

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

FILED

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Clerk of the
Appellate Courts

ANGELA MONTGOMERY v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Rutherford County
No. 80091 Barry R. Tidwell, Judge**

No. M2022-00780-CCA-R3-PC

The Petitioner, Angela Montgomery, was convicted in the Rutherford County Circuit Court of six counts of rape of a child, for which she received an effective sentence of forty years' imprisonment to be served at one hundred percent. This court affirmed her convictions, and she filed a petition for post-conviction relief claiming that she received the ineffective assistance of counsel. After an evidentiary hearing, the post-conviction court granted relief. The State then appealed, claiming for the first time that the petition was untimely. This court remanded the case to the post-conviction court to determine whether the Petitioner was entitled to due process tolling of the one-year statute of limitations. The post-conviction court held that she was not and denied the petition as untimely. The Petitioner now appeals contending that she is entitled to due process tolling because, despite her repeated requests, trial counsel failed to provide her with a copy of the trial transcript. Upon review, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which KYLE A. HIXSON and MATTHEW J. WILSON, JJ., joined.

John C. Taylor, Murfreesboro, Tennessee, for the Petitioner, Angela Montgomery.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Jennings H. Jones, District Attorney General; and Hugh Ammerman, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Following this court's remand in Angela Montgomery v. State, No. M2020-00427-CCA-R3-PC, 2021 WL 4306906, at *1 (Tenn. Crim. App. Sept. 22, 2021), the post-conviction court held an evidentiary hearing on April 22, 2022, for the purpose of

determining whether the Petitioner was entitled to equitable tolling of the statute of limitations. At the hearing, the Petitioner, trial counsel, and trial counsel's office manager testified as to the facts outlined below.

After the Petitioner's convictions and sentence were affirmed by this court on September 1, 2017, see State v. Angela Montgomery, No. M2016-00459-CCA-R3-CD, 2017 WL 3835962, * 1 (Tenn. Crim. App. Sept. 1, 2017), the Petitioner's trial counsel filed a timely motion to withdraw as counsel, which this court granted. In compliance with Tennessee Supreme Court Rule 14, trial counsel attached to the motion a letter to the Petitioner informing her of this court's affirmation of her convictions and his intent to withdraw as counsel. The letter stated that if the Petitioner wished to file an application for permission to appeal to the Tennessee Supreme Court, she must do so pro se by October 31, 2017. See Tenn. Sup. Ct. R. 14 (listing requirements to be met prior to being granted permission to withdraw from representation). The letter did not, however, reference post-conviction relief or the applicable deadline. Trial counsel's motion to withdraw and the attached letter were admitted as exhibits to the hearing.

The Petitioner did not file a Rule 11 application for permission to appeal to the Tennessee Supreme Court. Instead, she began preparing a petition for post-conviction relief with the assistance of another prisoner working as a law clerk. The prison law clerk advised the Petitioner that the deadline for filing the petition was October 31, 2018, one year after the deadline for filing an application for permission to appeal to the Tennessee Supreme Court. Based on the advice of the prison law clerk, the Petitioner also believed she needed her entire case file, including the transcripts from her trial, to file a meaningful petition for post-conviction relief. While working with the prison law clerk to prepare her post-conviction petition, the Petitioner tried to obtain a copy of her case file from trial counsel. The Petitioner sent trial counsel five letters requesting the file and complained to the Board of Professional Responsibility about his lack of response, or, more accurately, his inadequate response. Each of the Petitioner's letters was admitted as an exhibit to the hearing.

On January 4, 2018, the Petitioner mailed a letter to trial counsel requesting her case file so she could prepare her post-conviction petition. The Petitioner testified that in response to this letter, she received a copy of the relevant indictments, but not the entire case file. She then filed a complaint with the Board of Professional Responsibility claiming that she had not received a response to her request for her case file for more than sixty days. The Board contacted trial counsel and, on March 29, 2018, trial counsel's office manager mailed the Petitioner a copy of the case file.

On May 15, 2018, the Petitioner mailed a second letter to trial counsel requesting documents missing from the case file, specifically pre-trial motions and orders, the motion

for a new trial, and the appellate brief. In this letter, she referenced the urgent need for these documents given the post-conviction statute of limitations. Trial counsel's paralegal, with the assistance of his office manager, again mailed the Petitioner a copy of the case file. On June 7, 2018, before the Petitioner received the above response, the Petitioner mailed a third letter to trial counsel reiterating her request for the missing documents. This letter again referenced the urgent need for these documents given the post-conviction statute of limitations. The Petitioner received no response. On June 29, 2018, the Petitioner mailed a fourth letter to trial counsel specifically requesting, for the first time, the trial transcript. The letter stated that she could not "properly complete [her] petition for post[-]conviction without the transcript." The Petitioner received no response. On July 18, 2018, the Petitioner mailed a fifth letter to trial counsel stating that she still did not have a copy of the trial transcript and requesting that it be sent as soon as possible. The Petitioner received no response.

