

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
March 28, 2023 Session

FILED

05/08/2023

Clerk of the  
Appellate Courts

**ERIC FOSTER v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Knox County**  
**No. 120568 Steven Wayne Sword, Judge**

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**No. E2022-00787-CCA-R3-PC**

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The Petitioner, Eric Foster, appeals the Knox County Criminal Court's dismissal of his petition for post-conviction relief from his convictions for one count of aggravated rape, two counts of rape, one count of statutory rape, and one count of exhibition of harmful material to a minor. On appeal, the Petitioner argues that the post-conviction court erred by dismissing his petition for post-conviction relief as untimely. The Petitioner argues that he is entitled to due process tolling of the statute of limitations because he pursued his rights diligently and there were extraordinary circumstances preventing his timely filing. We affirm the judgment of the post-conviction court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and JILL BARTEE AYERS, J., joined.

Joseph Ali Sadighian, Knoxville, Tennessee, for the appellant, Eric Foster.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Charme P. Allen, District Attorney General; and Nathaniel Ogle, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. FACTUAL AND PROCEDURAL HISTORY**

On April 9, 2019, this court denied the Petitioner relief on the direct appeal of his convictions, and the Petitioner did not seek permission to appeal to our supreme court. *See Eric Foster*, No. E2018-01205-CCA-R3-CD, 2019 WL 1546996, at \*1 (Tenn. Crim. App. Apr. 9, 2019), *no perm. app. filed*. On January 28, 2022, the Petitioner filed a pro se petition for post-conviction relief. The post-conviction court entered a February 3, 2022

order finding the petition to be untimely and appointing the Petitioner post-conviction counsel. A hearing ensued to determine whether the Petitioner was entitled to due process tolling of the statute of limitations.

At the May 5, 2022 hearing, the Petitioner testified that after his convictions, he was sent to Northwest Correctional Complex (“Northwest”). The Petitioner recalled that in June 2019, appellate counsel notified the Petitioner that this court had denied his direct appeal from his convictions. The Petitioner stated that he received a packet from appellate counsel that explained the denial and that he discussed the appellate process with other inmates. The Petitioner said that he knew he had one year from this court’s denial of his direct appeal to petition for post-conviction relief.

The Petitioner testified that he had been placed in segregation from other inmates because he was “written up” for “holding things for gang members.” The Petitioner said that his conviction for “rape of a child” made him a target for violence in prison and that he was forced to hold items such as knives for other inmates. The Petitioner said that while in isolation, he was unable to access the prison library, that it “was up to the librarian” to bring the Petitioner requested post-conviction forms, and that he never received any forms. The Petitioner said that after he heard this court denied his appeal in June 2019, he requested to use the library every week but never received a response to his requests. He said that he also asked other inmates for help obtaining the post-conviction forms but that they refused.

The Petitioner testified that around June 2020, he was transferred from Northwest to Trowsdale prison because he was on the “Hot Boy List” for “holding so many knives” and repeatedly “getting into trouble.” The Petitioner said that while in Trowsdale prison, the other inmates were repeatedly violent toward him because of the nature of his convictions. The Petitioner explained that the inmates were placed on “lockdown” because of the COVID-19 pandemic and that no one “had access to anything.” The Petitioner said that he made requests to use the library but never received a response. The Petitioner said that he did not have a “prison counselor” to help him and that he did not have access to post-conviction forms.

The Petitioner testified that eventually he talked with an inmate who told the Petitioner about a “jailhouse lawyer” who assisted inmates with post-conviction petitions. The Petitioner explained that in late 2021, he spoke with the jailhouse lawyer, who helped the Petitioner file his petition for post-conviction relief. The Petitioner said that even if he had been able to access the library before the jailhouse lawyer helped him in 2021, he suffered from ADHD, ADD, and Fetal Alcohol Syndrome. He explained that these conditions would have made it difficult for him to understand legal principles and how to

file a petition for post-conviction relief. However, the Petitioner said that had he had access to the library, he would have attempted to file a petition despite his conditions.

On cross-examination, the Petitioner said that he had an address and phone number for his appellate counsel but that he did not contact him to inquire about post-conviction relief because he did not have the money for postage or phone calls. The Petitioner admitted that he had sent mail and made phone calls while in custody but said that they were to connect with his family.

The Petitioner's grandmother, Deborah Goldsmith, testified that when the Petitioner was age nineteen, he moved to Tennessee to live with her. She said that the Petitioner was a "good-hearted person" who was not "mean" or "violent" but that he had "very, very low" mental development.

In a written order, the post-conviction court denied the Petitioner's request to toll the one-year statute of limitations. The post-conviction court noted that the Petitioner knew he had one year to file his post-conviction petition and that the Petitioner was unable to access the library because of his behavior related to holding contraband for gang members in an effort to avoid assault from other inmates. The post-conviction court also acknowledged that the Petitioner said the COVID-19 pandemic prevented the Petitioner from visiting the library. The post-conviction court further noted that the Petitioner eventually worked with a jailhouse lawyer, who aided him in filing his petition.

The post-conviction court did not credit the Petitioner's testimony that he was diligently pursuing his rights under the post-conviction statute or that the delay in filing his petition was beyond his control. The post-conviction court reasoned that the Petitioner was unable to visit the library because of his own misconduct and that this was not beyond his control. The post-conviction court also stated that the Petitioner filed his petition without use of the library and that the Petitioner's inability to visit the library was "an excuse rather than a justification" for the delayed filing. The post-conviction court further found that the COVID-19 pandemic did not begin until the end of the statute of limitations in the Petitioner's case.

The post-conviction court found the Petitioner's testimony that he was unable to contact his appellate counsel because the Petitioner did not have the money was not credible. The Petitioner acknowledged that appellate counsel mailed him this court's decision regarding his direct appeal from his convictions and that the Petitioner had appellate counsel's telephone number and address. The post-conviction court reasoned that the Petitioner could have contacted his appellate counsel if he wished to file a petition for post-conviction relief.

The post-conviction court concluded that the Petitioner failed to establish that the Petitioner had pursued his rights diligently or that there were extraordinary circumstances preventing the Petitioner from filing a timely petition. The post-conviction court ruled that it did not have jurisdiction to consider the Petitioner's petition for post-conviction relief and dismissed the petition.

The Petitioner filed a timely appeal.

## II. ANALYSIS

Post-conviction relief is available when a “conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. *Id.* § 40-30-110(1); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). “Questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved” by the post-conviction court. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

### A. Due Process Tolling of Statute of Limitations

On appeal, the Petitioner argues that he is entitled to due process tolling of the one-year statute of limitations for filing his petition for post-conviction relief. The Petitioner argues that he diligently pursued his rights under the post-conviction statute and that extraordinary circumstances prevented him from filing his petition for post-conviction relief. The State responds that the post-conviction court properly dismissed his petition for post-conviction relief because the Petitioner failed to establish that he was entitled to due process tolling of the one-year statute of limitations.

“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). “Given the post-conviction statute's language conferring jurisdictional import to the timely filing of a petition, it is essential that the question of timeliness be

resolved before any adjudication on the merits of the petitioner’s claim may properly occur.” *Antonio L. Saulsberry v. State*, No. W2002-02538-CCA-R3-PC, 2004 WL 239767, at \*1 (Tenn. Crim. App. Feb. 9, 2004).

Under Tennessee Code Annotated section 40-30-102(a), a post-conviction petition must be filed “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.” The statute provides that the limitations period “shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.” *Id.* Failure to file within the limitations period removes the case from the court’s jurisdiction. *Id.* § 40-30-102(b).

The limitations period has three statutory exceptions for certain claims involving new constitutional rights, certain claims involving new scientific evidence, and for sentences enhanced by subsequently overturned convictions. Tenn. Code Ann. § 40-30-102(b). There is nothing in the record to suggest that any of these exceptions apply to the petitioner’s case.

Apart from the statutory exceptions described above, due process requires that prisoners seeking post-conviction relief must be afforded an opportunity to seek this relief “at a meaningful time and in a meaningful manner.” *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992). A post-conviction petitioner is therefore entitled to due process tolling of the one-year statute of limitations upon a showing “(1) that he or she had been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.” *Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013).

