

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2023

FILED

10/03/2023

Clerk of the
Appellate Courts

KELLY LEE PITTS v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Washington County
No. 48649 Stacy L. Street, Judge**

No. E2022-01455-CCA-R3-PC

The Petitioner, Kelly Lee Pitts, appeals the dismissal of his petition for post-conviction relief from his attempted first degree murder and possession of a firearm during the commission of or attempt to commit a dangerous felony convictions and his effective forty-eight year sentence. On appeal, the Petitioner contends that (1) the post-conviction court erred by summarily dismissing the petition after determining it was untimely and (2) he failed to receive the effective assistance of counsel at trial. We affirm the judgment of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JILL BARTEE AYERS, JJ., joined.

Kelly Lee Pitts, Whiteville, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Steven Finney, District Attorney General, and Dennis D. Brooks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner was convicted by a jury of seven counts each of attempted first degree murder and of employment of a firearm during the commission of or attempt to commit a dangerous felony, and he received an effective fifty-one-year sentence. He appealed his convictions alleging that the evidence was insufficient to support his convictions and that the trial court erred by considering the Petitioner's firearm convictions as Class C felonies rather than Class D felonies. On March 2, 2021, this court affirmed the Petitioner's convictions, modified his sentence to forty-eight years,

and remanded the case for the entry of corrected judgments regarding the firearm convictions. *See State v. Kelly Lee Pitts*, No. E2019-01656-CCA-R3-CD, 2021 WL 795148 (Tenn. Crim. App. Mar. 2, 2021), *perm. app. denied* (Tenn. July 12, 2021).

On August 16, 2022, the Petitioner filed a pro se petition for post-conviction relief alleging that his confession was coerced and made while he was under the influence of alcohol, that evidence at the trial was the result of an unconstitutional search and seizure, that his privilege against self-incrimination was violated, and that the prosecution failed to disclose evidence favorable to the defense. The State filed a motion to dismiss the petition, alleging that it was filed after the applicable statute of limitations. In response, the Petitioner filed a “Declaration of Timeliness,” alleging that the statute of limitations for post-conviction relief did not begin to run until ninety days after the denial of his Rule 11 application because that is the period of time in which he could file a writ of certiorari to the United States Supreme Court.

The post-conviction court found that the petition was filed beyond the one-year statute of limitations for relief and that none of the Petitioner’s tolling claims fit within the statutory exceptions to the one-year statute of limitations. This appeal followed.

On appeal, the Petitioner contends that the post-conviction court erred by dismissing his petition for relief after determining it was untimely and that he failed to receive the effective assistance of counsel at his trial. The State responds that the Petitioner failed to file his petition within the one-year statute of limitations for post-conviction relief, and, therefore, his petition is time-barred. We agree with the State.

Post-conviction relief is available “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 (2018). 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 consideration of the petition shall be barred.” T.C.A. § 40-30-102(a) (2018). The Post-Conviction Procedure Act states, “Time 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 [such an] action and is a condition upon its exercise.” *Id.* The Act provides:

(b) No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The petition must be filed within one (1) year of the ruling of

the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

Id. at (b)(1)-(3). In addition to the statutory exceptions, due process may require tolling of the statute of limitations in certain circumstances. *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992) (“[D]ue process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.”) (citing *Long v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982)). See *Whitehead v. State*, 402 S.W.3d 615, 623-24 (Tenn. 2013).

When a court receives a post-conviction petition, it must conduct a preliminary review to determine whether the petition is timely and whether it states a colorable claim. T.C.A. § 40-30-106(b), (d) (2018). “If it plainly appears from the face of the petition, any annexed exhibits or the prior proceedings in the case that the petition was not filed . . . within the time set forth in the statute of limitations . . . the judge shall enter an order dismissing the petition.” *Id.* at (b).

On July 12, 2021, our supreme court denied the Petitioner’s Rule 11 application to appeal, beginning the one-year statute of limitations period for post-conviction relief. The record reflects that the Petitioner gave his petition to prison officials on July 31, 2022, and that he filed his petition for post-conviction relief on August 16, 2022, both dates being more than one year after the denial of his Rule 11 application.

None of the Petitioner’s tolling claims fit within the statutory exceptions to the one-year statute of limitations. See *id.* § 40-30-102(b)(1)-(3). He has not alleged that he is entitled to the protections of a newly established constitutional right, that new scientific evidence establishes his actual innocence, or that his sentence was enhanced based upon convictions that have since been declared invalid. See *id.*

The Petitioner’s reliance on an additional ninety-day period for filing his petition after the one year expires is without merit. *See Demarkus Taylor v. State*, No. M2019-02020-CCA-R3-PC, 2020 WL 4332531, at *1 (Tenn. Crim. App. July 28, 2020) (the court rejected the petitioner’s argument that his judgments did not become final until ninety days after the Tennessee Supreme Court denied review—the time in which he was able to file a petition for writ of certiorari to the United States Supreme Court), *perm. app. denied* (Tenn. Nov. 12, 2020).

The record supports the post-conviction court’s summary dismissal of the petition as untimely. In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE