

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

FILED

08/04/2017

Clerk of the
Appellate Courts

MICHAEL SAMPLE v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. P-14252**

No. W2016-02324-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 renewed motion to reopen his post-conviction petition. The State has responded in opposition to the motion.

Following a jury trial, the Petitioner and his co-defendant, Larry McKay, each were convicted of two counts of first degree felony murder in connection with the 1981 armed robbery and shooting deaths of Benjamin Cooke and Steve Jones. Both the Petitioner and McKay were sentenced to death. In sentencing the Petitioner to death, the jury found three aggravating circumstances: (1) that the Petitioner created a great risk of death to two or more persons other than the victims who were murdered; (2) that he committed the murders to avoid, interfere with, or prevent a lawful arrest or prosecution; and (3) that the murders were committed in the course of committing a felony. *See Sample v. State*, 82 S.W.3d 267, 269 (Tenn. 2002) (citing Tenn. Code Ann. § 39-2404(i)(3), (6), (7) (Supp. 1981)). The Tennessee Supreme Court affirmed the Petitioner's convictions and sentence on direct appeal. *See State v. McKay*, 680 S.W.2d 447 (Tenn. 1984). The United States Supreme Court denied certiorari on March 4, 1985. *See Sample v. Tennessee*, 470 U.S. 1034 (1985).

The Petitioner has filed numerous petitions for post-conviction relief, all of which the post-conviction court denied. This Court upheld the post-conviction court's judgment on appeal. *See State v. Larry McKay and Michael Eugene Sample*, No. 02C01-9506-CR-00175, 1996 WL 417664, at *1 (Tenn. Crim. App. July 26, 1996), *perm. app. denied* (Tenn. Dec. 2, 1996); *Michael E. Sample and Larry McKay v. State*, No. 02C01-9104-CR-00062, 1995 WL 66563, at *1 (Tenn. Crim. App. Feb. 15, 1995), *perm. app. denied*

(Tenn. Jan. 27, 1997).

In January 1995, the Petitioner filed another petition for post-conviction relief. The post-conviction court dismissed the petition because the Petitioner had an appeal from the denial of a prior post-conviction petition pending in this Court. *See Michael Eugene Sample v. State*, No. 02C01-9505-CR-000131, 1996 WL 551754, at *1 (Tenn. Crim. App. Sept. 30, 1996), *perm. app. denied* (Tenn. Jan. 27, 1997). On appeal, this Court reversed the post-conviction court's judgment and remanded the case for further proceedings. *Id.* On remand, the post-conviction court again dismissed the Petitioner's petition, and this Court upheld the dismissal on appeal. *See Michael Eugene Sample and Larry McKay*, No. W1999-01202-CCA-R3-PC, 2001 WL 43381, at *1 (Tenn. Crim. App. Jan. 17, 2001). The Tennessee Supreme Court granted the Petitioner's application for permission to appeal, reversed the dismissal of the Petitioner's post-conviction petition, and remanded the case to the post-conviction court for further proceedings. *Sample v. State*, 82 S.W.3d 267, 268 (Tenn. 2002). On remand, the post-conviction court again denied the Petitioner relief, and this Court affirmed the post-conviction court's judgment on appeal. *Michael Eugene Sample v. State*, No. W2008-02466-CCA-R3-PD, 2010 WL 2384833, at *7 (Tenn. Crim. App. June 15, 2010), *perm. app. denied* (Tenn. Nov. 12, 2010).

On June 2, 2016, the Petitioner filed an amended motion for relief containing a renewed motion to reopen his post-conviction petition, relying upon the United States Supreme Court's opinion in *Hall v. Florida*, 134 S.Ct. 1986 (2014) and a motion to reopen his post-conviction petition relying upon the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S.Ct. 616 (2016). On October 26, 2016, the post-conviction court entered an order encompassing multiple requests for various relief but specifically denying the renewed motion to reopen and the newly filed motion to reopen.

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 argues that his post-conviction petition should be reopened in light of the United States Supreme Court's opinions in *Hall v. Florida*, 134 S.Ct. 1986 (2014), and *Hurst v. Florida*, 136 S.Ct. 616 (2016).

The Tennessee Supreme Court has rejected the claims raised by the Petitioner in relation to *Hall v. Florida* and the Petitioner admits as much in his application for permission to appeal. *See Payne v. State of Tennessee*, 493 S.W.3d 478 (Tenn. 2016).

The Petitioner argues that the Tennessee Supreme Court was in error in its ruling in *Payne* due to its failure to apply the rulings of the United States Supreme Court in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and *Welch v. United States*, 136 S.Ct. 1257 (2016). This Court will note that *Montgomery v. Louisiana* was decided on January 27, 2016 and *Payne v. State of Tennessee* was decided on April 7, 2016. As such, the argument that our Supreme Court failed to apply the reasoning and guidance of *Montgomery* is without merit in that at the time of the ruling in *Payne* the decision in *Montgomery* had been decided and published.

The timing of the decisions in the *Montgomery* and *Payne* cases notwithstanding, the ruling espoused by the Supreme Court in *Montgomery* made no mention of the findings of *Hall* nor did it mention any effect of the retroactive application of *Hall* as the Petitioner asks this court to determine. The *Montgomery* decision applied to the application of a sentence of life without parole to juvenile offenders and did not affect the application of the death penalty to adults. Therefore, the reliance upon *Montgomery* to overrule the *Payne* decision is without merit. The holdings of the *Montgomery* opinion would not, and did not, affect the retroactive application of *Hall* by Tennessee courts.

While *Welch* was decided after the *Payne* decision, the *Welch* decision provides no avenue of relief to encourage this Court to disagree with the ruling of our Supreme Court in *Payne*. It is true that the *Welch* opinion called for the retroactive application of a

new substantive rule of law as established in *Johnson v. United States*, 135 S.Ct. 2551 (2015), but the newly created rule from *Johnson* had no application to the present issue presented by the Petitioner. The *Johnson* ruling applied to the application of a secondary clause of a federal criminal statute related to a determination of the level of violence in certain criminal acts. *Id.* Much like *Montgomery*, the *Welch* opinion made no mention of the findings in *Hall*. *Id.* In issuing its ruling, the *Welch* court specifically declined to diverge from the standard set out in *Teague v. Lane* to be used to determine whether a law was procedural or substantive. *Welch* 136 S.Ct. at 1264 (citing *Teague v. Lane*, 109 S.Ct. 1060 (1989)). Therefore, the *Welch* opinion has no effect on the settled law as stated in *Payne v. State of Tennessee* finding *Hall v. Florida* has no retroactive application.

Finally, the Petitioner asserts that he is entitled to relief under the decision of the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016). The Petitioner argues that pursuant to the ruling in *Hurst*, the Petitioner is entitled to a jury determination of his competency to be eligible for the death penalty. However, the Supreme Court's opinion in *Hurst* related to the state of Florida's unique capital sentencing procedure. *Id.* at 617. The *Hurst* court based its ruling upon the application of the United States Supreme Court decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), which has been specifically found by the United States Supreme Court to not apply retroactively to death penalty cases already final on direct review. *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004). Specifically, *Hurst* espoused no new rule of law but only made a present determination on the constitutionality of the Florida sentencing procedure. There is no basis for relief on the argument that *Hurst* would require retroactive application to the Petitioner when his conviction became final on direct review prior to the Supreme Court ruling in *Ring*.

In addition to the initial application for permission to appeal, the Petitioner filed two separate supplements to his application for permission to appeal. In his supplements, the Petitioner seeks to rely upon the United States Supreme Court Case of *Moore v. Texas*, 137 S.Ct. 1039 (2017), which he alleges was supported by the summary dispositions in the matters of *Henderson v. Davis*, 137 S.Ct. 1450 (2017) and *Martinez v. Davis*, 137 S.Ct. 816 (2017). All of these cases were decided after the ruling of the post-conviction court and, therefore, none were cited or presented to the post-conviction court for consideration of the petition to reopen post-conviction proceedings. This Court cannot find that the lower court abused its discretion in denying the petition to reopen post-conviction proceedings using these cases as its guide.

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

J. ROSS DYER, JUDGE

JOHN EVERETT WILLIAMS, JUDGE

ALAN E. GLENN, JUDGE