

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 7, 2023 Session

FILED 10/18/2023 Clerk of the Appellate Courts
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COURTNEY ANDERSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

**Nos. 9709924, 9701093, 9701094, 9701095, 9701096, 9701097, 9706852, 9706853,
9706854, 9706855, 9706856, 9706857, 9708272, 9708273, 9709654, 9709655, 9709656,
9709657, 9709658, 9709659, 9709660, 9708497, 9708498**

Paula L. Skahan, Judge

No. W2023-00067-CCA-R3-PC

This is a State appeal, filed by the State Attorney General and Reporter, from the entry of an order granting the petitioner’s, Courtney Anderson’s, motion to reopen his post-conviction and amending/reducing his original sentence of 162 years, 11 months, and 29 days to a time served sentence of 25 years. The State appealed, arguing the trial court lacked jurisdiction to hear the petitioner’s motion as it was barred by the one-year statute of limitations and the petitioner failed to prove the statute should be tolled. Additionally, the State submits that the trial court lacked jurisdiction to amend the petitioner’s sentence under the post-conviction statute and that the trial court’s actions amount to an improper commutation of the petitioner’s sentence. The petitioner contends that the State waived any challenge to the statute of limitations by failing to raise the issue below and that his claim meets the requirements of the statute and allows for the tolling of the statute, and therefore, the trial court properly granted the relief requested. Upon our thorough review of the applicable law and the briefs and arguments of both parties, we conclude that the instant petition is barred by the one-year statute of limitations and that the petitioner failed to establish and the trial court failed to find a proper basis for tolling the statute. Accordingly, the trial court lacked jurisdiction to hear the petitioner’s motion and amend the petitioner’s sentence. Therefore, we reverse the decision of the trial court, reinstate the petitioner’s original sentence, and remand this matter for further proceedings consistent with this opinion.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TOM GREENHOLTZ, JJ., joined.

Jonathan Skrmetti, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Nicholas W. Spangler, Deputy Attorney General; Steve Mulroy, District Attorney General; and Danielle McMollum, Assistant District Attorney General, for the appellant, State of Tennessee.

Terrell Tooten, Memphis, Tennessee, for the appellee, Courtney Anderson.

OPINION

Procedural and Factual Background

The petitioner was indicted for eight counts of felony theft of property, seventeen counts of forgery, and one misdemeanor count of possession of a handgun in a public place. *See State v. Anderson*, No. W2000-02071-CCA-R3-CD, 2001 WL 912835, at *1 (Tenn. Crim. App., Aug. 13, 2001), *perm. app. denied* (Tenn. June 25, 2001). He proceeded to trial on one count of theft and one count of forgery, and a Shelby County jury convicted him of these offenses for which he received an effective sentence of twenty-one years. *See id.* After this Court affirmed his convictions and sentences on direct appeal, the petitioner entered guilty pleas to the twenty-one remaining charges. *See id.*; *see also State v. Anderson*, No. W2000-00244-CCA-R3-CD, 2001 WL 91734, at *4 (Tenn. Crim. App., Jan. 31, 2001). The trial court initially imposed an effective sentence of 171 years, 11 months, and 29 days but later modified it to a sentence of 168 years, 11 months, and 29 days. *See Anderson*, 2001 WL 912835, at *2. The petitioner appealed his sentence, and this Court held that the trial court erred in finding the petitioner to be a career offender for his Class C felonies and remanded the case for clarification or correction of the sentences imposed and for resentencing regarding the petitioner's Class C felony convictions. *See id.* at *3.

At the resentencing hearing, the petitioner received an effective sentence of 141 years, 11 months, and 29 days, which was to be served consecutively to his previous sentence of 21 years for a total effective sentence of 162 years, 11 months, and 29 days. *See State v. Anderson*, No. W2001-02764-CCA-R3-CD, 2003 WL 57421, at *1 (Tenn. Crim. App. Jan. 6, 2003), *perm. app. denied* (Tenn. June 12, 2006). The petitioner again appealed his sentence as excessive, and this Court affirmed the judgment of the trial court.

The petitioner filed a timely *pro se* petition for post-conviction relief. Following the appointment of counsel, the petitioner filed an amended post-conviction petition on October 5, 2004, claiming that counsel rendered ineffective assistance at the trial and appellate court levels. On November 15, 2005, the petitioner filed a "Memorandum on Post-Conviction Court's Authority to Grant Relief," asserting for the first time that counsel failed to perfect his appeal to the Tennessee Supreme Court pursuant to Tennessee Rule of

Appellate Procedure 11. On November 18, 2005, following a hearing, the post-conviction court entered an order allowing the petitioner to file a delayed application for permission to appeal to the Tennessee Supreme Court and staying the post-conviction proceedings pending the final disposition of the delayed appeal. On June 12, 2006, the Tennessee Supreme Court denied the petitioner's application.

