

*Tommy Nunley v. State of Tennessee*

No. W2016-01487-SC-R11-ECN

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The Tennessee Supreme Court’s unanimous decision in *Nunley v. State* restricts the ability of *pro se* criminal defendants to obtain *coram nobis* relief.<sup>1</sup> *Nunley* held that a *pro se coram nobis* petition is subject to being summarily dismissed if the face of the petition does not show that it was timely filed or that the defendant is entitled to equitable tolling of the statute of limitations.

Tommy Nunley was convicted of aggravated rape in 1998.<sup>2</sup> On July 25, 2000, he filed a petition for post-conviction relief, claiming that his “trial counsel was ineffective for failing to move for state-funded expert assistance for DNA testing of various items collected during the investigation of the case.”<sup>3</sup> After an evidentiary hearing, the post-conviction court entered a *sua sponte* order, directing the TBI to conduct DNA comparison testing between biological samples taken from the Defendant and those in the victim’s sexual assault kit.<sup>4</sup> However, the State reported that the sexual assault kit had been either lost or destroyed and was no longer available for testing.<sup>5</sup> On July 11, 2003, the post-conviction court granted the Defendant’s petition for post-conviction relief, finding that the failure to test the evidence at the time of trial resulted in a violation of the Defendant’s constitutional right to a fair trial.<sup>6</sup> The State appealed, and the Court of Criminal Appeals reversed the post-conviction court, holding that the proof did not support a

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<sup>1</sup> *Nunley v. State*, 552 S.W.3d 800 (Tenn. 2018)

<sup>2</sup> *Id.* at 807.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

finding that trial counsel's request for DNA testing would have affected the outcome of the Defendant's trial.<sup>7</sup>

In May 2014, the Defendant filed a petition for relief under the Post-Conviction DNA Analysis Act, requesting DNA testing on all evidence in the State's possession.<sup>8</sup> The trial court denied the Defendant's petition based on the post-conviction court's prior finding that any evidence which would have been tested no longer existed, and the Criminal Court of Appeals affirmed.<sup>9</sup>

In May 2016, the Defendant filed a pro se petition for writ of error *coram nobis*, claiming that the State's July 7, 2014 response to his petition for post-conviction DNA analysis included four exculpatory exhibits of which he had not previously been aware.<sup>10</sup> The first exhibit to the Defendant's *coram nobis* petition included two reports from a forensics laboratory.<sup>11</sup> The second exhibit consisted of two letters from the Assistant District Attorney to the TBI Crime Lab, asking for DNA testing of the evidence in the Defendant's case, or at least blood typing.<sup>12</sup> The third exhibit was an "Official Serology Report" from the TBI Crime Lab, and the fourth exhibit was a "memo" to the prosecution's case file from Assistant District Attorney.<sup>13</sup> A type-written statement on the memo read, "I spoke to Steve Wiechman at the TBI lab. His lab's policy is not to re-do tests already done by another certified lab. The local lab . . . determined that there was no match between the defendant and the [victim]. He will not re-do any tests."<sup>14</sup> The Defendant claimed that these four exhibits demonstrated that the State withheld exculpatory evidence that would have exonerated him, in violation of his Constitutional right to due process.<sup>15</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 807-808.

<sup>11</sup> *Id.* at 808.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

The trial court dismissed the Defendant's petition on its face as time barred.<sup>16</sup> On appeal, the Court of Criminal Appeals first declined to address whether the Defendant's petition was timely because the State did not plead the statute of limitations as an affirmative defense.<sup>17</sup> Next, the appellate court went on to address whether the Defendant should be entitled to *coram nobis* relief.<sup>18</sup> In affirming the trial court's denial of *coram nobis* relief, the appellate court noted that, "regardless of what the memo suggests, testing performed by Cellular and Molecular Forensics Laboratory did not, in fact, determine[ ] that there was no match between the defendant and the victim." The appellate court concluded that, when "examined within the context of the record as a whole, the information contained in the memo does not qualify as newly discovered evidence."

The Defendant filed a petition for writ of certiorari, contending that he was entitled to *coram nobis* relief because Exhibit D to his petition showed that the State withheld exculpatory evidence at his trial in violation of his constitutional right of due process under *Brady v. Maryland*.<sup>19</sup> It was not until after the Court granted permission to appeal that the Defendant was appointed counsel.

Ultimately, the Court held that the statute of limitations set forth in Tenn. Code Ann. § 27-7-103 is not an affirmative defense that must be specifically raised by the State in error *coram nobis* cases.<sup>20</sup> Instead, the *coram nobis* petition must show on its face that it is timely filed, or in the alternative, that the petitioner is entitled to equitable tolling of the statute of limitations.

The writ of error *coram nobis* is codified in Tenn. Code Ann. § 40-26-105 and provides a form of relief available to a convicted criminal defendants.<sup>21</sup> The Tennessee Supreme Court

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<sup>16</sup> *Id.* at 809.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Tenn. Code. Ann. § 27-7-103

<sup>21</sup> Tenn. Code. Ann. § 40-26-105(a).

has described it as “an extraordinary remedy known more for its denial than its approval.”<sup>22</sup> The decision to grant or deny a petition for writ of error *coram nobis* is within the trial court’s discretion.<sup>23</sup> The one-year *coram nobis* statute of limitations begins to run, thirty days after entry of the judgment in the trial court if no post-trial motion is filed, or upon entry of an order disposing of a timely filed post-trial motion.<sup>24</sup> And as a result, in most instances, to be timely, a petition for writ of error *coram nobis* generally will be filed during the pendency of an appeal as of right. Nevertheless, the statute of limitations may be tolled on due process grounds if a petition seeks relief based upon newly discovered evidence of actual innocence.<sup>25</sup> The Tennessee Supreme Court has stated that “[i]n determining whether tolling of the statute is proper, the court is required to balance the petitioner's interest in having a hearing with the interest of the State in preventing a claim that is stale and groundless.”<sup>26</sup>

Because the Sixth Amendment right to counsel ends at the first appeal of right,<sup>27</sup> writ of *coram nobis* petitioners seeking to argue that the statute of limitation should be tolled on due process grounds will either have to hire their own counsel to draft such arguments, or if they cannot afford counsel, attempt to draft such arguments without counsel. To afford indigent petitioners with a fair opportunity to obtain *coram nobis* relief, Tenn. Code Ann. § 40-14-204 provides that “[i]n all proceedings for the writ of habeas corpus or the writ of error *coram nobis*, the court having jurisdiction of those matters shall determine the question of indigency and appoint counsel, if necessary, in the manner set out . . .”<sup>28</sup> Nevertheless, the defendant in *Nunley* was not appointed counsel until after the Court granted certiorari.

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<sup>22</sup> *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999).

<sup>23</sup> *Workman v. State*, 41 S.W.3d 100, 105 (Tenn. 2001).

<sup>24</sup> *State v. Mixon*, 983 S.W.2d 661, 663 (Tenn. 1999).

<sup>25</sup> *Wilson v. State*, 367 S.W.3d 229, 234 (Tenn. 2012).

<sup>26</sup> *Id.*

<sup>27</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

<sup>28</sup> Tenn. Code. Ann. § 40-14-204

The Court's decision in *Nunley* ultimately makes it more difficult for indigent criminal defendants to obtain relief upon filing a petition for *coram nobis* because it places the burden on the petitioner to show that he or she is entitled to equitable tolling of the statute of limitations. Without access to counsel and without any legal training, indigent defendants face a significant hurdle in obtaining *coram nobis* relief once the one-year statute of limitations has passed.