

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

FILED
04/24/2018
Clerk of the
Appellate Courts

AKIL JAHI AKA PRESTON CARTER v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. P-28413**

No. W2017-02527-CCA-R28-PD

ORDER

This matter is before the Court on the Petitioner's application for permission to appeal the post-conviction court's denial of his motion to reopen his post-conviction petition. The State has responded in opposition to the motion.

The Petitioner was convicted of two count of felony murder during the perpetration of aggravated burglary and sentenced to death by a Shelby County jury in 1995. On appeal, the Tennessee Supreme Court affirmed the conviction but set aside the death sentence and remanded the matter for a new sentencing hearing. *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999). Upon remand, the Petitioner was again sentenced to death with the sentence affirmed by this Court and the Tennessee Supreme Court on appeal. *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003). The Petitioner sought post-conviction relief which was denied by the trial court and said denial affirmed upon appeal. In addition, the Petitioner previously filed a motion to re-open his post-conviction proceedings which was also denied by the trial court an no proper appeal was perfected.

The Petitioner has once again filed a motion to reopen his petition for post-conviction relief relying upon the United States Supreme Court decision in *Moore v. Texas*, 137 S.Ct. 1039 (2017), which he argues created a newly established constitutional right that should be applied retroactively. The post-conviction court denied the Petitioner's motion to reopen post-conviction proceedings finding that the Petitioner had raised the issue of his intellectual disability and that the same had been previously litigated. Furthermore, the trial court found that *Moore* did not establish grounds under Tennessee Code Annotated section 40-30-117 to reopen a post-conviction petition. The Petitioner has timely filed an application for permission to appeal with this Court and the

State of Tennessee has responded in opposition to the application.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

- (1) The claim in the motion 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. The motion 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; or
- (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
- (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the 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 motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
- (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court. *Id.* at (c).

The Petitioner first asserts that he is entitled to relief under Tennessee Code Annotated section 40-30-117(a)(1) in that the decision of the United States Supreme Court in *Moore* created a new constitutional right that would provide an avenue of relief. This Court must first assess whether the *Moore* decision created a new constitutional right that would afford any relief to the Petitioner. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

“For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner’s conviction became final and application of the rule was susceptible to debate among reasonable minds.”

Tenn. Code Ann. § 40-30-122. Further, the courts have determined that a “case

announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001).

In *Moore*, the Supreme Court held the analysis by the Texas Court of Criminal Appeals (hereinafter "TCCA") of the intellectual disability of the defendant was unconstitutional. *Moore* at 1044. The TCCA utilized factors created in *Ex Parte Jose Garcia Briseno*, 135 S.W.3d 1 (Texas Crim. App. 2004), to determine if *Moore* was intellectually disabled. In its ruling, the Supreme Court did not establish a newly created constitutional right to be retroactively applied but rather based its decision upon an application of its prior rulings in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), and *Hall v. Florida*, 134 S.Ct. 1986 (2014). The Supreme Court found error in the TCCA's use of its own self-created factors to determine the intellectual disability of the defendant rather than "the generally accepted, uncontroversial intellectual-disability diagnostic definition." *Moore* at 1045. The Supreme Court stated that the TCCA's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*. *Hall* instructs that, where an IQ score is close to, but above 70, courts must account for the tests 'standard error of measurement.'" *Id.* at 1049 (citing *Hall v. Florida*, 134 S.Ct. at 1995, 2001).

Moore is clearly derivative of *Atkins* and *Hall* and applies the standards created in the prior cases to the specific proceedings of the TCCA and abrogates the prior TCCA ruling in *Briseno*. The Supreme Court states

"By design and in operation, the *Briseno* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S., at ——, 134 S.Ct., at 1990. After observing that persons with "mild" intellectual disability might be treated differently under clinical standards than under Texas' capital system, the CCA defined its objective as identifying the "consensus of Texas citizens" on who "should be exempted from the death penalty." *Briseno*, 135 S.W.3d, at 6 (emphasis added). Mild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities, see *Hall*, 572 U.S., at —— ——, 134 S.Ct., at 1998–1999; *Atkins*, 536 U.S., at 308, and n. 3, 122 S.Ct. 2242; AAIDD–11, at 153, and States may not execute anyone in "the entire category of [intellectually disabled] offenders," *Roper*, 543 U.S., at 563–564, 125 S.Ct. 1183 (emphasis added); *see supra*, at 1048."

Moore at 1051. As with the prior Supreme Court ruling in *Hall*, the *Moore* decision did not enlarge the class of individuals affected by the Supreme Court ruling in *Atkins* but

directed the application of the principles established in *Atkins*. Therefore it follows that the Supreme Court's decision in *Moore v. Texas* did not announce a new constitutional rule requiring retrospective application to permit reopening of the post-conviction petition in this Petitioner's case. *Moore* does not create a right under which the Petitioner may be granted relief as any proceeding would be predicated upon the exercise of the right established in *Atkins v. Virginia*.

The Petitioner further argues in his application that the trial court erred in its conclusion that the intellectual disability of the Petitioner was fully litigated and in its refusal to consider expert medical proof presented. Neither of these arguments establishes sufficient grounds for re-opening of a petition for post-conviction relief and would be applicable to the present matter only if the referenced *Moore* case created a newly established constitutional right. As we have addressed above, the *Moore* case did not create a newly established constitutional right and therefore further analysis of these arguments is not warranted.

The Petitioner has failed to satisfy any of the grounds for reopening a post-conviction petition. Accordingly, the post-conviction court did not abuse its discretion in denying the motion to reopen. *See* T.C.A. § 40-30-117(a), (c).

IT IS HEREBY ORDERED that the Petitioner's application for permission to appeal is DENIED. Because it appears that the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE
ALAN E. GLENN, JUDGE
J. ROSS DYER, JUDGE