IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 13, 2018

STATE OF TENNESSEE v. PAUL FLANNIGAN

Appeal from the Criminal Court for Shelby County
No. 99-04120 Lee V. Coffee, Judge

No. W2017-01714-CCA-R3-CD

The defendant, Paul Flannigan, appeals the summary dismissal of his motion, filed pursuant to Tennessee Rule of Criminal Procedure 36.1, to correct what he believes to be an illegal sentence imposed for his Shelby County Criminal Court jury convictions of attempted first degree murder, especially aggravated robbery, aggravated rape, and aggravated burglary. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and TIMOTHY L. EASTER, JJ., joined.

Jessica L. Gillentine, Bartlett, Tennessee (on appeal), and Edwin C. Lenow, Memphis, Tennessee (on Rule 36.1 motion), for the appellant, Paul Flannigan.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; and Amy P. Weirich, District Attorney General, for the appellee, State of Tennessee.

OPINION

A Shelby County Criminal Court jury convicted the defendant of one count of attempted first degree murder, two counts of especially aggravated robbery, three counts of aggravated rape, and one count of aggravated burglary for his home invasion, robbery, and rape of the victims. *State v. Paul Flannigan*, No. W2001-00907-CCA-R3-CD (Tenn. Crim. App., Jackson, Feb. 15, 2002), *perm. app. denied* (Tenn. Sept. 9, 2002). The trial court imposed Range I sentences of 25 years each for the attempted murder, especially aggravated robbery, and aggravated rape convictions, all to be served consecutively to one another, and a concurrent six-year sentence for the aggravated burglary conviction, for a total effective sentence of 125 years. On appeal, this court

reversed and remanded one of the aggravated rape convictions for a new trial and modified the judgments to reflect a total effective sentence of 93 years. *Id.*, slip op. at 5, 9. In all other respects, this court affirmed the judgments, *id.*, slip op. at 1, and later affirmed the denial of the defendant's petition for post-conviction relief from his convictions, *see Paul K. Flannigan v. State*, No. W2003-02979-CCA-R3-PC (Tenn. Crim. App., Jackson, Feb. 28, 2005). A later bid for federal habeas corpus relief was similarly unsuccessful. *Paul Flannigan v. Tony Parker*, No. 05-2269-JPM-tmp (W.D. Tenn. Sept. 4, 2007). Most recently, this court denied the defendant's petition for writ of mandamus. *Paul Flannigan v. State*, No. W2016-00866-CCA-WRM-CO (Tenn. Crim. App., Jackson, July 6, 2016) (Order).

On July 20, 2017, the defendant moved the trial court under Rule 36.1 to correct his sentence, arguing that he had not been awarded pretrial jail credit of 1030 days and that his sentences had been applied retroactively, in violation of the ex-post facto provisions of the Tennessee Constitution and the United States Constitution. The trial court summarily dismissed the motion via an order filed on July 31, 2017.

In this appeal, the defendant reiterates his claim of entitlement to Rule 36.1 relief on the sole ground that his sentences on "judgment sheets 99-0412, 99-0120, 99-0122, 99-0125 and 99-0126 are void because the trial court failed to properly calculate his pretrial jail credit." The State asserts that summary dismissal was appropriate in this case because the defendant failed to state a cognizable claim for relief in a Rule 36.1 proceeding. We agree with the State.

Rule 36.1 provides the defendant and the State an avenue to "seek the correction of an illegal sentence," defined as a sentence "that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1; *see also State v. Wooden*, 478 S.W.3d 585, 594-95 (Tenn. 2015) (holding that "the definition of 'illegal sentence' in Rule 36.1 is coextensive with, and not broader than, the definition of the term in the habeas corpus context"). To avoid summary denial of an illegal sentence claim brought under Rule 36.1, a defendant must "state with particularity the factual allegations," *Wooden*, 478 S.W.3d at 594, establishing "a colorable claim that the sentence is illegal," Tenn. R. Crim. P. 36.1(b). "[F]or purposes of Rule 36.1 . . . 'colorable claim' means a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1." *Wooden*, 478 S.W.3d at 593. The determination whether a Rule 36.1 "motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law, to which de novo review applies." *Id.* at 589 (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007)).

In addressing the issue of the failure to award pre-trial jail credit in the context of a Rule 36.1 claim, our supreme court has stated as follows:

> Although pretrial jail credits allow a defendant to receive credit against his *sentence* for time already served, awarding or not awarding pretrial jail credits does not alter the *sentence* in any way, although it may affect the length of time a defendant is incarcerated. A trial court's failure to award pretrial jail credits may certainly be raised as error on appeal, . . . [b]ut a trial court's failure to award pretrial jail credits does not render the *sentence* illegal and is insufficient, therefore, to establish a colorable claim for relief under Rule 36.1.

State v. Brown, 479 S.W.3d 200, 212-13 (Tenn. 2015).

In the instant case, the defendant's claim of illegality on the basis that he was not properly awarded pretrial jail credits is simply not cognizable in a Rule 36.1 proceeding. *See id.* In any event, the judgment forms at issue are not included in the record. The appellant bears the burden of preparing an adequate record on appeal, *see State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993), and if the appellant fails to prepare an adequate record, this court must presume the trial court's ruling was correct, *see State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993).

Accordingly, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE