

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 2, 2018

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Appellate Courts

CARL LOVERSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

No. 16-03284 Lee V. Coffee, Judge

No. W2018-00694-CCA-R3-PC

The Petitioner, Carl Loverson, filed a pro se “Petition for Post-Conviction Relief and/or Petition for Clerical Error, Omission [sic] in Records,” alleging that, contrary to the trial court’s order, he was transported to the Tennessee Department of Correction instead of being released into a drug program. The post-conviction court summarily dismissed the petition as untimely and for failure to state a colorable claim for relief. The Petitioner appeals. Upon review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and ALAN E. GLENN, J., joined.

Carl Loverson, Hartsville, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Alanda Dwyer, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Factual Background

On May 12, 2016, the Petitioner was indicted for two counts of aggravated assault, a Class C felony; one count of reckless endangerment, a Class C felony; two counts of being a convicted felon in possession of a handgun, a Class D felony; and one count of coercion of a witness, a Class C felony. On January 18, 2017, the Petitioner pled guilty to the charged offenses. He was sentenced as a Range II, multiple offender to concurrent

sentences of eight years for each Class C felony and three years for each Class D felony, for a total effective sentence of eight years.

On February 26, 2018, the Petitioner filed a “Petition for Post-Conviction Relief and/or Petition for Clerical Error, Omission [sic] in Records.” In the petition, the Petitioner alleged that he “fell within the requirements for the Jericho Program and, even the presiding Judge said he was going to get the [Petitioner] assistant [sic] for his drug problem before he became sick and missed court several times.” The Petitioner said that he was supposed to be assigned to the program “until for no reason, [he] was transported to the Tennessee Department of Correction.” The Petitioner contended that the transfer was illegal and that the post-conviction court could correct an illegal sentence and judgment at any time. The Petitioner asserted that defense counsel, the prosecutor, and the judge agreed to his enrollment. The Petitioner maintains that the agreement was “administrated on record and in open court” and that it should have been honored.

The post-conviction court dismissed the petition without an evidentiary hearing or appointment of counsel, finding that “[p]er the attached documents, the Petitioner submitted the petition to prison authorities for mailing on February 20, 2018,” which was beyond the one-year statute of limitations for filing a post-conviction petition. The post-conviction court stated that the Petitioner had failed to allege any grounds warranting a tolling of the statute of limitations. Moreover, the post-conviction court found that the Petitioner’s complaint was that he had failed to receive alternative sentencing; therefore, the Petitioner had not stated any legal grounds for post-conviction relief. On appeal, the Petitioner challenges this ruling.

II. Analysis

On appeal, the Petitioner appears to concede that his petition for post-conviction relief was untimely and asks for an “extension of time” on the one-year statute of limitations so the post-conviction court could “administ[er] fairness” and sentence him to the Jericho Program. The Petitioner maintains that “train[ed] professionals” testified that he qualified for the program and that the trial judge noted on the judgment a recommendation that the Petitioner be admitted to the program. The State contends the post-conviction court correctly determined that the post-conviction petition was untimely and that the Petitioner failed to establish that the limitations period should be tolled. We agree with the State.

Tennessee Code Annotated section 40-30-102(a) provides that a petition for post-conviction relief must be filed within one year of the date on which the judgment became final or consideration of the petition will be time-barred. The Petitioner pled guilty and was sentenced on January 18, 2017; accordingly, he was required to file his petition for post-conviction relief within one year of February 17, 2017, the date his judgment

became final. See Tenn. Code Ann. § 40-30-102(a); State v. Green, 106 S.W.3d 646, 650 (Tenn. 2003) (holding that “a judgment of conviction entered upon a guilty plea becomes final thirty days after acceptance of the plea agreement and imposition of sentence”).

The stamped filed date on the petition was February 26, 2018. Although not contained in the appellate record, the post-conviction court noted documents attached to the petition showed that “the Petitioner submitted the petition to prison authorities for mailing on February 20, 2018.” Both dates were beyond the one-year statute of limitations.

The statute emphasizes that “[t]ime is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise.” Tenn. Code Ann. § 40-30-102(a). The statute allows a petition to be filed outside the limitations period for the following reasons: (1) the petition is based on 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”; (2) the petition is based on new scientific evidence; or (3) the petition seeks relief from a sentence that was enhanced because of a previous conviction that was later held to be invalid. Tenn. Code Ann. § 40-30-102(b).

