

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs October 30, 2018

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STATE OF TENNESSEE v. JEFFERY YATES

Appeal from the Criminal Court for Shelby County
No. 02-00754 Chris Craft, Judge

No. W2018-00284-CCA-R3-CD

Petitioner, Jeffery Yates, sought correction of a clerical error in his judgment from a 2003 conviction for aggravated robbery. After the trial court corrected the judgment, Petitioner appealed. On appeal, Petitioner alleges that the trial court was without jurisdiction to amend the judgment, that the trial court failed to find the original judgment contained a clerical error, and that the amended judgment is incomplete. We determine that the amended judgment form is incomplete because it does not specify that Petitioner is a Career Offender, and we remand the matter to the trial court for correction of the judgment form. In all other respects, the judgment of the trial court is affirmed.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and CAMILLE R. MCMULLEN, JJ., joined.

Jeffery Yates, Clifton, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Clark B. Thornton, Senior Counsel; Amy P. Weirich, District Attorney General; and Karen Cook, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Twenty-five years ago, Petitioner was convicted of especially aggravated kidnapping, attempted aggravated robbery, and aggravated kidnapping (the 1993 convictions) and received an effective eighteen-year sentence. *See Jeffrey D. Yates v. State*, No. 02C019608-CR-00276, 1997 WL 399311, at *1 (Tenn. Crim. App. July 16,

1997), *perm. app. denied* (Tenn. Feb. 23, 1998). He unsuccessfully sought post-conviction relief on the basis of ineffective assistance of counsel. *Id.* About one year later, he pled guilty to five counts of aggravated assault and two counts of possession of cocaine with intent to sell (the 1994 convictions), receiving an effective ten-year sentence which was ordered to be served concurrently with the sentences for the 1993 convictions. *See Jeffery Yates v. State*, No. W2007-02868-CCA-R3-HC, 2008 WL 3983111, at *1 (Tenn. Crim. App. Aug. 27, 2008), *perm. app. denied* (Tenn. Jan. 20, 2009).

In 2003, Defendant was convicted by a jury of aggravated robbery and sentenced as a Range III, career offender to thirty years in the Department of Correction. *State v. Jeffrey Yates*, No. W2003-02422-CCA-MR3-CD, 2005 WL 1707974, at *1 (Tenn. Crim. App. July 21, 2005), *perm. app. denied* (Tenn. Dec. 19, 2005). Petitioner did not challenge his sentence on direct appeal. *Id.* Petitioner sought post-conviction relief, but his attempt to prove that both trial and appellate counsel were ineffective was not successful. *Jeffery Yates v. State*, No. W2008-02498-CCA-R3-PC, 2009 WL 2985949, at *12 (Tenn. Crim. App. Sept. 18, 2009), *perm. app. denied* (Tenn. Feb. 22, 2010).

Dissatisfied with his effective eighteen-year sentence from the 1993 and 1994 convictions, Petitioner attempted to attack the judgments via the writ of habeas corpus. In 2006, he argued that his eighteen-year sentence for the 1993 convictions was illegal because it was required to be served consecutively to the ten-year sentence for his 1994 convictions because he was “on bail for the five aggravated assaults and for one count of possessing cocaine when he committed the especially aggravated kidnapping, aggravated kidnapping, and attempted aggravated robbery[.]” *Jeffery Yates v. State*, No. W2006-00969-CCA-R3-HC, 2007 WL 936117, at *1 (Tenn. Crim. App. Mar. 29, 2007), *perm. app. denied* (Tenn. Aug. 13, 2007). This Court denied relief because the judgment forms were facially valid and Petitioner failed to include any documents to support his argument. *Id.* Then, in 2007, Petitioner challenged the validity of his 1994 convictions on the same basis. *Jeffery Yates*, 2008 WL 3983111, at *1. He was again unsuccessful.

In 2009, Petitioner again sought habeas corpus relief on both his 1993 and 1994 convictions. *Jeffery Yates v. State*, No. W2009-01136-CCA-R3-HC, 2010 WL 4540063, at *1 (Tenn. Crim. App. Sept. 24, 2010), *perm. app. denied* (Tenn. Dec. 22, 2010). In this third attempt at habeas corpus relief, Petitioner advanced the same argument with regard to the manner of service of his sentence, this time citing Rule 32 of the Tennessee Rules of Criminal Procedure as support for his argument. The trial court denied relief on the basis that Petitioner “was no longer restrained of his liberty.” *Id.* at *2. This Court affirmed. *Id.* at *3.

