

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 22, 2023 Session

FILED

03/30/2023

Clerk of the
Appellate Courts

CODY RICKY COFER v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Cumberland County
No. 09-0016 Wesley Thomas Bray, Judge**

No. E2022-00351-CCA-R3-ECN

The Petitioner, Cody Ricky Cofer, was convicted in the Cumberland County Criminal Court of two counts of first degree felony murder and one count of attempted especially aggravated robbery and received an effective sentence of two consecutive life terms. The Petitioner filed a petition for writ of error coram nobis based on newly discovered evidence, and the coram nobis court denied the petition without a hearing because the petition was untimely. On appeal, the Petitioner claims that the coram nobis court erred by summarily denying the petition without first considering whether the statute of limitations should be tolled on due process grounds. The State argues that we should dismiss the appeal because the Petitioner's notice of appeal also was untimely. Based upon the oral arguments, the record, and the parties' briefs, we agree with the State and conclude that the appeal should be dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT W. WEDEMEYER, J., joined.

Richard C. Stooksbury, III, and Gregory P. Isaacs, Knoxville, Tennessee, for the appellant, Cody Ricky Cofer.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Bryant C. Dunaway, District Attorney General; and Amanda M. Worley, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case relates to a home invasion on November 7, 2008.¹ Two masked gunmen entered Albert Keith Patton's residence; demanded money; and shot and killed Mr. Patton and Robert William Asher. In March 2009, the Cumberland County Grand Jury indicted the Petitioner and Alexander Ruben Carino for two counts of first degree felony murder and one count of attempted especially aggravated robbery. The Petitioner went to trial in November 2010, and the jury found him guilty as charged in the indictment. The trial court imposed consecutive life sentences for the murder convictions and a concurrent twelve-year sentence for the conviction of attempted especially aggravated robbery.

The proof at trial showed that three men participated in the crimes: the two masked gunmen who entered the home and shot the victims, and a third masked man who waited outside and served as a lookout. *See State v. Cody Cofer*, No. E2011-00727-CCA-R3-CD, 2012 WL 3555310, at *2 (Tenn. Crim. App. Aug. 20, 2012), *perm. app. denied* (Tenn. Dec. 10, 2012). Joshua Hutson, who was charged with the same crimes as the Petitioner and Carino, testified that he drove the Petitioner and Carino to Mr. Patton's home so they could rob Mr. Patton and that the Petitioner and Carino went inside while he waited outside by the car. *Id.* at *4. Another codefendant, Amanda Spence, testified that Carino asked her if she knew anyone he could rob and that she told him about Mr. Patton. *Id.* at *5. Spence said that on the night of the crimes, the Petitioner, Carino, and Hutson left her home with a bag of guns. *Id.* at *6. She later received a telephone call from the Petitioner, who told her that "things" had not gone as planned. *Id.* An agent with the Tennessee Bureau of Investigation testified about telephone calls and text messages exchanged between the four defendants before and after the crimes, and a correctional officer testified about a note the Petitioner passed to Carino while they were in jail together after the crimes. *See id.* at *12-14. The telephone calls, the texts, and the note implicated the Petitioner. *See id.*

On direct appeal, this court affirmed the Petitioner's convictions and sentences. *Id.* at *1. He subsequently filed a petition for post-conviction relief, alleging that he received the ineffective assistance of trial and appellate counsel. *Cody Cofer v. State*, No. E2014-01844-CCA-R3-PC, 2015 WL 5679844, at *1 (Tenn. Crim. App. Sept. 28, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016). The post-conviction court denied relief, and this court affirmed the judgment of the post-conviction court. *Id.* The Petitioner then filed a petition for habeas corpus relief in the federal district court, again alleging that he received the ineffective assistance of trial and appellate counsel. *Cody Cofer v. Lee*, No. 3:16-cv-671,

¹ This court may take judicial notice of its own records. *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009). On July 15, 2022, this court entered an order granting the Petitioner's motion to take judicial notice of the appellate records in *State v. Cody Cofer*, No. E2011-00727-CCA-R3-CD, 2012 WL 3555310 (Tenn. Crim. App. Aug. 20, 2012), and *Cody Cofer v. State*, No. E2014-01844-CCA-R3-PC, 2015 WL 5679844, at *1 (Tenn. Crim. App. Sept. 28, 2015),

2019 WL 4016204, at *16 (E.D. Tenn. Aug. 26, 2019). That petition also was unsuccessful. *See id.* at *25. Thereafter, the Sixth Circuit denied the Petitioner's application for a certificate of appealability. *Cody Cofer v. Boyd*, No. 19-6060, 2020 WL 1320643, at *4 (6th Cir. Feb. 3, 2020).

