IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 17, 2019

JASON MATTHEW WYATT v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sumner County
No. 301-2018 Dee David Gay, Judge

No. M2019-00250-CCA-R3-PC

The Petitioner, Jason Matthew Wyatt, appeals the Sumner County Criminal Court's order summarily denying relief pursuant to Tennessee Rule of Criminal Procedure 36.1 and summarily dismissing post-conviction relief. The Petitioner argues the trial court erred in (1) holding that the Criminal Savings Statute in Code section 39-11-112 did not apply to the amendments to the theft grading statute in Code section 39-14-105 and (2) dismissing his Rule 36.1 motion/post-conviction petition without appointing counsel. We reverse the judgment of the trial court and remand for further proceedings in accordance with this opinion.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and D. KELLY THOMAS, JR., J., joined.

Jason Matthew Wyatt, Clifton, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Ray Whitley, District Attorney General; and C. Ronald Blanton, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

This case concerns a theft committed by the Petitioner on August 18, 2016. On August 17, 2017, the Petitioner petitioned the court for acceptance of a guilty plea to theft of property valued at $1,000 or more but less than $10,000 in exchange for a sentence of

eight years at thirty-five percent. See Tenn. Code Ann. § 39-14-105(a)(3) (Supp. 2016). An incident report included in the appellate record lists the value of the property associated with the Petitioner's theft to be $2,223.98.[1]

The theft grading statute in effect at the time the Petitioner committed the offense provided that a theft of property is "[a] Class D felony if the value of property . . . obtained is one thousand dollars ($1,000) or more but less than ten thousand dollars ($10,000)[.]" Tenn. Code Ann. § 39-14-105(a)(3) (Supp. 2016). On August 17, 2017, the trial court accepted the guilty plea to theft of property, a Class D felony, and sentenced the Petitioner pursuant to his plea agreement as a Range II, multiple offender to eight years at thirty-five percent in the Tennessee Department of Correction, with this sentence served consecutively to the Petitioner's prior Sumner County sentence in case number 502-2014.

On February 9, 2018, the Petitioner filed a document entitled "Pro Se Petition for Post-Conviction Relief." Therein, the Petitioner asserted that "Section 39-14-105, which went into effect on January 1, 2017, states that Theft of Property valued between $1,000 and $2,500 Dollars [sic] constitutes a [C]lass E felony." The Petitioner explained that "[o]n August 17, 2017, at the advisement of court-appointed counsel . . . , [he] entered a guilty plea and plea agreement with said court and [the State] for a sentence of eight (8) years @ 35% to serve." However, "[a]ccording to statute 40-35-112(b), a Range II Class E felony carries a sentence of not less than two (2) nor more than four (4) years at 35%, and subsection (c) states that a Range III [C]lass E felony carries a sentence of not less than four (4) nor more than six (6) years at 45%, making said plea agreement an illegal sentence which falls outside the sentencing guidelines." The Petitioner then stated that he was "hereby request[ing] relief from an illegal sentence for case #236-2017 based on these facts."

At the April 6, 2018 hearing, the trial court informed the Petitioner that pro se motions were "very, very difficult because they're not written by attorneys[,]" which made it hard "to really determine what a person wants." The court then said, "It's my understanding that you filed this motion and you say you've got an illegal sentence and you were saying that you should get the benefit of the lesser sentence," and the Petitioner replied, "Yes, Your Honor." The court stated, "According to the present case law and

[1] At the April 6, 2018 hearing on the Petitioner's "Pro Se Petition for Post-Conviction Relief," the State never disputed the value of the property associated with the Petitioner's theft. In fact, the State acknowledged at this hearing that depending on whether the Criminal Savings Statute applied to the amendments to the theft grading statute, "It's the difference between [the Petitioner's theft conviction] being a D felony and an E felony." Moreover, the State, in its appellate brief, conceded that "[t]here are no questions of fact" and that this appeal involved "[t]he question of law regarding the applicability of the criminal savings statute to the theft grading statute[.]"

statute, I agree with you one hundred percent. There was a recent case in dicta that said the same thing, but we're waiting on a ruling [in State v. Ashley N. Menke, No. M2017-00597-CCA-R3-CD, 2018 WL 2304275 (Tenn. Crim. App. May 21, 2018), aff'd in part, rev'd in part, No. M2017-00597-SC-R11-CD, ___ S.W.3d ___ (Tenn. Nov. 27, 2019),] it's my understanding, on appeal from this county on this issue." The prosecutor then announced that the Attorney General's office had informed him that it expected an opinion from the Tennessee Court of Criminal Appeals in the Ashley N. Menke case in the next six weeks and that there were several other cases on this issue that had been heard by the Court of Criminal Appeals the same day. After hearing from the prosecutor, the trial court announced:

> [S]ince we have a case that's pending in the Court of [Criminal] Appeals, I think it's in everybody's best interest and especially in the interest of the district attorney, since they've appealed that case, to see what the Court of [Criminal] Appeals says.
>
> . . . I embrace your issue, you filed it on time, and we'll deal with it when this opinion of the Court of [Criminal] Appeals comes [out].

The prosecutor next informed the court that the Petitioner was a Range III offender, even though the Petitioner had been allowed to plead out of range as a Range II offender. The prosecutor said, "[I]f this [guilty plea] is set aside and we start over, [the Petitioner] will be considered a Range III offender for sentencing purposes." The Petitioner replied that he understood what the prosecutor had said about his range and that he still wished to pursue his motion. At the conclusion of the hearing, the trial court said it was going to reset the Petitioner's case and see if there was an opinion by the Court of Criminal Appeals in Ashley N. Menke by the time the Petitioner returned to court.

At the June 29, 2018 hearing, the trial court acknowledged that the Petitioner was not present for this hearing but stated that it did not know why transportation was unavailable. The court recognized that since the last hearing, the Tennessee Court of Criminal Appeals had decided State v. Ashley N. Menke, 2018 WL 2304275, at *8, which held that "the criminal savings statute is not applicable so as to lessen the punishment for theft offenses committed before the effective date of the [Public Safety A]ct even if a defendant is sentenced after the effective date." The court then concluded that in light of the Court of Criminal Appeals' decision in Ashley N. Menke, the Petitioner had failed to present a colorable claim.

On July 11, 2018, the trial court entered an order summarily denying Rule 36.1 relief and summarily dismissing post-conviction relief. In this order, the court held, as follows:

> This Court has withheld from any action on this case because this issue was pending before the Tennessee Court of Criminal Appeals. On May 21, 2018, [t]he Court of Criminal Appeals ruled on the Sumner County case of State v. Ashley Menke, No. M2017-00597[-CCA-R3-CD, 2018 WL 2304275, at *8] (Tenn. Crim. App. May 21, 2018)[,] holding that "the criminal savings statute is not applicable so as to lessen the punishment for theft offenses committed before the effective date of the act even if a defendant is sentenced after the effective date." . . .
>
> Therefore, because of this ruling there is no basis for a petition for Post-Conviction Relief, nor is there a colorable claim under Rule 36.1 T.R.C.P. The Post-Conviction Relief Petition is DISMISSED and the Rule 36.1 Motion is DENIED.

The Petitioner filed his notice of appeal in this court on December 28, 2018, and this court waived the timely filing requirement imposed by Tennessee Rule of Appellate Procedure 4(a).

ANALYSIS

I. Application of the Criminal Savings Statute. The Petitioner generally contends that although he committed his theft in 2016, he should be sentenced under the 2017 statute pursuant to the Criminal Savings Statute in Code section 39-11-112. He notes that at the time of his offense, a theft of property valued at $2,223.98 was a Class D felony. See Tenn. Code Ann. § 39-14-105 (Supp. 2016). However, he asserts that when he was sentenced in 2017, the amendments to the theft grading statute changed the classification for thefts and set the theft of property valued at more than $1,000 but less than $2,500 as a Class E felony. See Tenn. Code Ann. § 39-14-105 (Supp. 2017). The State counters that because the Criminal Savings Statute in Code section 39-11-112 is not applicable to the amended theft grading statute in Code section 39-14-105, the Petitioner is not entitled to a lesser sentence under the amendments to the theft grading statute. In light of the Tennessee Supreme Court's recent opinions in the companion cases of State v. Menke, ___ S.W.3d ___, No. M2017-00597-SC-R11-CD, 2019 WL 6336427 (Tenn.

Nov. 27, 2019), State v. Keese, ___ S.W.3d ___, No. E2016-02020-SC-R11-CD, 2019 WL 6336386 (Tenn. Nov. 27, 2019), and State v. Tolle, ___ S.W.3d ___, No. E2017-00571-SC-R11-CD, 2019 WL 6336390 (Tenn. Nov. 27, 2019), we conclude that the trial court erred in holding that the Criminal Savings Statute did not apply to the amendments to the theft grading statute. We also conclude that the Petitioner received an illegal sentence pursuant to his plea agreement.

Code section 39-11-112, also known as the Criminal Savings Statute, provides:

> When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

Tenn. Code Ann. § 39-11-112 (emphasis added).

At the time the appellate briefs in this case were filed, there was a split of authority between different panels of this court regarding whether the amended theft grading statute provided a "lesser penalty," thereby requiring the application of the Criminal Savings Statute. Compare State v. Charles Keese, No. E2016-02020-CCA-R3-CD, 2018 WL 1353697 (Tenn. Crim. App. Mar. 15, 2018), aff'd and remanded (Tenn. Nov. 27, 2019), State v. Michael Eugene Tolle, No. E2017-00571-CCA-R3-CD, 2018 WL 1661616 (Tenn. Crim. App. Mar. 19, 2018), aff'd and remanded (Tenn. Nov. 27, 2019), State v. Steven Swinford, No. E2017-01164-CCA-R3-CD, 2018 WL 1831126 (Tenn. Crim. App. Apr. 17, 2018), State v. Steven Michael Odom, No. W2018-00634-CCA-R3-CD, 2019 WL 1126068 (Tenn. Crim. App. Mar. 12, 2019) perm. app. denied (Tenn. Dec. 9, 2019), State v. Brandon Ramel Cole-Pugh, No. W2017-02402-CCA-R3-CD, 2019 WL 1239868 (Tenn. Crim. App. Mar. 18, 2019) perm. app. denied (Tenn. Dec. 10, 2019), and State v. Ellen Becker Goldberg, No. M2017-02215-CCA-R3-CD, 2019 WL 1304109 (Tenn. Crim. App. Mar. 20, 2019) perm. app. denied (Tenn. Dec. 5, 2019), with State v. Ashley N. Menke, No. M2017-00597-CCA-R3-CD, 2018 WL 2304275 (Tenn. Crim. App. May 21, 2018), aff'd in part, rev'd in part (Tenn. Nov. 27, 2019).

However, on November 27, 2019, the Tennessee Supreme Court resolved this split of authority when it issued its opinions in State v. Menke, State v. Keese, and State v.

Tolle. In State v. Menke, ___ S.W.3d at ___, 2019 WL 6336427, at *1, the defendant entered guilty pleas to five felonies and three misdemeanors, including one count of theft, with the trial court to determine the appropriate sentences following a sentencing hearing, and evidence was presented showing that the value of the property for the theft count was exactly $1,000. At the sentencing hearing, the trial court took the matter under advisement without sentencing the defendant and asked the parties to submit briefs. Id. The defendant, in her brief, argued that the Criminal Savings Statute required the court to sentence her under the amendments to the theft grading statute because the amended statute provided for a lesser penalty. Id. On January 1, 2017, the Public Safety Act, which included the amended theft grading statute, became effective. Id. Thereafter, on March 10, 2017, the trial court sentenced the defendant to an eleven-month and twenty-nine-day sentence pursuant to the Criminal Savings Statute in Code section 39-11-112. Id. at *2. However, the judgment form entered for this conviction showed that the offense was a Class D felony. Id. The trial court later entered a corrected order clarifying that the theft count had to be punished as a Class A misdemeanor. Id. The State appealed, arguing that the trial court had improperly sentenced the defendant. Id. The Court of Criminal Appeals affirmed the defendant's conviction but vacated the sentence imposed for the theft conviction. Id. (citing Ashley N. Menke, 2018 WL 2304275, at *7-8). The Tennessee Supreme Court granted the defendant's application for permission to appeal. Id. at *3.

The Tennessee Supreme Court, after concluding that Code section 40-35-402(b)(1) served as a basis for the court's jurisdiction of this case, considered whether the amendments to the theft grading statute in Code section 39-14-105 are applicable when the defendant's offense occurred before the amendments' effective date but the defendant was sentenced after the amendments' effective date. Id. at *8. The court ultimately concluded that the Criminal Savings Statute is applicable to the amendments to the theft grading statute:

> After our thorough review, we are persuaded that the Criminal Savings Statute does apply to the amended theft grading statute. We remain particularly unconvinced that the value of the stolen property was intended to be an essential element of the offense of theft. This Court has made clear that value is a jury question. See State v. Hamm, 611 S.W.2d 826, 828-29 (Tenn. 1981) ("In determining the value of stolen property . . . , the trier of fact is to determine the fair cash market value of the stolen property at the time and place of the theft . . . ."). Still, it does not necessarily follow that value is an essential element. As noted above, the fair market value of the stolen property is a question determined by the jury after the defendant is found guilty of theft beyond a reasonable doubt. It is a separate determination made after a defendant's guilt has been established

> and pursuant to a different statute. Moreover, the inability to ascertain the stolen property's value is not fatal to the State's charge against the defendant. See Tenn. Code Ann. § 39-11-106(36)(C) (2014) ("If property or service has value that cannot be ascertained . . . , the property or service is deemed to have a value of less than fifty dollars ($50.00)[.]"). We, therefore, agree with the Keese panel of the Court of Criminal Appeals that the value of the stolen property is not an essential element of the offense of theft.

Id. at *11 (footnote omitted).

The court then concluded that the amendments to the theft grading statute effectively decreased the punishment for some crimes:

> While we cannot fully agree with the defendant's argument that the theft grading statute is a sentencing statute, we also cannot ignore the direct impact that the theft grading statute has on punishment. Under the subject statute, the stolen property's value is used to determine the corresponding offense class, and then, under section 40-35-111, the offense class is used to determine an authorized sentence. So, by raising the value ranges associated with each offense class—e.g., from $500 or less for Class A misdemeanor theft to $1,000 or less—the legislature reduced the punishment for the crime. See also Tenn. Code Ann. § 39-14-105, Sentencing Comm'n Cmts. ("This section provides the punishment for the offenses of theft. These offenses are punished according to the value of the property or services obtained."); Tenn. Code Ann. § 39-14-408(c)(2) (The statute criminalizing vandalism provides that the offense "shall be punished as for theft under § 39-14-105 . . . .").

Id. at *13 (footnote omitted). The court explained that "because the amendments at issue clearly provide for a 'lesser penalty' than the previous version of the theft grading statute, . . . the condition provided in the Criminal Savings Statute is satisfied[,] and . . . the amended version of the theft grading statute is applicable even where, as here, the offense occurred before the amendment's effective date." Id. (footnote omitted). Accordingly,

the court held that the trial court's imposition of a sentence of eleven-months and twenty-nine days for a Class A misdemeanor was proper. Id.

In State v. Keese, ___ S.W.3d at ___, 2019 WL 6336386, at *1, which was issued concurrently with Menke, the trial court gave the defendant the benefit of the amended theft grading statute in Code section 39-14-105 of the Public Safety Act, even though this act had not yet become effective, and sentenced the defendant, a Range III, career offender, to six years for a Class E felony, rather than sentencing him for a Class D felony, because the value of the property associated with the theft was $1,000 or more but less than $2,500. The State and the defendant appealed, and the Court of Criminal Appeals affirmed the defendant's conviction but vacated the sentence imposed by the trial court and remanded the case for entry of a twelve-year sentence, which reflected the appropriate sentence for a Class D felony. Id. at *1-2. The Tennessee Supreme Court granted the defendant's application for permission to appeal. Id. at *2. After concluding that appellate jurisdiction was proper pursuant to Code section 40-35-402(b)(1), the Tennessee Supreme Court held that "while the Court of Criminal Appeals did not err in determining that the Criminal Savings Statute applied generally, the amended version of the theft grading statute cannot apply in the case before us because the defendant was sentenced prior to the Public Safety Act's effective date." Id. at *5-6. It then affirmed the decision of the Court of Criminal Appeals to vacate the sentence imposed by the trial court and modified the trial court's judgment to reflect a conviction for Class D felony theft and a twelve-year sentence. Id. at *7.

In State v. Tolle, ___ S.W.3d at ____, 2019 WL 6336390, at *1, which was also issued concurrently with Menke, the defendant moved to dismiss the violation warrant at his probation revocation hearing and asked for the trial court to reduce the conviction class of his 2012 conviction for theft of property valued at more than $500 but less than $1,000 from a Class E felony to a Class A misdemeanor in light of the amendments to the theft grading statute in Code section 39-14-105. The trial court found that the defendant had violated the terms of his probation but elected to reduce the defendant's sentence to eleven months and twenty-nine days for a Class A misdemeanor, and the State appealed. Id. at *2. The Court of Criminal Appeals held that the State's appeal was improperly filed but elected to treat the appeal as a petition for the common law writ of certiorari; it then concluded that the trial court had erred in altering the class of the conviction offense following the revocation of the defendant's probation, and it vacated the trial court's order modifying the defendant's sentence to eleven months, twenty-nine days for a Class A misdemeanor. Id. Thereafter, the Tennessee Supreme Court granted the defendant's application for permission to appeal. Id. After concluding that Tennessee Rule of Criminal Procedure 35 served as the basis for the court's appellate jurisdiction, the Tennessee Supreme Court held, "Although we have concluded that the Criminal Savings Statute is generally applicable to the amended theft grading statute, here, the defendant's

punishment was imposed in August 2012 when he pleaded guilty to his crimes under the pre-2017 version of the theft grading statute." Id. at *3, *5. After concluding that the trial court abused its discretion when it modified the offense class and sentence pursuant to the amended version of the theft grading statute following the revocation of the defendant's probation, the court affirmed the decision of the Court of Criminal Appeals that vacated the sentence imposed by the trial court and then remanded the case to the trial court for further proceedings consistent with its opinion. Id. at *5.

