

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 9, 2023 Session

FILED

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Clerk of the
Appellate Courts

ADARION C. MORRIS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
Nos. 2016-C-1500, 2016-C-1501, 2016-D-2181 Jennifer Smith, Judge

No. M2022-00926-CCA-R3-PC

In April 2018, Petitioner, Adarion C. Morris, pleaded guilty in three separate cases and received an effective sentence of six years to be served on community corrections. However, after two community corrections violation warrants were filed, one in June 2018 and another in August 2018, the trial court held a hearing, revoked Petitioner's community corrections sentence, and re-sentenced Petitioner to forty-eight years in the Department of Correction. This court affirmed the trial court's revocation and sentence imposed on appeal. *See State v. Adarion C. Morris*, No. M2018-02034-CCA-R3-CD (Tenn. Crim. App. Dec. 5, 2019), *no perm. app. filed*. Petitioner subsequently filed a post-conviction petition alleging that he received ineffective assistance of counsel when entering his guilty pleas, which rendered his pleas unknowing and involuntary. He also alleged counsel was ineffective at the revocation hearing and re-sentencing for not challenging the legality of the original community corrections sentence. After a hearing, the post-conviction court concluded Petitioner's ineffective assistance of counsel claims regarding the guilty pleas were untimely and that the ineffective assistance of counsel claim relative to the revocation and re-sentencing was without merit. Petitioner appeals, arguing that he is entitled to due process tolling of the limitations period for his claims regarding his guilty pleas. After review, we affirm the judgment of the post-conviction court.

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

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

Daniel J. Murphy, Lewisburg, Tennessee (on appeal); and Kimberly L. Stark, Brentwood, Tennessee (at post-conviction hearing), for the appellant, Adarion C. Morris.

Jonathan Skrmetti, Attorney General. and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Doug Thurman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

a. Guilty Pleas, Community Corrections Revocation, and Appeal

In our opinion on Petitioner's direct appeal, this court set forth this summary of the initial procedural history in this case:

In case number 2016-C-1500, the Davidson County Grand Jury charged the defendant with one count of the possession with intent to sell or deliver .5 grams or more of cocaine and one count of the simple possession or casual exchange of marijuana. In case number 2016-C-1501, the same grand jury charged the defendant with two counts of aggravated assault, one count of felony evading arrest, and one count of second or subsequent offense of driving on a revoked license. In case number 2016-C-2181, the defendant was charged with one count of aggravated assault. On April 27, 2018, the defendant pleaded guilty as charged in case numbers 2016-C-1501 and 2016-C-2181 and count two of case number 2016-C-1500. He also pleaded guilty to the lesser included offense of the attempted possession with intent to sell or deliver .5 grams or more of cocaine in count one of case number 2016-C-1500. Pursuant to a plea agreement with the State, the defendant received a total effective sentence of six years to be served in a community corrections placement in exchange for his pleas of guilty.

State v. Adarion C. Morris, No. M2018-02034-CCA-R3-CD, 2019 WL 6591465, at *1 (Tenn. Crim. App. Dec. 5, 2019).

Our opinion continues:

Less than two months [after the plea agreement], on June 20, 2018, a community corrections violation warrant issued alleging that the defendant had violated the terms of his community corrections placement by failing to report. An amended violation warrant issued on July 25, 2018, alleging that the defendant had violated the terms of his community corrections placement

by garnering new charges of vandalism, assault, and aggravated assault. A second amended violation warrant issued on August 1, 2018, alleging that the defendant violated the terms of his community corrections placement by garnering yet another charge of aggravated assault.

Id.

On October 17, 2018, the trial court held a hearing on the revocation warrants.¹ *Id.* At the end of the hearing:

The State asked the trial court to revoke the defendant's community corrections placement and to exercise its discretion to resentence the defendant. To this end, the State exhibited to the hearing a re[-]sentencing report. The State asked the trial court to increase the individual sentences and to order consecutive service of the sentences. The defendant admitted "that he has violated his community corrections. That's obvious." Nevertheless, he asked the court not to increase the sentence and instead order the existing six-year sentence into service. The trial court took the case under advisement.

Id. at *2. On October 29, 2018, the trial court issued a written order revoking Petitioner's community corrections placement and re-sentencing Petitioner to an effective term of forty-eight years. *Id.* at *2-3.