Our supreme court has held that due process may require tolling the statute of limitations. Whitehead v. State, 402 S.W.3d 615, 622-23 (Tenn. 2013). “[A] post-conviction petitioner is entitled to due process tolling of the one-year statute of limitations upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.” Bush v. State, 428 S.W.3d 1, 22 (Tenn. 2014) (citing Whitehead, 402 S.W.3d at 361). Moreover, tolling “must be reserved for those rare instances where—due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” Whitehead, 402 S.W.3d at 631-32 (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)).

Here, the Petitioner does not allege any of the statutory exceptions to the one-year statute of limitations. He also does not allege that his claim for post-conviction relief arose after the statute of limitations expired, that his mental incompetence prevented compliance with the statute of limitations, or that his attorney committed misconduct. Accordingly, the post-conviction court did not err by summarily dismissing the petition as untimely.

Moreover, the post-conviction court found that the Petitioner failed to raise a colorable claim for relief. “Relief under [the Post-Conviction Procedure Act] shall be

granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The petition must contain “a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Tenn. Code Ann. § 40-30-106(d).

Even if the petition had been timely filed, the petition needed to assert a colorable claim for post-conviction relief. Tenn. Sup. Ct. R. 28 § 2(B)(2). A “colorable claim” is defined as “a claim . . . that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.” Tenn. Sup. Ct. R. 28 § 2(h). If the facts alleged in the petition, taken as true, fail to state a colorable claim, then summary dismissal is appropriate. Arnold v. State, 143 S.W.3d 784, 786 (Tenn. 2004).

In the petition, the Petitioner complained that he was transported to the Tennessee Department of Correction instead of being released into the “Jericho Program.” In other words, as the post-conviction court stated, “[t]he Petitioner simply is aggrieved that the trial court did not grant his request for alternative sentences. The Petitioner’s remedy was to file a timely appeal of the court’s denial of a request for alternative sentences.” This court previously has stated, “[t]here is no appellate review of the sentence in a post-conviction or habeas corpus proceeding.” Kenneth J. Cradic v. State, No. E2010-00140-CCA-R3-PC, 2010 WL 2612736, at *6 (Tenn. Crim. App. at Knoxville, June 30, 2010) (quoting Tenn. Code Ann. §40-35-401(a) (2006)). Accordingly, “a sentencing issue is not a colorable claim in a post-conviction proceeding.” Id.

We recognize that pro se petitions often are inartfully drafted and that pro se petitioners are not held to the same stringent drafting standards as attorneys. However, even liberally construing the Petitioner’s claims, nothing in his pro se petition could be construed as an allegation of ineffective assistance of counsel. Therefore, we conclude that the post-conviction court appropriately dismissed the petition without the appointment of counsel or an evidentiary hearing.

Alternatively, the Petitioner appears to seek relief to correct an illegal sentence pursuant to Rule 36.1 of the Tennessee Rules of Criminal Procedure. Rule 36.1 permits a defendant to seek correction of an unexpired illegal sentence at any time. See State v. Brown, 479 S.W.3d 200, 211 (Tenn. 2015). “[A]n illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1(a). As our supreme court has explained, only “fatal” sentencing errors render sentences illegal. State v. Wooden, 478 S.W.3d 585, 595 (Tenn. 2015). “Included in this category are sentences imposed pursuant to an inapplicable statutory scheme, sentences designating release eligibility dates where early release is statutorily prohibited, sentences that are ordered to be served concurrently where statutorily required

to be served consecutively, and sentences not authorized by any statute for the offenses.” Id. Conversely, “[c]laims of appealable error generally involve attacks on the correctness of the methodology by which a trial court imposed sentence.” Id. Few appealable errors rise to the level of an illegal sentence. Id.

The post-conviction court did not address the Petitioner’s claim of clerical error or “Omission [sic] in Records.” Nevertheless, we note that the Petitioner failed to allege that his sentence was illegal. The Petitioner contends that the trial court “said he was going to get the [Petitioner] assistant [sic] for his drug problem” and “agreed to [the Petitioner’s] enrollment into [the] Jericho Program.” The judgment of conviction reflects that the trial court made a “Judicial Recommendation for Drug Program.” The court recommended, but did not guarantee, placement in the Jericho Program; therefore, the record does not reflect that any provision of the plea agreement was violated or that the Petitioner’s sentence was illegal. See William Berrios v. State, No. E2003-01791-CCA-R3-PC, 2004 WL 962840, at *4 (Tenn. Crim. App. at Knoxville, May 5, 2004). Accordingly, the Petitioner is not entitled to relief.

III. Conclusion

Based upon the record and the parties’ briefs, we affirm the judgment of the post-conviction court.

NORMA MCGEE OGLE, JUDGE