A post-conviction petitioner bears the burden of proving by clear and convincing evidence that the statute of limitations should be tolled for due process. *Reid v. State*, 197 S.W.3d 694, 705 (Tenn. 2006). The question of whether a post-conviction statute of limitations should be tolled is a mixed question of law and fact and is subject to de novo review. *Bush v. State*, 428 S.W.3d 1, 16 (Tenn. 2014) (citing *Smith v. State*, 357 S.W.3d 322, 355 (Tenn. 2011)).

This court affirmed the Petitioner’s convictions on April 9, 2019. Thus, the statute of limitations expired on May 6, 2020. *See* Tenn. Code Ann. § 40-30-102(a); *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 25, 2020) (Order) (“Statutes of limitations . . . that would otherwise expire during the time period from Friday, March 13, 2020, through Tuesday, May 5, 2020, are hereby extended through Wednesday, May 6,

2020.”). The Petitioner filed his pro se petition for post-conviction relief on January 28, 2022, which is more than one year after the statute of limitations expired.

The post-conviction court correctly concluded that the Petitioner failed to diligently pursue his rights and that no extraordinary circumstances prevented the Petitioner from filing a timely petition for post-conviction relief. The Petitioner acknowledged that appellate counsel mailed him this court’s decision regarding his direct appeal from his convictions and that the Petitioner was therefore aware that he had one year to file his post-conviction petition. While the Petitioner blames the untimeliness of his petition on his lack of access to a law library, the Petitioner’s access to the library was limited because of his own misconduct. *See Whitehead*, 402 S.W.3d at 631-32 (noting that a resort to equitable tolling must arise ““due to circumstances external to the party’s own conduct”” (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000))). Moreover, the Petitioner filed a petition for post-conviction relief without use of the library, and the post-conviction court found that lack of library access was an “excuse rather than a justification.” The Petitioner also attributes the untimeliness of his petition to a change in prison procedures surrounding the COVID-19 pandemic. The post-conviction court correctly noted, however, that the COVID-19 pandemic began near the end of the Petitioner’s one-year statute of limitations, and the Petitioner’s filing date was extended from April 9, 2020, to May 6, 2020. *See In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 25, 2020) (Order). The Petitioner has not shown that any change in prison procedures due to COVID-19 was an “extraordinary circumstance” that prevented him from timely filing his petition. *See Bryan Shawn Blevins v. State*, No. E2021-01312-CCA-R3-PC, 2022 WL 3226793, at \*5 (Tenn. Crim. App. Aug. 10, 2022) (holding same and citing cases), *perm. app. denied* (Tenn. Dec. 14, 2022). Accordingly, the Petitioner is not entitled to relief on this issue.

#### B. Absence of Post-Conviction Counsel

The Petitioner argues that the post-conviction court erred by not finding that the Petitioner’s lack of post-conviction counsel during the limitations period “established cause to excuse procedural default.” The Petitioner cites to *Trevino v. Thaler*, 569 U.S. 413 (2013) and *Martinez v. Ryan*, 566 U.S. 1 (2012)—where the United States Supreme Court recognized that the absence of or ineffective assistance of post-conviction counsel may serve as cause to excuse a federal habeas corpus petitioner’s procedural default of substantial trial ineffectiveness claims—and argues that his untimely filing should be excused owing to his lack of post-conviction counsel during the limitations period. The State responds that the Petitioner waived review of this issue because he failed to raise the issue below.

Appellate review is generally limited to issues that have been properly preserved and presented for appeal in a manner prescribed by Tennessee Rule of Appellate Procedure 27. *State v. Bristol*, 654 S.W.3d 917, 923-25 (Tenn. 2022). Accordingly, an appellate court “may decline to consider issues that a party failed to raise properly.” *Id.* (quoting *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018)). Moreover, plain-error review is unavailable in post-conviction proceedings. *Grindstaff v. State*, 297 S.W.3d 208, 219 (Tenn. 2009).

Here, the Petitioner raises this issue for the first time on appeal. Accordingly, this issue is waived. In any event, this court has declined to extend the narrow holdings of *Martinez* and *Ryan* to state proceedings. *See, e.g., David Edward Niles v. State*, No. M2014-00147-CCA-R3-PC, 2015 WL 3453946, at \*7 (Tenn. Crim. App. June 1, 2015) (citing cases).

### III. CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the judgment of the post-conviction court.

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KYLE A. HIXSON, JUDGE