

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 9, 2023

FILED

05/17/2023

Clerk of the
Appellate Courts

CORY LAMONT BATEY v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2015-C-1517 Monte Watkins, Judge**

No. M2022-00407-CCA-R3-PC

Petitioner, Cory Lamont Batey, appeals the dismissal of his post-conviction petition. On appeal, he asserts that the post-conviction court erred in dismissing his petition as untimely because he was actively misled by his appellate counsel. 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 MATTHEW J. WILSON, JJ., joined.

Kimberly Stark (Hearing on Motion to Dismiss), Brentwood, Tennessee; and Dustin Faeder (On Appeal), Brentwood, Tennessee, for the appellant, Cory Lamont Batey.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Glenn R. Funk, District Attorney General; and Roger Moore and Janice Norman, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Petitioner was convicted by a Davidson County jury of one count of aggravated rape, two counts of attempted aggravated rape, one count of facilitation of aggravated rape, and three counts of aggravated sexual battery. He received an effective fifteen-year sentence to be served at one hundred percent. This court affirmed his convictions and sentence, and our supreme court denied his Rule 11 application for permission to appeal.

State v. Cory Lamont Batey, No. M2017-02440-CCA-R3-CD, 2019 WL 6817059 (Tenn. Crim. App. Dec. 13, 2019), *perm. app. denied* (Tenn. Apr. 15, 2020).

On May 10, 2021, Petitioner filed a petition for post-conviction relief acknowledging that he was filing it more than a year after the denial of his Rule 11 application. He argued that due process required tolling of the one-year statute of limitations because neither appellate counsel nor the clerk's office informed him of the supreme court's denial of his Rule 11 application. The State filed a motion to dismiss the post-conviction petition arguing that it was time-barred.

Post-conviction counsel was appointed, and a hearing was held on the State's motion to dismiss the petition. At the hearing, post-conviction counsel argued that due process required a tolling of the statute of limitations because Petitioner was "actively misled by his [appellate] attorney." Petitioner testified that he was unaware of the supreme court's denial of his Rule 11 application until he discovered it on Westlaw approximately a week after it was denied. He said that he immediately had his mother contact appellate counsel. Petitioner testified that appellate counsel spoke with his mother, but Petitioner never received an order or any documentation concerning the denial, other than what he saw on Westlaw. Petitioner also claimed that April 19, 2021, was the first time that appellate counsel communicated with him about the denial. He said that appellate counsel, through Petitioner's mother, advised him to find someone at the prison to file a post-conviction petition. Petitioner testified that he "hastily filed a post[-]conviction" petition.

On cross-examination, Petitioner testified that appellate counsel never explained the post-conviction process to him. He said that he learned through other inmates that he had a year to file a post-conviction petition after a denial of a Rule 11 application by the supreme court. Petitioner clarified that he learned of the denial of his Rule 11 application in April of 2021 while on Westlaw.

Appellate counsel testified that Petitioner and his family wanted to hire counsel for both the appeal and post-conviction proceedings. However, appellate counsel testified that he

made it very clear to [Petitioner] that I don't handle post[-]conviction cases, but if he wanted me to represent him for purposes of the motion for new trial and then for purposes of all the appellate work, that I would do that, but I would not represent him as a lawyer who does post[-]conviction. So from the earliest stage, he was very focused on what his post[-]conviction rights might be.

Appellate counsel testified that he explained Petitioner's post-conviction rights to him, and he thought that Petitioner was aware of those rights. Appellate counsel met with Petitioner on December 20, 2019, and gave him a copy of the opinion from this court denying Petitioner's direct appeal. They discussed the process for filing a Rule 11 application to the supreme court. Appellate counsel filed the application on February 11, 2020, and mailed a copy to Petitioner and e-mailed copies to Petitioner's mother and brother.

With respect to Petitioner's Rule 11 application, appellate counsel testified:

And we talked about the filing of a petition for a writ of certiorari in the United States Supreme Court. That would be triggered, of course, by the denial of the Rule 11. In fact, after the denial of the Rule 11, I prepared - - and what I had told [Petitioner] and his family was, if there was non-frivolous reason to appeal to the United States Supreme Court, that I would do that.

And you may remember the main issue that [Petitioner] raised on appeal was really the jury instruction issue.

Appellate counsel testified that he had prepared a draft of the petition for a writ of certiorari and an application for an extension of time, "things like that." He said that Petitioner was aware that the next step would "only be triggered by the denial of the Rule 11."

Appellate counsel testified that he was aware that the Rule 11 application was denied by the supreme court on April 15, 2020. He said, "I had communications with [Petitioner]. I had communications with his mother. And the communication was that the next step was is there a legitimate petition for writ of certiorari that would be filed." Appellate counsel testified that this was well within the one-year time for filing a petition for post-conviction relief, which he and Petitioner discussed. He also informed Petitioner of the consequences of not filing a timely petition. Appellate counsel testified that he ultimately did not file a petition for writ of certiorari because it was not "meritorious." When asked if Petitioner was aware of the filing deadlines for a post-conviction petition, appellate counsel testified: "I believe he was as interested as he was in ultimately filing a petition for post[-]conviction relief." Appellate counsel also said that he did not actively interfere in any way with Petitioner's ability to file a petition for post[-]conviction relief.

On cross-examination, appellate counsel testified that his file did not reflect that a copy of the order denying Petitioner's Rule 11 application was mailed to Petitioner. However, he said, "but obviously we spoke about it in terms of a cert petition draft that I was preparing." Appellate counsel did not recall if he specifically told Petitioner that the deadline for filing a post-conviction petition was April 15, 2021.

In its order dismissing Petitioner's post-conviction petition, the post-conviction court found that appellate counsel explained Petitioner's post-conviction rights to him on various occasions. The court further concluded:

Testimony also showed [appellate counsel] discussed with Petitioner the procedural implications of filing a Rule 11 Application. [Appellate counsel] testified that he told [] Petitioner of the Supreme Court's denial of Petitioner's Rule 11 Application; however, [appellate counsel] did not have a record showing whether or not [appellate counsel] gave Petitioner the hardcopy of the denial. At that time of the Rule 11 Application denial, [appellate counsel] testified he discussed Post-Conviction Relief rights and that he believed Petitioner understood those rights.

The post-conviction court granted the State's motion to dismiss Petitioner's post-conviction petition as time-barred. It is from this order that Petitioner now appeals.

ANALYSIS

Petitioner concedes that his petition for post-conviction relief was untimely filed. However, he asserts that he is entitled to tolling of the one-year statute of limitations because "his appellate attorney actively misled him regarding the status of his appeals," causing him to be late in filing his post-conviction petition. 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.

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).

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)).

The supreme court denied Petitioner’s Rule 11 application on April 15, 2020. The statute of limitations for Petitioner’s post-conviction claims expired on April 15, 2021. Petitioner’s petition for post-conviction relief was filed on May 10, 2021, more than one year after his judgment became final. The post-conviction court found that Petitioner’s appellate counsel explained Petitioner’s post-conviction rights to him on various occasions and advised Petitioner of the supreme court’s denial of his Rule 11 application. We also point out that appellate counsel informed Petitioner that he would not represent him in a post-conviction proceeding. Therefore, appellate counsel did not actively mislead Petitioner regarding the “status of his appeals.” Furthermore, in *Whitehead*, the supreme court noted that a trial counsel’s failure to accurately inform a defendant about the applicable statute of limitations, standing alone, is insufficient to require due process tolling of the statute of limitations and that the statute of limitations needed to be tolled due to the combined effect of trial counsel’s failures. *Id.* at 632. Ultimately, however, in *Whitehead*, the supreme court found the petitioner was entitled to due process tolling of the statute of limitations from the compound effect of counsel’s failure to timely inform the petitioner about his post-conviction rights, misinforming the petitioner about the correct

deadline to file a post-conviction petition, and failure to timely provide the petitioner his file after multiple requests. *Id.*

We conclude that none of the statutory exceptions found in Tennessee Code Annotated section 40-30-102(b) apply to Petitioner's case. Further, the post-conviction court credited appellate counsel's testimony that he advised Petitioner when his Rule 11 application was denied by the supreme court and of Petitioner's post-conviction rights. Petitioner has failed to show that he is entitled to due process tolling based on his sole claim that his appellate counsel actively misled him regarding the status of his appeals. Petitioner is not entitled to relief.

CONCLUSION

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

JILL BARTEE AYERS, JUDGE