

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 4, 2023

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RICKY DURHAM v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-05815 Chris Craft, Judge

No. W2022-00996-CCA-R3-PC

Petitioner, Ricky Durham, appeals the dismissal of his post-conviction petition. On appeal, he asserts that the post-conviction court erred in dismissing his petition as untimely without a hearing on the merits of his claims. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the post-conviction court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and J. ROSS DYER, JJ., joined.

Brett B. Stein, Memphis, Tennessee, for the appellant, Ricky Durham.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On October 1, 2018, Petitioner pled guilty to two counts of second-degree murder in return for a thirty-five-year sentence for each count to be served concurrently at 100 percent in the Tennessee Department of Correction. Because the record does not contain a transcript from the guilty plea hearing, we do not know the factual basis for the entry of the guilty pleas. The judgment became final on November 1, 2018. Petitioner through legal counsel filed a petition for post-conviction relief on March 25, 2021.

In his original petition, Petitioner alleged that he “intends to provide evidence at a hearing on this petition that he was unable to comply with the statute of limitations due to episodes of mental illness that impaired his ability to seek legal relief.” He further alleged that “trial counsel intentionally failed to inform Petitioner of his post-plea remedies, including but not limited to post-conviction relief and the statute of limitations for seeking relief.” The State filed a motion to dismiss on July 7, 2021, alleging the petition was filed well beyond the one-year statute of limitations for post-conviction petitions.

As pointed out in the post-conviction court’s order, the post-conviction court “reset the motion nine times, each reset at the request of the [P]etitioner’s attorney, asking for more time to obtain Tennessee Department of Correction records or other witnesses to furnish proof of the mental illness episodes alleged in the petition as the reason for tolling the statute.” However, on the morning of the post-conviction hearing, Petitioner filed an amended petition claiming that the statute of limitations should be tolled because Petitioner exercised due diligence in ascertaining grounds on which to file a petition for post-conviction relief, but that strict prison rules prevented him from becoming aware of such grounds until after the statute of limitations had expired. Petitioner then abandoned his mental illness claim and proceeded at the hearing solely on the grounds set forth in his amended petition. Petitioner testified that for the first ten months of his sentence at the Bledsoe County Correctional Center, the institution remained on “lockdown” for an unknown reason, and he thus did not have access to the law library during that ten-month period. Subsequently, Petitioner was transferred to the Riverbend Maximum Security Institution. Petitioner testified he did not have access to the law library there, either; however, he admitted that he exercised daily telephone privileges to talk with his family and got married while he was incarcerated at Riverbend.

The post-conviction court found that Petitioner’s testimony was not credible. The court reasoned that “during the year after Petitioner’s guilty plea was entered, he had daily phone privileges, was married to his present wife, and has shown no evidence of mental issues, despite having initially claimed this in his original petition.” The court also noted Petitioner’s “reason for an untimely filing, because he was in ‘lockdown,’ was only filed the day the court denied any further continuances to seek evidence of mental episodes and ordered that no further continuances of the hearing would be tolerated, more than [three and a half] years after his guilty plea had been entered.” The court reviewed the statutory exceptions to the statute of limitations for filing a post-conviction petition and reasoned that none of the grounds alleged in the petition fit any of the statutory exceptions. The court granted the State’s motion to dismiss. It is from this that Petitioner now appeals.

ANALYSIS

Petitioner contends that the post-conviction court erred by dismissing his petition as untimely without a hearing on the merits of his claim. Petitioner claims he is entitled to tolling of the one-year statute of limitation because he was denied access to legal materials until after the statute of limitations had expired.¹ The State responds that the post-conviction court properly dismissed the petition for post-conviction relief as untimely and that no circumstances require tolling the statute of limitations. We agree with the State.

Post-conviction relief is available when a “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 person in custody under a sentence of a court of this state must petition for post-conviction relief “within one 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 year of the date on which the judgment becomes final.” *Id.* § 40-30-102(a). “The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.” *Id.* Moreover, “[t]ime 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.* If it plainly appears on the face of the post-conviction petition that the petition was filed outside the one-year statute of limitations or that a prior petition attacking the conviction was resolved on the merits, the post-conviction court must summarily dismiss the petition. *Id.* § 40-30-106(b). “The question of whether the post-conviction statute of limitations should be tolled is a mixed question of law and fact that is. . . . subject to de novo review.” *Bush v. State*, 428 S.W.3d 1, 16 (Tenn. 2014) (citing *Smith v. State*, 357 S.W.3d 322, 355 (Tenn. 2011)).

Tennessee Code Annotated section 40-30-102(b) provides three exceptions to the statute of limitations for petitions for post-conviction relief: (1) claims based on a final ruling of an appellate court establishing a constitutional right not recognized as existing at the time of trial and given retroactive effect by the appellate courts; (2) claims based upon new scientific evidence establishing that the petitioner is actually innocent of the conviction offense; and (3) claims seeking relief from a sentence that was enhanced because of a previous conviction and the previous conviction was later held to be invalid. T.C.A. §§ 40-30-102(b)(1)-(3).

¹ Petitioner’s brief also claims that he is entitled to post-conviction relief for trial counsel’s ineffective assistance resulting in the entry of an involuntary guilty plea. Because we conclude the post-conviction court properly dismissed the post-conviction petition, we have not addressed this claim.

In addition to the statutory exceptions, our supreme court has held that due process principles may require tolling the statute of limitations. *See Whitehead v. State*, 402 S.W.3d 615, 622-23 (Tenn. 2013). To date, our supreme court “has identified three circumstances in which due process requires tolling the post-conviction statute of limitations” (1) when the claim for relief arises after the statute of limitations has expired; (2) when the petitioner’s mental incompetence prevents him from complying with the statute of limitations; and (3) when the petitioner’s attorney has committed misconduct. *Id.* at 623-24. To succeed upon such a claim, a petitioner must show “(1) that he or she had been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.” *Id.* at 631 (citing *Holland v. Florida*, 560 U.S. 631, 648-49 (2010)).

Petitioner pled guilty on October 1, 2018. His judgment became final on November 1, 2018. The statute of limitations for Petitioner’s post-conviction claims expired on November 1, 2019. Petitioner’s petition for post-conviction relief was filed on March 25, 2021, almost three years after his judgment became final. The post-conviction court found that Petitioner failed to offer any credible proof that he had been pursuing his rights diligently and that he had any credible excuse for failing to file his petition timely.

The evidence does not preponderate against the post-conviction court’s credibility findings, and as such, we properly defer to those findings and conclude that the post-conviction court’s dismissal of the petition was proper.

CONCLUSION

For the forgoing reasons, the judgment of the post-conviction court is affirmed.

JILL BARTEE AYERS, JUDGE