relief. The claimed factual allegations herein are merely cumulative or have been presumptively waived for failure to present upon direct appeal or the First Petition For Post Conviction Relief. Regarding the ineffective assistance of counsel ground, the petitioner has filed Discovery and Brady Motions asking for the privilege of searching through the State's file in order to find other possible allegations to present to the Court. The organic law of Tennessee

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including Title 40 Chapter 30 T.C.A. entitled Post Conviction Procedure does not provide for Discovery or Brady type Motions in cases involving Post Conviction Petitions. Petitioner's motions for such procedure in this case fails to warrant such extraordinary action by this court and is denied. Furthermore, the motions are meritless in face of the overwhelming proof of the guilt of the petitioner of Murder First Degree and Murder First Degree in Perpetration of a Felony. See: e.g. State v. Cone 665 S.W.2d at page 91(1984) which states:

"We do not deem it necessary to dwell further upon the factual background of the case, because the evidence is overwhelmingly sufficient to sustain the conviction on all of the charges. Indeed as previously stated, appellant has admitted guilt of all of them, but has denied responsibility solely on the basis of lack of mental capacity." At page 91 ibid.

Likewise, grounds 17,18,19,21,22,23,24,25,26,27,28,29,30,31, 32,33,34,35, and 36 involves a potpourri of various errors by the court at the trial all of which grounds have been considered and denied in direct appeal or the First Post Conviction Petition. Ground 20 attacks certain state statutes that have been previously upheld in many cited cases by the Tennessee Supreme Court as well as on the direct appeal and First Petition For Post Conviction Relief of this case. Ground 27 asserts illegal search of defendant's vehicle. This ground has been previously denied by the trial court and the Tennessee Supreme Court at 665 SW 2d Page 91. The automobile had been abandoned by the defendant. Paragraph 39 is the Petitioner's attempted explanation as to why the presumption of waiver should not obtain in the Second Petition sub judice. Petitioner's explanation to rebut the presumption of waiver under T.C.A. 40-30-112(2) fails as a matter of law to state a reason why the petitioner should not be held to have waived any ground or grounds, if any there be, not previously presented or could have been presented on direct appeal or by the First Petition for Post Conviction Relief.

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Petitioner says in paragraph 39, Second Petition for Post Conviction Relief to wit:

"The above claims were not raised previously either due to the law regarding the claim not being established at the time, ineffective assistance of counsel, the novelty of the claim or counsel's failure to apprise petitioner of the claim or its relevance to his case. Because of this, the petitioner himself has never had an opportunity before now to either raise these claims or waive them. Neither petitioner nor any person previously appointed to represent petitioner has knowingly and understandingly failed to raise any and all such claims earlier."

Petitioner apparently insists that unless he has undergone a Mackey type interrogation (State v. Mackey, 553 S. W. 2d 337) he cannot be held to have waived any ground that was available or should have been raised at a prior proceeding because he personally did not "knowingly and understandingly" waive such ground. Petitioner overlooks T.C.A. 40-30-112(2) which states that the petitioner is held as a matter of law to have waived a ground not previously presented unless he can show a legal excuse why he did not do so. See: e.g. Carruthers v. State, 814 SW 2d 64, 70 (Tenn. Crim. App., 1991). This he has failed to do. Petitioner's claim of "new law" "is meritless because there is no "new law" shown that would affect the results of the judgment in this case. The assertions of ineffective appellate counsel is denied because the statements are conclusory and further a court of competent jurisdiction, to wit the Tennessee Court of Criminal Appeals has held that counsel John Dice was not ineffective. See eg. Cone v. State, 747 SW 2d 353,357 (Tenn. Crim. App. 1987). Moreover, Petitioner states no facts to support claim that Attorney James Kopernak was ineffective regarding the First Petition For Post Conviction. Additionally, the United States Sixth Amendment constitutional right to counsel does not apply to Post Conviction suits. See e.g. Carruthers v. State, *ibid*, at page 69. Petitioner further states that the waiver should not be invoked because of the "novelty" of the claim. This allegation is conclusory and states nothing to support the "novelty" claim. It is proper to consider the

record in this case in which it is shown that the petitioner was an honor graduate of the University of Arkansas and had been accepted for admission into law school, scoring in the ninety-sixth percentile on a law-school admission test. The pro se petitions and amendments filed by the petitioner without the aid of counsel are very well drawn and clearly set out his grounds for consideration by the court. In short, the petitioner is not a simple, illiterate struggling to express himself. Thusly, Petitioner's explanation that he was not apprised by his lawyer or that he nor his lawyer thought of additional grounds now been sought to litigate reaches a point of absurdity. For if that were the law, it would be a simple matter for a prisoner to continually file Post Conviction claims ad infinitum with the explanation each time that because he had not thought of these allegations before he did not knowingly and understandingly waive them. Swanson v. State, 749 SW 2d 731 Tenn. 1988 notwithstanding, the Tennessee Legislature did not intend to grant prisoners the right to file countless petitions for post conviction relief simply because they or their counsel did not think of it at the time of the previous filing. Moreover, this Court does not read Swanson to hold that a prisoner is entitled to file limitless "bites of the apple" without satisfying the requirements of TCA 40-30-112 (2). The petitioner here has not complied with subsection 2 of this statute and is held to have waived all grounds petitioner claims as "new" grounds. Note 6 under TCA 40- 30-112 states to wit:

"The 1971 amendment to section 40-30-112 TCA (subsection 2) which added the second paragraph was but a legislative declaration of the construction that the courts would have given the section even if the amendment had not been enacted. Arthur v. State, 483 SW 2d 95 (Tenn 1972); Recor v. State, 489 SW 2d 64 (Tenn. Crim. App. 1972); Brown v. State, 489 SW 2d 268 (Tenn. Crim. App. 1972).

The petitioner, by way of his Third Amendment, continues with grounds 41,42,43,44,45,46,47,48,49,50,51 and 52 all of which grounds are clearly re-statements of previous grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition.

Ground 46 alleges that the jurors were provided Bibles and ground 47 says that defendant was precluded from sitting at the Counsel table. These grounds have no merit either because they were previously determined and denied in the First Post Conviction Petition or have no constitutional basis under T.C.A. 40-30-105. Petitioner's reliance upon State v. Middlebrooks 840 S.W. 2d 317 (Tenn. 1992) found in ground 43 is misplaced because the trial jury did not find the felony murder as an aggravating circumstance. See: e.g. Cone v. State, 665 SW 2d 87,94. The fourth aggravating circumstance being 39-2-203(i) 3 to wit: "The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder...." was not submitted to the jury by the trial judge because it was not applicable to the facts of the case. See: e.g. Buck v. State, 670 SW 2d 600,608 (Tenn. 1984). Buck states that the aggravating circumstances charged to the jury by the trial judge must be supported by the evidence in the case. Thus, the jury's gratuitous finding of Aggravating Circumstances T.C.A. 39-2-203(i)3 was held harmless by the Tennessee Supreme Court quoting State v. Workman 667 SW 2d 44 (Tenn 1984) and, sustaining the remaining three aggravating circumstances, affirmed the sentences of death.

The Second Petition for Post Conviction Relief and all amendments are hereby denied for reasons that most of the grounds were previously determined and those grounds not previously determined are presumptively waived as a matter of law. Also, many of the grounds are conclusory in nature and totally devoid of merit, and finally a number of the grounds were non-cognizable in a post conviction case because they did not state a constitutional deprivation.

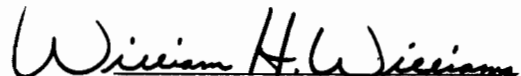
These murders were committed by the petitioner in 1980. The death sentences handed down by the trial jury in 1982 are still in litigation today. Undoubtedly, further appeals will be taken. It is without question, and society demands, that no person's life be exacted

by capital punishment except and only after the guilt and the sentencing proceedings be carefully and, indeed, exhaustingly reviewed by the proper tribunals. But if the death sentence is affirmed, then justice demands that the law be obeyed. Not to do so brings the law into sharp disrepute and promotes disrespect for the law to such extent that any deterrent effect brought about by capital punishment is lost.

All grounds set out in the Second Petition for Post Conviction Relief, as amended, are hereby denied and the Petition is ordered dismissed.

IT IS FURTHER ORDERED that the sentence of death will be carried out as provided by law on the 25th day of April, 1994.

Costs taxed to defendant.

  
WILLIAM H. WILLIAMS  
SENIOR JUDGE

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Whereupon Court adjourned until 9:30 o'clock tomorrow morning.

/s/ William H. Williams  
JUDGE