In the present case, the Petitioner argues that because the Court of Criminal Appeal's opinion in Charles Keese had been released at the time of his April 6, 2018 hearing, the trial court should have sentenced him under the amended theft grading statute instead of waiting for the Court of Criminal Appeals' decision in Ashley N. Menke. While we do not believe that the trial court abused its discretion in resetting the Petitioner's case to June 29, 2018, as explained below, we do conclude that the trial court erred in summarily denying the Petitioner's request for Rule 36.1 relief.

Rule 36.1 allows a defendant or the State to seek the correction of an unexpired illegal sentence. See Tenn. R. Crim. P. 36.1(a)(1); State v. Brown, 479 S.W.3d 200, 211 (Tenn. 2015). For the purposes of Rule 36.1, "an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1(a)(2). To avoid summary denial of an illegal sentence claim brought under Rule 36.1, the defendant must establish a colorable claim that the sentence is illegal. Tenn. R. Crim. P. 36.1(b)(2). For the purposes of Rule 36.1, a colorable claim is 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." State v. Wooden, 478 S.W.3d 585, 593 (Tenn. 2015). Examples of illegal sentences include:

> (1) a sentence imposed pursuant to an inapplicable statutory scheme; (2) a sentence designating a [Release Eligibility Date (RED)] where a RED is specifically prohibited by statute; (3) a sentence ordered to be served concurrently where statutorily required to be served consecutively; and (4) a sentence not authorized for the offense by any statute.

Davis v. State, 313 S.W.3d 751, 759 (Tenn. 2010) (citations omitted). The determination of whether a Rule 36.1 motion states a colorable claim is a question of law, which this court reviews de novo. Wooden, 478 S.W.3d at 589 (citing Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007)). The determination of whether a sentence is illegal is also a question of law, which this court reviews de novo. See State v. Al Mutory, 581 S.W.3d 741, 744 (Tenn. 2019).

By the June 29, 2018 hearing, the trial court had the benefit of Court of Criminal Appeals' decision in Ashley N. Menke, but it also had the benefit of strong contrary authority based on the Court of Criminal Appeals' decisions in Charles Keese, Michael Eugene Tolle, and Steven Swinford, which supported the Petitioner's claim that his sentence was illegal. Given the substantial legal authority that supported the Petitioner's request for relief, we conclude that the trial court erred in holding that the Petitioner's pro se petition, which we construe as a Rule 36.1 motion, failed to state a colorable claim. See Tenn. R. Crim. P. 36.1(b)(2). Moreover, given the conflicting authority on this issue that existed at the time, we also believe the trial court should have, at a minimum, determined that a hearing was necessary in order to give both parties the opportunity to argue their respective positions based on the applicable case law. See Tenn. R. Crim. P. 36.1(b)(3). In addition, the trial court should have appointed counsel to represent the Petitioner, who was indigent, prior to holding a hearing on this motion. See id.

In light of the Tennessee Supreme Court's opinions in Menke, Keese, and Tolle, we conclude that the trial court erred in summarily denying relief after concluding that the Criminal Savings Statute in Code section 39-11-112 did not apply to the amendments to the theft grading statute in Code section 39-14-105. Here, because the record shows that the value of the property taken was $2,223.98 and because the Petitioner entered a guilty plea to a Class D felony, rather than a Class E felony entitling him to a lesser penalty under the amended theft grading statute, we conclude that the Petitioner received an illegal sentence pursuant to his plea agreement. See Tenn. Code Ann. § 39-14-105(a)(2) (Supp. 2017); Tenn. R. Crim. P. 36.1(a)(2). Moreover, because the Petitioner would have received a lesser penalty for Class E felony theft, we conclude that the illegal aspect of the Petitioner's sentence was a material component of his plea agreement and was not to the Petitioner's benefit. See Tenn. R. Crim. P. 36.1(c)(3)(C).