On November 24, 2008, the post-conviction court entered an order dismissing the petition for post-conviction relief, and on December 16, 2008, the petitioner filed a timely notice of appeal. On December 18, 2008, in response to the petitioner's first "Motion to Re-Open his Petition for Post-Conviction Relief," the post-conviction court entered an order finding that all issues raised in the "Motion to Re-Open" had been resolved pursuant to the November 24, 2008 order denying post-conviction relief. *Anderson v. State*, No. W2008-02814-CCA-R3-PC, 2010 WL 432414, at *1-2 (Tenn. Crim. App. Feb. 5, 2010), *perm. app. denied* (Tenn. Oct. 12, 2010).

On December 5, 2022, the petitioner filed his second "Motion to Re-Open Post-Conviction and Reduce Sentence," seeking a sentence reduction under Tenn. Code Ann. § 40-30-117(a)(3). Per the motion, the petitioner alleged he was entitled to relief because his "sentence was enhanced based on prior felony convictions that are no longer considered felonies in Tennessee." The petitioner also alleged that he could overcome the applicable one-year statute of limitations because he diligently pursued his rights and the 2017 amendment to the theft-graduation statute was an extraordinary circumstance that prevented him from timely filing his motion.

The parties appeared before the trial court on December 13, 2022. At the outset of the hearing and prior to any argument or proof being presented, the trial court stated it had reviewed the petitioner's sentence and determined it was "excessive." The court then confirmed it had prepared and signed an order granting the petitioner's motion, resentencing the petitioner to a time-served sentence of 25 years, and releasing the petitioner that day. After the terms of the amended judgments were read into the record, the trial court voir dired the petitioner. The petitioner testified he was fifty-four years old and confirmed that he had been in custody for twenty-five years. He also stated that he had received his barber's license while incarcerated and was going to live with his sister and work as a barber upon being released. The trial court then informed the petitioner that when his motion "came to [her] desk," she found his sentence was excessive and contacted the District Attorney's office to "try to do something if we can" because "you were done wrong." The court went on to state,

So[,] it was all timing with Amy Weirich out of the office and the right judge who might be willing to do something to help you, it was all timing. It's just the way I guess God looking down on you. So[,] don't blow it.

....

Don't blow it. Because things don't usually work out like this, okay? So, that's just the way I feel about it. It just worked out for you. You've done a whole lot of time. You got yourself in a whole lot of trouble. You messed up – I'm sure these forgeries and whatever, ID theft, all these things, you messed up people, you know, back in the 90's. But that's too much time, obviously, way too much time, and I know how Judge Dailey was. I -- believe me, I practiced in there. It was not fun. They just piled up on people. But, anyway, I really, really hope we're not going to see you back down here, okay?

Upon concluding its voir dire of the petitioner, the trial court entered its written "Order Granting Petitioner's Motion to Re-Open the Post-Conviction and Reducing Petitioner's Sentence." Despite the requirements of the statute, the trial court's order did not cite the post-conviction reopening statute or include any of the findings necessary to grant reopening under Tenn. Code Ann. § 40-30-117(a)(3). Rather, the order summarily states that "[p]etitioner has articulated the required statutory grounds to reopen the post-conviction, as well as grounds to toll the statute of limitations." The order further states, "this court believes the original sentence to be excessive and a reduction is necessary." The only "analysis" offered by the trial court in its order was as follows: "This court took into consideration that [p]etitioner's convictions are all nonviolent offenses, three of [p]etitioner's prior felony [theft] convictions are now misdemeanors under Tennessee statute, and [p]etitioner has served 25 years so far on these sentences." The order concludes that "[p]etitioner's new sentence will be an effective time[-]served sentence." The court then entered 23 amended judgments reflecting that time-served sentence.

This timely appeal followed.

Analysis

On appeal, the State insists the trial court 1) lacked jurisdiction "to reopen post-conviction proceedings because the motion was filed outside the applicable statute of limitations and because there was no cognizable basis for reopening either pleaded or found"; and 2) "lacked jurisdiction to grant post-conviction relief because there was not constitutional violation pleaded, proven, or found." Additionally, the State contends that the trial court's order "essentially commuting the petitioner's sentence is illegal because under the Tennessee Constitution only the Governor has the authority to commute a sentence."

