IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 29, 2023

STATE OF TENNESSEE v. DAN E. DURELL

Appeal from the Criminal Court for Knox County
Nos. 123097, 123098 Steven Wayne Sword, Judge

No. E2022-01800-CCA-R3-CD

The pro se petitioner, Dan E. Durrell, appeals the Knox County Criminal Court's summary dismissal of his motion to correct an illegal sentence filed pursuant to Tennessee Rule of Criminal Procedure 36.1. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and JILL BARTEE AYERS, J., joined.

Dan E. Durell, Sandstone, Minnesota, pro se.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; and Charme P. Allen, District Attorney General, for the appellee, State of Tennessee.

OPINION

In June 1988, the petitioner pleaded guilty to armed robbery and first degree burglary resulting from his robbing and shooting a Knoxville physician in April 1986. *See Dan E. Durell v. State*, No. E2022-01541-CCA-R3-HC, 2023 WL 4489453, at *1 (Tenn. Crim. App., Knoxville, July 12, 2023); *State v. Daniel Durrell*, No. 1213, 1989 WL 75727, at *1-2 (Tenn. Crim. App., Knoxville, July 11, 1989).[1]

During the July 1988 sentencing hearing, the State presented evidence of the petitioner's prior felony convictions, which included 1986 federal convictions in Florida

[1] Although the petitioner's surname appears as "Durrell" in this court's opinion on direct appeal, the record reflects that the correct spelling is "Durell."

for conspiracy to cause bodily injury to a witness in a bankruptcy proceeding and attempt to cause bodily injury to a witness in a bankruptcy proceeding and 1987 Florida state convictions for armed burglary and armed robbery. *See Daniel Durrell*, 1989 WL 75727, at *2. The victim of the armed robbery and armed burglary in the Florida state case testified at the sentencing hearing regarding the circumstances of the offenses and the injuries that she received. *Id.* at *1. The trial court found that the petitioner was a Range II, especially aggravated offender in that the petitioner committed a felony resulting in bodily injury to another where the petitioner had previously been convicted of a felony that resulted in bodily injury. *Id.* at *3; *see* T.C.A. § 40-35-107(1) (Supp. 1985) (repealed). The trial court sentenced the petitioner to life imprisonment for armed robbery and ten years for first degree burglary to be served concurrently with each other and consecutively to his sentence for the Florida state convictions. *Daniel Durrell*, 1989 WL 75727, at *1, 5. This court affirmed the petitioner's sentences on direct appeal. *Id.* at *1.

In October 2004, the petitioner filed a "motion for correction of illegal sentence," alleging that the State withheld exculpatory or "favorable" evidence from the petitioner and the trial court at sentencing in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See State v. Dan E. Durell*, No. E2004-03014-CCA-R3-CD, 2005 WL 1584419, at *1 (Tenn. Crim. App., Knoxville, July 7, 2005) (memorandum opinion). The trial court construed the motion as a petition for post-conviction relief and dismissed the petition as time-barred. *Id.* This court affirmed the trial court's decision on appeal. *Id.* at *2.

In May 2019, the petitioner filed a petition for writ of habeas corpus, alleging that the State withheld exculpatory evidence that was favorable in terms of the petitioner's sentence in violation of *Brady*, that the convictions violated double jeopardy principles, and that the trial court relied on "improper, inaccurate, and mistaken information" in imposing the sentence. *See Dan E. Durell v. State*, No. E2019-01393-CCA-R3-HC, 2020 WL 2612028, at *1 (Tenn. Crim. App., Knoxville, May 22, 2020). The habeas corpus court summarily dismissed the petition. *Id.* On appeal, this court dismissed the petitioner's appeal as untimely filed but also noted that, "[i]n addition to being without merit, none of petitioner's claims are proper for habeas corpus relief." *Id.* at *2.

In September 2021, the petitioner filed a second petition for writ of habeas corpus, alleging that the State violated *Brady* by failing to provide the transcripts from the proceedings in the federal and Florida state cases, which "were based on the same criminal offenses as his Tennessee convictions," and that the trial court relied upon "misinformation" from the State in imposing the sentences. *See Dan E. Durell v. State*, No. E2021-01238-CCA-R3-HC, 2022 WL 3657050, at *1 (Tenn. Crim. App., Knoxville, Aug. 25, 2022), *no perm. app. filed*. The habeas corpus court dismissed the petition, and this court affirmed the dismissal on appeal, concluding that the petitioner failed to attach copies of his original judgments to the petition and failed to state a cognizable claim for

relief. *Id.* at *3-4. This court reasoned that *Brady* violations result in a voidable, not void, judgment and that the petitioner's claim of misrepresented evidence during the sentencing hearing related to the sufficiency of the evidence and was not a proper claim for habeas corpus relief. *Id.*

In October 2022, the petitioner filed a third petition for writ of habeas corpus, "raising the same issues as his first petition and attaching copies of his original judgments." *Dan E. Durell*, 2023 WL 448943, at *2. The habeas corpus court summarily dismissed the petition. *Id.* On appeal, the petitioner argued that the State withheld exculpatory evidence in sentencing, that the trial court relied upon "materially false information" in imposing the sentences, and that his federal and Tennessee convictions were based on the same Knoxville robbery and, thus, violated double jeopardy principles. *Id.* This court determined that none of the petitioner's claims were cognizable in a habeas corpus proceeding and affirmed the summary dismissal of the petition. *Id.* at *2-3.

On November 21, 2022, the petitioner filed a pro se motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1, raising claims similar to those raised in his prior habeas corpus petitions. He asserted that the State violated *Brady* in failing to disclose records from his federal case, which he maintained established that terms of his plea agreement in federal court encompassed the offenses upon which his Florida and Tennessee state convictions were based. The petitioner maintained that during the sentencing hearing, the prosecutor falsely represented that the federal and Florida state convictions were prior convictions, and that the trial court relied upon "materially false information" in imposing the sentences in violation of his due process rights. The petitioner also argued that his sentences violated the principles announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

On November 29, 2022, the trial court entered an order denying the petitioner's motion. On December 12, the petitioner filed a motion to reconsider, which the trial court denied on December 14. On December 27, the petitioner filed a notice of appeal.

On appeal, the petitioner asserts that the State violated *Brady* by withholding documents relating to the federal criminal proceedings from the petitioner and the trial court. He asserts that the documents were "material" in that they established that the prosecutor's claim during the sentencing hearing that the petitioner's federal and Florida state convictions were prior convictions was "factually false information," upon which the trial court relied in imposing the sentences for the petitioner's Tennessee convictions. The petitioner also maintains that the trial court violated *Apprendi v. New Jersey* in imposing the sentences and that the trial court's reliance on "factually false information" otherwise violated his due process rights.

Rule 36.1 provides the defendant and the State an avenue to "seek to correct an illegal sentence," defined as a sentence "that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1; *see also State v. Wooden*, 478 S.W.3d 585, 594-95 (Tenn. 2015) (holding that "the definition of 'illegal sentence' in Rule 36.1 is coextensive with, and not broader than, the definition of the term in the habeas corpus context"). To avoid summary denial of an illegal sentence claim brought under Rule 36.1, a defendant must "state with particularity the factual allegations," *Wooden*, 478 S.W.3d at 594, establishing "a colorable claim that the unexpired sentence is illegal," Tenn. R. Crim. P. 36.1(b). "[F]or purposes of Rule 36.1 … '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 determination whether a Rule 36.1 "motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law, to which de novo review applies." *Id*. at 589 (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007)).

We note that the petitioner raises virtually the same claims that he previously raised in his habeas corpus petitions and that this court previously determined were not cognizable in habeas corpus proceedings. *See Dan E. Durell*, 2023 WL 448943, at *2-3; *Dan E. Durell*, 2022 WL 3657050, at *3-4. Because the definition of an "illegal sentence" in Rule 36.1 "mirrors" the definition of an illegal sentence that courts have applied in the habeas corpus context, *State v. Brown*, 479 S.W.3d 200, 209 (Tenn. 2015), the petitioner is not entitled to relief under Rule 36.1 for claims that he previously raised and this court rejected as not cognizable in habeas corpus proceedings. Furthermore, the petitioner's claim regarding a violation of his due process rights is a general attack on the excessiveness of his sentences, and this claim and his claims of a violation of the principles announced in *Apprendi v. New Jersey* are not cognizable claims for relief under Rule 36.1. *See State v. William Henry Smith, Jr.*, No. M2020-00125-CCA-R3-CD, 2021 WL 1345455, at *2 (Tenn. Crim. App., Nashville, Apr. 12, 2021); *State v. Rafael Antonio Bush*, No. M2016-01537-CCA-R3-CD, 2017 WL 2376825, at *7 (Tenn. Crim. App., Nashville, June 1, 2017). Accordingly, we conclude that the trial court properly denied the petitioner's Rule 36.1 motion and that the petitioner is not entitled to relief.

For the foregoing reasons, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE