

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 1, 2023

FILED

09/08/2023

Clerk of the
Appellate Courts

MCARTHUR BOBO v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 08-02588 Chris Craft, Judge

No. W2022-01554-CCA-R3-PC

Petitioner, McArthur Bobo, appeals the summary dismissal of his pro se petition for post-conviction relief. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Post-Conviction Court
Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which MATTHEW J. WILSON, J., joined. JOHN W. CAMPBELL, SR., J., not participating.

Terrell L. Tooten, Memphis, Tennessee, for the appellant, McArthur Bobo.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural History

In 2009,¹ Petitioner was convicted of the second degree murder of Michael Gibbs and sentenced as a career offender to 60 years' imprisonment. *State v. Bobo*, No. W2009-02565-CCA-R3-CD, 2011 WL 2464207, at *1 (Tenn. Crim. App. June 21, 2011), *perm. app. dismissed* (Tenn. July 14, 2014) ("*Bobo I*"). Petitioner filed a motion for new trial, which the trial court denied, but in ruling on the motion, the trial court mistakenly recalled the facts of another case. *See Bobo v. State*, No. W2017-00681-CCA-R3-PC, 2018 WL

¹ We note that 2011 appears in some of the various orders and opinions in this case as the year of Petitioner's conviction; however, the judgments of conviction reflect that Petitioner was convicted in 2009.

5115689, at *1-2 (Tenn. Crim. App. Oct. 19, 2018), *perm. app. granted* (Tenn. Feb. 27, 2019) (“*Bobo II*”).

On direct appeal, Petitioner asserted that the trial court erred by admitting improper impeachment evidence, failing to suppress photo lineup identifications of him as the shooter, and allowing testimony that the victim’s children were present on the night of the shooting. *Id.* at *1-2. A panel of this Court held that Petitioner waived the photo lineup suppression issue by failing to make an adequate appellate record and waived the other two issues by failing to include them in his motion for new trial. *Id.* at *2. On direct appeal, Petitioner did not challenge the trial court’s misstatement of the facts at his motion for new trial hearing. *Id.* at *5.

Petitioner subsequently filed a pro se petition for post-conviction relief, asserting that his appellate counsel was ineffective for failing to file a timely Rule 11 application for permission to appeal. *Id.* at *1. The post-conviction court stayed the post-conviction proceeding and granted Petitioner permission to file a delayed Rule 11 application. The Tennessee Supreme Court ultimately dismissed the application as untimely. Petitioner filed a “Second Amended Petition” alleging: that his trial counsel and appellate counsel were ineffective; that his rights against self-incrimination and due process were violated; and that the trial court deprived him of “a full and complete hearing on his motion for new trial’ by confusing his case with a different case.” *Id.* at *1-4. For his ineffective assistance of trial counsel claim:

Petitioner alleged that trial counsel was ineffective for, among other things: not requesting a mistrial when the State failed to produce the witness statement of Kenya Samuels, or, at a minimum, not requesting that her testimony be stricken from the record; not raising as issues in the motion for new trial the State’s failure to produce Ms. Samuels’ witness statement, the introduction of the prejudicial recorded jail telephone conversation between the Petitioner and his sister, or the admission of the prejudicial testimony about the presence of the victim’s children in the victim’s home at the time of the shooting; and not objecting when the trial court confused the Petitioner’s case with the facts of another case at the motion for new trial hearing.

Id. at *2.

After a hearing, the post-conviction court entered a written order denying relief and concluding that Petitioner failed to demonstrate that trial counsel was deficient or that any alleged deficiency resulted in prejudice to Petitioner’s case. *Id.* at *2. The post-conviction court noted that while appellate counsel was deficient, no prejudice occurred and that the

trial judge's confusion of the facts "was not tantamount to the denial of a motion for new trial." *Id.* A panel of this Court affirmed the post-conviction court's denial of relief, finding that the record supported the post-conviction court's conclusion "that the Petitioner failed to show any deficiency on trial counsel's part or any resulting prejudice to his case." *Id.* at *6. The panel specifically noted regarding the trial court's misstatement of the facts:

The transcript of the motion for new trial reveals that the trial court confused the facts of the Petitioner's case, in which the victim's children had been present in the victim's home, with another case in which a defendant shot into a van that had children in it. Trial counsel did not, however, correct the trial court's mistake at the hearing, no doubt due to the fact that it most certainly would not have altered the ruling of the court. We agree with the State that any objection the Petitioner had to the trial court's mistake should have been raised before the trial court itself, or on direct appeal.

We further agree with the State and the post-conviction court that the trial court's "misremembering" of some of the facts does not equate to the Petitioner's not having had his motion for new trial heard by the trial court. It is clear from the record that the trial court held a hearing on the Petitioner's motion for new trial, at which it addressed each of the issues raised. The Petitioner is not entitled to post-conviction relief on the basis of this claim.

Id. at *5.

Petitioner filed an application to appeal the denial of post-conviction relief, which the Tennessee Supreme Court granted. Our supreme court, noting "the unusual circumstances of this case," including the trial court's misapplication of the facts of another case in ruling on Petitioner's motion for new trial, concluded that Petitioner was, "as a practical matter, deprived of a hearing on his motion for new trial, and the resulting appeal was flawed from its inception." *Bobo v. State*, No. W2017-00681-SC-R11-CO (Tenn. Feb. 27, 2019). The court thus granted permission to appeal "for the purpose of remanding the case to the original trial judge for a hearing on [Petitioner]'s motion for new trial filed on November 2, 2009."

On remand, after a hearing, the trial court denied Petitioner's motion for new trial and his "amended motion for judgment of acquittal or in the alternative motion for new trial." *State v. Bobo*, No. W2021-00650-CCA-R3-CD, 2022 WL 808040, at *1 (Tenn. Crim. App. Mar. 17, 2022), *perm. app. denied* (Tenn. Aug. 3, 2022) ("*Bobo III*"). Petitioner appealed, and a panel of this Court affirmed the judgment of the trial court. *Id.*

Petitioner subsequently filed the pro se post-conviction petition that is the subject of this appeal, in which he asserted that his trial counsel was ineffective for: (1) failing to adequately prepare for trial; (2) failing to investigate possible defenses; (3) failing to interview a potential witness; and (4) failing to challenge the admissibility of photographs and testimony. On September 1, 2022, the post-conviction court entered an “Order Denying Second Petition for Post-Conviction Relief,” noting that the only purpose of the Tennessee Supreme Court’s remand was to conduct a hearing on Petitioner’s motion for new trial and that the supreme court’s order left the previous post-conviction determinations undisturbed. Treating the petition as a petition to reopen Petitioner’s prior post-conviction petition and finding that the grounds raised did not satisfy criteria set out in Tennessee Code Annotated section 40-30-117, the post-conviction court summarily dismissed it. Additionally, the post-conviction court found that Petitioner had waived any “additional grounds of ineffective assistance” not previously raised.

We observe that Petitioner’s notice of appeal, filed on November 4, 2022, is untimely. Tennessee Rule of Appellate Procedure 4(a) provides that the notice of appeal must be filed “within 30 days after the date of entry of the judgment appealed from.” In criminal cases, however, “the ‘notice of appeal’ document is not jurisdictional and the timely filing of such document may be waived in the interest of justice.” *Id.* The State does not challenge the timeliness of Petitioner’s notice of appeal, and given the already convoluted history of this case, we will waive the timely filing and consider the issues argued by Petitioner on appeal.

Analysis

Petitioner contends that the post-conviction court erred by summarily dismissing his petition. The State responds that the post-conviction court’s summary dismissal was proper because Petitioner’s factual allegations did not arise from the handling of his delayed appeal and his other claims were previously determined.

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.” T.C.A. § 40-30-103. A post-conviction court, upon receipt of a petition, must examine the factual allegations of the petition, and if “the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed.” *Id.* § 40-30-106(f). A ground for relief is generally considered waived “if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” *Id.* § 40-30-106(g). A ground for relief is considered previously determined “if a court of competent jurisdiction has ruled

on the merits after a full and fair hearing.” *Id.* § 40-30-106(h); Tenn. Sup. Ct. R. 28, § 2(E). A full and fair hearing is a proceeding “where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence.” T.C.A. § 40-30-106(h); *see* Tenn. R. Sup. Ct. 28, § 2(E).

Petitioner’s ineffective assistance of trial counsel claims were resolved on the merits after a full and fair hearing on his original post-conviction petition. *See Bobo II*, 2018 WL 5115689, at *2. Although the record before us does not include a transcript of that hearing, we take judicial notice that the court held an evidentiary hearing at which trial counsel and Petitioner testified. *Id.* at *3-4; *see Harris v. State*, 301 S.W.3d 141, 147 n.4 (Tenn. 2010) (noting that an appellate court may take judicial notice of its own records). Following the hearing, the post-conviction court found, “among other things, . . . that the Petitioner had not met his burden of demonstrating that his trial counsel was deficient in representation or that any alleged deficiency resulted in prejudice to his case.” *Bobo II*, 2018 WL 5115689, at *4. A panel of this Court affirmed the post-conviction court’s order. *Id.* at *9.

Petitioner insists in his reply brief that upon remand by our supreme court for a hearing on the motion for new trial, his case “started over” and “there is no post-conviction” proceeding. Petitioner essentially argues that the post-trial procedural history outlined above “does not exist” and that “there is no scenario in which his arguments could be considered waived or previously litigated.” However, Petitioner is simply incorrect and his argument must fail.

The post-conviction court’s summary dismissal of Petitioner’s most recent petition was proper. *See* T.C.A. § 40-30-102(c) (“In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment,” and “[i]f 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.”). The petition sought post-conviction relief from the same conviction as his original petition. Accordingly, any issues regarding the ineffectiveness of trial counsel cannot now be reached.

Supreme Court Rule 28, section 9 provides an avenue for relief: “Where a delayed appeal is granted and the petitioner is unsuccessful on appeal, and new issues cognizable in a post-conviction proceeding result from the handling of the delayed appeal, the petitioner may amend the original post-conviction petition to include such new issues.” Tenn. Sup. Ct. R. 28, § 9(D)(3)(a). Petitioner has not raised any new claims related to the handling of the delayed appeal or related to the remand. Rather, he challenged the effectiveness of his counsel’s representation at trial. These claims, even if not previously determined, do not arise “from the handling of the delayed appeal.” Petitioner is, therefore, not entitled to relief under Rule 28.

Finally, we agree with the post-conviction court that the underlying petition does not satisfy any of the statutory criteria to reopen his petition for post-conviction relief. *See* T.C.A. § 40-30-117. To be clear, Petitioner's present claims for post-conviction relief, as provided by Tennessee's Post-Conviction Procedure Act, for the killing of Michael Gibbs, have been fully reviewed and properly denied.

CONCLUSION

Based on the foregoing, we affirm the judgment of the post-conviction court.

TIMOTHY L. EASTER, JUDGE