Initially, the petitioner, relying on Tenn. R. App. P. 24, argues the State has provided this Court with an inadequate record on appeal, and therefore, this Court must presume the ruling of the trial court is correct. The petitioner also submits that the State has waived review of its claims because the State not only failed to raise the issue of the statute of limitations at trial but actually consented to the tolling of the statute of limitations. The petitioner contends, however, that the statute of limitations was tolled based on the entire record, and all filings and pleadings, arguing both the State and the petitioner “concluded that the matter was appropriately before the [t]rial [c]ourt based on the facts and the entire record.” “Therefore, any arguments that [the State] is now attempting to make for the first time are waived.” Finally, the petitioner argues that the trial court’s order does not commute the petitioner’s sentence; rather, the trial court simply determined that his sentences should be served concurrently as opposed to consecutively.

Upon our review of the applicable law, the record, and the briefs and arguments of the parties, we conclude the trial court lacked jurisdiction to act upon the petitioner’s motion to reopen as the motion was 1) barred by the statute of limitations and no basis for tolling the statute was pled or found and 2) no constitutional infringement was pled, proven, or found. Additionally, the actions of the trial court constituted an impermissible commutation of the petitioner’s sentence—an action delineated by the Tennessee Constitution solely to the Governor. Accordingly, we reverse the decision of the trial court and reinstate the petitioner’s original sentences.

A. Completeness of the Record

Initially, the petitioner contends the record before this Court is incomplete. Per the petitioner, the trial court reviewed “the transcripts, judgment sheets, appellate opinions, and all pre-sentence information in the court’s jacket.” And, while not completely clear from the petitioner’s brief, he appears to argue, relying on Tenn. R. App. P. 24, that the lack of a “complete record” on appeal either waives the State’s claim or requires this Court to presume the correctness of the trial court’s ruling. In response, the State initially argues that the issues raised in the instant appeal do not require review of this Court’s prior records as the State is only challenging the validity of the order granting the motion to reopen on jurisdictional grounds and that the record as currently constructed “adequately demonstrates the jurisdictional defect.” In the alternative, the State asks this Court to supplement the record or take judicial notice of the records from the petitioner’s prior appeals.¹ Upon reviewing the record before this Court and the arguments of the parties,

¹ During oral argument before this Court, the petitioner maintained there were additional filings and transcripts that were reviewed by the trial court in reviewing and granting the instant petition. Therefore, this Court provided the petitioner with the opportunity to supplement the record with those documents and transcripts. In response to this Court’s invitation, the petitioner filed one transcript from an appearance by the petitioner on November 16, 2022.

we agree with the State and conclude the record as constructed is sufficient to allow for a complete and thorough review of the issues presented. Moreover, we would note that this Court can take judicial notice of the Court records in an earlier proceeding of the same case and the actions of the courts thereon. *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987) (citing *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451 (1964)); see e.g., Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009).

B. Merits of Issues Presented

Having determined the record before this Court is sufficient, we turn our attention to the merits of the State's claims.

In *Nichols v. State*, this Court analyzed a post-conviction court's review of a motion to reopen and a subsequent amendment to a first post-conviction petition made pursuant to a post-conviction court's order granting a motion to reopen. See *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020). Concerning the general availability of post-conviction relief in Tennessee, this Court explained

In *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus litigation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. In its current ideation, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." Tenn. Code Ann. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed," a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." *Id.*; see *Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997).

Nichols, 2019 WL 5079357, at *3. Although Tennessee limits the filing of a post-conviction relief petition to one petition, there are limited circumstances whereby a petitioner may allege later arising claims via a motion "to reopen the first post-conviction petition." Tenn. Code Ann. § 40-30-117(a). As relevant in this case, a motion to reopen a

first post-conviction petition should be granted when “[t]he 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.” *Id.* § 40-30-117(a)(3) (emphasis added). Once a motion to reopen is granted, “the procedure, relief and appellate provisions of this part shall apply.” *Id.* § 40-30-117(b)(1).

