

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 12, 2025 Session

FILED

11/07/2025

Clerk of the
Appellate Courts

DAVERSEA ARMEN FITTS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sumner County
No. 2019-CR-907 Dee David Gay, Judge

No. M2024-00565-CCA-R3-PC

The petitioner, Daversea Armen Fitts, appeals the denial of his petition for post-conviction relief, arguing the post-conviction court erred in finding he received the effective assistance of counsel. Following our review of the record and the applicable law, we conclude that the amended post-conviction petition was not properly before the post-conviction court; however, the court retained jurisdiction over the original pro se petition. Additionally, we affirm the post-conviction court's determination that the petitioner failed to meet the burden required of him and is not entitled to relief.

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

J. ROSS DYER, J., delivered the opinion of the court, in which JILL BARTEE AYERS and TOM GREENHOTLZ, JJ., joined.

Michael Pellegrin, Gallatin, Tennessee, for the appellant, Daversea Armen Fitts.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Eric Mauldin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner, Daversea Armen Fitts, appeals from the denial of his post-conviction petition, arguing the post-conviction court erred in finding he received the effective assistance of counsel at trial. Following our review, we affirm the denial of the petition.

Facts and Procedural History

On February 2, 2017, the petitioner was convicted by a Sumner County jury of one count of first-degree murder for which he received a life sentence. The petitioner appealed his conviction. On June 26, 2019, this Court affirmed that conviction. *See State v. Fitts*, No. M2018-00750-CCA-R3-CD, 2019 WL 2612697 (Tenn. Crim. App. June 26, 2019), *no perm. app. filed*.

On November 30, 2014, the Gangster Disciples in North Nashville held a meeting to discuss the potential punishment for violating gang rules for a few of their members, including the victim. *Id.* at *2. The petitioner, who served the gang as chief of security for the “615 region”—which consisted of Nashville, Clarksville, Gallatin, Lebanon, Dickson, and “other ones,” was also at that meeting. *Id.* at *5. In discussing the victim’s punishment, Johnny Austin, who was a codefendant and a member of the gang, suggested “[t]hree minutes with no cover.” The [petitioner] scoffed at the suggestion and told Mr. Austin to leave.” *Id.* “Several others agreed with Mr. Austin’s recommended punishment, but Doyle Cammon[, a codefendant,] suggested ‘[e]radication.’ Mr. Cammon offered to kill the victim, justifying the punishment by saying ‘A snitch is a snitch.’” *Id.*

On December 2, 2014, the petitioner contacted Mr. Tracy Clark, Mr. Cammon, Mr. Austin, and the victim claiming he wanted their help in committing a robbery of a rival gang member in Gallatin, Tennessee. *Id.* at *6. After driving around for Gallatin for several minutes, the petitioner stopped the vehicle and

told the victim and Mr. Cammon to switch seats. Mr. Cammon and the victim exited the black SUV. The victim walked around to the back of the SUV while Mr. Austin observed Mr. Cammon pull out a gun and cock it. The [petitioner] stated, “Handle that,” and then Mr. Austin heard multiple gunshots and the victim holler, “Oh, oh, oh.” Mr. Austin slid down in his seat believing that they were being ambushed by the Bloods. Mr. Cammon reentered the vehicle and sat in the front passenger seat. Mr. Austin inquired about the victim’s whereabouts and Mr. Cammon responded, “Back there where a snitch supposed to be at.” The [petitioner] then asked Mr. Cammon to confirm that the victim was dead because, if he were not, Mr. Cammon would be “in some trouble.” The [petitioner] then threatened Mr. Austin that if he said “anything” he would be “where [the victim] was.”

Id. Based on the proof presented, the jury found the petitioner guilty of one count of first-degree murder.

Following the denial of his direct appeal, the petitioner filed a timely pro se petition for post-conviction relief on November 1, 2019, which complied with the statutory mandates. On November 14, 2019, the post-conviction court entered an order finding the petitioner had presented “colorable claims of ineffective assistance of trial and appellate counsel” and appointing counsel to represent the petitioner. Additionally, the court ordered post-conviction counsel to,

investigate all possible constitutional grounds for relief for the purpose of filing an amended petition if necessary. The amended petition shall be filed within thirty (30) days of the date of this Order. *In the event no amended petition will be filed, counsel will file a notice stating that no amended petition will be filed.* In any event, counsel shall file the certificate of counsel required in post-conviction cases.