According to the Petitioner's trial counsel, he instructed his staff to copy the entire file and send it to the Petitioner each time she requested it. His office manager testified that she copied the Petitioner's entire file twice and sent it to the Petitioner on two separate occasions. On the first occasion, the office manager personally copied "three big accordion files worth of stuff" and sent it to the Petitioner. On the second occasion, the office manager helped another employee who had received the Petitioner's request in copying "everything" in the file. Nevertheless, trial counsel acknowledged that he does not always maintain copies of transcripts and could not remember whether a copy of the trial transcript was ever included in the Petitioner's case file.

On September 18, 2018, despite having never received a copy of the trial transcript, the Petitioner submitted a pro se petition for post-conviction relief to prison authorities for mailing. In this petition, she claimed that she received the ineffective assistance of counsel. She also stated that the petition was timely because the one-year statute of limitations did not begin to run until the sixty-day period for filing an application for discretionary appeal to the Tennessee Supreme Court expired on October 31, 2017. The Petitioner also believed the petition was timely filed based on the advice of the prison law clerk. Thereafter, the post-conviction court appointed post-conviction counsel, who subsequently filed multiple amended petitions for post-conviction relief on the Petitioner's behalf.

Based on the above proof, the post-conviction court entered an order on May 24, 2022, and determined that "it was the Petitioner's reliance on the prison[] law clerk[']s knowledge of the post-conviction process which caused her to late file [the petition] and not the lack of [the requested] transcript." Accordingly, "it was a misunderstanding of the . . . date when the statute began to run that led to Petitioner's late file, which does not entitle her to due process tolling of her late filed petition." The Petitioner filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

The Petitioner argues that the post-conviction court erred in denying her petition for post-conviction relief on the basis that it was untimely. She maintains that she is entitled to due process tolling of the statute of limitations because, despite her repeated requests, trial counsel failed to provide her with a copy of the trial transcript and thus prevented her timely filing. The State responds, and we agree, that denial of post-conviction relief was proper.

A petition for post-conviction relief 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.” T.C.A. § 40-30-102(a) (2006). “Time is of the essence of the right to file a petition for post-conviction relief . . . and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise.” *Id.* The timeliness of a petition for post-conviction relief is therefore jurisdictional, and if the petition is not timely, a court is without authority to grant or deny relief.

This court filed its opinion affirming the Petitioner’s convictions on September 1, 2017, and the Petitioner did not file a Rule 11 application for permission to appeal to our supreme court. Accordingly, the statute of limitations began to run from September 1, 2017, the date our direct appeal opinion was filed, and the Petitioner had until September 1, 2018, to file a petition for post-conviction relief. Angela Montgomery v. State, 2021 WL 4306906, at *8 (Tenn. Crim. App. Sept. 22, 2021) (citing Tenn. Code Ann. § 40-30-102(a) and Wiggins v. State, No. W2020-00095-CCA-R3-PC, 2020 WL 7233127, at *2 (Tenn. Crim. App. Dec. 8, 2020) (recognizing that the statute of limitations for filing a petition for post-conviction relief begins to run when this court files its direct appeal opinion if the petitioner does not file an application for permission to appeal to the Tennessee Supreme Court)). The Petitioner did not file her petition until September 18, 2018, seventeen days after the one-year statute of limitations had expired. Accordingly, her petition was untimely, and the original post-conviction court was required to dismiss the petition unless the Petitioner established due process tolling of the limitations period.¹

A court may consider an untimely petition for post-conviction relief if applying the statute of limitations would deny a petitioner due process. Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992). Due process, in the post-conviction context, requires that a petitioner be afforded an opportunity to present his or her claims “at a meaningful time and

¹ The Petitioner does not allege any grounds under Tennessee Code Annotated section 40-30-102(b), which permits a court to consider an untimely petition if: (1) a new constitutional right has been recognized and applies retroactively; (2) new scientific evidence establishes the petitioner’s innocence; or (3) a previous conviction that enhanced the petitioner’s sentence has been held to be invalid, are applicable.

in a meaningful manner” before those claims are dismissed for failure to comply with the statute of limitations. Seals v. State, 23 S.W.3d 272, 277-78 (Tenn. 2000) (quoting Burford, 845 S.W.2d at 208). Whether due process requires tolling of the post-conviction statute of limitations is a mixed question of law and fact subject to de novo review. Whitehead v. State, 402 S.W.3d 615, 621 (Tenn. 2013) (citing Smith v. State, 357 S.W.3d 322, 355 (Tenn. 2011)). A post-conviction court’s findings of fact, however, are conclusive on appeal unless the evidence preponderates against them. Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006). The Tennessee Supreme Court has identified three circumstances in which due process requires tolling of the statute of limitations: (1) claims arising after the statute of limitations has expired; (2) claims based on mental incompetence that prevented the petitioner from complying with the statute of limitations; and (3) claims based on attorney misconduct. Whitehead, 402 S.W.3d at 623-24.