“[A] post-conviction court’s grant of a motion to reopen does not fully place a petitioner back into the procedural posture of his original post-conviction proceedings.” *Nichols*, 2019 WL 5079357, at *7. As noted by our supreme court, claims raised in a motion to reopen and subsequent amendments may be barred by the statute of limitations, previous determination, or waiver. *Coleman v. State*, 341 S.W.3d 221, 255 (Tenn. 2011). Generally, a petitioner must file a petition for post-conviction relief “within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.” Tenn. Code Ann. § 40-30-102(a) (2018). The statutory grounds for tolling the statute of limitations are coextensive to those for granting a motion to reopen. *Id.* § 40-30-102(b) (2018). Thus, if an amended claim arising from a motion to reopen a post-conviction petition does not meet the requirements of Code sections 40-30-102(b) and 40-30-117(a), the claim is barred by the statute of limitations. “A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.” *Id.* § 40-30-106(h) (2018). Further, a claim will be treated as waived when “not raised before a court of competent jurisdiction in which the ground could have been presented.” *Id.* § 40-30-110(f) (2018); see *Coleman*, 341 S.W.3d at 257 (discussing the waiver of a specific ineffective assistance of counsel claim for failing to raise it in the original post-conviction petition). The Post-Conviction Procedure Act *requires* the post-conviction court to summarily dismiss any claims which are raised beyond the statute of limitations, have been previously determined, or have been waived. Tenn. Code Ann. § 40-30-106(b), (f). We review the post-conviction court’s order de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004).

1. Jurisdiction

This Court is required to “consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review.” Tenn. R. App. P. 13(b). Subject matter jurisdiction is “the power of a court to adjudicate the particular category or type of case brought before it.” *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015). “Subject matter jurisdiction involves the nature of the cause of action and the relief sought, and can only be conferred on a court by legislative or constitutional act.” *State v.*

Cawood, 134 S.W.3d 159, 163 (Tenn. 2004) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)). Subject matter jurisdiction “cannot be waived, because it is the basis for the court’s authority to act.” *Meighan v. U.S. Sprint Commc’ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996). “It is fundamental that jurisdiction, neither original nor appellate, can be conferred by consent and neither waiver nor estoppel could be more effective than the consent of parties.” *State v. Smith*, 278 S.W.3d 325, 329 (Tenn. Crim. App. 2008) (quoting *James v. Kennedy*, 174 Tenn. 591, 129 S.W.2d 215, 216 (1939)). Whether a court has subject matter jurisdiction is a question of law, and our review is de novo with no presumption of correctness. *Cawood*, 134 S.W.3d at 163 (internal quotation omitted).

As discussed *supra*, “a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken.” Tenn. Code Ann. § 40-30-102(a). This limitation period applies not only to the original post-conviction, but also to motions to reopen post-conviction proceedings. *Id.* “No court shall have jurisdiction” to consider a time-barred petition unless it falls within one of the enumerated statutory exceptions, *see* Tennessee Code Annotated section 40-30-102(b), or is mandated by due process, *see Williams v. State*, 44 S.W.3d 464, 468 (Tenn. 2001).

Initially, the State insists the trial court lacked jurisdiction because the petitioner’s motion to reopen was barred by the one-year statute of limitations and the petitioner failed to raise a claim that allows for the tolling of the statute. The petitioner contends that the State has waived this challenge because the State not only did not object to the statute of limitations at trial, but actually consented to the tolling of the statute. Therefore, we must first address the petitioner’s waiver argument.

While the State is generally required to file a response to a petition for post-conviction relief in which it “shall admit or deny each and every allegation set forth in the petition,” including “the facts relied upon to support the motion to raise as a defense that . . . the petition is barred by the statute of limitations,” *see* Tenn. Sup. Ct. R. 28, § 5(G), the State’s “failure to timely file the answer or motion to dismiss . . . or the failure to detail the facts relating to the defenses . . . shall not entitle [the] petitioner to relief without proof, but may result in the imposition of sanctions in the exercise of the trial judge’s discretion.” Tenn. Sup. Ct. R. 28, § 5(I).

Rule 28, section 5 clearly states that a petitioner is not entitled to relief simply because the State fails to comply with that rule. *See* Tenn. Sup. Ct. R. 28, § 5(I); *see also* Tenn. Code Ann. § 40-30-108(a) (“Failure by the [S]tate to timely respond does not entitle the petitioner to relief under the Post-Conviction Procedure Act.”). Rather, the petitioner bears the burden of pleading and proving that the statute of limitations should be tolled on due process grounds. *See* Tenn. Sup. Ct. R. 28, § 5(F)(4) (“A petition may be dismissed

without a hearing if it . . . does not state the reasons that the claim is not barred by the statute of limitations”); *see also State v. Nix*, 40 S.W.3d 459, 464-65 (Tenn. 2001). Unlike civil affirmative defenses, which must be sufficiently raised by a defendant to be preserved, a post-conviction petitioner must prove compliance with the statute of limitations to be entitled to post-conviction relief because the post-conviction statute of limitations is a jurisdictional requirement for the courts of Tennessee. *See* Tenn. Code Ann. § 40-30-102(a) (“[T]he one-year limitations period is an element of the right to file the [post-conviction] action and is a condition upon its exercise.”); Tenn. Code Ann. § 40-30-102(b) (“No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period”); Tenn. Sup. Ct. R. 28, § 4(B); *Nix*, 40 S.W.3d at 464 (noting that “the one-year statutory period is an element of the right to file a post-conviction petition and . . . it is not an affirmative defense that must be asserted by the State”). Indeed, because failure to comply with the statute of limitations precludes jurisdiction, courts have a duty to ensure that the post-conviction statute of limitations is satisfied and must dismiss a post-conviction petition on this basis *sua sponte* if necessary. Tenn. Code Ann. § 40-30-106(b) (“If it plainly appears . . . that the petition was not filed . . . within the time set forth in the statute of limitations . . . , the judge shall enter an order dismissing the petition.”). Accordingly, the State has not waived the statute of limitations as a defense despite the District Attorney’s concession at the trial level. Having determined that the State has not waived its defense, we turn to the questions of whether the petition was filed outside the one-year statute of limitations and, if so, whether due process allows for tolling of the statute—in short, whether the trial court had jurisdiction to hear the instant petition.

The first question, whether the petition was filed within the one-year statute of limitations, is relatively simple to resolve. Here, the petitioner’s motion to reopen his post-conviction is based on a claim that the theft convictions used to enhance his current sentence were invalidated. As such, the petitioner was required to file the instant motion within one year of the date of the “finality of the ruling holding the previous conviction to be invalid.” Tenn. Code Ann. § 40-30-117(a)(3). As will be discussed *infra*, the petitioner’s underlying theft convictions were never invalidated; therefore, the petitioner’s underlying judgments became final, and have remained final, per post-conviction purposes on June 12, 2006, when our supreme court denied the petitioner’s delayed appeal of his convictions. *Anderson*, 2003 WL 57421, at *1. The petitioner, however, did not file the instant motion to reopen until December 5, 2022, nearly sixteen years after the expiration of the statute of limitations. Accordingly, the trial court lacked jurisdiction to entertain the petitioner’s motion short of the petitioner establishing one of the limited exceptions tolling the statute or due process grounds. *See* Tenn. Code Ann. § 40-30-102(b); *Williams*, 44 S.W.3d at 468.

In his petition and on appeal, the petitioner alleges that “[b]ecause [the petitioner] has been pursuing his rights diligently and he was unable to file a timely filing, the statute

of limitations should be tolled.” In support of his diligence claim, the petitioner points to his direct appeal of his conviction and his initial post-conviction petition. While the petitioner has pursued the appellate and post-judgment avenues available to him, he has not diligently pursued his instant claim. More specifically, in the instant petition, the petitioner, relying on an amendment to the grading of theft statute, insists he has been diligently pursuing his rights. And he insists, based on the amendment, that he is entitled to relief under the exception in Tennessee Code Annotated section 40-30-117(a)(3), allowing a motion to reopen post-conviction proceedings when an enhancing conviction has later been *invalidated*. Even if we were to conclude that the amendment to the theft graduation statute falls under the exception in Tennessee Code Annotated section 40-30-117(a)(3), which as will be discussed *infra* that we do not, the petitioner has failed to meet the initial hurdle that he has been diligently pursuing this claim.

The Public Safety Act of 2016 (“the 2016 Act”) amended Tennessee Code Annotated section 39-14-105, the statute providing for grading of theft offenses. The petitioner, relying on the 2016 Act, contends that three of his prior felony theft convictions are now considered misdemeanors, and, therefore, he is entitled to relief. However, the 2016 Act took effect on January 1, 2017, and the petitioner did not file the instant petition until December 5, 2022, over five years after the effective date of the statute. Clearly, such a delay cannot be described as diligent pursuit of one’s rights. The petitioner’s claim and the trial court’s finding that the petitioner has been diligently pursuing his rights is in no way supported by the record.²

In addition to failing to establish he diligently pursued his rights, the petitioner also failed to plead and prove an extraordinary circumstance stood in his way and prevented him from timely filing. *Bush v. State*, 428 S.W.3d 1, 22 (Tenn. 2014). Again, the petitioner relies on the 2016 Act amendment to the theft-graduation statute, arguing that three of his prior felony convictions which were used to enhance his current sentence would now be classified as misdemeanors. However, the amendment to the theft-graduation statute does not amount to an extraordinary circumstance as it has no affect on the petitioner’s otherwise final sentences. *See State v. Keese*, 591 S.W.3d 75, 84 (Tenn. 2019) (“a criminal defendant whose sentence is final prior to the effective date cannot benefit from a statutory amendment that provides for a lesser punishment.”).

Accordingly, the petitioner failed to establish a basis for allowing the tolling of the one-year statute of limitations, and therefore, the trial court lacked jurisdiction to entertain

² Again, we note that during oral argument the petitioner claimed the record before was incomplete and a more complete record would support his claim that he had been diligently pursuing relief under the 2016 Act. However, the only supplement to the record by the petitioner is a transcript from a hearing on November 16, 2022. However, this hearing, much like the instant petition, occurred nearly five years after the effective date of the 2016 Act, and therefore, does not amount to diligent pursuit of his claim.

the petition to re-open post-conviction proceedings and erred in granting the petitioner relief.

2. No Statutory Basis for Re-Opening

Assuming arguendo the petitioner's motion to reopen was timely filed, the trial court erred in finding that the 2016 Act entitles the petitioner to relief under Tennessee Code Annotated section 40-30-117(a)(3). Per the statute, a petitioner may, in very limited circumstances, allege later arising claims via a motion to reopen the first post-conviction petition. Tenn. Code Ann. § 40-30-117(a). More specifically as it relates to the petitioner's challenge, a petitioner may seek to reopen post-conviction proceedings when "[t]he 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" *Id.*, § -117(a)(3). However, as discussed *supra*, the amendment to the graduation of theft statute did not render the petitioner's prior enhancing convictions invalid. *Keese*, 591 S.W.3d at 84. Moreover, the petitioner did not plead and the trial court did not find that the amendment invalidated the petitioner's prior enhancing convictions. Rather, both simply note that the petitioner's prior felony theft convictions would be considered misdemeanors if he had committed them after the amendment to the statute. At no point did the petitioner claim his convictions had been invalidated and at no point did the trial court make a finding in support of such a claim. As such, the petitioner failed to allege a statutory basis for reopening his post-conviction, and therefore, the trial court lacked jurisdiction to hear the matter and, more importantly, to grant the petitioner relief.

During argument, the petitioner extended his claim, arguing that the theft convictions in question have been invalidated. When questioned regarding the alleged invalidation of his judgments, the petitioner noted that the amended judgments entered by the trial court in the instant matter "dismissed" his prior theft convictions. In short, the petitioner relies on an action taken by a trial court without jurisdiction to act as the basis for how the Post-Conviction Procedure Act applied to his petition. Such reliance is nonsensical and in no way provides for the application of the 2016 act and/or the tolling of the statute of limitations.

3. No Constitutional Violation Alleged or Found

Next the State insists the petitioner failed to allege or present evidence of a constitutional violation. Though the State notes that the petitioner's ground for reopening under § 40-30-117(a)(3) "doubles as a substantive constitutional claim," the State argues the petitioner's claim fails as a constitutional challenge for the same reasons it fails as a basis for reopening his post-conviction—the reclassification of his prior felony convictions

does not invalidate those convictions. Additionally, the State contends the trial court's order fails to identify a constitutional violation warranting relief. Upon our review, we agree with the State.

As discussed at length *supra*, the amendment to the theft graduation statute does not invalidate the petitioner's prior convictions. Accordingly, the petitioner cannot satisfy the requirements of § 40-30-117(a)(3). Furthermore, even if we were to view the petitioner's claim and the trial court's ruling under a more liberal lens and assume the petitioner was arguing and the trial court found that the criminal savings statute invalidated the petitioner's prior felony theft convictions, such a conclusion is contrary to prior decisions of our supreme court. In *Keese*, our supreme court held that "[a]lthough . . . the Criminal Savings Statute is generally applicable to the amended theft grading statute, we must conclude . . . that the amendments cannot be applied in the defendant's case because he was sentenced before the effective date of the Public Safety Act." 591 S.W.3d at 84 (citing *State v. Houser*, No. E2017-00987-CCA-R3-CD, 2017 WL 5054074, at *4-5 (Tenn. Crim. App. Nov. 1, 2017)). The Court went on to hold that

[t]he language of the [c]riminal [s]avings [s]tatute does not change the long-standing rule that a statute or act of the legislature cannot become operative until its effective date, nor can "the people . . . be compelled or permitted to act thereunder." *Wright [v. Cunningham]*, 91 S.W. [293,] 295 [(Tenn. 1905)]. The exception to the general rule that offenders must be sentenced pursuant to the statute in effect at the time of the offense embodied in the [c]riminal [s]avings [s]tatute only applies when the defendant is sentenced after the effective date of the relevant amendment. To put it another way, a criminal defendant whose sentence is final prior to the effective date cannot benefit from a statutory amendment that provides for a lesser punishment.

