

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2023

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Clerk of the
Appellate Courts

DAN E. DURELL v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
No. 122737 Steven Wayne Sword, Judge**

No. E2022-01541-CCA-R3-HC

Dan E. Durell, Petitioner, appeals from the summary dismissal of his habeas corpus petition, in which he claimed his convictions were void because the State withheld exculpatory evidence during sentencing; the State misrepresented facts to the trial court that were relied upon in sentencing; and his convictions violate double jeopardy. After a thorough review of the record and the applicable law, we affirm the judgment of the habeas court.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

Dan E. Durell, Sandstone, Minnesota, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Mary Elizabeth King, Assistant Attorney General; and Charme P. Allen, District Attorney General, for the appellee, State of Tennessee.

OPINION

In the late 1980s, Petitioner was one of several defendants prosecuted in federal court for crimes related to a Racketeer Influenced and Corrupt Organizations (RICO) investigation. As a result of the federal investigation, it was discovered that Petitioner participated in the April 1986 robbery and shooting of a Knoxville physician.

In June 1988, Petitioner pled guilty in the Knox County Criminal Court to armed robbery and burglary; Petitioner claimed at the sentencing hearing that he had been instructed to rob a drug dealer and that he regretted the mistake of identity. *State v.*

Durrell,¹ No. 1213, 1989 WL 75727, at *1-2 (Tenn. Crim. App. July 11, 1989), *perm app. dismissed* (Tenn. Nov. 6, 1989). The trial court sentenced Petitioner as a Range II, especially aggravated offender to concurrent sentences of life and ten years. *Id.*

In October 2004, Petitioner filed a motion for correction of an illegal sentence, in which he alleged that the State withheld exculpatory evidence in sentencing. *State v. Durell*, No. E2004-03014-CCA-R3-CD, 2005 WL 1584419, at *1 (Tenn. Crim. App. July 7, 2005). The trial court construed the motion as a petition for post-conviction relief, found that the petition was time-barred, and dismissed it. *Id.* This court affirmed. *Id.* at *2.

On May 6, 2019, Petitioner filed a petition for writ of habeas corpus, alleging again that the State withheld evidence that would have been favorable to Petitioner’s sentencing; that his convictions violated double jeopardy; and that the trial court relied on “improper, inaccurate, and mistaken information” when sentencing him. *Durell v. State*, No. E2019-01393-CCA-R3-HC, 2020 WL 2612028, at *1 (Tenn. Crim. App. Apr. 29, 2020), *perm. app. denied* (Tenn. Jan. 14, 2021). The habeas court summarily dismissed the petition for failing to attach copies of the original judgments to his petition and for failing to state a colorable claim. *Id.* This court dismissed the appeal after determining that Petitioner’s appeal was untimely filed and that the interests of justice did not mandate waiver of the requirement of a timely notice of appeal. *Id.* We noted that, “[i]n addition to being without merit, none of [P]etitioner’s claims are proper for habeas corpus relief.” *Id.* at *2.

On September 10, 2021, Petitioner filed a second petition for writ of habeas corpus, raising the same claims but omitting the double jeopardy issue. *Durell v. State*, No. E2021-01238-CCA-R3-HC, 2022 WL 3657050, at *1 (Tenn. Crim. App. Aug. 25, 2022), *no perm. app. filed*. Petitioner argued that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to supply him with trial transcripts from the federal and Florida state cases “that were based upon the same criminal offenses as his Tennessee convictions” and that the trial court relied upon “misinformation” by the State during the sentencing hearing. *Id.* The habeas court dismissed the petition, finding, in relevant part, that Petitioner failed to attach to his petition copies of his original judgments.

This court affirmed, concluding that summary dismissal was proper because Petitioner again failed to attach copies of his original judgments to the petition. *Id.* at *3. This court found that dismissal was also proper because Petitioner failed to state a cognizable claim for relief, noting that *Brady* violations result in a voidable, not void, judgment, and that Petitioner’s issue regarding misrepresented evidence at the sentencing

¹ The direct appeal opinion spelled Petitioner’s surname “Durrell”; the record reflects, however, that the correct spelling is Durell.

hearing related to the sufficiency of the evidence, which was not a proper habeas claim. *Id.* at *3-4.

On October 11, 2022, Petitioner filed a third petition for writ of habeas corpus (the Petition), raising the same issues as his first petition and attaching copies of his original judgments. The habeas court summarily dismissed the Petition, finding that Petitioner had not raised a cognizable claim for relief. Petitioner timely appealed.