Accordingly, we remand this case to the trial court for the Petitioner to be appointed counsel and given the opportunity to withdraw his plea. See id. If the Petitioner chooses to withdraw his plea, then the trial court "shall file an order stating its findings that the illegal aspect was a material component of the plea agreement and was not to the defendant's benefit, stating that the defendant withdraws his or her plea, and reinstating the original charge against the defendant." Id. However, if the Petitioner, following the appointment of counsel, chooses not to withdraw his plea, then the trial court must enter an amended judgment form reflecting a conviction offense for theft of property valued at more than $1,000 but less than $2,500, a Class E felony, and setting forth the correct sentence for the Petitioner as a Range II, multiple offender convicted of Class E felony theft. See id. This amended judgment form shall reflect that the Petitioner is a Range II offender because the illegality concerning the Petitioner's sentence stemmed from the designation of his offense class, not his sentencing range.

Although we have concluded that the trial court erred in holding that the Criminal Savings Statute did not apply to the amended theft grading statute, we will nevertheless address the additional arguments made by the Petitioner in his appeal.

Due Process Rights. The Petitioner argues that the trial court violated his due process rights when it recognized that he had received an illegal sentence at the April 6, 2018 hearing but failed to correct his sentence at that time pursuant to the Court of Criminal Appeals' decision in Charles Keese or, alternatively, failed to allow him to withdraw his guilty plea. He claims that at the time of the April 6, 2018 hearing, the trial court "possessed all the legal conclusions of law required to complete" the proceedings and, therefore, was not justified in "'wait[ing]' on a pending, future" decision by the Court of Criminal Appeals in Ashley N. Menke, which might or might not change legal precedent on this issue. The Petitioner, citing West v. Schofield, 468 S.W.3d 482 (Tenn. 2015), argues that his case was ripe for a judicial decision at the April 6 hearing. See id. at 490 (holding that the ripeness doctrine "requires a court to answer the question of whether the dispute has matured to the point that it warrants a judicial decision" (citation and internal quotation marks omitted)).

The State asserts that the Petitioner's reference to West is "entirely out of context and has no application to the current scenario." We agree. The record shows the trial court recognized that the Petitioner's claim was identical to the claim under review by this court in Ashley N. Menke and delayed deciding the Petitioner's case until this court had released its opinion in Ashley N. Menke. We note that the decision to grant or deny a continuance rests within the sound discretion of the trial court. State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991); see Tenn. R. Crim. P. 12(c). Moreover, "[t]he ability of the trial court judge to control the docket and the flow of justice therefrom is a critical ingredient to the proper functioning of our court system." State v. Barbara Norwood, No. 03-C-01-9111-CR-00366, 1992 WL 362561, at *2 (Tenn. Crim. App., at Knoxville, Dec. 10, 1992); see State v. Benn, 713 S.W.2d 308, 310 (Tenn. 1986) (recognizing the "inherent common law power of [a] trial court to control its own jurisdiction and docket"). A trial court should balance the potential harm to the defendant caused by a delay against the potential harm to the State caused by no delay and should balance these potential harms within the context of the court's duty to administer the criminal justice system within its circuit, including the control of its docket. Morgan, 825 S.W.2d at 117. The party alleging errors regarding the grant or denial of a continuance has the burden of showing that the action of the trial court was prejudicial. Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973).

Our evaluation of the record shows that the trial court did not abuse its discretion in continuing the Petitioner's case to June 29, 2018. We have already concluded,

pursuant to the Tennessee Supreme Court's decisions in Menke, Keese, and Tolle, that the trial court erred in concluding that the Criminal Savings Statute in Code section 39-11-112 did not apply to the amendments to the theft grading statute in Code section 39-14-105. However, because the Petitioner has failed to show that the trial court's decision to wait on this court's opinion in Ashley N. Menke prejudiced him or violated his due process rights, he is not entitled to relief on this issue.

Withdrawal of Guilty Plea under Rule 36.1. The Petitioner also asserts that the trial court violated his due process rights by denying him "the right to withdraw his plea agreement" pursuant to the "clearly established procedures" of Rule 36.1. He claims that at the April 6, 2018 hearing, the prosecutor was "open to the [Petitioner's] request for probation consideration" and if the trial court had "simply followed the Rule 36.1 motion procedures[,] the [Petitioner] and the [St]ate would no doubt have entered into amicable negotiations to this end." He claims that had the trial court allowed him to withdraw his guilty plea, he would have had the "opportunity to possibly negotiate another plea agreement or pursue the due process right of a jury trial in regards to the complex, changing set of legal questions surrounding the case."

We have already held that the trial court erred in failing to follow the procedures outlined in Rule 36.1 and erred in holding that the Criminal Savings Statute in Code section 39-11-112 did not apply to the amendments to the theft grading statute in Code section 39-14-105. Because we have already granted the Petitioner relief on this issue, we will not restate our analysis here.

