

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs June 5, 2018

FILED

07/06/2018

Clerk of the
Appellate Courts

COREY GRAY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-17-208 Roy B. Morgan, Jr., Judge

No. W2017-02267-CCA-R3-PC

The Petitioner, Corey Gray, appeals the Madison County Circuit Court's denial of his untimely petition for post-conviction relief from his convictions of four counts of attempted first degree premeditated murder, four counts of aggravated assault, four counts of employing a firearm during the commission of a dangerous felony, and one count of felony evading arrest and resulting effective sentence of 104 years in confinement. On appeal, the Petitioner contends that the post-conviction court erred by determining that due process did not require tolling the statute of limitations. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

William J. Milam, Jackson, Tennessee, for the appellant, Corey Gray.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Alfred Lynn Earls, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On the night of November 11, 2013, the Petitioner and three other males fired gunshots into a home on Holland Avenue in Jackson. State v. Corey Antuan Gray, No. W2015-00049-CCA-R3-CD, 2015 WL 7536105 at *1 (Tenn. Crim. App. at Jackson, Nov. 24, 2015). At the time of the shooting, Kimberly Swift Jeter; her husband, Donell L. Jeter; and their two sons, Jonathan Swift and Dontavious Jeter, were in the home. Id.

Jonathan Swift and a third son, Joshua Jeter, were affiliated with the Vice Lords gang, and the Petitioner was affiliated with the Crips gang. See id. at *1, 3. On November 12, 2013, the Petitioner gave a statement to a police officer in which he admitted firing two shots into the home before the Tec-9 nine-millimeter gun he was using jammed. Id. at *4. He stated, “The reason I shot at this house is because the people inside the house are responsible for shooting at my house more than one time.” Id.

In March 2014, the Madison County Grand Jury indicted the Petitioner for one count of attempted first degree premeditated murder, one count of aggravated assault, and one count of employing a firearm during the commission of a dangerous felony for each of the four victims. He also was indicted for one count of felony evading arrest. In November 2014, a jury convicted him of all thirteen counts. After a sentencing hearing, the trial court merged each count of aggravated assault into its corresponding count of attempted first degree murder and sentenced the Petitioner to consecutive sentences of twenty years for each attempted murder conviction and six years for each conviction of employing a firearm during the commission of a dangerous felony. The trial court sentenced the Petitioner to one year, six months for evading arrest and ordered that the sentence be served concurrently with the other sentences for a total effective sentence of 104 years in confinement.

This court affirmed the Petitioner’s convictions and sentences on November 24, 2015, and our supreme court denied his Rule 11 application for permission to appeal on March 23, 2016. On August 3, 2017, the Petitioner filed a pro se petition for post-conviction relief, alleging that he received the ineffective assistance of counsel, that his convictions violated double jeopardy, and that his convictions were based on illegally obtained evidence. The State responded to the petition, arguing that it was time-barred because it was filed more than one year after our supreme court denied the Petitioner’s Rule 11 application for permission to appeal. The post-conviction court appointed counsel; ordered that post-conviction counsel file an amended petition, if necessary; and set an evidentiary hearing for October 16, 2017. Post-conviction counsel did not file an amended petition for post-conviction relief.

At the evidentiary hearing, post-conviction counsel advised the post-conviction court that he wanted to question the Petitioner “just about why the petition was filed later than what the statute allows.” The Petitioner briefly testified that in 2017, he was in solitary confinement at Turney Center and did not have access to the documents he needed to file a petition for post-conviction relief. He stated, “And when I came up, I immediately filed it and sent it in.” On cross-examination, the Petitioner testified that he went into solitary confinement in April 2015, and he acknowledged that he remained there until August 2017. The State noted that the certificate of service attached to the petition for post-conviction relief showed that the Petitioner mailed the petition to the

Madison County Circuit Court Clerk on July 31, 2017. The State asked if the Petitioner began filling out the form in July 2017, while he was still in solitary confinement, and the Petitioner answered,

No. When I came out, you know, it was like the beginning, and then I filed. Somebody helped me in the law -- it was in the law library, one of the legal aids. He had helped me, and I had told him. He's like, Man, your time has been barred, but you still gonna file and see what happens. That's what he told me, the legal aid there.

The Petitioner acknowledged that he could send and receive mail in solitary confinement and that prisoners in solitary confinement could talk to their attorneys. He said, though, that he never had an attorney while he was in solitary confinement.

