

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 6, 2023 Session

FILED
09/28/2023
Clerk of the
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FRED AUSTON WORTMAN, III v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 15-02878 James Jones, Jr., Judge

No. W2023-00017-CCA-R3-PC

Petitioner, Fred Auston Wortman, III, appeals the summary dismissal of his petition seeking post-conviction relief from his 2015 guilty-pleaded conviction for attempted first degree murder, arguing that the post-conviction court incorrectly concluded that the Petition was time-barred. After our review of the record, we reverse and remand the case to the post-conviction court. On remand, the post-conviction court should appoint counsel, if necessary; provide an opportunity for counsel to amend the Petition; and conduct a hearing to make findings of fact and conclusions of law relative to due process tolling of the statute of limitations.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;
Case Remanded**

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which J. ROSS DYER and TOM GREENHOLTZ, JJ., joined.

W. Lewis Jenkins, Jr., Dyersburg, Tennessee, for the appellant, Fred Auston Wortman, III.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from Petitioner's attempts to kill his then-wife by injecting poison into her toothpaste and soliciting her murder on multiple occasions. The relevant events occurred in Shelby and Fayette Counties, and Petitioner was subsequently indicted, in

relevant¹ part, for attempted first degree murder in Shelby County Criminal Court Case Number 15-02878.

On November 10, 2015, Petitioner entered an *Alford* plea to attempted first degree murder in Case Number 15-02878. The plea form in Case Number 15-02878 reflects that, in exchange for Petitioner's *Alford* plea, the State recommended a 30-year sentence, at 30% service, to be served concurrently with Petitioner's sentences in Fayette County Circuit Court Case Number 15-CR-179. Additionally, the record reflects that a document entitled, "Memorandum of Understanding Clarifying Terms of Guilty Plea" was signed by a Fayette County prosecutor, a Shelby County prosecutor, the District Attorney General for the 29th Judicial District, Petitioner, and Petitioner's trial counsel. It provided as follows:

This document is intended so as to clarify certain points of the Guilty Pleas of [Petitioner]: The guilty plea is as follows:

- a. Plea of Guilty to Class A felony Criminal Attempt Murder First Degree and Solicitation of First Degree Murder (counts 1 and 3) under [Fayette County Circuit Court] Indictment Number 15-CR-179, 30 years at 30% on the Attempt and 8 years @ 30%² on the Solicitation, concurrent with each other. This is a hybrid sentence mixing RII Offender Status with RI release eligibility;
- b. Plea of Guilty to Class A felony, Criminal Attempt Murder First Degree under [I]ndictment Number 15-02878 to 30 years at 30%. This is again a hybrid sentence.
- c. The two sentences will be served CONCURRENTLY, for an effective sentence of 30 years with 30% release eligibility;
- d. Count 2 of Indictment Number 15-CR-179 will be dismissed;
- e. Conduct engaged in by [Petitioner] in Dyer County in which [Petitioner] solicited a citizen to kill [the victim] will not be the basis for any charge. That conduct is considered by this Memorandum to be, for all relevant purposes, included in Indictment Number 15-CR-179.

¹ Neither the Shelby County nor Fayette County indictments were included in the record.

² This section of the document contained a handwritten note of "8 years @ 30%" with the typed text "time served" crossed out. Handwritten initials beside the change were similar in appearance to Petitioner's signature.

What, therefore, is intended is a resolution of effectively four cases (three indicted cases and one unindicted case in Dyer County) in exchange for a guilty plea to two Class A felonies, one Class B felony and an effective total-sentence of 30 years with 30% release eligibility. This plea will resolve those cases, and the State hereby acknowledges that it does not have any knowledge of any other cases or actions that could arise to the level of a case involving [Petitioner] and his attempts or solicitations to kill his wife beyond these four cases. For example, the evidence in these cases includes a large number of reconstructed computer searches for hitmen. The State does not believe it has any evidence other than these computer searches that [Petitioner] actually contacted or solicited any other hitmen than those that form the basis of [Fayette County Circuit Court] Indictment 15-CR-179, [Shelby County Criminal Court] Indictment 15-02878 and the unindicted conduct in Dyer County. If the State did have such evidence, whether known or unknown, and then later charged [Petitioner] based in whole or in part on that evidence, such would constitute improper “holding back” and would violate this Memorandum of Understanding and be reason for these Guilty Pleas to be set aside. By these guilty pleas, the State and [Petitioner] intend finality in these matters.

In accordance with the Memorandum, the trial court imposed a sentence of 30 years and 8 years, respectively, to be served concurrently. The judgment form in Case Number 15-02878 included a handwritten note that Petitioner was to receive a Range II sentence but with Range I release eligibility.

On September 19, 2019, an initial parole hearing was held in Petitioner’s case. A transcript of the hearing reflects that the Fayette County prosecutor spoke at the hearing and stated that he “strongly oppose[d]” Petitioner’s receiving parole. The Fayette County prosecutor added that he had spoken to officials with the Tennessee Bureau of Investigation (TBI) and that the TBI also strongly opposed parole in this case. The Fayette County prosecutor opined that Petitioner had expressed “zero acceptance of responsibility for his crimes” and “zero remorse” and that Petitioner “poses a clear and present danger” to the victim. The Fayette County prosecutor said that, although rehabilitation was a purpose of incarceration, retribution and deterrence would be served by denying parole. The Fayette County prosecutor stated that Petitioner “had demonstrated . . . a clear resilience in his determination to kill his wife, ruin his children’s lives, and . . . even poison his own daughter.”

The Fayette County prosecutor said that Petitioner had “left out several relevant facts” when discussing the facts of the case with Parole Board Member Gary Faulcon, including the following:

[Petitioner] was notified by the Collierville Police Department and the [Federal Bureau of Investigation] about the discovery of his computer searches for hit men and poison. In fact, he poisoned his own daughter. But that did not deter him. Despite that warning from law enforcement, he then solicited a high school classmate of his in Dyersburg, Tennessee, asked him to solve a breathing problem and tried to hire him to kill his wife. He didn't mention that.

He then solicited an undercover hit man, a TBI agent, to kill his wife. As I laid out in my letter, he provided certain information to the officer. He was arrested and placed in jail. That did not deter him.

And while in jail, he then solicited another inmate, on recorded audio, to kill his wife. He did not just fall in with what the inmate was saying; he actively solicited his wife's murder and offered payment in multiple ways.

The Shelby County prosecutor also spoke and stated that the victim, her family, and the District Attorney General had asked him to attend the hearing and oppose Petitioner's being granted parole. The Shelby County prosecutor noted that Petitioner had tried to kill the victim three or four times and "tried to poison his wife, exposed his younger daughter to the poison, [and] had a kit hidden behind the backyard with poison and a syringe in it." The Shelby County prosecutor continued:

He solicited not just one but three different hit men to kill his wife, including, for all he knew, a hit man to come into the home. The kids' bedroom is right there next to where this victim sleeps. He loved his kids so much he tried to kill her three separate times. Wrong decisions? It's a shame that . . . we're even talking about parole.

And then I heard somebody say he's not supposed to be there in the prison. Well, you know who's not supposed to be here? [The victim] is not supposed to be here. She's supposed to be in the ground, dead. And he tried at least four times to put her there.

We shouldn't be talking about parole. We should be talking about him serving every day of this sentence. I believe that's justice, and I believe that's what he has earned.

On December 2, 2022, Petitioner filed a pro se petition for post-conviction relief, in which he claimed that the State had violated the terms of his plea agreement by opposing his release at the parole hearing. Petitioner asserted that he was "induced in a significant degree to enter into [the plea agreement] based on the promises of the State . . . that [he]

would serve 30% of the sentence in incarceration and be released to complete the sentence in the community.” Petitioner argued that he had served 30% of his sentence and that he should be released from confinement. Petitioner also claimed that “the special due process protections afforded to plea agreements toll the statute of limitations.”

The post-conviction court subsequently denied relief, finding that the Petition was time-barred. The court made no findings regarding the issue of due process tolling.

Analysis

On appeal, Petitioner claims that he is entitled to due process tolling of the statute of limitations because his claim was later-arising. Relatedly, he contends that the post-conviction court should have made findings of fact and conclusions of law related to due process tolling. The State responds that Petitioner has waived due process tolling for failure to raise it in the Petition, that Petitioner did not establish that he diligently pursued his rights between the time of the September 2019 initial parole hearing and when he filed the Petition in December 2022, and that the post-conviction court correctly determined that the Petition was time-barred.

This court reviews the post-conviction court’s summary dismissal of the Petition de novo. See *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002); *Odom v. State*, No. M2022-00252-CCA-R3-PC, 2022 WL 17261526, at *5 (Tenn. Crim. App. Nov. 29, 2022). The Post-Conviction Procedure Act states that “a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part . . . within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.” Tenn. Code Ann. § 40-30-102(a) (2022). Tennessee courts “have previously recognized that in 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). “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.” *Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013). The court in *Whitehead* cautioned that due process tolling “must be reserved for those rare instances where—due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Id.* at 631-32 (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). As relevant to this case, the *Whitehead* court specified that “claims for relief that arise after the statute of limitations has expired” allow for equitable tolling. *Id.* at 623. “[B]efore a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” *Buford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992).

“Issues regarding whether due process required the tolling of the post-conviction statute of limitations are mixed questions of law and fact and are, therefore, subject to de novo review.” *Whitehead*, 402 S.W.3d at 621. However, the post-conviction court’s findings of fact are binding on this court unless the evidence preponderates against them. *Id.* The post-conviction court’s ultimate conclusion as to whether due process requires tolling the statute of limitations is a question of law. *Id.*

The post-conviction court’s order only addressed that the Petition was time-barred based upon its filing date in December 2022 and Petitioner’s guilty plea entry date in 2015. We disagree with the State that Petitioner wholly failed to raise due process tolling in the Petition; Petitioner incorrectly supported his due process tolling argument with case law related to the due process protections applying to enforcement of plea agreements, but he did raise the issue.

However, the post-conviction court made no findings of fact or conclusions of law relative to due process tolling, and the record does not contain any information regarding the delay between Petitioner’s 2019 initial parole hearing and his filing the Petition in 2022. Accordingly, the record is insufficient for this court to consider Petitioner’s issue. In order for Petitioner to have “the opportunity for the presentation of [his] claims at a meaningful time and in a meaningful manner,” *see Buford*, 845 S.W.2d at 208, we reverse the judgment of the post-conviction court. On remand, the post-conviction court should appoint counsel, if necessary; allow counsel the opportunity to file an amended brief; hold a hearing; and make findings of fact and conclusions of law relative to due process tolling.

Conclusion

For the foregoing reasons, the post-conviction court’s dismissal of the Petition is reversed, and the case remanded for further proceedings consistent with this opinion.

ROBERT L. HOLLOWAY, JR., JUDGE