

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs June 6, 2023

FILED

07/11/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. FREDERICK D. DEBERRY**

**Appeal from the Circuit Court for Fayette County**  
**No. 3737 J. Weber McCraw, Judge**

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**No. W2022-01530-CCA-R3-CD**

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The petitioner, Frederick D. DeBerry, appeals from the Fayette County Circuit Court's summary dismissal of his pro se motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. Based on our review of the record, the parties' briefs, and the applicable law, we conclude that the petitioner's appeal is untimely, the interest of justice does not mandate waiver of the untimely notice, and therefore, the appeal should be dismissed.

**Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed**

J. ROSS DYER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Frederick D. DeBerry, Whiteville, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Mark E. Davidson, District Attorney General; and Falen Chandler, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

***Facts and Procedural History***

In 1992, a Fayette County jury convicted the petitioner of one count of aggravated rape, and the trial court subsequently sentenced the petitioner to twenty years in confinement as a Range I offender to be served consecutively to a prior federal sentence. *State v. Frederick D. DeBerry*, No. 02C01-9304-CC-00074, 1993 WL 492702, at \*1 (Tenn. Crim. App. Dec. 1, 1993), *perm. app. denied* (Tenn. May 16, 1994). This Court affirmed the petitioner's conviction and sentence on direct appeal. *Id.* at 4. The petitioner

subsequently filed a “motion for new trial,” alleging prosecutorial misconduct and ineffective assistance of counsel, but he was unsuccessful in both the trial court and on appeal. *State v. Frederick D. DeBerry*, No. W2005-02843-CCA-R3-CD, 2006 WL 2040437, at \*1 (Tenn. Crim. App. July 20, 2006), *perm. app. denied* (Tenn. Jan. 2, 2007). The petitioner next filed an untimely petition for post-conviction relief but was again unsuccessful. *Frederick D. DeBerry v. State*, No. W2015-00951-CCA-R3-PC, 2016 WL 369390, at \*1 (Tenn. Crim. App. Jan. 29, 2016), *no perm. app. filed*.

On August 23, 2022, the petitioner filed a motion to correct an illegal sentence, pursuant to Tennessee Rule of Criminal Procedure 36.1. He alleged his sentence was illegal because the trial court considered “unfounded and unsupported ‘judge found’ fact(s) to enhance his sentencing range.” On August 23, 2022, the trial court denied the Rule 36.1 motion due to multiple procedural deficiencies, noting the petitioner failed to attach a copy of his judgment sheet and make a declaration regarding whether he had filed prior motions to correct illegal sentencing. The petitioner subsequently filed a motion to reconsider and amended motion to correct an illegal sentence. Although the amended motion included the required declaration, the petitioner failed to include a copy of his judgment sheet and instead attached a printout from the Tennessee Offender Management Information System (TOMIS), which was labeled “judgment order.” The trial court entered an order denying the petitioner’s motion to reconsider on September 16, 2022, noting that it “continues to find that the mandates of Rule 36.01 . . . have not been met. Regardless of the defects of the motion, the [c]ourt finds that the sentence is not illegal[.]” The petitioner mailed a notice of appeal to the Fayette County Circuit Court Clerk on October 7, 2022, and on October 31, 2022, he filed an untimely notice of appeal in the Appellate Court Clerk’s office.

### *Analysis*

On appeal, the petitioner asserts the trial court erred in summarily denying his Rule 36.1 motion. The petitioner argues the trial court should have appointed counsel to assist him in curing the deficiencies in his motion. Additionally, the petitioner asserts his sentence is illegal because the trial court relied on sentencing factors that were not submitted to the jury and proven beyond a reasonable doubt in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). The State contends the trial court did not err in denying the Rule 36.1 motion. Upon our review, it is clear the petitioner is not entitled to relief.

Whether a motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law calling for de novo review. *State v. Wooden*, 478 S.W.3d 585, 589 (Tenn. 2015) (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007)). Rule 36.1(a)(1) provides that the petitioner “may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction

was entered.” A sentence is illegal if it is not authorized by the applicable statutes or directly contravenes an applicable statute. Tenn. R. Crim. P. 36.1(a)(2). If the motion states a colorable claim, the trial court shall appoint counsel if the petitioner is indigent and not already represented by counsel and hold a hearing on the motion, unless the parties waive the hearing. Tenn. R. Crim. P. 36.1 (b)(3). A “‘colorable claim’ means a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1.” *Wooden*, 478 S.W.3d at 593. “The movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents.” Tenn. R. Crim. P. 36.1(a)(1).

Initially, we note the petitioner’s notice of appeal was untimely. Tennessee Rule of Appellate Procedure 4(a) states that the notice of appeal “shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from[.]” Here, the trial court entered its order denying the petitioner’s Rule 36.1 motion on August 23, 2022, and the petitioner’s notice of appeal was file-stamped October 31, 2022.<sup>1</sup> Although the petitioner asserts in his reply brief that he initially, but mistakenly, filed a timely notice of appeal with the trial court clerk, we disagree. The notice of appeal the petitioner mailed to the trial court clerk is not file-stamped, but the petitioner’s certificate of service indicated that he “placed it in the outgoing inmate mailing system” on October 7, 2022, two weeks after the thirty-day filing period ended. The petitioner’s notice of appeal was clearly untimely.

“[H]owever, in all criminal cases the ‘notice of appeal’ document is not jurisdictional and the timely filing of such document may be waived in the interest of justice.” *Id.* “In determining whether waiver is appropriate, this court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case.” *State v. Rockwell*, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007) (quoting *State v. Markettus L. Broylid*, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at \*1 (Tenn. Crim. App. Dec. 27, 2005).

In the present case, the petitioner failed to provide any insight into why his notice of appeal was untimely filed. Instead he argues that, after he was informed that he had incorrectly filed his notice of appeal with the trial court clerk, he immediately corrected his mistake, and “this Appellate Court accepted his Notice as timely filed.”

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<sup>1</sup> The petitioner’s motion to reconsider did not toll the thirty-day limit to file a notice of appeal. See *State v. John Calvin Murray*, No. M2020-00169-CCA-R3-CD, 2021 WL 2156932, at \*2 (Tenn. Crim. App. May 27, 2021), *no. perm. app. filed*.

As for the petitioner's issue on appeal, this Court has repeatedly held that "a *Blakely* violation would not render a judgment void and does not meet the definition of an illegal sentence under Rule 36.1." *State v. Calvin Scott*, No. W2020-01574-CCA-R3-CD, 2021 WL 4786372, at \*3 (Tenn. Crim. App. Oct. 14, 2021), *no perm. app. filed*. See also *State v. Kevin McDougle*, No. W2022-01103-CCA-R3-CD, 2023 WL 2968224, at \* (Tenn. Crim. App. Apr. 4, 2023); *Duane M. Coleman v. State*, M2012-00848-CCA-R3-PC, 2013 WL 948430, at \*3 (Tenn. Crim. App., March 11, 2013), *no perm app. filed*; *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at \*3 (Tenn. Crim. App., May 1, 2007), *no perm. app. filed*.

The petitioner failed to state a colorable claim that his sentence is illegal. Thus, we conclude that the interest of justice does not mandate waiver of the timely notice of appeal requirement in the present case. Accordingly, we dismiss the appeal as untimely, and the petitioner is not entitled to relief.

### ***Conclusion***

Based on the foregoing, the petitioner's appeal is dismissed.

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J. ROSS DYER, JUDGE