

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 29, 2023

FILED

09/14/2023

Clerk of the
Appellate Courts

BRUCE PARKS, JR., v. STATE OF TENNESSEE

Appeal from the Criminal Court for Bradley County
No. 11-CR-101 Sandra Donaghy, Judge

No. E2022-01592-CCA-R3-CD

Pro se Petitioner, Bruce Parks, Jr., appeals the Bradley County Criminal Court's summary dismissal of his motion to correct an illegal sentence, filed pursuant to Tennessee Rule of Criminal Procedure 36.1. Because the Petitioner's claim that the State failed to give notice of enhancement factors or its intent to seek consecutive sentencing is not cognizable in a Rule 36.1 motion, we affirm the trial court's summary dismissal of the motion to correct an illegal sentence.

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

CAMILLE R. McMULLEN, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JILL BARTEE AYERS, JJ., joined.

Bruce Parks, Jr., Whiteville, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Robert Steven Bebb, District Attorney General; and Stephen M. Hatchett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In January of 2012, the Petitioner was convicted of aggravated rape and aggravated burglary. State v. Bruce Anton Parks, Jr., No. E2012-02621-CCA-R3-CD, 2013 WL 5314600, at *1-4 (Tenn. Crim. App. Sept. 7, 2012), no perm. app. filed. These convictions arose from an incident on October 22, 2010, in which a masked intruder, whom the victim recognized as the Petitioner based on his voice, entered the victim's apartment, moved her Sony PlayStation, beat her, and digitally penetrated her twice. Parks v. Lebo, No. 116-CV-00149-JRG-CHS, 2019 WL 4178621, at *1 (E.D. Tenn. Sept. 3, 2019). He received consecutive sentences of twenty-five years and six years, respectively, for an effective sentence of thirty-one years. Parks, 2013 WL 5314600, at *1. On direct appeal, the

Petitioner challenged his sentences as excessive. Upon our review, the record showed the trial court imposed consecutive sentencing after finding the Petitioner was a dangerous offender. Tenn. Code Ann. § 40-35-115(b)(4).

In affirming the sentence, we held that the trial court properly considered whether the sentences were necessary in order to protect the public from further misconduct by the Petitioner and that the terms of the sentence were reasonably related to the severity of the offenses. Parks, 2013 WL 5314600, at *10 (citing State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)). The Petitioner subsequently sought post-conviction relief, arguing various grounds of ineffective assistance of counsel, none of which involved sentencing. This court affirmed the denial of post-conviction relief. Bruce Anton Parks v. State, No. E2014-02359-CCA-R3-PC, 2015 WL 9013165, at *1 (Tenn. Crim. App. Dec. 15, 2015). The Petitioner later unsuccessfully sought federal habeas corpus relief and attempted to attack his sentence; however, the federal court rejected this claim because the Petitioner had not presented it in his state post-conviction matter. Lebo, 2019 WL 4178621, at *2.

On June 29, 2022, the Petitioner filed a pro se motion seeking a reduction of his sentence to 21 years pursuant to Rule 36.1 of the Tennessee Rules of Criminal Procedure. Within the motion, the Petitioner alleged that “the State failed to give proper notice of intent to seek enhanced punishment;” “the trial [court] failed to apply the T.C.A. 40-35-114 to his Class A felony conviction and place on the record;” and “the State failed to give any notice to seek consecutive sentencing T.C.A. 40-35-115 B 4 B 2.” On October 31, 2022, the trial court issued a written order summarily dismissing the Petitioner’s motion. The trial court noted that the Petitioner raised an excessive sentencing claim in a prior appeal and that the instant claim “essentially mirrors” that claim, which was rejected by this court. The trial court determined that the Petitioner’s claims had been “previously and fully litigated.” In regard to the Petitioner’s claim that he did not receive notice of consecutive sentencing, the trial court determined that none was required. Because the Petitioner failed to present a colorable claim for relief, the trial court summarily dismissed his motion. On November 14, 2022, the Petitioner filed a timely notice of appeal, and this case is properly before this court for review.