The Petitioner contends she is entitled to due process tolling of the one-year statute of limitations based on trial counsel’s misconduct in withholding the trial transcripts. A petitioner is entitled to due process tolling based on attorney misconduct if the petitioner shows that: (1) he or she has been pursuing his or her rights diligently; and (2) some extraordinary circumstance prevented timely filing. Id. at 631 (citing Holland v. Florida, 560 U.S. 631, 649 (2010)). The first prong “does not require a [petitioner] to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts. . . . Moreover, the due diligence inquiry is an individualized one that must take into account the conditions of confinement and the reality of the prison system.” Id. (quoting Downs v. McNeil, 520 F.3d 1311, 1323 (11th Cir. 2008)). The second prong is met when the petitioner’s attorney “abandons the [petitioner] or acts in a way directly adverse to the [petitioner’s] interest, such as by actively lying or otherwise misleading the [petitioner] to believe things about his or her case that are not true.” Id. The word “prevent” in the second prong requires the petitioner to demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing. See Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000); Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th Cir. 2005). The Tennessee Supreme Court has highlighted that “[i]n every case in which we have held the statute of limitations is tolled, the pervasive theme is that circumstances *beyond a petitioner’s control* prevented the petitioner from filing a petition for post-conviction relief within the statute of limitations.” Smith, 357 S.W.3d at 358 (emphasis in original).

An attorney’s failure to provide legal files is not alone an extraordinary circumstance that entitles a petitioner to due process tolling. See Whitehead, 402 S.W.3d at 632; see also Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir. 2003). In Whitehead, the petitioner was entitled to due process tolling because his attorney’s conduct amounted to abandonment. 402 S.W.3d at 632. The attorney not only failed to provide the petitioner any legal files until after the post-conviction statute of limitations expired, but the attorney

also failed to timely notify the petitioner that their attorney-client relationship had ended, failed to timely notify the petitioner that the United States Supreme Court had denied his petition for certiorari, and provided the petitioner with the wrong deadline for his post-conviction petition. Id. The Tennessee Supreme Court emphasized that “[n]one of the failures, standing alone, would be sufficient [to toll the statute of limitations].” Id. Together, however, this “egregious combination” amounted to extraordinary circumstances that prevented the petitioner’s timely filing. Id.

In this case, the post-conviction court found that: (1) trial counsel’s office manager copied the Petitioner’s entire file as requested and sent it to the Petitioner; (2) if a copy of the trial transcript was in the Petitioner’s file, it would have been sent; (3) no extraordinary circumstance stood in the Petitioner’s way and prevented her from timely filing her petition; and (4) the Petitioner’s reliance on the law clerk’s incorrect deadline, not the lack of the trial transcript, caused the Petitioner’s untimely filing. The court explicitly accredited the testimony of trial counsel and his office manager’s testimony that she twice sent the entire file to the Petitioner. The court determined the Petitioner was not credible in her claim that trial counsel’s office never responded to her letters. The court’s factual findings are supported by the record and entitled to due deference. We will review the court’s legal determinations that no extraordinary circumstance prevented the Petitioner from filing her petition more fully below.

In her brief, the Petitioner relies heavily on the section of Whitehead discussing Spitsyn, a case in which the Ninth Circuit reasoned that without the case file, it was “unrealistic to expect [petitioner] to prepare and file a meaningful petition on his own within the limitations period.” Whitehead, 402 S.W.3d at 633-34 (quoting Spitsyn, 345 F.3d at 801). However, Spitsyn is easily distinguishable. The petitioner in Spitsyn had *no* legal files, and the attorney’s failure to provide the files was accompanied by the attorney’s failure to prepare and file a petition for post-conviction relief, despite being hired to do so. See Spitsyn, 345 F.3d at 801. In this case, trial counsel complied with Tennessee Supreme Court Rule 14, advised the Petitioner her case had concluded and of the deadline to file an appeal to the Tennessee Supreme Court, and properly withdrew from representation. While not having the trial transcript may have made it more difficult for the Petitioner to prepare her post-conviction petition, it did not hinder her ability to file her petition pro se. Moreover, the Petitioner had many of her legal files to assist her in preparing her petition and complained only of the omitted trial transcript. She nevertheless filed her petition without receiving a copy of the trial transcript and believed that the petition was timely filed. In other words, the lack of trial transcript did not cause the Petitioner’s untimely petition. Rather, the petition was untimely based on the Petitioner’s misunderstanding of the filing deadline which was attributable to her reliance on the advice of another prisoner working as a law clerk, not the advice of trial counsel. This court has consistently held that a petitioner’s misunderstanding of the filing deadline does not toll the statute of limitations.

Womack v. State, No. W2013-02288-CCA-R3-PC, 2014 WL 5502426, at *2 (Tenn. Crim. App. Oct. 31, 2014); Waddell v. State, No. M2001-00096-CCA-R3-PC, 2001 WL 1246393, at *3 (Tenn. Crim. App. Oct. 17, 2001). Because the Petitioner has failed to establish that trial counsel “abandon[ed]” her or behaved directly adverse to her interest, the Petitioner has failed to establish that extraordinary circumstances prevented her from timely filing her petition for post-conviction relief. Accordingly, she is not entitled to due process tolling. See Whitehead, 402 S.W.3d at 632.

CONCLUSION

Based on the above reasoning and authority, the judgment of the post-conviction court is affirmed.

CAMILLE R. MCMULLEN, PRESIDING JUDGE