Petitioner appealed, arguing that he was statutorily ineligible for community corrections placement, the trial court had no authority to resentence him, and the trial court imposed an excessive sentence. *Id.* at *3.² In his direct appeal, Petitioner did not argue that his plea agreement was unknowing or involuntary.³ This court rejected Petitioner's arguments and affirmed the judgment of the trial court. *Id.* at *4-5.

¹ The attorney representing Petitioner at the revocation hearing was not the same attorney who represented Petitioner at the plea hearing. Thus, this court will reference Petitioner's pretrial and plea-stage attorney as "first counsel" and the attorney who represented Petitioner at the revocation hearing as "second counsel."

² Second counsel raised the issue regarding Petitioner's supposed ineligibility for community corrections for the first time on appeal. *Id.* at *4.

³ In his amended post-conviction petition, Petitioner claims he filed two motions to correct an illegal sentence: one on December 27, 2018, and one on April 14, 2020. The trial court denied both motions. The motions were not appealed and do not appear in the record for either Petitioner's direct appeal or the instant appeal. Further, the post-conviction petition says nothing about Petitioner challenging his guilty pleas in either of these motions.

b. Post-Conviction Proceedings

On September 29, 2020, less than one year after this court affirmed the revocation of Petitioner's community corrections sentence and re-sentencing, but more than two years after Petitioner pleaded guilty to the original offenses, Petitioner filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel, who filed an amended petition. As to first counsel's representation, Petitioner raised seven claims in the post-conviction court alleging that first counsel's ineffectiveness rendered Petitioner's 2018 guilty pleas unknowing and involuntary. Petitioner argued, generally, that first and second counsel were ineffective by failing to "properly and adequately advise Petitioner of his rights" and by failing to "consult with Petitioner at crucial stages during all prior proceedings. The only assertion of ineffective assistance relating specifically to second counsel's representation during the revocation proceedings was that second counsel "failed to challenge the legality of the original [c]ommunity [c]orrections placement at the time of the revocation hearing [or] at the re[-]sentencing."

In its response, the State, citing to this court's opinion in Petitioner's direct appeal, argued that all issues concerning the legality of Petitioner's sentences had been previously determined. The State also made general denials of Petitioner's claims that he received the ineffective assistance of counsel and that his guilty pleas were unknowing and involuntary.

While neither party's pleadings in the post-conviction court addressed the timeliness of Petitioner's claims regarding his guilty pleas, or due process tolling of the statute of limitations at the post-conviction hearing on November 19, 2021, the State argued Petitioner's claims related to the voluntariness of his guilty pleas (including first counsel's alleged ineffectiveness) were untimely, as they were filed more than a year after the judgments entered pursuant to the plea became final. The post-conviction court allowed the hearing to proceed but gave Petitioner's counsel the opportunity to file a post-hearing brief on the timeliness issue. However, there is nothing in the record showing Petitioner's attorney in the post-conviction court, who withdrew after filing the notice of appeal, did so.

The hearing proceeded and three witnesses testified—first counsel, second counsel, and Petitioner. First counsel testified that when he first met with Petitioner about this case, he discussed Petitioner's pending charges "in depth." First counsel recalled meeting with Petitioner "quite often" before Petitioner entered his plea, but he was unable to recall an exact number of meetings because counsel also represented Petitioner in another unrelated case.

First counsel represented Petitioner at the April 2018 hearing where Petitioner pleaded guilty and was sentenced to community corrections. First counsel "did not think"

the six-year plea offer was the State's first offer, as the case had been set for trial previously. Counsel recalled attempting to get a "better" offer than the one Petitioner accepted, but the State never made a better offer. Counsel testified that he "absolutely" explained to Petitioner the terms of the guilty pleas; specifically, counsel stated that he explained to Petitioner "that if he was to get in or violate some type of conditions of his [c]ommunity [c]orrections, then he could be re-sentenced on it." Counsel said he talked about this possibility "a lot" with Petitioner because "it's a strong consideration with anybody that's going to be on [c]ommunity [c]orrections." First counsel denied the State ever offered a probationary sentence rather than a community corrections sentence.

