

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs June 24, 2014 at Knoxville

MARCUS BOALES v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Henderson County
Nos. 96-162 & 96-164 Roy B. Morgan, Jr., Judge**

No. W2013-02512-CCA-R3-HC - Filed July 30, 2014

The federally-incarcerated Petitioner, Marcus Boales, filed a petition for writ of habeas corpus in the Henderson County Circuit Court, seeking relief from his two 1996 drug convictions that were used to enhance his federal sentence. The habeas corpus court summarily dismissed the petition, and the Petitioner appeals. Upon review, we affirm the judgment of the habeas corpus court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ROBERT W. WEDEMEYER, J., joined.

Marcus Boales, Forrest City, Arkansas, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Senior Counsel; James G. Woodall, District Attorney General; and Angela R. Scott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
FACTUAL BACKGROUND

On December 6, 1996, the Petitioner pled guilty to one count of each of the following offenses: sale of .5 grams or more of cocaine (Henderson County Case No. 96-162), a Class B felony; possession of .5 grams or more of cocaine with the intent sell (Henderson County Case No. 99-164), a Class B felony; and theft over \$1,000 (Henderson County Case No. 94-470), a Class D felony. Pursuant to the terms of the agreement, he received Range I sentences of eight years for the Class B felony convictions and four years for the Class D felony conviction; all sentences were to be served concurrently with one another. The

agreement further provided that the effective eight-year sentence was to be served consecutively “to priors # 91-637, 91-553, 93-260 [and] 94-466.”

Thereafter, on August 18, 2000, the Petitioner entered into another plea agreement, this time agreeing to plead guilty to one count of sale of a Schedule II controlled substance (Henderson County Case No. 00-002-1), a Class C felony, in exchange for a sentence of four and one-half years as a Range I, standard offender. The plea agreement also reflected that the Petitioner was receiving credit for “time served” and, therefore, had no portion of this sentence to serve before being placed on probation. The Petitioner’s probation in Case No. 00-002-1 was later revoked in September 2004, and a corrected judgment form was entered showing that the sentence was to be served concurrently with the Petitioner’s “present Madison County Case.” His 1996 convictions were not referenced in any of the documentation provided in Case No. 00-002-1.

Twelve years later, the Petitioner filed a petition for writ of habeas corpus in July 2012. In the petition, he contended that his two 1996 drug convictions should be vacated because his trial counsel was ineffective and because his guilty pleas were not knowingly and voluntarily entered. The Petitioner asserted that, on March 23, 2012, he was sentenced in federal court and that his federal sentence had been enhanced due to the 1996 Henderson County drug convictions. The Petitioner acknowledged that he was “no longer in custody on the judgment herein” and was challenging “the collateral consequences of increasing significantly the length and harshness” of his federal sentence.

The State filed a response, and the habeas corpus court summarily dismissed the petition by order filed July 1, 2013. The habeas corpus court determined that it was “without jurisdiction in this matter” because the Petitioner was in federal custody.

On July 3, 2013, the Petitioner’s “Motion in Opposition to Order Dismissing Petitioner’s Application for Writ of Habeas Corpus” was filed. In addition to challenging the summary dismissal of his habeas corpus petition for lack of jurisdiction, the Petitioner, argued for relief via a writ of error coram nobis. In the motion, the Petitioner intertwined the terms coram nobis and habeas corpus, but it appears that he attempted to assert the same grounds for coram nobis relief regarding the 1996 drug convictions as he asserted in the habeas corpus petition. The Petitioner admitted again that he was “no longer under any sentence for this charge” in Tennessee. The habeas corpus court entered another order denying the motion, filed August 5, 2013, stating again that it was “without jurisdiction” because the Petitioner was in federal custody and, additionally, because “[p]ursuant to [Tennessee Code Annotated section] 29-21-102, the Petitioner [was] not entitled to the benefits of a writ in the State of Tennessee.”

This Petitioner's notice of appeal document was filed on November 6, 2013. The case is now before this court for our review.

ANALYSIS

On appeal, the pro se Petitioner contends that the habeas corpus court erred by denying the petition, couching his argument in terms of the denial of coram nobis relief. However, the Petitioner again commingles the terms coram nobis and habeas corpus in his appellate filings. Also, he includes Case No. 00-002-1 in his argument on appeal, which was not referenced in the pleadings below. He appears to be contending in his appellate brief that, although he is currently in federal custody, he is still serving a concurrent sentence on Case No. 00-002-1. However, he provides no evidence that such is the case from a four-and-one-half-year imposed in 2000. Moreover, the judgment form on Case No. 00-002-1 states only that the sentence is concurrent with a "present Madison County Case," no reference is made to the federal sentence, and the federal judgment is not a part of the appellate record.