Id. at 84.

In its order granting relief, the trial court failed to make any findings sufficient to satisfy the statutory requirements. Instead, the trial court makes overly broad statements such as the petitioner "has articulated the required statutory grounds to re-open the post-conviction." The trial court makes no factual finding as to what the petitioner has articulated and even fails to cite to the statute the trial court was relying on. Additionally, rather than articulate and explain the constitutional basis for its decision, the trial court broadly states it is granting relief because "this court believes the original sentence to be excessive and a reduction is necessary." In short, as argued by the State, the trial court failed to make any of the required constitutional findings or analysis necessary to grant the relief. And, as we have discussed at great length throughout, the record does not support

the actions of the trial court. Accordingly, the trial court erred in finding a constitutional violation, in reopening the petitioner's post-conviction, and in granting the petitioner relief.

C. Commutation of Sentence

Lastly, the State submits that the trial court's action of "granting post-conviction relief without any cognizable basis" amounted to an illegal commutation of the petitioner's sentence. We agree.

The power of a governor to commute a prisoner's sentence is rooted in the Tennessee Constitution. Article III, Section 6 of the Constitution provides: "He [the governor] shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment." It is a well-established principle of law that the power to "grant reprieves and pardons" embraces the right to commute a sentence. *Ricks v. State*, 882 S.W.2d 387, 391-92 (Tenn. Crim. App. 1994). In 59 Am. Jur. 2d *Pardon and Parole* § 23 (1987), it is said:

The power to commute a sentence is a part of the pardoning power and may be exercised under a general grant of that power. The general power necessarily contains in it the lesser power of remission or commutation. If the whole offense may be pardoned, a fortiori, a part of the punishment may be remitted or the sentence commuted.

Neither the legislative nor the judicial branch of government has the authority to regulate or control the governor's power to commute a sentence.

When a governor commutes a prisoner's sentence, the governor simply shortens the sentence—a lesser or shorter sentence is substituted for the sentence imposed by the jury or the trial court following the prisoner's conviction. *Ricks*, 882 S.W.2d at 391-92. A commutation does not alter, change or otherwise affect the adjudication of the prisoner's guilt or the judgment entered by the trial court predicated upon the prisoner's guilt of the crimes for which he was convicted. *Id.* In addition, a commutation affirms the sentence imposed by the jury or the trial court—it simply modifies this sentence. *Id.* In other words, the modified or commuted sentence simply replaces the sentence imposed by the jury or the trial court; and the commuted sentence has the same legal effect as if it had been originally imposed by the jury or the trial court. The law is succinctly summarized in 59 Am. Jur. 2d *Pardon and Parole* § 23 (1987):

The effect of a commutation of sentence is merely to remit or release the punishment without removing the guilt of the offender, and since it is a mere substitution of a lesser for a greater punishment, it has the same legal

effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term.

Id.

Here, having determined that the trial court lacked jurisdiction to entertain the petitioner's motion and that the petitioner's claim fails to satisfy a statutory exception allowing the reopening of post-conviction proceedings, the trial court's actions amount to nothing more than an improper attempt to commute the petitioner's sentence under the guise of a motion to reopen. "To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution." *Abdur'Rahman*, 648 S.W.3d at 196 (quoting *Nichols*, 2019 WL 5079357, at *12); *State v. Dalton*, 72 S.W. 456, 457 (Tenn. 1903). Accordingly, the ruling of the trial court is reversed and the petitioner's original sentence is reinstated.

D. Actions of the Trial Court

Finally, we pause to express our concerns with the actions of the trial court. While not expressly stated, one can easily infer from the transcript that the trial court in this matter not only predetermined the outcome prior to conducting a hearing on the motion but directed the actions of the parties to reach a desired and specific result. During the December 13 hearing, the trial court noted that when the petitioner's case "came to my desk" the court brought the ADA into chambers and directed the ADA "we've got to try and do something if we can" and "we tried to get a lawyer in here that would hopefully do something about it." Then, during the November 16 hearing, the trial court inquired of the parties, "How are *we going to do this?*" When petitioner's counsel informed the trial court that they would be filing a post-conviction petition, the trial court made the following statements, "I think that's – I mean, as soon as I saw this, I thought that [reopening the post-conviction petition] would be the only thing to do"; "Yeah, Yeah. I agree [that reopening the post-conviction is 'cleaner and easier']"; and "Okay. Great. *I'm excited about it.*" After further discussion about the plan and the timing of the next hearing, the trial court stated, "I am certainly on board. I was hopeful this would be able to happen as soon as I looked at it. Seriously [his sentence] is so outrageous." Finally, the trial court opened the December 13 hearing by confirming that it had already prepared and signed an order granting the petitioner's motion and had prepared amended judgments modifying the petitioner's sentence.