In another attempt at habeas corpus relief, Petitioner argued that his 2003 conviction for aggravated robbery was void because it failed to specify whether the thirty-year sentence was to be served consecutively to or concurrently with the 1993

sentence. *Jeffery Yates v. Randy Lee, Warden*, No. E2017-00201-CCA-R3-HC, 2017 WL 2829821, at *1 (Tenn. Crim. App. June 30, 2017), *perm. app. denied* (Tenn. Sept. 20, 2017). The trial court denied relief and this Court affirmed, finding that the absence of the information from the judgment form did not render the judgment void because Tennessee Rule of Criminal Procedure 32(c)(3)(A) required consecutive service of a sentence imposed for a felony committed while on parole regardless of whether the judgment specified the manner of service of the sentence.

Petitioner tried a different approach by filing a motion to correct an illegal sentence under Tennessee Rule of Criminal Procedure 36.1. *Jeffery Yates v. State*, No. W2014-00325-CCA-R3-CO, 2015 WL 128097, at *1 (Tenn. Crim. App. Jan. 8, 2015), *perm. app. denied* (Tenn. May 15, 2015). Petitioner argued:

[H]is 1993 and 1994 convictions were void because their sentences were not ordered to be served consecutively; therefore, his 2003 sentence for aggravated robbery was illegal because the sentencing court had relied on the 1993 and 1994 convictions in classifying [Petitioner] as a career offender. [Petitioner] also argued that his 2003 sentence was illegal because the sentencing court, in classifying him as a career offender, relied on a void judgment of conviction that “had been withdrawn through a prior [p]ost-[c]onviction proceeding.” [Petitioner] further argued that his 2003 sentence was illegal because he was denied his right to “allocution” at the sentencing hearing.

Id. at *2. This Court affirmed the trial court’s summary denial of the motion under Rule 36.1 because Petitioner failed to state a colorable claim. *Id.* at *3.

Petitioner filed another motion under Rule 36.1, arguing that his sentences for the 1993 and 1994 convictions were illegal because he received concurrent sentences when consecutive sentences were statutorily required. *State v. Jeffery Yates*, No. W2015-01075-CCA-R3-CD, 2016 WL 721035, at *1 (Tenn. Crim. App. Feb. 23, 2016), *perm. app. denied* (Tenn. June 24, 2016). This Court denied relief on the basis that the underlying sentences about which he was complaining were expired. *Id.* at *2.

All of these prior attempts to gain relief from his convictions and sentences bring us to the present appeal. In October of 2017, Petitioner filed a motion for correction of a clerical error pursuant to Tennessee Rule of Criminal Procedure 36. In response to the motion, the trial court entered an order finding that Petitioner “complains that his judgment of conviction and sentence entered on the above-styled indictment on June 19, 2003, does not on its face [state] that his 30[-]year sentence for aggravated robbery runs consecutively with the other sentences for which he was on parole at the time of his offense.” The trial court ordered that “the attached new corrected judgment be sent to the

Department of Correction adding this information at [Petitioner's] request." On the corrected judgment, the trial court hand wrote that Petitioner's sentence was consecutive to "all other sentences [for] which he was on parole on 8/26/01." Petitioner appealed.

Analysis

At the outset of our analysis, we must make a determination with regard to a motion filed by Petitioner to correct the record that remains pending with this Court. Petitioner filed a motion to correct the record, alleging that the copy of the Original Judgment order for aggravated robbery is not complete because it did not "include the complete bottom of the original judgment order to show that a CR-3149 (rev. 04-00) Judgment Order form was used when the Original Judgment Order was imposed." A panel of this Court deferred consideration of this motion to the panel assigned to hear this appeal. We find the information from the "complete bottom of the original judgment form" irrelevant to our consideration of the issue on appeal. As such, we determine that a corrected record is not needed in order to adequately review Petitioner's issue on appeal, and Petitioner's motion to correct the record is denied.

On appeal, Petitioner argues that the amended judgment issued by the trial court is void for three reasons: (1) the trial court was without jurisdiction to amend the original judgment because it was a final order; (2) the trial court was without jurisdiction to amend the original judgment because there was no proof that there was a clerical error in the judgment; and (3) the amended judgment was not complete because it did not contain all of the information required on the face of the judgment, i.e. the judgment did not specify Petitioner's Offender Status or Release Eligibility.

A judgment of conviction becomes final thirty days after its entry unless a timely notice of appeal or post-trial motion is filed. *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). Once a judgment becomes final, a trial court loses jurisdiction to amend it except under certain circumstances. *Id.* (citing *State v. Moore*, 814 S.W.2d 381, 382 (Tenn. Crim. App. 1991)); *see* Tenn. R. Crim. P. 35 (motion for reduction of sentence), 36 (correction of clerical errors), 36.1 (correction of illegal sentences). Erroneous judgments that do not fall into the category of either clerical errors or illegal sentences may be addressed only on direct appeal. *See generally Cantrell v. Easterling*, 346 S.W.3d 445, 449-453 (Tenn. 2011) (distinguishing clerical errors, appealable errors, and fatal errors).

Tennessee Rule of Criminal Procedure 36 allows a court to correct clerical mistakes in judgments "at any time." Clerical errors "'arise simply from a clerical mistake in filling out the uniform judgment document' and may be corrected at any time under Tennessee Rule of Criminal Procedure 36." *State v. Wooden* 478 S.W.3d 585, 595 (Tenn. 2015) (quoting *Cantrell v. Easterling*, 346 S.W.3d 445, 449 (Tenn. 2011)).

“Where a trial court fails, by reason of clerical mistake, oversight, or omission, to record a defendant’s sentence accurately on a judgment, the trial court maintains the power to correct the clerical error under Rule 36.” *State v. Brown*, 479 S.W.3d 200, 213 (Tenn. 2015). “To determine whether the judgment contains a clerical error, a court ordinarily must compare the judgment with the transcript of the trial court’s oral statements,” which is controlling. *Id.* A trial court’s ruling on a Rule 36 motion is reviewed on appeal for an abuse of discretion. *State v. Tony Arthur Swann*, No. E2015-01516-CCA-R3-CD, 2017 WL 2483000, at *2 (Tenn. Crim. App. June 8, 2017), *no perm. app. filed*.

Petitioner’s first argument—that the trial court’s amended judgment is void because the original judgment was final and, therefore, the trial court lost jurisdiction to amend it—is stupefying because Petitioner himself is the one that asked the trial court to correct the judgment. Petitioner’s motion quoted the text of Rule 36, which clearly gives the trial court the jurisdiction to correct a clerical error at any time. *See Wooden* 478 S.W.3d at 595. Petitioner cannot now complain that the trial court gave him the very remedy he sought.

We note that both the portion of the transcript of the sentencing hearing submitted by Petitioner to this Court and the original judgment entered on the 2003 aggravated robbery conviction are silent regarding the alignment of the sentences. However, this Court has previously held that such silence did not render the sentence illegal. *Jeffery Yates v. Randy Lee, Warden*, 2017 WL 2829821, at *1. Assuming that Petitioner was on parole when he committed the aggravated robbery, this Court determined that the judgment was not “illegal because Tennessee Rule of Criminal Procedure 32(c)(3) mandates that a sentence ‘shall be consecutive whether the judgment explicitly so orders or not.’” *Id.* Despite our holding that silence on the judgment form did not translate into a concurrent sentence, Petitioner asked the trial court to correct the judgment to reflect that the sentence for the 2003 aggravated robbery was to be run consecutively to the sentences for which he was on parole at the time. Petitioner now asks this Court to determine that the sentence could not be ordered to run consecutively because the trial court failed to mention his parole status on the original judgment form and at the sentencing hearing. Petitioner cannot have it both ways. “A petitioner may not change theories between the lower court and the appellate court.” *See State v. Alder*, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001). The trial court maintained the jurisdiction to correct a clerical error under Rule 36.

Petitioner’s second argument centers around the fact that the trial court failed to make an explicit finding that there was a clerical error in the original judgment. Petitioner asked the trial court to correct a clerical error, and the trial court entered an amended judgment correcting the asserted error without finding that it was a clerical error. Rule 36 does not require the trial court to make an explicit finding that a clerical

error exists when filing a corrected judgment. *See* Tenn. R. Crim. P. 36. Petitioner is not entitled to relief on this basis.

Petitioner’s last argument—that the amended judgment is incomplete because it does not indicate whether he was sentenced as a Career Offender—is correct. Tennessee Code Annotated section 40-35-209(e)(1)(E) mandates that a judgment form “shall” indicate whether a defendant is sentenced as a Career Offender. The remedy for noncompliance is for the judgment form to be “return[ed] to the sentencing court to be completed.” T.C.A. § 40-35-209(g). The portion of the 2003 sentencing hearing submitted with Petitioner’s motion clearly indicates that the trial court determined that Petitioner had the “requisite number of prior convictions” to establish his status as a Career Offender. Moreover, the original judgment form indicated that Petitioner was a Career Offender, and the amended judgment was, as stated in the order, entered to add information to the original judgment form. On remand, the trial court should correct the amended judgment to reflect that Petitioner is a Career Offender with 60% release eligibility.

Conclusion

For the foregoing reasons, we remand the matter to the trial court for entry of a corrected judgment.

TIMOTHY L. EASTER, JUDGE