Stare Decisis. In addition, the Petitioner contends that he was entitled to relief at the time the trial court conducted his April 6, 2018 hearing based upon "the legal principle of stare decisis." He asserts that pursuant to this principle, the trial court should have been bound by Court of Criminal Appeals' decision in Charles Keese at the time of the April 6, 2018 hearing and should not have "postponed" his decision to wait for the Court of Criminal Appeals' decision in Ashley N. Menke. He claims that courts should not be able to "unjustifiably suspend proceedings at will until the 'winds of justice' shift back into a direction more beneficial and convenient to the [S]tate instead of the [Petitioner] whenever the [Petitioner] is in a more advantageous position[.]"

"The doctrine of stare decisis embodies the principle that a judicial decision should not be lightly overruled once it has been implemented and acted under for a period of time as long as the decision is not repugnant to some rule of law of vital importance." Hooker v. Haslam, 437 S.W.3d 409, 422 (Tenn. 2014) (citing In re Estate of McFarland, 167 S.W.3d 299, 305 (Tenn. 2005)). However, the doctrine of stare decisis only applies to binding precedent. State v. Pruitt, 415 S.W.3d 180, 228 (Tenn. 2013); Staten v. State, 232 S.W.2d 18, 19 (Tenn. 1950). Because all of the relevant cases at the time of the trial

court's decision in this case were unpublished opinions of this court, they constituted only persuasive authority and were not binding precedent. See Tenn. S. Ct. R. 4(G)(1) ("Unless designated 'Not for Citation,' 'DCRO' or 'DNP' pursuant to subsection (E) of this Rule, unpublished opinions for all other purposes shall be considered persuasive authority."); State v. Transil, 72 S.W.3d 665, 667 (Tenn. Crim. App. 2002). Because the doctrine of stare decisis does not apply to these unpublished opinions, the Petitioner is not entitled to relief on this issue.

Abuse of Discretion. The Petitioner also asserts that the trial court's "reasoning and actions in this specific legal circumstance w[ere] clearly an abuse of the court's discretion when aligned with and scrutinized by the criteria set-forth [sic] by the abuse of discretion standard." He claims he was "eligible for relief at the time of the [April 6, 2018] hearing[,] but the trial court violated [his] due process right[s] by simply imposing its own arbitrary decision[.]" Citing Esparza v. Sheldon, 765 F.3d 615, 624-25 (6th Cir. 2014), the Petitioner argues that the trial court only would have been able to justify its continuance of this case if "such a delay was reasonably necessary and if the outcome would not have been any different" for the Petitioner.

We have already concluded that the trial court did not abuse its discretion when it continued the Petitioner's case to June 29, 2018. To the extent that the Petitioner challenges the trial court's decision to summarily deny his petition, we have already granted the Petitioner relief on this issue.

"Law of the Land" and Equal Protection Violation. The Petitioner asserts that "for approximately 15 months[,] defendants in similar cases had been granted relief based on the existing conclusions of law and legal precedent as typified by [the Court of Criminal Appeals' decision in] State v. Keese." He argues that the "law of the land" clause in the Article I, section 8 of the Tennessee Constitution and the "equal protection" clause in the Fourteenth Amendment entitle him to the "same relief that previous defendants have already been granted." In particular, he claims that the Court of Criminal Appeals' decision in Charles Keese "clearly established what the 'law of the land' was at the time" and that it "should be applied equally to all relevant defendants affected thereby."

Article I, Section 8 of the Tennessee Constitution, known as the "law of the land" clause, guarantees "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Similarly, the Section 1 of the Fourteenth Amendment of the United States Constitution prevents "any State [from depriving] any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws." The Tennessee Supreme Court has concluded that Article I, Section 8 and Article XI, Section 8 confer "'essentially the same protection'" as the equal protection clause of the Fourteenth Amendment to the United States Constitution. State v. Tester, 879 S.W.2d 823, 827 (Tenn. 1994) (quoting Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993)).

We reiterate that at the time the trial court decided the Petitioner's case, all of the relevant cases concerning whether the Criminal Savings Statute should be applied to the amended theft grading statute were unpublished opinions of this court, which constituted only persuasive authority and were not binding precedent. See Tenn. S. Ct. R. 4(G)(1); Transil, 72 S.W.3d at 667. We have already concluded that the trial court erred in concluding that that the Criminal Savings Statute in Code section 39-11-112 did not apply to the amendments to the theft grading statute in Code section 39-14-105. However, because there was no binding legal precedent on this issue at the time of the trial court's ruling in the Petitioner's case, we conclude that the Petitioner has failed to show that his due process rights under the law of the land clause and equal protection clause were violated.