On July 24, 2020, counsel for the Petitioner filed the instant petition for writ of error coram nobis based on newly discovered evidence in the form of an affidavit signed by codefendant Carino. In the petition, the Petitioner alleged as follows: Before the Petitioner's trial, Carino entered into an agreement with the State in which Carino agreed to plead guilty to two counts of second degree murder and receive a forty-three-year sentence in exchange for his testimony against the Petitioner. However, at the Petitioner's trial and outside the presence of the jury, Carino refused to testify.² On July 24, 2019, Carino executed an affidavit in which he stated that Hutson gave false testimony at the Petitioner's trial in that it was Carino and Hutson who entered Mr. Patton's home while the Petitioner waited outside. The Petitioner asserted in his petition that Carino's information may have changed the outcome of his trial because it would have impeached Hutson's trial testimony. The Petitioner acknowledged that his petition was filed outside the one-year statute of limitations but argued that the statute of limitations should be tolled because Carino was unavailable to testify at the Petitioner's trial and because the Petitioner filed his petition within one year of Carino's affidavit. The Petitioner attached Carino's affidavit to his petition.

The State responded to the petition and requested that the coram nobis court dismiss the petition because it was untimely, the evidence was not newly discovered, and the evidence still put the Petitioner at the scene of the crimes. On September 8, 2020, the coram nobis court entered an order summarily denying the petition on the basis that it was filed outside the statute of limitations. More than one year later, on November 22, 2021, the Petitioner filed a motion to reconsider. The coram nobis court entered an order denying the motion on March 8, 2022, and the Petitioner filed a notice of appeal on March 21, 2022.

ANALYSIS

On appeal, the Petitioner claims that the coram nobis court erred by summarily denying his petition for writ of error coram nobis without first considering whether the statute of limitations should be tolled on due process grounds. The State argues that we should dismiss the appeal because the Petitioner's notice of appeal was untimely and that, in any event, the coram nobis court properly denied the petition without a hearing. The Petitioner responds that we should waive the timely filing requirement for the notice of

² Our review of the trial transcript confirms the terms of Carino's plea agreement and refusal to testify against the Petitioner.

appeal and address his claim on the merits. We conclude that the appeal should be dismissed.

Tennessee Rule of Appellate Procedure 4(a) instructs that “the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from[.]” The coram nobis court filed its order summarily denying the petition on September 8, 2020, and the Petitioner did not file his notice of appeal until March 21, 2022.

Although the Petitioner’s notice of appeal was untimely, a notice of appeal is not jurisdictional, and the requirement for a timely notice of appeal may be waived in the interests of justice. Tenn. R. App. P. 4(a). “In determining whether waiver is appropriate, this [c]ourt will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case.” *State v. Markettus L. Broyld*, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App. at Nashville, Dec. 27, 2005).

Here, the Petitioner filed his coram nobis petition well-outside the one-year statute of limitations. *See* Tenn. Code Ann. § 27-7-103 (providing that a writ of error coram nobis must be filed within one year after the judgment becomes final in the trial court). To accommodate due process concerns, the one-year statute of limitations for a coram nobis petition may be tolled on due process grounds if the petition seeks relief based upon newly discovered evidence of actual innocence. *Nunley v. State*, 552 S.W.3d 800, 828-29 (Tenn. 2018). The Petitioner failed to explain in the petition why he could not obtain the information from Carino sooner or why he waited another year after Carino executed the affidavit to file the petition. Moreover, Carino’s assertion that he and Hutson entered Mr. Patton’s home while the Petitioner waited outside does not establish the Petitioner’s actual innocence. Therefore, we conclude that the interests of justice do not warrant waiving the requirement for the timely filing of the notice of appeal. Accordingly, we dismiss the appeal.

CONCLUSION

Based upon the oral arguments, the record, and the parties’ briefs, the Petitioner’s appeal is dismissed.

JOHN W. CAMPBELL, SR., JUDGE