

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs September 3, 2014

STATE OF TENNESSEE v. DONALD TERRELL

Appeal from the Criminal Court for Shelby County
Nos. 9010940, 9115675, 9101739, 9300455, 9302666 Glenn Wright, Judge

No. W2014-00340-CCA-R3-CO - Filed December 8, 2014

The Appellant, Donald Terrell, filed a pro se motion to correct an illegal sentence under Tennessee Rule of Criminal Procedure 36.1. The trial court summarily dismissed the Appellant's motion, and he appealed. Following our review of the record, we conclude that the Appellant's motion presented a colorable claim that his sentences were illegal. We therefore reverse the trial court's summary dismissal and remand for further proceedings.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the Court, in which ALAN E. GLENN, and ROBERT W. WEDEMEYER, JJ., joined.

Donald Terrell, pro se, as the appellant.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Amy Weirich, District Attorney General; and Ann Schiller, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

According to the pleadings, Donald Terrell ("the Appellant") was arrested as a juvenile on January 29, 1990, for one count of unlawful possession of a controlled substance with intent to sell and was subsequently released to his parents. On March 1, 1990, he was arrested for theft of property and held at the juvenile detention center. The juvenile court determined that the Appellant would be tried as an adult and set bail at \$10,000, which the Appellant made. While out on bail, the Appellant was arrested on June 16, 1990, for

unlawful possession of cocaine with intent to sell. The Appellant remained in custody following this third arrest, and he was indicted on all three charges.

On March 6, 1991, the Appellant entered guilty pleas to all three counts and, pursuant to his plea agreement, was sentenced to concurrent eight-year, three-year, and eight-year sentences, respectively. Upon his completion of boot camp, the Appellant was placed on probation. During the service of his probation, the Appellant was arrested on August 28, 1992, for aggravated assault and was released on bail. The Appellant was then arrested on February 8, 1993, for unlawful possession of a controlled substance with intent to sell. The Appellant's probation officer filed a petition to revoke his probation.

On May 20, 1993, the Appellant pleaded guilty to the new charges and admitted violating probation. According to the plea agreement, he received an eight-year sentence for unlawful possession of a controlled substance with intent to sell and a four-year, concurrent sentence for aggravated assault.¹ This effective eight-year sentence was also ordered to run concurrently with the 1991 eight-year sentence.

In August 2013, the Appellant filed the instant pro se "Motion to Correct Illegal Sentence Pursuant to Tennessee Rule[] of Criminal Procedure 36.1," asserting, among other things, that his concurrent sentences were illegal because they were imposed in direct contravention of Tennessee Code Annotated section 40-20-111(b) and Tennessee Rule of Criminal Procedure 32. On October 18, 2013, the trial court dismissed the Appellant's motion without appointing counsel and without a hearing. This appeal followed.

Analysis

The Appellant contends that his motion to correct an illegal sentence raised a colorable claim, and therefore, the trial court erred when it summarily dismissed the motion.

On July 1, 2013, Tennessee Rule of Criminal Procedure 36.1 became effective. Rule 36.1 provides in pertinent part that:

- (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

¹Concerning the 1993 offenses, the Appellant attached the plea agreement and judgment of conviction for unlawful possession of a controlled substance with intent to sell (case number 93-02666) to his Rule 36.1 motion. The plea agreement and judgment of conviction for aggravated assault in case number 93-00455 were not attached and are not a part of the record before this Court.

sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

(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.

Tenn. R. Crim. P. 36.1(a), (b) (2014).

