

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs June 21, 2005

**BARRY L. ARMISTEAD v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 99-D-2724 Seth Norman, Judge**

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**No. M2004-02795-CCA-R3-PC - Filed August 15, 2005**

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The petitioner, Barry L. Armistead, appeals the Davidson County Criminal Court's summary dismissal of his petition for post-conviction relief. He claims that the trial court erred in dismissing his petition without appointing counsel and that his due process rights were violated at his probation revocation hearing. We affirm the trial court.

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

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and J.C. MCLIN, J., joined.

Dwight E. Scott, Nashville, Tennessee, for the appellant, Barry L. Armistead.

Paul G. Summers, Attorney General and Reporter; Richard H. Dunavant, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

This case relates to the petitioner's convictions for aggravated assault. The trial court sentenced the petitioner to eight years on probation to be served consecutively to a sentence originating from Putnam County. Before the petitioner began serving his sentence of probation, the Davidson County Criminal Court revoked it, ordering him to serve his eight-year sentence in the Department of Correction. The petitioner appealed the Davidson County Criminal Court's order revoking his probation, and this court affirmed. See State v. Barry Lee Armistead, No. M2002-01877-CCA-R3-CD, Davidson County (Tenn. Crim. App. Sept. 11, 2003), app. denied (Tenn. Jan. 26, 2004).

On October 14, 2004, the petitioner filed a pro se petition for post-conviction relief in the Davidson County Criminal Court, alleging (1) the state violated his right to due process of law, (2) he was denied the effective assistance of counsel, (3) newly discovered evidence existed that

contradicted evidence upon which the trial court relied at the revocation hearing, (4) the trial court's order revoking his probation constituted "an unreasonable determination of the facts," (5) the probation revocation warrant was obtained by an agency without supervisory authority, (6) an excessive sentence, (7) the lack of notice of the requirements of probation, and (8) the trial court revoked his probation based upon insufficient evidence of a new arrest. The trial court dismissed the petition without holding an evidentiary hearing and without appointing counsel on October 19, 2004.

The petitioner appeals, claiming the trial court erred in summarily dismissing his petition because he presented a colorable claim for relief. He contends that his petition contained an allegation that the state violated his right to due process by failing to serve on him a probation revocation warrant and that, therefore, he presented a colorable claim for relief. The state responds that a petition for post-conviction relief cannot be used to attack a trial court's order revoking probation, that the defendant has waived the due process issue by failing to present it on direct appeal, and that the record does not indicate the petitioner failed to receive proper notice of the allegations supporting the revocation of his probation.

Whether a trial court properly dismissed a petition for post-conviction relief for failure to state a claim for relief is reviewed as a question of law. See Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002). Thus, our review of the trial court's dismissal of the petition is de novo. See id.; Fields v. State, 40 S.W.3d 450, 457 (Tenn. 2001).

The Post-Conviction Procedure Act states that a petition for post-conviction relief must specify the grounds for relief and set forth facts to establish a colorable claim for relief. See T.C.A. § 40-30-106(d). "A colorable claim is a claim, in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). When the facts, taken as true, fail to demonstrate that the petitioner is entitled to relief, then the trial court may dismiss the petition. T.C.A. § 40-30-106(f). When the trial court concludes that a petition does not present a "colorable claim," it may summarily dismiss the petition without appointing counsel. See Blair v. State, 969 S.W.2d 423, 424 (Tenn. Crim. App. 1997).

In Young v. State, 101 S.W.3d 430, 433 (Tenn. Crim. App. 2002), this court held "that the Tennessee Post-Conviction Procedure Act does not permit the filing of a petition under its provisions to attack collaterally the validity of a proceeding to revoke the suspension of sentence and/or probation." The petitioner's petition for post-conviction relief exclusively attacks the trial court's order revoking his probation, and therefore, he is not entitled to relief.

Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE