IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 9, 2014

TERRY EARL JACKSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
Nos. 253820, 259470 Don W. Poole, Judge

No. E2014-01511-CCA-R3-PC - Filed April 14, 2015

Petitioner, Terry Earl Jackson, appeals the trial court's summary dismissal of his motion filed pursuant to Tennessee Rule of Criminal Procedure 36.1. He alleges that his sentences are illegal because his concurrent sentences had to run consecutively because he was on probation at the time of the offenses. After a thorough review, we affirm the judgment of the trial court.

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

THOMAS T. WOODALL, P. J., delivered the opinion of the Court, in which ALAN E. GLENN and TIMOTHY L. EASTER, JJ., joined.

Terry E. Jackson, Atlanta, Georgia, *Pro Se*.

Herbert H. Slatery III, Attorney General and Reporter; Lacy Wilber, Senior Counsel; Neal Pinkston, District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

On October 5, 2005, Petitioner pled guilty in case number 253820 to possession of cocaine in an amount less than .5 grams with intent to sell or deliver with an agreed sentence of four years to be served on probation and simple trespass in case number 254804 with an agreed thirty-day suspended sentence to be served concurrently. On June 27, 2006, Petitioner pled guilty in case number 259470 to possession of cocaine in an amount less than .5 grams with intent to sell or deliver with an agreed sentence of eight years to be served in confinement. The plea agreement also provided that Petitioner "[a]dmit violation" of

probation in case number 253820 and that the eight year sentence in case number 259470 would run concurrently with the probation violation.

On April 12, 2013, Petitioner filed a "Motion to Reopen State Judgment Orders." In the motion, Petitioner argued that there was a "clerical error" on the judgment for case number 259470 because the sentence should have run consecutively to "1131465." Petitioner also argued that his concurrent sentences were void because they violated Rule 32(c) of the Tennessee Rules of Criminal Procedure. On April 12, 2013, the trial court entered an order on the motion noting that case number 1131465 referenced in the motion to reopen was a general sessions court case. The trial court found:

> Because the defendant does not seek the correction of the judgment in case 259470 to include a provision making the sentence in that case, contrary to the plea agreement, consecutive to the sentence in case 253820 the Court disregards the allegation of a clerical error and treats the subject "motion" as an application for the writ of *habeas corpus*.

Citing T.C.A. § 29-21-101, the trial court also held that an allegation in a habeas petition that a sentence is "illegally concurrent with a prior sentence is no longer a ground for the writ." The trial court then summarily dismissed the petition. However, the trial court "*sua sponte*" determined that the "omission from the judgment in case 259470 of a provision making the sentence in that case concurrent to the sentence in case 253820 . . . di[d] not accurately reflect the plea agreement between the parties and d[id] constitute a clerical error subject to correction at any time pursuant to Tenn. R. Crim. P. 36." The trial court ordered the judgment in "case 259470 to be corrected to reflect that the sentence in that case was concurrent with the sentence in case 253820 . . ."

On May 8, 2014, Petitioner filed a second "Motion to Reopen Judgments and Correct Clerical Errors that Renders [sic] Judgment Void." In the second motion, Petitioner argued that the trial court erred by ordering the sentence is case number 259470 to run concurrently with case number 253820. Petitioner argued concurrent sentences violated Rule 32 of the Tennessee Rules of Criminal Procedure which mandates a sentence to be run consecutively to a previous sentence if the second offense was committed while a defendant was on probation or parole for the first offense. Petitioner relied on Tennessee Rule of Criminal Procedure 36.1 in his motion. The trial court entered a subsequent order finding that Petitioner's motion was "basically the same argument and motion" that Petitioner had made in his first motion. The trial court summarily dismissed the second motion. Petitioner now appeals from the order dismissing the second motion, filed pursuant to Tennessee Rule of Criminal Procedure 36.1.

II. Standard of Review

In 2013, the Tennessee General Assembly promulgated Rule 36.1, which provides, in part:

> (a) Either the defendant or the state may, at any time, seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.
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> (b) Notice of any motion filed pursuant to this rule shall be promptly provided to the adverse party. If the motion states a colorable claim that the sentence is illegal, and if the defendant is indigent and is not already represented by counsel, the trial court shall appoint counsel to represent the defendant. The adverse party shall have thirty days within which to file a written response to the motion, after which the court shall hold a hearing on the motion, unless all parties waive the hearing.
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> . . . .

The legislature also amended Tennessee Rule of Appellate Procedure 3(b) to provide both the State and a defendant with an appeal as of right from "an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure." Therefore, Rule 36.1 provided a new appeal as of right for individuals who had received an illegal sentence. Pursuant to Rule 36.1, appellant would be entitled to a hearing and appointment of counsel if he stated a colorable claim for relief. Tenn. R. Crim. P. 36.1(b); *see Marcus Deangelo Lee v. State*, No. W2013-01088-CCA-R3-CO, 2014 WL 902450, at *6 (Tenn. Crim. App., Mar. 7, 2014), *no perm. app. filed*. Because Rule 36.1 does not define "colorable claim," a panel of this court adopted the definition of a colorable claim used in the context of post-conviction proceedings from Tennessee Supreme Court Rule 28 § 2(H): "A colorable claim is a claim . . . that, if taken as true, in the light most favorable to the [appellant], would entitle [appellant] to relief . . . ." *State v. David Morrow*, No. W2014-00338-CCA-R3-CO, 2014 WL 3954071, at *2 (Tenn. Crim. App., Aug. 13, 2014), *no perm. app. filed*.

In this case, Petitioner argues that his sentence in case number 259470 was illegal because it was not ordered to run consecutively to case number 253820 since he was on probation when he committed the offense in case number 259470. We disagree.

Tenn. R. Crim. P. Rule 32(c)(3) states that

> [w]hen the defendant has additional sentences not yet fully served as the result of convictions in the same or other courts and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply:
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> (A) to a sentence for a felony committed while on parole for a felony;
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> (B) to a sentence for escape or for a felony committed while on escape;
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> (C) to a sentence for a felony committed while the defendant was released on bail and the defendant is convicted of both offenses; and
>
> (D) for any other ground provided by law.

There is nothing in the language of Rule 32(c) that *mandates* the imposition of consecutive sentencing when a defendant commits a felony offense while on probation. A trial court has *discretion* to impose a consecutive sentence when a defendant is sentenced for an offense committed while on probation. T.C.A. § 40-35-115(b); *see also Frederick O. Edwards v. State*, No. W2014-01463-CCA-R3-CD, 2014 WL 7432166 (Tenn. Crim. App. Dec. 30, 2014). Petitioner is not entitled to relief.

The trial court did not err in summarily dismissing the petition. We affirm the judgment of the trial court.

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THOMAS T. WOODALL, PRESIDING JUDGE