Although first counsel testified that he explained to Petitioner the conditions of Petitioner's community corrections plea, including the trial court's ability to resentence him if he violated the community corrections term, first counsel acknowledged that during the plea colloquy, the trial court did not advise Petitioner about the possibility of re-sentencing.

Second counsel testified he was appointed to Petitioner's case in August 2018, and appeared in court at least three times with Petitioner including the revocation hearing. Second counsel said that before the revocation hearing, he and Petitioner discussed "the re[-]sentencing, and I was telling him about what the State was trying to do. They were asking the judge to increase his sentence. And, of course, I was telling him . . . they can increase it to the top of the range." Second counsel recalled Petitioner asked him about how he could be re-sentenced; second counsel told Petitioner "well, because you had a [c]ommunity [c]orrections" sentence. Second counsel could not recall Petitioner ever claiming he did not understand his original guilty plea.

Second counsel testified that Petitioner asked him about the State's willingness to agree to a six-year sentence in custody; counsel relayed this offer to the State, which rejected the offer. Counsel testified Petitioner "want[ed] to delay the re[-]sentencing hearing until after . . . his new charges were resolved." Ultimately, that delay did not occur, and the revocation hearing occurred as scheduled. As described above, the trial court revoked Petitioner's community corrections sentence. Although second counsel argued the trial court should sentence Petitioner to six years in custody, the trial court re-sentenced Petitioner to a higher sentence. Second counsel then appealed the trial court's decision; he recalled he spoke with Petitioner "a lot" on the phone about the issues to be included on appeal, and met with him once outside of court. In Petitioner's direct appeal, second counsel did not raise any issue related to Petitioner's entering an unknowing guilty plea. Addressing the issues he did raise on appeal, second counsel said,

I raised the issue of . . . him not being eligible for [c]ommunity [c]orrections.
At least two of the cases I believe involve[d] aggravated assaults, and that he

didn't meet the eligibility under the [c]ommunity [c]orrections statute for those sentences. And I raised another issue about the sentence was—that was [the] increase[] was excessive.

Petitioner testified that, before his guilty plea, he only met with first counsel once to discuss the case and had no more than two phone conversations with him. Petitioner claimed first counsel had “nothing” on the case at the time he was retained, and that first counsel never reviewed discovery or the facts of the case with him. Petitioner claimed he first learned of the offer for a community corrections sentence on a date the case was set for trial. Petitioner claimed first counsel did not discuss the terms of the community corrections sentence with him, yet Petitioner agreed to the six-year sentence because Petitioner believed the community corrections sentence was “basically, probation.” According to Petitioner, first counsel never told Petitioner what would happen if Petitioner violated the community corrections terms. Petitioner claimed that had first counsel told him about the terms of community corrections, including the possibility of re-sentencing, Petitioner would not have pleaded guilty.

Petitioner acknowledged that at the plea hearing when the trial court asked whether Petitioner was satisfied with first counsel's representation, understood the charges and penalties in these cases, and signed the plea agreements freely and voluntarily, Petitioner answered “yes” to all questions. He also answered “yes” when the trial court asked whether he had reviewed the terms of the plea agreement with first counsel. However, Petitioner claimed that despite his responses, “I was pleading to something I didn't have no understanding of.”

Petitioner testified he met second counsel when Petitioner first appeared in court in advance of the revocation hearing.

[T]he first time that I showed up for court, I had told him that I was going to hire an attorney. And he supposedly was—but I couldn't afford an attorney. So when I came back to court, he was still on my case. So we never discussed the first time, when he first came. And then when he came the second time, I was telling him that I wanted to try to get my charges that I was violated for taken care of and get my re[-]sentencing and revoked thing put off until I finished up what was going on with my charges. And he basically said that the DA said that he is going with re[-]sentencing and the judge said that we are going to proceed on with the hearing. So I never—I never got the chance to talk to him. He never did get to proceed with witnesses on my behalf or—he didn't know nothing about my case, period.

At their third court appearance together, Petitioner requested that second counsel ask to be removed from Petitioner's case before the revocation hearing proceeded. Petitioner claimed he did so because second counsel knew "nothing about anything that was going on with my situation pertaining to my case." Petitioner claimed counsel had no witnesses to present on Petitioner's behalf at the revocation hearing. But at the post-conviction hearing, when Petitioner was asked about any favorable witnesses that could have been called at the revocation hearing, Petitioner could only identify first counsel. At the beginning of the revocation hearing, second counsel to withdraw, but the trial court denied the motion. Petitioner also claimed he did not give second counsel permission to concede to the community corrections violations at the revocation hearing. He also faulted second counsel for not arguing at the revocation hearing that Petitioner was a "violent offender" and therefore ineligible for community corrections.

