

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

FILED

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Clerk of the
Appellate Courts

DONNIE E. JOHNSON v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. P5654**

No. W2017-00848-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 post-conviction petition. The State has responded in opposition to the motion.

Following a jury trial, the Defendant was convicted of first degree murder for the 1984 murder of his wife, Connie Johnson. After conviction, the jury found the Petitioner had been convicted of prior felonies which involved the use or threat of violence to the person and that the murder was especially cruel and involved torture or depravity of mind. Finding that these aggravating circumstances outweighed any mitigating evidence, the jury sentenced the Petitioner to death. Both the conviction and sentence were upheld on appeal and affirmed by our Supreme Court. *See State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987). After his direct appeal, the Petitioner unsuccessfully sought post-conviction relief in the trial court with said denial affirmed on appeal. *See Donnie E. Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887, at * 1 (Tenn. Crim. App. Mar. 27, 1997), *perm. app. denied* (Tenn. Sept. 8, 1997); *Johnson v. State*, No. 02C01-9111-CR-00237, 1995 WL 603159 (Tenn. Oct. 9, 1995); *Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483, at *1 (Tenn. Crim. App. Mar. 23, 1994); *Johnson v. State*, No. 02-S-01-9207-CR-00041, 1993 WL 61728, at *1 (Tenn. Crim. App. Mar. 8, 1993).

In June 2016, the Petitioner filed a motion to reopen post-conviction petition, relying upon Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the United States Supreme Court's ruling in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and the United States Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), as bases to reopen his post-conviction petition. The trial court denied

the motion of the Petitioner and he has timely appealed the denial of his motion to this Court.

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.

Tenn. Code Ann. §40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court and the review by this Court will be based upon the abuse of discretion standard. *Id.* at (c).

The Petitioner's reliance upon a dissenting opinion in *Glossip* offers him no relief. In order to be successful in reopening a previously filed petition, the claim asserted must be "based upon a final ruling of an appellate court." Tenn. Code Ann. § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. *Glossip*, 135 S.Ct. at 2731. Therefore, the trial court did not abuse its discretion in denying relief to the Petitioner based upon his reliance on Justice Breyer's dissent.

The *Obergefell* case held that "same-sex couples may exercise the fundamental right to marry" and that "under the Due Process and Equal Protection Clauses of the

Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty.” *Obergefell*, 135 S.Ct. at 2604-05. The Petitioner argues that the death penalty, which has been imposed against him, “denies his fundamental right to life, denies him inherent human dignity, and unconstitutionally diminishes his personhood – all of which are prohibited by *Obergefell*.” However, the application of the death penalty has not been ruled unconstitutional by either the United States Supreme Court or the Tennessee Supreme Court. Therefore, the trial court did not abuse its discretion in holding that *Obergefell* did not create a right upon which the Petitioner can base a motion to reopen his post-conviction petition.

The remaining argument of the Petitioner in support of his application for permission to appeal is based on *Johnson v. United States*. In that case, the Supreme Court held that the “residual clause” contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines “violent felony” as

“any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*” §924(e)(2)(B) (*emphasis added*).

The “otherwise involves conduct that presents a serious potential risk of physical injury to another” language is known as the ACCA’s “residual clause.” *Johnson*, 135 S.Ct. at 2556. The court observed that, “unlike the part of the definition of a violent felony that asks whether the crime ‘has *as an element* the use . . . of physical force,’ the residual clause asks whether the crime ‘*involves conduct*’ that presents too much risk of physical injury.” *Id.* at 2557. (*emphasis in original*). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it “leaves grave uncertainty about how to estimate the risk posed by a crime” and it “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557-58. In other words, “[d]eciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.” *Id.* at 2557. That “task goes beyond deciding whether creation of risk is an *element* of the crime.” *Id.* (*emphasis added*). As such, the majority declined the dissent’s suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62.

The Petitioner alleges that the *Johnson* decision created a new constitutional right

that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look at *Johnson* to determine if a new constitutional right was created. 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.”

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). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

“Last Term, this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision *void for vagueness*.”

Welch v. United States, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

“Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is *void for vagueness*.”

Id. (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The “void for vagueness” doctrine was not a new creation of the *Johnson* court in that the due process provisions of the 5th and 14th amendments have been utilized many times prior to *Johnson* to determine that a statute is unconstitutionally vague. *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S.Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring “credible and reliable” identification); *Colautti v. Franklin*, 99 S.Ct. 675 (1979) (statute vague due to required interpretation of “is viable” and “may be viable”); *Smith v. Goguen*, 94 S.Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S.Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

Even if a new retroactively applicable constitutional right was created by the *Johnson* decision, such ruling would not offer relief to the Petitioner. The argument of the Petitioner is that one of the aggravating factors found by the jury to sentence the Petitioner to death is vague and under the ruling espoused by the *Johnson* court would be unconstitutional. The statute referenced by the Petitioner has been amended since the time of his trial and conviction but at the time of trial stated: “The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.” Tenn. Code Ann. §39-13-204(i)(2) (1988). A comparison of the two clauses the ACCA and the pre-1989 (i)(2) provision reveals that application of the *Johnson* court ruling would not result in the finding that the pre-1989 (i)(2) provision is unconstitutionally vague.

The “residual clause” of the ACCA defines a violent felony as a felony that “otherwise involves conduct that presents a serious risk of physical injury to another” while the pre-1989 (i)(2) provision required that the felony “involve the use or threat of violence to the person.” The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the “categorical approach” in applying the ACCA. *Id.* (citing *Taylor v. United States*, 110 S.Ct. 2143 (1990)). Under this “categorical approach”, the court must assess “whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’” *Id.* (citing *Begay v. United States*, 128 S.Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the “ordinary case” interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. *See State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes

of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the “use or threat of violence” language of the pre-1989 (i)(2) provision, the vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an “ordinary case” of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner’s motion.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Petitioner’s application for permission to appeal is, therefore, denied. Because it appears the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE
ALAN E. GLENN, JUDGE
CAMILLE R. MCMULLEN, JUDGE