

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

FILED
06/27/2017
Clerk of the
Appellate Courts

STATE OF TENNESSE v. DAVID FRAZIER

**Appeal from the Criminal Court for Polk County
No. 04-097 Andrew Freiberg, Judge**

No. E2016-00006-CCA-R3-CD

The pro se defendant, David Frazier, appeals as of right from the Polk County Criminal Court's order summarily dismissing his motion for correction of illegal sentence. Tenn. R. Crim. P. 36.1. The State has filed a motion to affirm the trial court's order pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals. Following our review, we conclude that the State's motion is well-taken and affirm the order of the trial court.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which NORMA MCGEE OGLE and ROBERT H. MONTGOMERY, JR., JJ., joined.

David Frazier, Memphis, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Counsel; and Stephen D. Crump, District Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

On July 19, 2004, the pro se defendant pleaded guilty to two counts of felony evading arrest. Pursuant to the negotiated plea agreement, the trial court imposed concurrent two-year sentences. The defendant was adjudicated for at least four violations of probation from 2004 through 2007. On September 21, 2013, the defendant filed a motion to correct illegal sentence. He later filed an amendment to the motion alleging that he was on bail for the first evading arrest offense when he committed the second offense. On November 12, 2013, the trial court summarily dismissed the motion. On

appeal, this court concluded that the defendant had presented a colorable claim and remanded the case for a hearing to determine whether the defendant had proven his allegations and, if so, whether the illegal sentence was a material element of the defendant's plea. *David Frazier v. State*, No. E2013-02563-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., at Knoxville, June 16, 2013). On remand, the trial court attempted to remedy the illegality by correcting the judgments to reflect two consecutive one-year sentences, but failed to make any findings concerning whether the illegal sentence was a material element of the plea.

On April 27, 2015, the defendant filed the instant motion to correct illegal sentence alleging that the remand court failed to follow the instructions of this court's opinion.¹ On August 20, 2015, the trial court entered an order finding that the defendant had presented a colorable claim. The trial court vacated the remand court's corrected judgments as void and set the matter for further hearing. At the December 15, 2015 hearing, the trial court found that the defendant had presented a colorable claim that the sentences were illegal because they were imposed concurrently, rather than consecutively, for a felony offense that occurred while on bail for another offense. Tenn. R. Crim. P. 32(c)(3)(C). The court further found, however, that the sentences had long ago expired and, therefore, the defendant was not entitled to relief. The defendant filed a timely notice of appeal from the trial court's judgment.

Rule 36.1 provides the defendant and the State an avenue to "seek the correction of an illegal sentence," defined as a sentence "that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1; *see also State v. Wooden*, 478 S.W.3d 585, 594-95 (Tenn. 2015) (holding that "the definition of 'illegal sentence' in Rule 36.1 is coextensive with, and not broader than, the definition of the term in the habeas corpus context"). To avoid summary denial of an illegal sentence claim brought under Rule 36.1, a defendant must "state with particularity the factual allegations," *Wooden*, 478 S.W.3d at 594, establishing "a colorable claim that the sentence is illegal," Tenn. R. Crim. P. 36.1(b). "[F]or purposes of Rule 36.1 . . . 'colorable claim' means 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." *Wooden*, 478 S.W.3d at 593. The determination whether a Rule 36.1 "motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law, to which de novo review applies." *Id.* at 589 (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007)).

Although Rule 36.1, at the time of the defendant's filing, purported to allow for the correction of an illegal sentence "at any time," *see* Tenn. R. Crim. P. 36.1 (2015), our supreme court has concluded that "the phrase 'at any time' has no bearing on whether Rule 36.1 authorizes relief from expired illegal sentences" but instead "conveys two other

¹ The trial judge at remand retired, and a newly elected judge presided over the motion to correct illegal sentence that is the subject of this appeal.

important, but unrelated, principles: (1) an illegal sentence may be corrected ‘at any time, even if [the sentence] has become final,’ and (2) Rule 36.1 motions, like habeas corpus petitions, are not subject to any statute of limitations.” *State v. Brown*, 479 S.W.3d 200, 210 (Tenn. 2015). The high court ultimately held “that Rule 36.1 does not expand the scope of relief and does not authorize the correction of expired illegal sentences. Therefore, a Rule 36.1 motion may be summarily dismissed for failure to state a colorable claim if the alleged illegal sentence has expired.” *Id.* at 211.

In this case, the defendant pleaded guilty in exchange for an effective two-year sentence in 2004. Clearly, the defendant’s sentences expired long before he filed the Rule 36.1 motion in 2015. In consequence, the trial court did not err by summarily dismissing the motion. Accordingly, we affirm the judgment of the Polk County Criminal Court pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals.

JAMES CURWOOD WITT, JR., JUDGE