Plain Error. In addition, the Petitioner claims that "the error of postponing the Rule 36.1 proceedings constitutes a plain error violation by the trial court." He asserts that this court has "the discretion, authority, and jurisdiction to review this under the plain-error principle."

It is apparent that the Petitioner misapprehends the plain error doctrine, which states that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. App. P. 36(b). Here, the Petitioner properly raised the error regarding the illegality of his sentence in his petition, which we have construed as a Rule 36.1 motion. Accordingly, the Petitioner is not entitled to relief on this issue.

II. Appointment of Counsel. Lastly, the Petitioner contends that the trial court violated his procedural due process rights when it failed to appoint him counsel during the "post-conviction petition/Rule 36.1 motion proceedings[,]" which resulted in the "denial of professional, legal guidance relative to the legal issues[.]" First, the Petitioner asserts that the trial court violated his constitutional and statutory rights to appointed counsel because when the court postponed his case on April 6, 2018, he "was unaware of the possible legal ramifications and/or harm which might be incurred as a result of the proceedings being postponed" and was not "allowed to object to or question the trial court's decision concerning its course or action at the time." The Petitioner also asserts

that the trial court violated his rights at the June 29, 2018 hearing when it ruled on his petition in his absence and without the assistance of counsel. The State counters that because the Petitioner failed to state a colorable claim, regardless of whether the Petitioner's filing is interpreted as a post-conviction petition or a Rule 36.1 motion, he is not entitled to relief.

We have already concluded that the trial court erred in failing to follow the procedure in Rule 36.1, which required the trial court to appoint counsel to represent the Petitioner, who was indigent, before conducting a hearing on the Petitioner's motion. See Tenn. R. Crim. P. 36.1(b)(3). However, we will now consider whether the trial court violated the Petitioner's right to be present and have appointed counsel at the April 6, 2018 and June 29, 2018 hearings pursuant to the Post-Conviction Procedure Act.

If we construe the Petitioner's filing as a petition for post-conviction relief, then upon receiving the petition, the court was required to review it to determine whether the petition asserted a colorable claim. Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002); Tenn. Sup. Ct. R. 28, § 6(B)(2). A colorable claim is defined as "'a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.'" Tenn. Sup. Ct. R. 28 § 2(H). "If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief, or in other words, fail to state a colorable claim, the petition shall be dismissed." Tenn. Code Ann. § 40-30-106(f). However, if the petition does state a colorable claim, the court "shall enter a preliminary order." Id. § 40-30-107(a). This order shall direct that "[i]f a petitioner not represented by counsel requests counsel and the court is satisfied that the petitioner is indigent as defined in § 40-14-201, the court shall appoint counsel to represent the petitioner." Id. § 40-30-107(b)(1); see Frazier v. State, 303 S.W.3d 674, 680 (Tenn. 2010) ("The rationale for the appointment of counsel in the post-conviction setting is to afford a petitioner the full and fair consideration of all possible grounds for relief."). Conversely, if the petition does not state a colorable claim, the court is not required to appoint counsel. Tenn. Code Ann. § 40-30-106(f).

The Petitioner, in his "Pro Se Petition for Post-Conviction Relief," noted that the amended theft statute, which made his offense a Class E felony, became effective on January 1, 2017. However, he stated that on August 17, 2017, he entered his guilty plea, based on the advice of appointed counsel, and received a sentence of eight years at thirty-five percent, which was greater than the Range II and III sentence ranges for a Class E felony. Although the Petitioner did not explicitly state that these facts made his guilty plea involuntary or that appointed counsel provided ineffective assistance with regard to his plea, these claims are reasonably inferred from his pro se filing, and both of these claims are colorable claims for post-conviction relief. However, because the Petitioner made no mention of these grounds in his appellate brief, and because we have already

granted Rule 36.1 relief to the Petitioner, we conclude that the Petitioner is not entitled to relief on this issue.

CONCLUSION

Because the illegal aspect of the Petitioner's sentence was a material component of his plea agreement and was not to Petitioner's benefit, the judgment of the trial court is reversed and the case is remanded for the Petitioner to be appointed counsel and given the opportunity to withdraw his plea. If the Petitioner chooses not to withdraw his plea, the trial court must enter an amended judgment form reflecting a conviction offense for theft of property valued at more than $1,000 but less than $2,500, a Class E felony, and setting forth the correct sentence for the Petitioner as a Range II, multiple offender convicted of Class E felony theft.

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CAMILLE R. MCMULLEN, JUDGE