Before Rule 36.1 became effective, Tennessee recognized “two distinct procedural avenues [] to collaterally attack a final judgment in a criminal case—habeas corpus and post-conviction petitions.” Hickman v. State, 153 S.W.3d 16, 19 (Tenn. 2004)(citing Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992)). Article I, section 15 of the Tennessee Constitution guarantees “the privilege of the writ of habeas corpus.” In the 200 plus years that have elapsed since the Tennessee Constitution was ratified, a significant body of case law has developed interpreting Article I, section 15, and mandatory procedures governing habeas corpus petitions have been codified. See Tenn. Code Ann. §§ 29-21-101 to 130. In 1967, the Tennessee General Assembly enacted the Post-Conviction Procedures Act, now codified at Tennessee Code Annotated sections 40-30-101 to 122, and in the 40 plus years since its enactment, a significant body of case law has developed interpreting the act. Both habeas corpus and post-conviction relief are limited in their scope and application. For example, habeas corpus review is restricted to “the face of the judgment or the record of the proceedings upon which the judgment is rendered,” State v. Galloway, 45 Tenn. 326, 337 (1868); may only be used to attack a void judgment; and is only available to a “person imprisoned or restrained of liberty.” Tenn. Code Ann. § 29-21-101(a). Post-conviction relief petitions are available to attack void and voidable judgments but must be filed within one year from the date the action accrues. Tenn. Code Ann. § 40-30-102(a).

On its face, Rule 36.1 does not limit the time within which a person seeking relief must file a motion, nor does it require the person seeking relief to be restrained of liberty. Also, Rule 36.1 does not define the term “colorable claim.” In interpreting Rule 36.1, this Court has looked to post-conviction and habeas corpus relief cases for guidance. For example, this Court has adopted the definition for “colorable claim” from the post-conviction context: “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) (quoting Tennessee Supreme Court Rule 28, § 2(H)) (citation omitted).

Since its enactment, Rule 36.1 motions claiming that a sentence is illegal because a mandatory consecutive sentence was ordered to be served concurrently have consistently been found to state a “colorable claim” and have been remanded to the trial court for hearing, usually with a concession from the State.² However, in State v. Adrian R. Brown, No. E2014-00673-CCA-R3-CD, 2014 WL 5483011 (Tenn. Crim. App. Oct. 29, 2014), this Court relied on habeas corpus case law to affirm the summary dismissal of a Rule 36.1 motion where the record established that the illegal sentence was fully served. In that case, Brown challenged an allegedly illegal sentence based upon the trial court’s failure to provide jail credits, and the State conceded that Brown presented a colorable claim for relief. Id. at *5. Citing Summers v. State, 212 S.W.3d 251 (Tenn. 2007), a habeas corpus case involving a challenge to an allegedly illegal sentence, the Brown Court nonetheless affirmed the trial court’s summary dismissal of the Rule 36.1 motion, explaining:

Mootness is a doctrine regarding the justiciability of a controversy. McIntyre v. Traugher, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). A case is justiciable when it involves “a genuine and existing controversy requiring the present adjudication of present rights.” Id. “A moot case is one that has lost its character as a present, live controversy. The central question in a mootness inquiry is whether changes in the circumstances existing at the beginning of the litigation have forestalled the need for meaningful relief.” Id. (citations omitted). When the case may no longer provide relief to the prevailing party, it is considered moot. Id. The direct appeal of a sentence which has been served in its entirety, for instance, presents a moot question. See State v. Phelps, 329 S.W.3d 436, 451 (Tenn. 2010); State ex rel. Lewis v. State, 347 S.W.2d 47, 48-49 (Tenn. 1961). This is so even when the action alleges that the State acted beyond its jurisdiction. See Summers, 212 S.W.3d at 258; Lewis, 347 S.W.2d at 47.

² See Marcus Deanelo Lee v. State, No. W2013-01088-CCA-R3-CO, 2014 WL 902450 (Tenn. Crim. App. Mar. 7, 2014); State v. David Morrow, No. W2014-00338-CCA-R3-CO, 2014 WL 3954071 (Tenn. Crim. App. Aug. 13, 2014); Cumecus R. Cates v. State, No. E2014-00011-CCA-R3-CD, 2014 WL 4104556 (Tenn. Crim. App. Aug. 20, 2014); David Frazier v. State, No. E2013-02563-CCA-R3-CD, 2014 WL 2743243 (Tenn. Crim. App. June 16, 2014); State v. Jonathan T. Deal, No. E2013-02623-CCA-R3-CD, 2014 WL 2802910 (Tenn. Crim. App. June 17, 2014); and State v. Omar Robinson, No. E2014-00393-CCA-R3-CD, 2014 WL 53932401 (Tenn. Crim. App. Oct. 22, 2014).

Adrian R. Brown, 2014 WL 5483011, at *5.³ The Brown Court concluded:

The appellant here does not assert that his guilty pleas were coerced, involuntary, or otherwise invalid; he merely insists that his sentences were contrary to statute and void because he was deprived of pretrial jail credits. The appellant acknowledges, however, that he has served his sentences and that “[o]n June 10, 2005, . . . the Movant’s sentence ended.” Accordingly, there is no “meaningful relief” this court can give. *McIntyre*, 884 S.W.2d at 137. Because the appellant’s allegedly illegally lengthy sentences have been fully served, we conclude that there is no longer any remedy he can seek from the court to correct any illegality in his sentences, and his controversy is moot.

Id. at *6; see also Derrick Sawyers v. State, No. M2007-01598-CCA-R3-HC, 2008 WL 2901628 (Tenn. Crim. App. July 24, 2008), *perm. to app. denied* (Tenn. Jan. 20, 2009) (concluding that the petitioner was not entitled to habeas corpus relief where the illegal sentence had been fully served and that the “fulfillment of the promise of concurr[en]c[e]” had, in effect, purged the judgment of the contaminating reference to concurrent sentencing.)

Turning back to the motion filed by the Appellant, because the motion was summarily dismissed, the record before this Court is limited to the information in the motion and attached exhibits. The attached “Negotiated Plea Agreement” in case number 93-02666 shows that the Appellant pleaded guilty to unlawful possession of a controlled substance with intent to sell on May 20, 1993, and was sentenced to an effective sentence of eight years, concurrent with his sentence for aggravated assault in case number 93-00455. The judgment provides pretrial jail credit from February 3, 1993, through May 19, 1993. Although it seems reasonable to assume that the Appellant’s eight-year sentence has expired in the 20 plus years since it was imposed, there is no proof in the record to show that is the case. The order filed by the trial court simply states, “Defendant’s Motion is denied and dismissed.” There were no factual findings made by the trial court, and the record does not establish whether the sentence has been fully served. Thus, taking the Appellant’s assertions in the motion as true and viewing them in the light most favorable to him, the Appellant committed a felony offense while released on bail and received concurrent sentences, in direct contravention of Tennessee Code Annotated section 40-20-111 and Rule 32(c)(3)(C) of the Tennessee Rules

³ The Brown Court also cited other jurisdictions that “have concluded that a challenge to the legality of a sentence becomes moot once the sentence is fully served.” Id., at *6.

of Criminal Procedure.⁴ We conclude that the Appellant's motion presents a colorable claim that his sentence was illegal. Accordingly, the plain language of Rule 36.1 requires the trial court to determine indigency and, if necessary, appoint counsel for the Appellant. Tenn. R. Crim. P. 36.1(b). Further, the trial court must conduct a hearing on the motion unless all parties waive the hearing. Id.

Conclusion

Based on the foregoing, we reverse the trial court's summary dismissal and remand for further proceedings consistent with this opinion.

ROBERT L. HOLLOWAY, JR., JUDGE

⁴ Tennessee Code Annotated section 40-20-111(b) provides that if a defendant commits a felony while released on bail and is convicted of both offenses, the trial judge has no discretion as to whether the sentences shall run concurrently or cumulatively but must order that the sentences run cumulatively. Tenn. Code Ann. § 40-20-111 (1990) (employing the term "cumulatively" rather than the term "consecutively"). Similarly, Rule 32(c)(3)(C) mandates consecutive sentences when a defendant commits a felony while released on bail and is eventually convicted of both offenses. Tenn. R. Crim. P. 32(c)(3)(C) (1990).