

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs July 11, 2023

FILED

08/01/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. CHRIS M. JONES**

**Appeal from the Criminal Court for Shelby County**  
**No. 08-05720      Chris Craft, Judge**

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**No. W2023-00141-CCA-R3-CD**

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Pro-se petitioner, Chris M. Jones, appeals the Shelby County Criminal Court's denial of his "Rule 36 Plain Error Motion for New Trial." Following our review of the entire record and the briefs of the parties, we affirm the judgment of the trial court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., AND ROBERT W. WEDEMEYER, J., joined.

Chris M. Jones, Wartburg, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual and Procedural Background**

Petitioner was convicted of second degree murder, attempted second degree murder, attempted voluntary manslaughter, using a firearm during the commission of a dangerous felony, and possession of a firearm where alcoholic beverages are served. He received an effective twenty-six-year sentence to be served in the Department of Correction. *State v. Jones*, No. W2009-01698-CCA-R3-CD, 2011 WL 856375, at \*1 (Tenn. Crim. App. Mar. 9, 2011).

These convictions arose from a parking lot dispute at a karaoke bar in Memphis during the early morning hours of March 14, 2008, resulting in an altercation in which Petitioner, an off-duty Shelby County deputy, shot two bar patrons resulting in the death of Donald Munsey and injury to Justin Smith. Petitioner also pointed a gun at a third patron, David Eagan, and threatened to kill him. On direct appeal, this court affirmed Petitioner's convictions. *Id.* at \*1-8. Petitioner subsequently filed unsuccessful petitions for post-conviction relief and for writ of error coram nobis. This court upheld the denial of those petitions on appeal. *Jones v. State*, No. W2017-00405-CCA-R3-PC, 2018 WL 3157013 (Tenn. Crim. App. June 27, 2018); *Jones v. State*, No. W2017-00706-CCA-R3-ECN (Tenn. Crim. App. May 17, 2018).

On January 5, 2023, Petitioner filed a "Rule 36 Plain Error Motion for New Trial" alleging that there were too many live rounds and spent shell casings found at the scene to have all come from his weapon and that no ballistics testing was performed on the spent shell casings, Petitioner's firearm, or the bar owner's firearm to show that Petitioner only fired one round in self-defense "while effecting the arrest of David Eagan, who made a terrorist threat" to kill him. Petitioner further asserted that he was "covered under [f]ederal and [s]tate law, use of deadly force by a law enforcement officer while effecting an arrest." He argued that the State withheld evidence that the bar owner illegally possessed a pistol inside the bar and did not have a liquor license at the time of the offenses rendering Petitioner's "indictment faulty, and conviction illegal," that the judge who presided over his trial was biased against him and should have "set aside the verdict and rendered a [d]irect verdict of acquittal on all charges," that the same trial judge erroneously instructed the jury on lesser-included offenses, and that the judge failed to grant Petitioner a change of venue outside the "Memphis news media viewing area" making his trial a "circus." Petitioner also argued that plain error should attach, and his convictions should be vacated in the interest of justice.

Petitioner's motion stated that it was filed "pursuant to Tennessee Rules of Criminal Court, Rule 36 Plain Error." The trial court treated Petitioner's pleading as a motion to correct an illegal sentence under Rule 36.1 of the Tennessee Rules of Criminal Procedure and entered an order summarily dismissing Petitioner's motion for failure to state a colorable claim under Rule 36.1(b)(2). The trial court concluded:

In this case, the sentences [Petitioner] received were all authorized under the various statutory schemes of the offenses for which he was convicted, and are therefore not illegal. For that reason, he can obtain no relief from Tenn. R. Crim. [P] 36. If this petition were treated as a petition to reopen his prior petition for post-conviction

relief, it would be denied as not satisfying any of the conditions set out in Tenn. Code Ann. § 40-30-117(a)(1)<sup>1</sup>.

It is from this order that Petitioner now appeals. We note that Petitioner also filed in this court on the same date he filed his notice of appeal, a motion to recuse the trial judge who dismissed his “Rule 36 Motion.”

## ANALYSIS

Petitioner argues that the trial court erred by summarily dismissing his “Rule 36 Plain Error Motion for New Trial,” that the trial judge should recuse himself from hearing any motions filed by Petitioner and that the Sentencing Act of 1989 is unconstitutional. The State responds that the trial court properly dismissed Petitioner’s motion for failure to state a colorable claim and that he waived the issues of the trial court’s recusal and the constitutionality of the Sentencing Act of 1989 because he did not raise the issues in the trial court.

Petitioner filed his petition “pursuant to Tennessee Rules of Criminal Court, Rule 36 Plain Error.” Tennessee Rule of Criminal Procedure 36.1 permits a defendant to seek correction of an unexpired illegal sentence at any time by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. Tenn. R. Crim. P. 36.1(a)(1); *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(2). Our supreme court has interpreted the meaning of “illegal sentence” as defined in Rule 36.1 and concluded that the definition “is coextensive, and not broader than, the definition of the term in the habeas corpus context.” *State v. Wooden*, 478 S.W.3d 585, 594-95 (Tenn. 2015).