Neither party presented any other evidence at the hearing. The post-conviction court noted that it appointed post-conviction counsel to represent the Petitioner in order to “discuss the issues that might have been omitted from the pro se petition” and that post-conviction counsel did not file an amended petition. The court held that no statutory exception for filing the petition outside the one-year statute of limitations applied and that “good cause has not been shown in any way . . . as to why he did not meet the statutory requirements for statutory limitations.” The court noted that “[a]s the State points out, the petition was filed July of 2017,” while the Petitioner was still in solitary confinement. The court held that even if the Petitioner was in solitary confinement from April 2015 to August 2017, “[h]e had access. He could have filed and he did not, and that access being through pen and paper and mail.” Thus, the court held that due process did not require tolling the statute of limitations and that the petition was time-barred. In a written order filed on October 17, 2017, the post-conviction court reiterated its oral ruling, stating as follows:

The petitioner has not demonstrated any justification set out by statute that would have prevented his filing the petition. For inmates in the Tennessee Department of Correction[s] a petition is deemed filed when it is delivered to a prison official for mailing. The petitioner by his own testimony clearly could have delivered the petition by mail in timely manner. He had access to the mail and could receive and send mail and speak with counsel. There has been no showing of any exception allowed by law or other cause why the petitioner could not have filed his petition in a timely

manner particularly in light of the fact that the petition was first filled out and signed while in solitary confinement.

II. Analysis

The Petitioner contends that due process requires tolling the statute of limitations because he was in solitary confinement from April 2015 to August 2017. The State argues that the petition is time-barred because the evidence shows the Petitioner drafted the petition while he was in solitary confinement, that he would have been able to mail it while he was in solitary confinement, and that he could have timely-filed the petition. We conclude that due process does not require tolling the statute of limitations in this case.

Tennessee Code Annotated section 40-30-102(a) provides that a petition for post-conviction relief must be filed within one year of our supreme court's denying a Rule 11 application for permission to appeal or consideration of the petition will be time-barred. The statute emphasizes that "[t]ime is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise." Tenn. Code Ann. § 40-30-102(a). The statute allows a petition to be filed outside the limitations period for the following reasons: (1) the petition is based on 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"; (2) the petition is based on new scientific evidence; or (3) the petition seeks relief from a sentence that was enhanced because of a previous conviction that was later held to be invalid. Tenn. Code Ann. § 40-30-102(b).

Our supreme court has held that due process may require tolling the statute of limitations. Whitehead v. State, 402 S.W.3d 615, 622-23 (Tenn. 2013). "[A] post-conviction petitioner is entitled to due process tolling of the one-year statute of limitations 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." Bush v. State, 428 S.W.3d 1, 22 (Tenn. 2014) (citing Whitehead, 402 S.W.3d at 361). In explaining the first prong of the analysis, the court stated that "pursuing one's rights diligently 'does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts [to pursue his or her claim].'" Id. (quoting Whitehead, 402 S.W.3d at 631). "[T]he second prong is met when the prisoner's attorney of record abandons the prisoner or acts in a way directly adverse to the prisoner's interests, such as by actively lying or otherwise misleading the prisoner to believe things about his or her case that are not true." Whitehead, 402 S.W.3d at 631. Moreover, 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)).

Prior to Whitehead and Bush, the court had specifically identified the following three circumstances in which due process requires tolling the 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 compliance with the statute of limitations; and (3) when the petitioner’s attorney has committed misconduct. Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995). “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, 428 S.W.3d at 16 (citing Smith v. State, 357 S.W.3d 322, 355 (Tenn. 2011)).

Here, the Petitioner does not allege any of the statutory exceptions to the one-year statute of limitations. He also does not allege that his claim for post-conviction relief arose after the statute of limitations expired, that his mental incompetence prevented compliance with the statute of limitations, or that his attorney committed misconduct. Instead, he argues that he is entitled to due process tolling under Whitehead because he was in solitary confinement from April 2015 to August 2017, “which hindered his ability to file a timely petition for post-conviction relief.”

Our supreme court denied the Petitioner’s Rule 11 application for permission to appeal on March 23, 2016. Therefore, the statute of limitations for filing the petition expired on or about March 23, 2017. According to the certificate of service signed by the Petitioner and attached to his petition for post-conviction relief, the Petitioner mailed the petition to the Madison County Circuit Court Clerk on July 31, 2017. The clerk stamped the petition as filed on August 3, 2017. Therefore, the petition was filed more than four months after the statute of limitations expired.

The post-conviction court found that due process tolling is not required because even if the Petitioner was in solitary confinement from April 2015 to August 2017, he could have filed a timely petition for post-conviction relief. We are compelled to agree with the post-conviction court. The Petitioner testified that while he was in solitary confinement, he did not have access to documents he needed to file the petition. However, he did not specify the documents he needed, and he did not present any proof that he attempted to obtain certain documents but was denied access to them. Moreover, he said he could send and receive mail while he was in solitary confinement, and the record shows that he filled out his petition in July 2017, while he was still in solitary confinement. It was the Petitioner’s burden to prove 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. at Nashville, July 30, 2015). In this case, the Petitioner simply failed to present any proof that his being in solitary confinement prevented him from preparing and timely filing the petition. Accordingly, the post-conviction court properly ruled that the petition is time-barred.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the post-conviction court's denial of the petition for post-conviction relief.

NORMA MCGEE OGLE, JUDGE