

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2023

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LEROY SEXTON, JR. v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Fentress County
No. 9493 E. Shayne Sexton, Judge**

No. M2022-00100-CCA-R3-PC

The Petitioner’s original and untimely petition for post-conviction relief was dismissed on the merits because all his claims were either waived or previously determined. Thereafter, the Petitioner filed a second petition alleging that the statute of limitations for his first petition should have been tolled due to his then mental incompetency. The post-conviction court dismissed the second petition, finding that the Petitioner was not mentally incompetent. On appeal, we conclude that, because the Petitioner’s first petition was resolved on the merits, any second or subsequent petition is barred, and any issue regarding the timely filing of the first petition is immaterial. Accordingly, we respectfully affirm the judgment of the post-conviction court.

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

TOM GREENHOLTZ, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Jay Umerley, Nashville, Tennessee (on appeal) and Thomas Harding Potter, Allardt, Tennessee (at post-conviction hearing), for the appellant, Leroy Sexton, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Jared Effler, District Attorney General; and Philip A. Kazee and Jade A. Peters, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On September 21, 2001, a Fentress County jury found the Petitioner guilty of child rape, and the trial court sentenced the Petitioner to a term of twenty-five years. This Court

affirmed the conviction and sentence, and the supreme court denied permission to appeal on May 14, 2007. *See State v. Sexton*, No. M2004-03076-CCA-R3-CD, 2007 WL 92352 (Tenn. Crim. App. Jan. 12, 2007), *perm. app. denied* (Tenn. May 14, 2007) (*Sexton I*).

The Petitioner filed a petition for post-conviction relief on May 22, 2008, in the wrong county of venue, and he later filed another petition in Fentress County on November 6, 2008. The post-conviction court summarily dismissed the Fentress County petition as being untimely. The court also found that all claims were either waived or previously determined. *See Sexton v. State*, No. M2009-01018-CCA-R3-PC, 2010 WL 653007, at *1 (Tenn. Crim. App. Feb. 24, 2010), *perm. app. denied* (Tenn. Sept. 13, 2010) (*Sexton II*).

The Petitioner appealed the dismissal, arguing that due process principles tolled the running of the statute of limitations. This Court agreed that the filing of the post-conviction petition was “well outside the statute of limitations.” *Sexton II*, 2010 WL 653007, at *2. However, because all of the Petitioner’s previous claims were waived or previously determined, we affirmed the summary dismissal of the petition without deciding whether due process principles tolled the running of the statute of limitations. *Id.* at *4 (“[W]e need not remand for a determination as to whether due process requires the tolling of the statute of limitations. Even if the statute of limitations were to be tolled the issues presented by Petitioner are waived or previously determined.”).

On April 8, 2011, the Petitioner filed a second petition for post-conviction relief, reasserting many of the same substantive grounds he had previously raised. In a purported affidavit attached to this petition, the Petitioner explained why he was filing a second petition for post-conviction relief:

I would like to explain why I’m filing my Post-Conviction at this time. On January 12, 2011, I found I was mentally incompetent from February the 13th of 2007 until July 21, 2009. It was during this time that I filed my Post-Conviction.

The Petitioner also asserted that his lawyer failed to explain when the statute of limitations would run and did not clarify that he no longer represented him. As such, the Petitioner

placed [his first petition] in the Prison mail box on May, 15 2009 [sic] missing the 1 year de[a]dline by (1) one day. . . . Then on January 21, 2011 I found that I was Mentally Incompetent and that is why I am filing this second Post-Conviction.

Following delays that are not readily explained from the record, the Petitioner filed two additional amended petitions relating back to this second petition, with the last being

filed in October 2016. As part of these amendments, the Petitioner attempted to subpoena Dr. William Diebold, a Tennessee Department of Correction physician, to testify in support of his petition. After substantial litigation over whether this physician could be compelled to attend a hearing or to testify by deposition, *Sexton v. State*, No. M2017-00698-CCA-WR-CO, 2018 WL 6266167 (Tenn. Crim. App. Nov. 30, 2018) (*Sexton III*), the parties ultimately decided to submit affidavits from Dr. Diebold in lieu of his testimony.

After the Petitioner filed a third amended petition in September 2017, the State filed a motion to dismiss the second petition. The State initially argued that the petition was an improper second petition. However, it also later asserted that the Petitioner failed to show that he acted with reasonable diligence in seeking post-conviction relief to benefit from due process tolling of the statute of limitations.

The post-conviction court held a hearing on the State's motions to dismiss on November 16, 2021. In its formal order dismissing the petition, which was filed on December 27, 2021, the post-conviction court found that the Petitioner "failed to establish a prima facie case that he was incompetent in order to toll the statute of limitations and bring another Petition for Post-Conviction Relief."

The Petitioner filed a timely notice of appeal on January 24, 2022. On appeal, he asserts that the post-conviction court erred in dismissing his second petition and that his prior incompetency tolled the original statute of limitations. For its part, the State argues that the petition represents an impermissible second petition and that the post-conviction court also properly denied the second petition on the merits. On our review, we respectfully affirm the dismissal of the Petitioner's post-conviction petition.

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). The principal issue in this case is whether the Petitioner may file a second petition for post-conviction relief to raise a new ground upon which the original statute of limitations could have been tolled. "This court reviews a post-conviction court's summary dismissal of a post-conviction petition de novo." *Odom v. State*, No. M2022-00252-CCA-R3-PC, 2022 WL 17261526, at *5 (Tenn. Crim. App. Nov. 29, 2022) (citing *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002)).

ANALYSIS

The Tennessee Post-Conviction Procedure Act provides an avenue for relief "when the 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 (2018). To initiate post-conviction proceedings, a petitioner must first file “a written petition for relief[.]” *Woodard v. State*, No. M2022-00162-CCA-R3-PC, 2022 WL 4932885, at *2 (Tenn. Crim. App. Oct. 4, 2022), *no perm. app.* This petition must “allege the abridgment of a constitutionally guaranteed right.” *Wallace v. State*, No. E2017-02481-CCA-R3-PC, 2019 WL 1959764, at *3 (Tenn. Crim. App. May 2, 2019). It must also “contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Tenn. Code Ann. § 40-30-106(d) (2018).

Importantly, however, a post-conviction petitioner generally cannot file multiple petitions attacking a single judgment of conviction. Indeed, a second or subsequent petition for post-conviction relief is specifically barred by statute and court rule. For example, Tennessee Code Annotated section 40-30-102(c) (2018) provides:

This part 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. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40-30-117.

Similarly, Tennessee Supreme Court Rule 28, section 5(B) recognizes that “[e]ach petitioner shall be entitled to file only one petition for each conviction or sentence incurred.”

Despite the general prohibition on second or subsequent petitions, this general rule is also subject to a couple of exceptions. First, the Act permits a petitioner to reopen the proceedings in specific circumstances. These circumstances include, for example, where new scientific evidence is discovered which establishes that the petitioner is “actually innocent” of the offenses, where the courts recognize a new rule of constitutional law that applies retroactively, and where the petitioner’s current sentence has been enhanced because of a previous conviction that has been held to be invalid. Tenn. Code Ann. § 40-30-117(a)(1)-(3) (2018).

Second, a subsequent petition may be filed if the first petition was not resolved on the merits by a court of competent jurisdiction. Tenn. Code Ann. § 40-30-102(c). This circumstance may occur, for example, where the petitioner withdraws a petition without prejudice before the hearing and then later refiles a timely petition for post-conviction relief. *See* Tenn. Code Ann. § 40-30-109(c) (2018). Conversely, a petitioner may not file a second petition if the first was dismissed for a failure to state a claim for post-conviction

relief. *Benson v. State*, No. W2016-02346-CCA-R3-PC, 2018 WL 486000, at *5 (Tenn. Crim. App. Jan. 19, 2018). Our appellate courts have recognized that a post-conviction petition is resolved on the merits when it is dismissed because all of the identified claims have been waived or were previously determined. *Id.* at *4 (citing *Blair v. State*, No. W1999-01847-CCA-R3-PC, 2000 WL 277138, at *1 (Tenn. Crim. App. Jan. 12, 2000) (Order)).

In this case, the Petitioner does not assert that any of the grounds for reopening a post-conviction petition pursuant to Tennessee Code Annotated section 40-30-117(a) (2018) apply in his case. Moreover, the Petitioner's first untimely petition for post-conviction relief was, in fact, dismissed on the merits. Although the Petitioner raised issues of due process tolling in that appeal, this Court did not address those issues. Instead, we affirmed the dismissal of the first petition on the merits, finding that the petition failed to state a cognizable claim for post-conviction relief. *See Sexton II*, 2010 WL 653007, at *2. Indeed, because all of the Petitioner's claims in his original petition were either waived or previously determined, we expressly pretermitted any issue regarding the tolling of the original statute of limitations. *Id.*

Issues related to the running of the statute of limitations are, and have been, irrelevant to whether the Petitioner is entitled to post-conviction relief. As such, any claim that the Petitioner's earlier incompetence should have tolled the original statute of limitations is of no moment. *Cf. Putman v. State*, No. E2019-01608-CCA-R3-PC, 2020 WL 1161338, at *2 (Tenn. Crim. App. Mar. 9, 2020) (concluding that the second post-conviction petition was barred when post-conviction court summarily dismissed the first petition as untimely and found that it failed to assert a colorable claim). Accordingly, because no exception exists to the statutory prohibition on filing a second or subsequent petition for post-conviction relief, we conclude that the Petitioner's second petition must be summarily dismissed pursuant to Tennessee Code Annotated section 40-30-102(c).

CONCLUSION

In summary, we hold that Tennessee Code Annotated section 40-30-102(c) bars the filing of the Petitioner's second petition for post-conviction relief because his first petition was resolved on the merits by a court of competent jurisdiction. Accordingly, we respectfully affirm the judgment of the post-conviction court summarily dismissing the petition.

TOM GREENHOLTZ, JUDGE