A trial court may summarily dismiss a Rule 36.1 motion if it does not state a colorable claim for relief. Tenn. R. Crim. P. 36.1(b)(2). A “‘colorable claim’ means a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1.” *Wooden*, 478 S.W.3d at 593. “[F]ew sentencing errors render [a sentence] illegal.” *Id.* at 595. Rather, sentencing errors may be clerical, appealable, or fatal, and only fatal errors render a sentence illegal. *Id.*

Petitioner’s motion is void of a single claim that would entitle him to relief under Rule 36.1. He challenges his convictions but does not raise any issues alleging that his sentence is illegal. Petitioner disputes some of the evidence to support his convictions and raises other appealable errors that do not render his sentence void or illegal. Petitioner has

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<sup>1</sup> We note that Petitioner’s motion could not be treated as a post-conviction petition because the statute of limitations had expired, and the motion did not allege any cognizable grounds for habeas corpus relief.

not presented a colorable claim for relief, and a Rule 36.1 motion to correct illegal sentence is not the proper mechanism by which to raise his claims.

We next consider whether Petitioner intended to file his petition pursuant to Rule 36(b) of the Tennessee Rules of Appellate Procedure, which states that “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R. App. P. 36(b). However, the rule does not authorize the filing of a separate claim or a separate proceeding for plain error review. *Id.* Petitioner’s claims should have been addressed on direct appeal or in a timely-filed petition for post-conviction relief. *See Gilmore v. Kenneth Locke, Warden*, No. M2005–01235–CCA–R3–HC, 2006 WL 1097493, at \*4 (Tenn. Crim. App. Mar. 30, 2006) (“The only method of collaterally attacking the judgment because of constitutional deprivations occasioned by erroneous jury instructions is by petition for post conviction relief.”); *see also Cooper v. Howard Carlton, Warden*, No. E2011-00783-CCA-R3-HC, 2012 WL 1523960, at \*5 (Tenn. Crim. App. Apr. 30, 2012) (“The alleged defect in the jury instructions, even if true, would render petitioner’s conviction voidable, not void.”); *Winters v. State*, No. E2015-00268-CCA-R3-CD, 2015 WL 5692145, at \*2 (Tenn. Crim. App. Sept. 29, 2015) (Petitioner “alleges that the trial court committed plain error in its jury instructions and in its sentencing procedure, claims which should have been addressed on direct appeal or in a timely-filed petition for post-conviction relief” rather than a Rule 36.1 motion.)

Additionally, this court cannot consider Petitioner’s issues under its discretionary “plain error” review because the record does not clearly establish what occurred in the trial court as we do not have the corresponding transcripts. Therefore, Petitioner has not established all five requirements for plain error. *Winters*, 2015 WL 5692145, at \*3. Petitioner is not entitled to relief on this issue.

As for Petitioner’s claim that the trial judge should be recused from presiding over any motion filed by Petitioner, we find that Petitioner has waived consideration of this issue by raising the issue for the first time on appeal and by failing to follow the procedural requirements of a motion to recuse. *See State v. Johnson*, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996); *see also* Tenn. Sup. Ct. R. 10(b); Tenn. R. App. P. 36(a) (relief is not available “to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error”). A motion to recuse “must be filed promptly after the facts forming the basis for the motion become known ... and the failure to seek recusal in a timely manner results in a waiver of a party’s right to question a judge’s impartiality.” *Lofton v. Lofton*, 345 S.W.3d 913, 917 (Tenn. Ct. App. 2008) (internal quotation omitted). Our “[c]ourts frown upon the manipulation of the impartiality issue to gain procedural advantage and will not permit litigants to refrain from asserting known grounds for disqualification in order ‘to experiment with the court ... and raise the objection later when the result of the trial is unfavorable.’” *Kinard v. Kinard*, 986

S.W.2d 220, 228 (Tenn. Ct. App. 1998) (quoting *Holmes v. Eason*, 76 Tenn. 754, 757 (1882)).

In this case, Petitioner did not file his motion to recuse until after the trial court summarily dismissed his Rule 36 motion and when he filed his notice of appeal to this court. Therefore, this issue is waived, and Petitioner is not entitled to relief.

Finally, Petitioner argues for the first time on appeal that the Sentencing Act of 1989 is unconstitutional. However, as set forth above, issues raised for the first time on appeal are considered waived. *Johnson*, 970 S.W.2d at 508. Additionally, challenges to the constitutionality and interpretation of sentencing statutes are not cognizable claims for relief under Rule 36.1. *State v. Carpenter*, No. E2016-00450-CCA-R3-CD, 2016 WL 5416350, at \*3 (Tenn. Crim. App. Sept. 28, 2016). Petitioner is not entitled to relief on this issue.

### CONCLUSION

For the forgoing reasons, the judgment of the trial court is affirmed.

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JILL BARTEE AYERS, JUDGE