As noted by the State and corroborated by the transcripts, the trial court, prior to an actual filing by the petitioner, hearing any argument from the parties, or taking any evidence, was prepared to grant the petitioner relief. We remind the trial court that pursuant

to the Tennessee Rules of Judicial Conduct (“RJC”), a judge shall “aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.” Tenn. Sup. Ct. R. 10, Preamble; *see also* RJC 1.2, Comment 3 (“Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.”). “Tennessee litigants are entitled to have cases resolved by fair and impartial judges.” *Cook v. State*, 606 S.W.3d 247, 253 (Tenn. 2020) (citing *Davis v. Liberty Mutual Insurance Company*, 38 S.W.3d 560, 564 (Tenn. 2001)); *see also State v. Griffin*, 610 S.W.3d 752, 757-58 (Tenn. 2020). To preserve public confidence in judicial neutrality, judges must be fair and impartial, both in fact and in perception. *Cook*, 606 S.W.3d at 253; *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). To these ends, the RJC’s declare that judges must “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Tenn. Sup. Ct. R. 10, RJC 1.2. Another provision declares that judges “shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” *Id.*, RJC 2.2. To act “impartially” is to act in the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” *Id.*, Terminology. “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” *Id.*, RJC 2.11(A).

Additionally, we express our concern with the trial court’s *ex parte* conversations with the District Attorney General’s office. Per the trial court’s comments during the December 13 hearing, the trial court, upon receiving the petitioner’s filing, called the assistant district attorney (“ADA”) into her chambers and had an *ex parte* conversation with the ADA about the petitioner’s case, including directing the ADA “we’ve got to try and do something if we can.” This conversation is concerning because the trial court engaged in *ex parte* communication with a party contrary to the prohibition in RJC 2.9(A). “A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter” Tenn. Sup. Ct. R. 10, RJC 2.9 (emphasis added).

When, as in the instant matter, a judge makes comments of the sort at issue here, a reviewing court may properly consider the entire record of the proceeding when evaluating whether those comments are a basis to conclude that the judge’s impartiality might reasonably be questioned. *Cook*, 606 S.W.3d at 257; *see also Leighton v. Henderson*, 414 S.W.2d 419, 420 (Tenn. 1967) (reversing for a new hearing before a competent judge based on comments the trial court made); *In re Cameron*, 151 S.W. 64, 76, 79 (Tenn. 1912) (remanding for a new trial because the judge made comments indicating that he had already decided the case); *Buschardt v. Jones*, 998 S.W.2d 791, 803-04 (Mo. Ct. App. 1999)

(reversing and remanding for a new trial before a different judge because comments the original trial judge made in his oral ruling created an appearance of partiality).

Finally, the trial court's comments concerning the former District Attorney General and, more importantly, the original trial judge are extremely troubling. As noted, a judge shall at all times "act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." RJC 1.2. However, here, the trial court took time during her oral ruling to unnecessarily and without provocation or proof, call into question the character of members of the judicial system and, indirectly, the system as a whole. More specifically, the trial court stated,

So[,] it was all timing with Amy Weirich [the former District Attorney General] out of the office and the right judge who might be willing to do something to help you, it was all timing. It's just the way I guess God looking down on you. . . . But that's too much time, obviously, way too much time, and I know how Judge Dailey was. I -- believe me, I practiced in there. It was not fun. They just piled up on people.

These comments by the trial court only further the concerns relating to bias or prejudice to one party, as well as, cast doubt on the integrity and impartiality of the judicial system. In short, these comments, especially when viewed in light of a court acting without jurisdiction and other comments noted above, are contrary to the spirit of the Code of Judicial Conduct, if not directly in violation of it.

Based on our reversal of the trial court and our concerns about the trial court's impartiality in this matter, we, upon remand to the Criminal Court of Shelby County, direct the clerk to reassign this matter to another division of criminal court and that trial court shall immediately reinstate the petitioner's original sentence and issue a *capias* for the petitioner.

Conclusion

Based on the foregoing authorities and reasoning, we reverse the trial court's grant of the petitioner's motion to reopen, reinstate the petitioner's original sentence, and remand for further proceedings consistent with this opinion.

J. ROSS DYER, JUDGE