



Tennessee Supreme Court
DISCRETIONARY APPEALS
Grants & Denials List
September 3, 2019 - September 6, 2019

GRANTS

Style/Appeal Number	County/Trial Judge/ Trial Court No.	Intermediate Court	Supreme Court Action
<u>Jackson</u> CORDARIUS MAXWELL v. STATE OF TENNESSEE W2018-00318-SC-R11-PC	Madison County Circuit Court Donald H. Allen C-17-308	Williams, John Everett: Reverse	Granted/Remanded: Application of State of Tennessee Order filed 9-3-19 9 (See Attached Order)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED
09/03/2019
Clerk of the
Appellate Courts

CORDARIUS MAXWELL v. STATE OF TENNESSEE

**Appeal by Permission from the Court of Criminal Appeals
Circuit Court for Madison County
No. C-17-308 Donald H. Allen, Judge**

No. W2018-00318-SC-R11-PC

For Publication

ORDER

This case is before the Court upon the application of the State of Tennessee under Rule 11 of the Tennessee Rules of Appellate Procedure. We hold that the application should be summarily granted, the opinion of the Court of Criminal Appeals reversed, and the order of the post-conviction court reinstated for the reasons set forth below.

A jury convicted Maxwell of six counts of attempted second-degree murder, six counts of aggravated assault, and one count each of aggravated robbery, robbery, employing a firearm during the commission of a dangerous felony, and vandalism over \$1,000. The trial court imposed an effective thirty-seven year sentence. *State v. Demetrius J. Pirtle and Cordarius R. Maxwell*, No. W2014-02222-CCA-R3-CD, 2016 WL 4009712 (Tenn. Crim. App. July 22, 2016), *perm. app. denied* (Tenn. Nov. 22, 2016).

Maxwell, represented by counsel, timely filed a post-conviction petition. The State filed a response and moved to dismiss, asserting that the petition was not in proper form. The State also alleged that the petition failed to meet the requirements of Tennessee Code Annotated sections 40-30-104(c), (d), (e), (f), and (g). Maxwell, through his counsel, neither filed a response to the motion to dismiss nor took any other action to remedy the alleged defects.

Fifty days after the State's response and motion to dismiss, the post-conviction court dismissed the petition because it did not contain Maxwell's signature verifying, under oath and subject to the penalty for perjury, that the contents of the petition are true and correct. *See* Tenn. Code Ann. § 40-30-104(e) (2014).

One week after the post-conviction court dismissed the petition, Maxwell's counsel filed a "Motion to Reconsider Preliminary Order and to Amend Petition for Relief from Conviction or Sentence," in which he asserted that the petition had been inadvertently filed without the executed verification page. Counsel attached to the motion an amended petition with a verification page indicating that Maxwell had signed it on November 1, 2017, about two weeks before the petition was originally filed. The hearing date set for the motion was outside the time period for filing a notice of appeal. Counsel, to preserve Maxwell's right to appeal, filed a notice of appeal without waiting on a ruling from the trial court on his motion.

In a split decision, the majority of the Court of Criminal Appeals reversed the trial court, holding that Maxwell should not be deprived of his opportunity to seek post-conviction relief because of his counsel's technical statutory violation. *Maxwell v. State*, No. W2018-00318-CCA-R3-PC, 2019 WL 1783501 (Tenn. Crim. App. Apr. 23, 2019). The majority reasoned that letting a pro se petitioner correct a defect "without affording such an opportunity to a petitioner who is represented by counsel essentially discourages a petitioner from seeking the assistance of counsel before filing a post-conviction petition." *Id.* at *2. The dissenting judge would have affirmed the trial court, relying on the language of Tennessee Code Annotated section 40-30-106(d), which contains no exception for a defendant represented by counsel. *Id.* at *3–5.

Post-conviction review is not required by constitutional principles. *See Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013). Such review is afforded solely as a matter of legislative grace – it is "entirely a creature of statute." *Bush v. State*, 428 S.W.3d 1, 15–16 (Tenn. 2014) (citing *Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005)). Accordingly, the "availability and scope of post-conviction relief lies within the discretion of the General Assembly." *Id.* at 15. The legislature "may set up reasonable procedural requirements," and post-conviction claims "may be terminated for failure to comply with a reasonable procedural rule." *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000) (internal citation omitted). Those requirements are contained in Tennessee Code Annotated section 40-30-104. The provision at issue here is the requirement contained in subsection (e) that a petition for post-conviction relief and any amended petition "shall be verified under oath." Tenn. Code Ann. § 40-30-104(e); *see also* Tenn. Sup. Ct. R. 28, § 5(E)(2) (requiring that a post-conviction petition include an affidavit from the petitioner).

Despite the mandatory language of the content requirements, the legislature has granted trial courts the limited authority to permit a pro se petitioner to correct a deficient petition. Tenn. Code Ann. § 40-30-106(d); *see also* Tenn. Sup. Ct. R. 28, § 6(B)(4)(b). Petitions that are incomplete shall be filed by the clerk of the court, but shall be completed as set forth in an order entered in accordance with section 40-30-106(d). Tenn. Code Ann. § 40-30-104(b). However, nothing in section 106(d) contemplates that counsel

will be given an opportunity to correct a deficiency. It is only if the petition was filed by an unrepresented person that a trial court retains any authority to allow the filing of a compliant amended petition. Tenn. Code Ann. § 40-30-106(d).

The legislature did not extend the same correction opportunity to petitioners represented by counsel. “It is primarily the role of the legislature to determine the public policy of this state,” and not that of the judiciary. *Cary v. Cary*, 937 S.W.2d 777, 781 (Tenn. 1996) (citing *Crawford v. Buckner*, 839 S.W.2d 754, 759 (Tenn. 1992)); *see also Frazier v. State*, 495 S.W.3d 246, 249 (Tenn. 2016); “Courts are not at liberty to rewrite statutes.” *Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 145 (Tenn. 2017) (citations omitted); *see also Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013) (quoting *Britt v. Dyer’s Emp’t Agency, Inc.*, 396 S.W.3d 519, 523 (Tenn. 2013)) (“[c]ourts may neither alter or amend statutes nor substitute [their] own policy judgments for those of the General Assembly.”).

Here, the post-conviction court did not err in dismissing the post-conviction petition for failure to comply with the requirements of Tennessee Code Annotated section 40-30-104(e). The Court of Criminal Appeals erred by substituting its own policy preference for that of the legislature. Accordingly, we reverse the Court of Criminal Appeals and reinstate the order of the post-conviction court dismissing the petition.

The costs of this appeal are taxed to the State of Tennessee for which execution may issue if necessary.

PER CURIAM