

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2022

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Clerk of the
Appellate Courts

ANTHONY E. BARNETT v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Lawrence County
No. 36370 Christopher V. Sockwell, Judge**

No. M2021-00554-CCA-R3-PC

The petitioner, Anthony E. Barnett, appeals the dismissal of his petition for post-conviction relief as untimely. Because the record establishes that the incarcerated petitioner did not submit his petition to the appropriate prison official for mailing within one year of the final action of the supreme court on his direct appeal, we affirm the ruling of the post-conviction court.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, and J. ROSS DYER, JJ., joined.

Ben Bush, Summertown, Tennessee, for the appellant, Anthony E. Barnett.

Herbert H. Slatery III, Attorney General and Reporter; T. Austin Watkins, Assistant Attorney General; Brent Cooper, District Attorney General; and Christi L. Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In April 2017, a Lawrence County Circuit Court Jury convicted the petitioner of possession with intent to sell alprazolam, possession of a firearm with the intent to go armed during the commission of a dangerous felony, simple possession of marijuana, and speeding, and this court affirmed the convictions and accompanying five-year sentence on direct appeal. *See State v. Anthony Eugene Barnett*, No. M2017-02317-CCA-R3-CD, 2019 WL 1057386 (Tenn. Crim. App., Nashville, Mar. 6, 2019). This court summarized the evidence adduced at trial in its analysis of the sufficiency of the convicting evidence:

The evidence adduced at trial established that, upon stopping the defendant for speeding, Trooper [Jeremy] Miller

observed a baggy containing marijuana and pills in the floorboard of the defendant's truck. Trooper Miller seized the baggy, and TBI testing established that the pills were alprazolam. In addition to the marijuana and pills, Trooper Miller seized from the defendant's person nearly \$5,000 in cash, a firearm, and a notebook that . . . could have been a ledger. The defendant had no prescription for the pills. Although Ms. [Lorrie] Pewitt testified that the drugs belonged to her, the jury was free to reject this testimony. . . .

. . . .

. . . Trooper Miller recovered a firearm from the defendant's person. Mr. [Daniel] Hunt, the original owner of the weapon, testified that it was a Springfield Armory 1911 .45 pistol. Contrary to the defendant's assertion, the statute does not require a showing that the gun could fire but only requires a showing that it was "designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use." *Id.* § 39-11-106(11). The gun in this case clearly satisfied that requirement. . . .

Id., 2019 WL 1057386, at *4. Our supreme court denied the petitioner's application for permission to appeal on July 18, 2019.

On August 10, 2020, the incarcerated petitioner filed a pro se petition for post-conviction relief, which petition indicated that it had been signed and delivered to prison officials for mailing on July 30, 2020. On August 20, 2020, the post-conviction court appointed counsel and ordered the State to respond to the petition. The court set the case for hearing on March 31, 2021.

At the March 31, 2021 hearing, the post-conviction judge, who had been assigned to the case following the filing of the preliminary order, observed that there was "a statute of limitations issue" that should be addressed "before we go calling a bunch of witnesses and doing what we need to do." The court observed that the petition was received by the court and filed on August 10, 2020; that the petition indicated that it had been signed and submitted for mailing on July 30, 2020; and that "the notary certificate has it sworn and subscribed on the 15th day of June," 2020. The court indicated that it wanted to allow the petitioner to explain the discrepancies and specifically noted that the petitioner had also asked for due process "tolling of the statute of limitations because COVID-19 has had us on lockdown for several months."

The petitioner testified that, generally, the COVID-19 outbreak made it difficult “to get into the law library to be able to do my legal work.” He said that the prison “was on lockdown for COVID to do testing when the outbreak was real bad” and that he was assigned to “the lockdown pod for 90 days” at one point, but he later clarified that this occurred in August 2020. The petitioner acknowledged that he signed and delivered his petition to prison officials for mailing on July 30, 2020, because “it had to be filed that day.” He testified that he knew that he “had a year to file it from the date of my appeal” and said that he “looked at my appeal, the date that they sent me, . . . I believe it’s dated 7/30 of 2019.” He recalled that he was “really, really, you know, worried about getting it in the mail” on July 30, 2020. The petitioner said that he handed the petition to a person in the mailroom on that date. As to the date of the notary signature, the petitioner explained that the notary “just comes up every now and then” and that his petition was “almost 90 percent complete” so he had her notarize the petition on June 15, 2020.

The petitioner testified that, before February 2020, he was assigned “to a CMS class” that lasted from 8 a.m. until 2 p.m., which meant that by the time he was free to go, “the legal library would be closed.” Then, in February or March 2020, “the COVID hit.”

During cross-examination, the petitioner said that the supreme court denied his application for permission to appeal on July 30, 2019, and “that there’s no way that I would have missed the deadline of one year, because I really, really tried to work real hard to make sure that I got it in there.” The petitioner said that he had received a letter from the supreme court explaining that the order had been filed but that he had not brought the letter with him to court because he did not know he would need it. The court noted that the mandate order was “not dated, at all” but “that the accompanying letter that notices the mandate was issued July 30, 2019.” The petitioner said that the contents of his petition did not change between June 15, 2020, when the petition was notarized, and July 30, 2020, when he delivered it for mailing. He testified that during the interim, “the legal aids” in the prison library were “studying” his petition to make sure he had raised the appropriate issues. He recalled that the “legal aids” told him that “because of Covid” he “could ask for maybe a little bit of leeway if I was to be a little bit late.”

At the conclusion of the hearing, the post-conviction court took the matter under advisement and directed the parties to find documentation for the date that the supreme court denied the application for permission to appeal and the date that the petitioner actually mailed his petition.

On April 5, 2021, the State moved to dismiss the petition as untimely. The State noted that the supreme court’s order denying the application for permission to appeal

was filed on July 18, 2019, and exhibited a certified copy of the order to its motion. The State averred that the petition, submitted for mailing on July 30, 2020, was untimely. Additionally, the State argued that the petitioner had failed to establish that issues related to the COVID-19 pandemic prevented him from timely filing.

On April 20, 2021, the post-conviction court issued a written order dismissing the petition as untimely. The court found that the statute of limitations for filing a petition for post-conviction relief began to run on July 18, 2019. The court accredited the petitioner's testimony that he signed the petition and delivered it for mailing on July 30, 2020. The court concluded that because the petition was not filed within one year of the final action of the highest state appellate court in his case, it was untimely. The court also determined that the petitioner had failed to present a sufficient basis for the tolling of the statute of limitations due to the COVID-19 pandemic. The court specifically observed that the petitioner was able to have the petition notarized in June 2020 and that he had not given any "rationale for not being able to file his petition" on that same date.

In this timely appeal, the petitioner contends that the post-conviction court erred by dismissing his petition as untimely. He asserts that his petition was filed within one year of the final action of the supreme court, arguing that the final action on his direct appeal was actually the issuance of the mandate on July 30, 2019. He also claims entitlement to due process tolling of the statute of limitations. The State contends that the post-conviction court did not err.

Code section 40-30-102 provides that 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," otherwise, "consideration of the petition shall be barred." T.C.A. § 40-30-102(a). The statute of limitations for filing a post-conviction petition is jurisdictional. *See id.* § 40-30-102(b) ("No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless [certain statutory prerequisites are met].").

Our supreme court denied the petitioner's application for permission to appeal this court's opinion affirming his convictions on July 18, 2019, and issued the mandate on July 30, 2019. The issuance of the mandate is a purely ministerial act, *see State v. Cawood*, 134 S.W.3d 159, 164 n.6 (Tenn. 2004) (citing 5 Am. Jur. 2d Appellate Review § 777), by which jurisdiction of the case is transferred from the appellate court back to the trial court for the execution of judgment, the collection of costs, and any other action directed in the appellate court opinion, *see Sanders v. Loyd*, 364 S.W.2d 369, 371 (Tenn. 1960) ("It is the rule that a mandate or an order of remand is necessary to reinvest the lower court with jurisdiction to proceed with the case."); *see also generally Raht v. S.*

Ry. Co., 387 S.W.2d 781, 788 (Tenn. 1965). The mandate consists of “[c]opies, certified by the clerk of the appellate court, of the judgment, any order as to costs or instructions as to interest, and a copy of the opinion of the appellate court,” Tenn. R. App. P. 42, and does not include any further action on the merits of the case. Consequently, the denial of the petitioner’s application for permission to appeal, and not the issuance of the mandate, was the final action of the highest appellate court. *See, e.g., Antonio Bonds v. State*, No. W2021-00589-CCA-R3-PC, 2022 WL 1165950, at *3 (Tenn. Crim. App., Jackson, Apr. 20, 2022) (“The Petitioner’s time for filing a petition for post-conviction relief expired one year following our supreme court’s . . . order denying his application for permission to appeal.”); *see also Jonathan Adams v. State*, No. E2012-00297-CCA-R3-PC, 2013 WL 1187654, at *5 (Tenn. Crim. App., Knoxville, Mar. 21, 2013) (stating “that the ‘final action’ of this court was the filing of its . . . opinion”); *David Lackey v. State*, No. M2004-00558-CCA-R3-CD, 2005 WL 1303124 (Tenn. Crim. App., Nashville, May 31, 2005) (same); *Edward Pinchon v. State*, No. M2003-00816-CCA-R3-PC, 2004 WL 193055, at *4 (Tenn. Crim. App., Nashville, Jan. 28, 2004) (same); *Kenneth P. Bondurant and Hugh Peter Bonderant v. State*, No. M2000-02287-CCA-R3-PC, 2002 WL 31487529, at *5 (Tenn. Crim. App., Nashville, Oct. 30, 2002) (same). Thus, the time for filing a petition for post-conviction relief in the petitioner’s case expired on July 18, 2020, and his petition, filed on July 30, 2020, was untimely.

A petition for post-conviction relief filed outside the one-year statute of limitations may nevertheless be considered if its allegations fall within three rather narrow exceptions, none of which are applicable here. T.C.A. § 40-30-102(b); -122. Additionally, due process principles may, in very limited circumstances, require tolling of the post-conviction statute of limitations. *See Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992); *see also generally Seals v. State*, 23 S.W.3d 272 (Tenn. 2000). “[A] post-conviction petitioner is entitled to due process tolling of the one-year statute of limitations upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.” *Bush v. State*, 428 S.W.3d 1, 22 (Tenn. 2014) (citing *Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013)).

The petitioner failed to present any evidence to support due process tolling of the statute of limitations in this case. Although the petitioner stated that his access to the law library was somewhat limited by his attendance at a class and by the COVID-19 pandemic, he also admitted that his petition was essentially complete by the time he had it notarized on June 15, 2020, more than a month before the expiration of the statute of limitations. Additionally, COVID-19 precautions did not begin until March 2020, some eight months after the denial of the application for permission to appeal, and the petitioner did not specify how those precautions prohibited him from filing his petition on time. Perhaps more importantly, the petitioner’s testimony clearly established that he

intentionally waited until July 30, 2020, to deliver his petition for mailing because he believed that to be the date on which the statute of limitations expired.

Accordingly, we affirm the order of the post-conviction court dismissing the petition as untimely.

JAMES CURWOOD WITT, JR., JUDGE