ANALYSIS

Rule 36.1 provides the defendant and the State an avenue to “seek to correct an illegal sentence,” which is defined as a sentence “that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1(a)(1), (2); see also State v. Wooden, 478 S.W.3d 585, 594-95 (Tenn. 2015) (holding that “the definition of ‘illegal sentence’ in Rule 36.1 is coextensive with, and not broader than, the definition of the term in the habeas corpus context”). To avoid summary denial of an illegal sentence claim brought under Rule 36.1, a defendant must “state with particularity the

factual allegations,” Wooden, 478 S.W.3d at 594, establishing “a colorable claim that the unexpired sentence is illegal.” Tenn. R. Crim. P. 36.1(b). “[F]or purposes of Rule 36.1 . . . ‘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. The determination whether a Rule 36.1 “motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law, to which de novo review applies.” Id. at 589 (citing Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007)). Sentencing errors fall into three categories: clerical errors, appealable errors, and fatal errors. Wooden, 478 S.W.3d at 595. Rule 36.1 applies only to fatal errors. Id.

We reject the Petitioner’s claim on multiple grounds. As an initial matter, we agree with the trial court’s assessment of the Petitioner’s claim as another challenge to the excessive nature of his sentence which was affirmed by this court on direct appeal. As such, the Petitioner’s claim has been previously determined. “Rule 36.1 may not be used to relitigate those issues that have been previously determined.” State v. Ricky Flamingo Brown, No. M2015-01754-CCA-R3-CD, 2016 WL 987641, at *2 (Tenn. Crim. App. Mar. 15, 2016), perm. app. denied (Tenn. Aug. 18, 2016). Additionally, to the extent there was any error in the consecutive nature of the Petitioner’s sentence, a trial court’s finding concerning the imposition of consecutive or concurrent sentences is appealable by either party, Tenn. Code Ann. § 40-35-115(c), and is therefore considered an appealable error, not a fatal error. See State v. Eric Bernard Howard, No. M2019-01900-CCA-R3-CO, 2020 WL 3408794, at *2 (Tenn. Crim. App. June 22, 2020); State v. Eddie Readus, No. M2017-02339-CCA-R3-CD, 2019 WL 3064049, at *3 (Tenn. Crim. App. July 12, 2019), perm. app. denied (Tenn. Dec. 4, 2019); State v. Kenneth Gaines, No. W2016-01262-CCA-R3-CD, 2017 WL 715159, at *2 (Tenn. Crim. App. Feb. 23, 2017), perm. app. denied (Tenn. May 22, 2017). Appealable errors may not be corrected under Rule 36.1. Wooden, 478 S.W.3d at 595.

Finally, even if the State failed to give sufficient notice of its intent to seek enhanced punishment, such an error would not render the Petitioner’s sentence illegal because it too is an appealable error, and, consequently, would not merit relief under Rule 36.1. See State v. Juan LaSean Perry, No. M2020-01169-CCA-R3-CD, 2021 WL 4770255, at *3 (Tenn. Crim. App., Nashville, Oct. 13, 2021) (“An error regarding the notice to seek enhanced punishment does not render a sentence illegal under Rule 36.1.” (citing State v. Atlanta Pearl Hardy, No. M2017-00537-CCA-R3-CD, 2017 WL 3492060, at *2 (Tenn. Crim. App. Aug. 16, 2017))); State v. Walker, No. E2021-01115-CCA-R3-CD, 2022 WL 4475939, at *4 (Tenn. Crim. App. Sept. 27, 2022), perm. app. denied (Tenn. Jan. 11, 2023). Accordingly, the trial court’s summary dismissal of the Petitioner’s Rule 36.1 motion is affirmed.

CONCLUSION

Based on the above reasoning and authority, we affirm the judgment of the trial court.

CAMILLE R. MCMULLEN, PRESIDING JUDGE