Analysis

On appeal, Petitioner claims that the habeas court erred by summarily dismissing the Petition. He argues that his convictions are void because the State withheld exculpatory evidence in sentencing; the trial court relied upon “materially false information” in sentencing, specifically that Petitioner had not yet been convicted in his federal and Florida state cases but that the court treated them as prior convictions; and that his federal and Tennessee convictions violate double jeopardy because both were based upon the same Knoxville robbery. The State responds that Petitioner’s claims are not cognizable in a habeas corpus proceeding and that the habeas court properly dismissed the Petition. We agree with the State.

Habeas Corpus Relief

Habeas corpus relief may only be granted in limited circumstances. *Edwards v. State*, 269 S.W.3d 915, 920 (Tenn. 2008). Unlike petitions for post-conviction relief, “the purpose of the habeas corpus petition is to contest void and not merely voidable judgments.” *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992) (citing *State ex rel. Newsome v. Henderson*, 424 S.W.2d 186, 189 (Tenn. 1968)).

Habeas corpus relief is available in Tennessee only when “it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered” that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant’s sentence of imprisonment or other restraint has expired.

Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993) (quoting *State v. Galloway*, 45 Tenn. (5 Cold.) 326, 336-37 (1868)).

A petitioner bears the burden of establishing by a preponderance of the evidence that a judgment is void or that the confinement is illegal. *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). A habeas corpus petition may be summarily dismissed without a hearing when the petition “fails to demonstrate that the judgment is void.” *Hickman v. State*, 153

S.W.3d 16, 20 (Tenn. 2004) (citing Tenn. Code Ann. § 29-21-109). “Whether habeas corpus relief should be granted is a question of law[,]” which we review de novo. *Edwards*, 269 S.W.3d at 919.

Brady

As this court discussed in Petitioner’s second habeas appeal, “[f]or this [c]ourt to make a determination that a *Brady* violation occurred requires ‘proof beyond the face of the record of judgment,’” meaning that the judgment would only be voidable, not void. *Durell*, 2022 WL 3657050, at *3 (quoting *Summers v. State*, 212 S.W.3d 251, 256 (Tenn. 2007)). Habeas petitions must demonstrate that the judgment is void instead of voidable. *Potts*, 833 S.W.2d at 62. Consequently, a *Brady* claim is not cognizable in a habeas proceeding, and Petitioner is not entitled to relief on this basis.

Sufficiency of the Evidence

Similarly, this court noted in Petitioner’s second habeas appeal that Petitioner’s contention that the trial court based its sentencing determination on false information is properly framed as a challenge to the sufficiency of the evidence. *Durell*, 2022 WL 3657050, at *4. Challenges to the sufficiency of the evidence are not cognizable in a habeas proceeding. *Gant v. State*, 507 S.W.2d 133, 136 (Tenn. Crim. App. 1973).

We note that, by Petitioner’s own admission in the Petition, he was convicted in federal court of two charges on August 8, 1986, and he pleaded guilty to ten additional charges on September 29, 1986; Petitioner was convicted in Florida on September 24, 1987. Petitioner was sentenced in Knox County on July 5, 1988. As this court stated in Petitioner’s direct appeal, the trial court properly considered the federal and Florida convictions to be prior convictions for purposes of sentencing. *Durrell*, 1989 WL 75727, at *6. This claim is meritless.

Double Jeopardy

Petitioner argues that his federal and Tennessee convictions violate the Double Jeopardy Clause because some of his federal convictions also arose from the Knoxville robbery and shooting. However, a violation of double jeopardy, even if meritorious, “would render a conviction merely voidable, not void, and as such is not a proper basis of a petition for habeas corpus.” *Wisdom v. Lee*, No. E2016-01737-CCA-R3-HC, 2017 WL 991910, at *3 (Tenn. Crim. App. Mar. 14, 2017), *no perm. app. filed*. A voidable judgment is not reviewable in a habeas petition. *See Potts*, 833 S.W.2d at 62. Thus, Petitioner’s double jeopardy argument is not a cognizable claim, and he is not entitled to relief on this basis.

Conclusion

Upon the foregoing and the record as a whole, we affirm the judgment of the habeas court.

ROBERT L. HOLLOWAY, JR., JUDGE