(emphasis added).

Five months later, on April 17, 2020, the post-conviction court entered an order substituting post-conviction counsel. Contrary to the post-conviction court’s November 14, 2019 order, neither an amended petition nor a “notice stating that no amended petition will be filed” had been filed with the court. On February 7, 2022, over two years after entry of the post-conviction court’s preliminary order, the court entered an “Order Requiring an Amended Post-Conviction Relief petition to be Filed by February 28, 2022, and Show Cause Notice.” In that order, the court noted that on August 9, 2021, it had ordered new post-conviction counsel to file an amended petition by August 13, 2021.¹ The court then directed counsel to file an amended petition by February 28, 2022.

Chronologically, the next “Filed” stamped document contained in the record before this Court is the State’s March 22, 2022 response to the petitioner’s amended post-conviction petition. Immediately preceding the State’s response in the record is a document titled “Amended Petition for Relief from Conviction or Sentence”; however, the document is not “Filed” stamped and does not contain the signature of post-conviction counsel or the petitioner.

A series of evidentiary hearings was held on June 23, 2023, September 15, 2023, and March 15, 2024, during which trial counsel, appellate counsel, and the petitioner testified. On May 21, 2024, the post-conviction court entered an order denying the petitioner relief. The petitioner filed a premature notice of appeal to this Court on April 16, 2024.

¹ The post-conviction court’s August 9, 2021 order is not included in the record on appeal.

On July 7, 2025, this Court, upon an initial review of the record, entered an order noting that the copy of the petitioner’s amended petition “does not bear the trial court clerk’s ‘filed’ stamp or counsel’s signature.” Accordingly, this Court,

direct[ed] the clerk of the trial court to prepare a supplemental record consisting of the “filed” stamp copy of the amended petition. The clerk shall have fifteen days to certify and transmit the supplemental record to this Court. If that item is not included in the clerk’s file, she shall acknowledge that fact in a certified statement in response to this order.

On July 14, 2025, this Court received a statement from the trial court clerk in response to this Court’s order. In her statement, the Clerk informed the Court that

[t]he original Amended Petition for Relief from Conviction or Sentence *was never properly filed* with the Court. The document referenced in the Order was provided to our office by [the post-conviction court] and was *inadvertently included in the original record* filed on September 20, 2024. *The [Appellant] was supposed to provide a signed verification to complete this filing but failed to do so.*

(emphasis added). Based on that response, this Court questioned whether it had subject matter jurisdiction in this matter, and therefore, in accordance with *State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022) (reemphasizing that “an appellate court’s authority ‘generally will extend only to those issues presented for review’”), invited the parties to file any supplemental arguments with this Court addressing the Court’s concern regarding subject matter jurisdiction.²

On July 31, 2025, the trial court clerk supplemented the record with a “Filed” stamped copy of the petitioner’s amended petition. While the petition was signed by both post-conviction counsel and the petitioner, the document was stamped as filed on July 31, 2025, some fifteen months after the notice of appeal had been filed with this Court.

Analysis

On appeal, the petitioner argues that he was deprived of his right to effective assistance of counsel because trial counsel failed to call certain witnesses to testify about his absence at the November 30 meeting of the gang in which they discussed the victim’s

² While both parties were invited to file supplemental arguments concerning the Court’s jurisdiction both prior to and during oral argument, neither party filed a responsive brief or motion. However, both parties were questioned extensively and presented their positions concerning jurisdiction during oral argument.

punishment for violating gang rules or to testify as alibi witnesses for the night of the murder. The State responds that the post-conviction court properly found that trial counsel was not deficient and that the petitioner suffered no prejudice. However, before this Court can address the merits of the petitioner's claims, we must first determine whether the trial court had jurisdiction to hear the matter.

Post-conviction review is not required by constitutional principles. *See Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013). Such review is afforded solely as a matter of legislative grace – it is “entirely a creature of statute.” *Bush v. State*, 428 S.W.3d 1, 15-16 (Tenn. 2014) (citing *Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005)). Accordingly, the “availability and scope of post-conviction relief lies within the discretion of the General Assembly.” *Id.* at 15. The legislature “may set up reasonable procedural requirements,” and post-conviction claims “may be terminated for failure to comply with a reasonable procedural rule.” *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000) (internal citation omitted). Those requirements are contained in Tennessee Code Annotated section 40-30-104. The provision at issue here is the requirement contained in subsection (e) that a petition for post-conviction relief and any amended petition “shall be verified under oath.” Tenn. Code Ann. § 40-30-104(e); *see also* Tenn. Sup. Ct. R. 28, § 5(E)(2) (requiring that a post-conviction petition include an affidavit from the petitioner). Additionally at issue in the instant matter is the requirement contained in Tennessee Code Annotated section 40-30-107(2), requiring appointed counsel to file an “amended petition or written notice that no amended petition will be filed within thirty (30) days of the entry of the preliminary order, unless extended for good cause.” Tenn. Code Ann. § 40-30-107(2); *see also* Tenn. Sup. Ct. R. 28, § 6(C)(2)-(3) (requiring appointed counsel to review the original petition, file an amended petition or notice that no amendment will be filed, and file, within thirty days, a certificate informing the court that counsel has “thoroughly investigated the possible constitutional violations alleged by the petitioner).

Despite the mandatory language of the content requirements, the legislature has granted trial courts the limited authority to permit a pro se petitioner to correct a deficient petition. Tenn. Code Ann. § 40-30-106(d); *see also* Tenn. Sup. Ct. R. 28, § 6(B)(4)(b). Petitions that are incomplete shall be filed by the clerk of the court but shall be completed as set forth in an order entered in accordance with section 40-30-106(d). Tenn. Code Ann. § 40-30-104(b). However, nothing in section 106(d) contemplates that counsel will be given an opportunity to correct a deficiency. It is only if the petition was filed by an unrepresented person that a trial court retains any authority to allow the filing of a compliant amended petition. Tenn. Code Ann. § 40-30-106(d).

The legislature did not extend the same correction opportunity to petitioners represented by counsel. “It is primarily the role of the legislature to determine the public policy of this state,” and not that of the judiciary. *Cary v. Cary*, 937 S.W.2d 777, 781

(Tenn. 1996) (citing *Crawford v. Buckner*, 839 S.W.2d 754, 759 (Tenn. 1992)); *see also* *Frazier v. State*, 495 S.W.3d 246, 249 (Tenn. 2016). “Courts are not at liberty to rewrite statutes.” *Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 145 (Tenn. 2017) (citations omitted); *see also* *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013) (quoting *Britt v. Dyer’s Emp’t Agency, Inc.*, 396 S.W.3d 519, 523 (Tenn. 2013) (“[c]ourts may neither alter or amend statutes nor substitute [their] own policy judgments for those of the General Assembly.”)).

As outlined at length *supra*, there are numerous deficiencies in the instant matter. First and foremost, the record as originally constructed does not contain a “Filed” stamped copy of the amended petition. Despite the statutory requirement, as well as an order from the trial court directing the same, the petitioner failed to file an amended petition or a statement noting that no amendment will be filed. Moreover, the unfiled document styled as an amended petition does not contain a signed certification of counsel nor a signed verification by the petitioner, both of which are required by statute and rule. Tenn. Code Ann. §§ 40-30-104(e), -107(2); Tenn. Sup. Ct. R. 28, §§ 5(E)(2), 6(C)(2)-(3). Because the amended petition in the instant matter failed to meet several mandatory statutory provisions, it was not properly before the post-conviction court, and therefore, the court was without jurisdiction to hear the matter. *See Maxwell v. State*, 647 S.W.3d 593, 594-95 (Tenn. 2019). Our inquiry, however, does not end with the determination that the post-conviction court was without jurisdiction to hear and rule on the amended petition.

Despite at least two invitations by this Court for the parties to address whether the post-conviction court had jurisdiction to conduct a hearing on the original pro se petition when the petitioner failed to comply with the mandatory language of the statute—counsel “must file an amended petition or a written notice that no amendment will be filed”—neither party took the opportunity to do so. *See* Tenn. Code Ann. § 40-30-107(b). While we do not believe it is appropriate to resolve that issue today due to the parties’ decision not to address it as well as the fact that the merits of the petitioner’s claim do not entitle him to relief as discussed *infra*, we would note that the mandatory language could easily be read to allow for dismissal of the petition altogether. Moreover, Tennessee Supreme Court Rule 28, section 6(c)(5) provides that “appointed counsel who fails to comply with this section may be denied compensation for services rendered.”³ Therefore, in order to avoid dismissal of the petition and being denied compensation, the better practice for both post-conviction courts and counsel would be to ensure the mandatory language of the statute has been complied with prior to conducting a hearing. Unfortunately, that did not occur in the instant matter.

³ Tennessee Supreme Court Rule 28, section 6(c)(2) mirrors the language of Tennessee Code Annotated section 40-30-107(b) requiring appointed counsel to “file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed.”

Despite our concerns with whether the petitioner complied with the statutory mandates, our review of the original pro se petition and the proof presented, or not presented, at the hearing reveals the petitioner is not entitled to relief. As noted *supra*, the issue on appeal is whether counsel was ineffective for failing to call certain witnesses to testify both about his absence at the November 30 gang meeting in which they discussed the victim's punishment and to testify as alibi witnesses for the night of the murder. However, neither of these claims was included in the original petition, yet another reason post-conviction counsel and the petitioner should be held to the standards outlined in the statute. Even if we were to liberally interpret the petitioner's allegations concerning trial counsel's preparation and investigation into his case as including these claims, the petitioner failed to offer sufficient proof to establish his claims. Per *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020), "Tennessee appellate courts may only consider issues that were not formally raised in the post-conviction petition if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection." See *Starner v. State*, No. M2018-01015-CCA-R3-PC, 2019 WL 3856852, at *13 (Tenn. Crim. App. Aug. 16, 2019) (holding that an issue was "reviewable on the merits" because the petitioner argued it during the post-conviction hearing with no objections); *Williams v. State*, No. W2018-01269-CCA-R3-PC, 2019 WL 2407157, at *11 (Tenn. Crim. App. June 7, 2019) (interpreting Tennessee Supreme Court Rule 28, section 8(D)(5) to hold that an issue may not be waived if it was "raised at the post-conviction hearing and ruled on by the post-conviction court" without objection because the petitioner would not have been aware of the need to amend the petition to include the issue), *perm. app. denied*, (Tenn. Oct. 11, 2019); *Matthews v. State*, No. W2018-00966-CCA-R3-PC, 2019 WL 1110101, at *9 (Tenn. Crim. App. Mar. 11, 2019) (considering an issue on the merits that was not specifically mentioned in the post-conviction petition, though alleged generally, because it was litigated at the post-conviction hearing without objection); *Brown v. State*, No. W2017-01755-CCA-R3-PC, 2019 WL 931735, at * 10 (Tenn. Crim. App. Feb. 22, 2019) (considering an issue not included in petition but argued at the post-conviction hearing without objection); *Yarboro v. State*, No. W2017-00125-CCA-R3-PC, 2018 WL 4441364, at *7 (Tenn. Crim. App. Sept. 17, 2018) (deciding an issue not presented in the petition because it was argued at the post-conviction hearing and not objected to by opposing counsel and petitioner was no longer able amend the petition); *Herron*, 1992 WL 43273, at *4 ("On the other hand, if an issue is not specially pled, we do not view [our case law] as prohibiting a trial court from ruling on it if it is litigated by the parties in a post-conviction hearing without objection.").

To establish a claim for ineffective assistance of counsel for failure to investigate and present testimony from a witness, the petitioner must "(1) produce the witness at his post-conviction hearing; (2) show that through reasonable investigation, the trial counsel could have located the witness; and (3) elicit both favorable and material testimony from

the witness.” *Denton v. State*, 945 S.W.2d 793, 802-03 (Tenn. Crim. App. 1996) (citing *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). “It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness’s testimony might have been if introduced by defense counsel.” *Black*, 794 S.W.2d at 757.

Here, the petitioner did not present a single potential witness to testify at his post-conviction hearing. He failed to present any witnesses to testify about his alleged absence at the November 30 meeting and failed to present any alibi witnesses for the night of the murder. Accordingly, he has failed to present sufficient evidence that trial counsel’s performance was deficient on this issue and cannot meet the first prong of the *Strickland* test. Furthermore, because the petitioner failed to present the witness at the evidentiary hearing, he cannot establish prejudice. *See Black*, 794 S.W.2d at 757-58. The petitioner is, therefore, not entitled to relief.

Conclusion

Based on the foregoing authorities and reasoning, the instant appeal is dismissed.

s/ J. ROSS DYER

J. ROSS DYER, JUDGE