In an order filed June 10, 2022, the post-conviction court concluded that Petitioner's claims regarding the voluntariness of his guilty pleas and first counsel's alleged ineffectiveness relative to the guilty pleas were untimely. Accordingly, the post-conviction court dismissed the claims without making findings of fact or conclusions of law on the merits of those claims. Regarding Petitioner's claim that second counsel rendered ineffective assistance, the trial court found that second counsel adequately met with Petitioner before the revocation hearing and explained the nature of the forthcoming proceedings against Petitioner, including the possibility that chance he could be re-sentenced to a term far longer than six years. The post-conviction court also found that because this court concluded on appeal that Petitioner's convictions were eligible for community corrections, second counsel was "not deficient for failing to raise a meritless issue in the trial court." Finding all of Petitioner's claims without merit, the post-conviction court denied relief.

This timely appeal followed.

Analysis

In this appeal, Petitioner argues he was entitled to tolling of the one-year post-conviction statute of limitations on due process grounds, and therefore the post-conviction court erred by failing to toll the statute of limitations. He also argues first counsel's ineffective assistance related to Petitioner's pleas led Petitioner to enter unknowing and involuntary guilty pleas. Petitioner does not raise any issues regarding second counsel's representation related to the revocation and re-sentencing proceedings.

As stated above, the post-conviction court did not make findings of fact or conclusions of law regarding first counsel's alleged ineffectiveness at the guilty plea hearing because it dismissed that issue in the petition as untimely. If we were to agree with

the post-conviction court's conclusion that the post-conviction petition was untimely, the issue of first counsel's ineffectiveness would be moot. If we were to conclude that Petitioner was entitled to due process-based tolling of the limitations period, we would remand the case to the post-conviction court for the entry of findings of fact and conclusions of law. Accordingly, we will only address Petitioner's contentions regarding the timeliness of his claims related to his guilty pleas.

A petitioner may seek post-conviction relief when a "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. A post-conviction petition must be filed "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). If the petition is untimely, in most circumstances "consideration of the petition shall be barred." *Id.*; *see also id.* § 40-30-106(b) ("If it plainly appears from the face of the petition . . . that the petition was not filed" within the one-year limitations period, "the judge shall enter an order dismissing the petition."). "As a general rule, a trial court's judgment becomes final thirty days after its entry unless a timely notice of appeal or specified post-trial motion is filed." *State v. Moore*, 814 S.W.2d 381, 382 (Tenn. Crim. App. 1991) (citing Tenn. R. App. 4(a) and (c)).

The one-year limitations period may be tolled in limited circumstances. "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) 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.

Tenn. Code Ann. § 40-30-102(b)(1)-(3).

Additionally, the statute of limitations may be tolled on due process grounds. “[I]n certain circumstances, strict application of the statute of limitations would deny a defendant a reasonable opportunity to bring a post-conviction claim and thus, would violate due process.” *Williams v. State*, 44 S.W.3d 464, 468 (Tenn. 2001). Thus, “[w]hen a petitioner fails to timely file a petition for post-conviction relief due to circumstances outside of his control, due process requires tolling of the statute of limitations.” *Ugenio Dejesus Ruby-Ruiz v. State*, No. M2017-00834-CCA-R3-PC, 2018 WL 1614054, at *2 (Tenn. Crim. App. Apr. 3, 2018) (“*Ruby-Ruiz*”) (citing *Williams*, 44 S.W.3d at 468-69). “A petitioner is entitled to due process tolling upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.” *State v. Whitehead*, 402 S.W.615, 631 (Tenn. 2013) (citing *Holland v. Florida*, 560 U.S. 631, 648 (2012)). “This rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.” *Bush*, 428 S.W.3d at 22. The post-conviction petitioner “bears the burden of pleading and proving that the statute of limitations should be tolled on due process grounds.” *Raymond Andrew Herbst v. State*, No. M2014-01918-CCA-R3-PC, 2015 WL 4575140, at *3 (Tenn. Crim. App. July 30, 2015) (citing Tenn. Sup. Ct. R. 28, § 5(F)(4)).

In this case, Petitioner’s post-conviction claims regarding the revocation of his community corrections sentence were proper for consideration, as it is unquestioned that a litigant may file a post-conviction claim based on the revocation of a community corrections sentence. *See Carpenter v. State*, 136 S.W.3d 608, 612-13 (Tenn. 2004). Petitioner filed his post-conviction petition within one year of this court’s opinion on direct appeal of the revocation case, so it was timely filed as to those claims. However, Petitioner has abandoned these claims on appeal, so this court’s sole focus is whether Petitioner’s post-conviction claims regarding the entry of his guilty pleas, including the effectiveness of first counsel’s representation during that time, are untimely.

When faced with a previous appeal involving a procedural history similar to that of Petitioner’s case—in which a petitioner attempted to raise claims related to both the revocation of his community corrections sentence and the entry of the guilty pleas giving rise to the original community corrections term—this court concluded the post-conviction claims related to the petitioner’s original guilty pleas were untimely. In *Anthony L. Grant, Jr., v. State*, No. M2007-00052-CCA-R3-PC, 2008 WL 4169985, at *1 (Tenn. Crim. App.

Sept. 8, 2008), a petitioner pleaded guilty in June 2005 to two offenses and was sentenced to eight years on community corrections. In August 2005, the petitioner in *Anthony L. Grant* conceded a community corrections violation; the trial court kept the petitioner on community corrections but added six months to the petitioner’s term. *Id.* In November 2005, the petitioner conceded another violation; this time, the trial court revoked the community corrections sentence and ordered the petitioner to serve the eight-and-a-half-year term in custody. *Id.* In October 2006—more than one year after the guilty pleas and first community corrections violation but less than a year after the trial court revoked the community corrections sentence—the petitioner filed a petition for post-conviction relief. *Id.* The trial court dismissed the petition as untimely, referencing only the original date of the petitioner’s guilty pleas. *Id.* On appeal, this court reversed the post-conviction court’s decision in part, concluding the petitioner had the right to raise claims related to the revocation of the community corrections sentence, but that claims related to the guilty pleas and the first community corrections violation were time-barred. *See id.* at *4. This court also stated, “[n]one of the statutory or due process-based exceptions appl[ied] in [Grant’s] case.” *Id.* at *2.

Accordingly, in this case we conclude the post-conviction court properly found that Petitioner’s post-conviction claims related to his guilty pleas were untimely because the post-conviction petition was filed more than a year after the judgments resulting from the guilty pleas became final. None of the statutory tolling provisions apply. Thus, Petitioner’s claims regarding his guilty pleas would be proper for review only under a due process-based exception to the limitations period.⁴

Petitioner argues that at the very least, he is entitled to have his case remanded to the post-conviction court for consideration of the due process tolling issue because the post-conviction court did not address the issue—even though Petitioner himself did not address due process tolling in the court below. Specifically, Petitioner states in his brief, “In cases where the post-conviction relief statute of limitations and subsequent tolling is at issue, appellate review is premature without the Post-Conviction Court having taken the opportunity to address the issue.”

⁴ This court has previously concluded that when a post-conviction petitioner raises the issue of due process-based tolling of the limitations period for the first time on appeal, the claim is waived for failure to raise it in the court below. *See Michael D. Williams v. State*, 2018 WL 2725497, at *1. (Tenn. Crim. App. June 6, 2018). Had the State raised waiver on appeal, we would have considered whether Petitioner’s due process tolling argument is waived on appeal. However, our supreme court recently held that this court’s review of an unpreserved and unrepresented issue “without providing the parties notice that it intended to reach that issue or an opportunity to address it either in their briefs or at oral argument” would constitute an abuse of this court’s discretion. *See State v. Bristol*, 654 S.W.3d 917, 926-30 (Tenn. 2022). Thus, we will address Petitioner’s due process tolling issue on its merits.

In support of this contention, Petitioner cites to this court's opinion in *Ruby-Ruiz*, cited above. In that case, after this court's May 12, 2015 opinion affirming the trial court's judgments on direct appeal, appellate counsel for the petitioner filed an untimely application for permission to appeal to the Tennessee Supreme Court, per Rule 11 of the Tennessee Rules of Appellate Procedure. *Id.* at *1. The untimely Rule 11 application was filed August 21, 2015, and dismissed March 23, 2016. *Id.* Three months after the Tennessee Supreme Court order dismissing the Rule 11 application, the petitioner filed a pro se post-conviction petition. *Id.* The post-conviction court "noted that the petition was untimely, but the court set a matter for a hearing to determine whether due process required the tolling of the one-year statute of limitations." *Id.* However, the post-conviction court did not hold such a hearing, instead issuing a subsequent order concluding the petition was timely because it was filed one year after the Tennessee Supreme Court's order dismissing the Rule 11 application, despite the fact that the petition was filed more than one year after this court's opinion on direct appeal. *Id.* The case then proceeded to a hearing, and after the post-conviction court issued an order denying relief, the petitioner appealed. *Id.*

On appeal, this court did not address the post-conviction court's ruling on the merits of the post-conviction petition, instead stating that "we must first determine the timeliness of the petition for post-conviction relief." *Id.* This court, quoting *Williams*, concluded that the post-conviction petition was untimely because the late-filed Rule 11 application "does not constitute an appeal . . . and therefore does not delay commencement of the one-year post-conviction statute of limitations." *Id.* at *3 (quoting *Williams*, 44 S.W.3d at 471) (internal quotation marks omitted). This court remanded the case to the post-conviction court for a hearing on the due process tolling issue. *Id.* at *3-4. In doing so, this court noted that the petitioner's counsel on direct appeal had given the petitioner roughly a month and a half to pursue post-conviction relief, but "the question of what length of time constitutes 'enough time' for a petitioner to pursue post-conviction relief is a question of fact for the post-conviction court." *Id.* at *3.

Petitioner also argues he was unable to file a post-conviction petition regarding the entry of his guilty pleas while his appeal of the revocation and re-sentencing was proceeding because the trial court would have had no jurisdiction to consider a post-conviction petition. In support of this second argument, he cites to this court's opinion in a habeas corpus case, *Thurmond v. Carlton*, 202 S.W.3d 131, 133 (Tenn. Crim. App. 2006), in which we stated that a "habeas corpus or post-conviction petition may not be maintained while a direct appeal attacking the original conviction and sentence is pending in the appellate courts."

We find Petitioner's arguments unavailing. Here, unlike in *Ruby-Ruiz*, the parties did not raise due process tolling below and thus the post-conviction court never addressed the issue. Additionally, as the State points out in its brief, this court's comment in *Ruby-Ruiz* about appellate counsel's leaving the petitioner with less than two months to file a post-conviction petition suggests that post-conviction counsel's failure to file a timely Rule 11 application may have constituted a circumstance beyond Ruby-Ruiz's control which could have prevented him from pursuing his post-conviction claims in a timely manner. No such circumstance existed here. First counsel did not represent Petitioner in this case beyond the entry of his guilty pleas, so Petitioner was not encumbered by an attorney who may well have been unwilling, if not unable, to raise an ineffective assistance of counsel claim against himself. Petitioner could have pursued post-conviction relief regarding the guilty pleas at any point after those judgments became final.

Perhaps more importantly, Petitioner's assertion that he could not have pursued a post-conviction claim regarding the entry of his guilty pleas and first counsel's alleged ineffectiveness during the plea process is incorrect. Petitioner could not have pursued post-conviction relief regarding the community corrections revocation and re-sentencing during the pendency of his direct appeal, but there was nothing preventing Petitioner from pursuing a post-conviction claim regarding his original guilty pleas. Yet Petitioner presented no proof at the post-conviction hearing suggesting that he did anything to "diligently pursue" any claims regarding his guilty pleas until he filed the current post-conviction claims. Conversely, neither first counsel nor second counsel testified Petitioner had difficulty understanding the consequences of his guilty pleas.

In sum, the post-conviction court properly concluded Petitioner's post-conviction claims regarding his guilty pleas were untimely, and Petitioner has failed to establish his entitlement to due process tolling of the limitations period as to those claims. He has also abandoned any claims regarding the revocation of his community corrections sentence. Accordingly, Petitioner is not entitled to relief.

Conclusion

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

MATTHEW J. WILSON, JUDGE