As a preliminary matter, we must address the untimely filing of the notice of appeal document. Tennessee Rule of Appellate Procedure 4(a) provides that the notice of appeal is not jurisdictional and that timely filing may, therefore, be waived in the interest of justice. The Petitioner implores this court to waive the untimely filing of his notice of appeal because he was awaiting the habeas corpus court's ruling on his "Motion in Opposition to Order Dismissing Petitioner's Application for Writ of Habeas Corpus" filed on July 3, 2013. The Petitioner averred that he was never informed that his motion had been denied until a family member inquired with the court clerk's office. He claimed he never received a signed, copy of the August 5, 2013 order; he did admit that he received an unsigned copy from the assistant district attorney general. The Petitioner asks that this court accept his belated notice due to "the court's negligence." The State does not seek dismissal for the untimely filing of the notice of appeal document.

The Petitioner's July 3, 2013 motion, in essence a motion to reconsider, is not a specified motion that tolls the timely filing of a notice of appeal. See Tenn. R. App. P. 4(c). A motion to reconsider is not recognized by the Tennessee Rules of Criminal Procedure. State v. Turco, 108 S.W.3d 244, 245 n.2 (Tenn. 2003). Therefore, it does not toll the time for filing a notice of appeal. State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992). The Petitioner should have filed his notice of appeal document within thirty days of the July 1, 2013 order of summary dismissal. Additionally, the Petitioner's July 3, 2013 motion was not ruled upon until August 5, 2013. His notice of appeal document was filed over two months after that ruling on November 6, 2013. The Petitioner asserts that he never received a signed copy of the August 5, 2013 order. The Petitioner attempted to explain the delay in

filing the notice of appeal and apparently also sought a status update from the court clerk regarding the disposition of his motion. Again, the State does not request dismissal on this ground. Given the posture of the present appeal, this court exercises its authority and waives the timely filing of the notice. See State v. Brent Allen Blye, No. E2011-00787-CCA-R3-PC, 2011 WL 529515, at *4 (Tenn. Crim. App. Aug. 19, 2011) (“We conclude that the interest of justice mandates waiver when the pro se Defendant, who was unschooled in the law, filed various post-trial motions he mistakenly believed would extend the time for filing his notice of appeal.”).

However, we need not tarry long over the Petitioner’s issues. As a prerequisite to habeas corpus relief, a petitioner “must be ‘imprisoned or restrained of liberty’ by the challenged convictions.” Benson v. State, 153 S.W.3d 27, 31 (Tenn. 2004) (quoting Tenn. Code Ann. § 29-21-101). Persons detained because of federal convictions are not entitled to state habeas review of their federal detention. See Tenn. Code Ann. § 29-21-102. The “[u]se of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a habeas corpus challenge to the original conviction long after the sentence on the original conviction has expired.” Hickman v. State, 153 S.W.3d 16, 23 (Tenn. 2004). Moreover, “[h]abeas corpus relief does not lie to address a conviction after the sentence on the conviction has been fully served.” Summers v. State, 212 S.W.3d 251, 257 (Tenn. 2007).

The Petitioner is presently incarcerated in a federal prison on a wholly separate federal conviction, and nothing in the record suggests that he is serving a sentence from any of the challenged judgments concurrently with his federal sentence, notably because the sentences have apparently expired. See Faulkner v. State, 226 S.W.3d 358, 362 (Tenn. 2007). Furthermore, we note that the Petitioner’s claims regarding the ineffectiveness of counsel and the knowing and voluntary nature of his pleas would, at best, render his judgments voidable, not void; therefore, such allegations are not cognizable claims for habeas corpus relief. See Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). The Petitioner’s claims for habeas corpus relief are unavailing.

If we were to treat the petition as one for a writ of error coram nobis, there would likewise be no basis for relief. As the State points out, the Petitioner asserts no newly discovered evidence or facts not known to the trial court at the time of his plea; the only “new” fact asserted by the Petitioner is that his convictions were used to enhance a later federal sentence. The Petitioner’s claim is not proper for a writ of error coram nobis. See Tenn. Code Ann. § 40-26-105. Even if proper, any petition would be well outside the one-year statute of limitations. See Tenn. Code Ann. §§ 27-7-103, 40-26-105; State v. Mixon, 983 S.W.2d 661, 670-71 (Tenn. 1999).

CONCLUSION

Based upon the foregoing, the order of summary dismissal is affirmed.

D. KELLY THOMAS, JR., JUDGE