

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 10, 2010

ANTONIO MAURICE BATTS v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2006-A-636 Steve Dozier, Judge**

No. M2010-00953-CCA-R3-PC - Filed January 6, 2011

The petitioner, Antonio Maurice Batts, pleaded guilty to aggravated assault in exchange for a six-year, Range II sentence with the manner of service to be determined by the trial court. Following the denial of alternative sentencing and an unsuccessful appeal to this court, the petitioner timely filed a petition for post-conviction relief alleging that his guilty plea was involuntary based upon allegations of ineffective assistance of counsel and the petitioner's mental incompetence at the time of the guilty plea. After an evidentiary hearing, the trial court denied relief. The petitioner filed an untimely notice of appeal. Because the interest of justice does not require that we waive the filing requirement, we dismiss the appeal.

Tenn. R. App. P. 3; Appeal Dismissed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Ryan Caldwell, Nashville, Tennessee, for the appellant, Antonio Maurice Batts.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Rachel Sobrero, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 10, 2006, a Davidson County grand jury indicted the petitioner on one count of aggravated robbery. On July 12, 2007, the petitioner pleaded guilty to aggravated assault in exchange for a six-year sentence as a Range II, multiple offender. Pursuant to the plea agreement, the manner of service of the sentence was left to the determination of the trial court. At the August 31, 2007 sentencing hearing, the trial court

denied alternative sentencing and ordered the six-year sentence to be served in confinement.¹ The petitioner appealed the denial of alternative sentencing to this court, and we affirmed the trial court's judgment. *See State v. Antonio Maurice Batts*, No. M2007-02269-CCA-R3-CD (Tenn. Crim. App., Nashville, Oct. 6, 2008).

On March 11, 2009, the petitioner timely filed a pro se petition for post-conviction relief alleging that his conviction of aggravated assault resulted from an involuntary guilty plea caused by both the ineffective assistance of counsel and the petitioner's medicated condition for bipolar personality disorder. Following the appointment of counsel, the petitioner filed an amended petition that specifically alleged that trial counsel performed deficiently by failing to investigate the facts of the offense, by giving him erroneous advice concerning the guilty plea, and by preventing him from testifying at his sentencing hearing. The petitioner also claimed that he did not understand the ramifications of his guilty plea because he was medicated at the time of the plea.

At the August 21, 2009 evidentiary hearing, the petitioner testified that he did not understand the terms of his guilty plea. He said that trial counsel did not explain that he would receive a Range II sentence and that trial counsel also promised him that he would receive probation. On cross-examination, the petitioner admitted that he remembered pleading guilty and that he was not confused about the plea. He also admitted that he never told the trial court that he was confused about the plea agreement or dissatisfied with trial counsel's representation.² The petitioner said that he did not alert the trial court to his mental health issue because, he said, "I ain't crazy and I ain't retarded," but he still claimed that his medication for bipolar personality disorder made him "sleepy" during the guilty plea hearing.

Trial counsel testified that he routinely explained the elements of an offense and the terms of any plea agreement to his clients. He recalled having "extensive conversations" with the petitioner concerning the indictment, the guilty plea, and the petitioner's sentencing range classification. He also recalled that the petitioner was "incredibly indecisive" about the plea. Trial counsel said that he would never guarantee a specific outcome, such as probation, to any client. In fact, he recalled advising the petitioner that his chances of being granted probation were "slight" because of his criminal history.

¹The trial court also ordered the sentence to be served consecutively to a sentence for which the petitioner had been on parole at the time of the commission of the present offense. At the evidentiary hearing, the petitioner testified that he had since "flattened" the previous sentence. It is apparent that the petitioner became dissatisfied with the terms of his plea agreement when he was not immediately released from custody upon the satisfaction of the previous sentence.

² A transcript of the guilty plea hearing was exhibited at the evidentiary hearing and confirms the petitioner's admissions relative to the plea colloquy with the trial court.

Trial counsel said that he knew that the petitioner had mental health issues, but he believed that the petitioner understood the terms of the plea agreement.

The trial court accredited the testimony of trial counsel in its written findings. The trial court also found that the petitioner's testimony lacked any credibility. Accordingly, the trial court concluded that the petitioner failed to prove his allegations by clear and convincing evidence and denied relief.

On appeal, the petitioner contends that the evidence does not support the trial court's findings. The State urges this court to dismiss the appeal due to the petitioner's failure to file a timely notice of appeal. Alternatively, the State contends that the evidence supports the trial court's findings and conclusions of law, and, therefore, the order denying post-conviction relief should be affirmed. Following our review, we agree with the State on both contentions.

The record reflects that the trial court entered the order denying post-conviction relief on September 11, 2009. The petitioner did not file a notice of appeal until April 27, 2010. Rule 4(a) of the Tennessee Rules of Appellate Procedure requires that "[i]n an appeal as of right to [this court], the notice of appeal . . . 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." As noted by the State, the petitioner incorrectly asserts in his brief that his notice of appeal was timely filed. Clearly, it was not. However, Rule 4(a) further provides that "the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." The petitioner, however, has filed no motion with this court seeking to be excused from the requirement of a timely notice of appeal, and accordingly, he has asserted no basis for this court to conclude that it should excuse the untimely filing in the interest of justice.

Nevertheless, we have reviewed the record, including the transcript of the testimony at the evidentiary hearing, the briefs of the parties, and the applicable law in order to determine whether the interest of justice compels us to excuse the lack of a timely notice of appeal. We discern no basis for making such a determination. The trial court accredited the testimony of trial counsel at the evidentiary hearing. The petitioner plainly failed to carry his burden of proving his post-conviction claims by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-210(f). In short, the record evinces no basis for determining that justice requires us to excuse the timely filing of a notice of appeal. *Accord State v. Cleotha Nash*, No. 02C01-9701-CC-00026 (Tenn. Crim. App., Jackson, Feb. 18, 1998) (appellate court declined to waive requirement of timely filing of notice of appeal where record did not divulge any reason why justice required such and appellant offered no explanation for failure to make timely filing).

In the absence of a timely filed notice of appeal, the appeal is dismissed.

JAMES CURWOOD WITT, JR., JUDGE