

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
September 1, 2020 Session

<p><b>FILED</b> 11/30/2020 Clerk of the Appellate Courts</p>
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**JOHN N. MOFFITT v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Henderson County  
No. 13-123-1 Roy B. Morgan, Jr., Judge**

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**No. W2020-00594-CCA-R3-ECN**

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A Henderson County jury convicted the Petitioner, John N. Moffitt, of reckless aggravated assault, as a lesser included offense of aggravated assault, for slashing the victim’s arm with a pocketknife following a property dispute. State v. John N. Moffitt, No. W2014-02388-CCA-R3-CD, 2016 WL 369379, at \*1 (Tenn. Crim. App. Jan. 29, 2016), perm. app. denied (Tenn. June 24, 2016). This Court affirmed his conviction on direct appeal; however, this Court also reduced the amount of restitution that the trial court ordered and remanded the case to the trial court to determine the amount of restitution that the Petitioner could pay. Id. On March 10, 2020, the Petitioner, acting pro se, filed a petition for writ of error coram nobis, arguing that his conviction for reckless aggravated assault was “an illegal and unconstitutional conviction” because the indictment failed to allege “recklessly,” which the Petitioner contends is a “required mental state indicating a lesser kind of culpability” than that required for aggravated assault. The Petitioner alleged that he was entitled to due process tolling of the statute of limitations because he was “totally unaware of the fact about [sic] the illegal and unconstitutional conviction.” The coram nobis court summarily dismissed the petition, finding that it was time-barred and that the Petitioner’s allegations did not constitute new evidence and thus did not toll the statute of limitations. Following our review, we affirm the judgment of the coram nobis court.

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

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and ROBERT L. HOLLOWAY, JR., J., joined.

John N. Moffitt, Lexington, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Jody Pickens, District Attorney General; and Al Earls, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

During a dispute about a fence repair on the property next to the Petitioner's property, the Petitioner cut the victim's arm with his pocketknife, which resulted in the victim losing the use of his arm for approximately four months. John N. Moffitt, 2016 WL 369379, at \*1. The Petitioner disputed the victim's version of events, arguing that the victim threatened him first; nevertheless, the jury convicted the Petitioner of reckless aggravated assault. Id. at \*1-2. While the Petitioner's direct appeal was still pending, the Petitioner, acting pro se, filed a petition for writ of habeas corpus, alleging that the "indictment charging him with aggravated assault was fatally defective." John N. Moffitt v. Perry, No. W2015-01763-CCA-R3-HC, 2016 WL 1169140, at \*1 (Tenn. Crim. App. Mar. 24, 2016). Similar to this appeal, the Petitioner argued in his habeas corpus petition that "[t]he indictment does not withstand constitutional muster because it fails to state the essential elements of the charged offense (Aggravated Assault) of the convicted offense (Reckless Aggravated Assault)." Id. This Court concluded that the indictment was not defective and affirmed the denial of relief to the Petitioner by memorandum opinion. Id. at 2. In 2017, the Petitioner filed a Petition for Post-Conviction Relief, alleging several instances of ineffective assistance of counsel, including the Petitioner's argument that the indictment "wrongfully omitted the 'essential element of reckless,'" which was denied by the post-conviction court and affirmed by this Court on appeal. John Moffitt v. State, No. W2016-02487-CCA-R3-PC, 2017 WL 4124166, at \*4,\*8 (Tenn. Crim. App. Sept. 18, 2017), perm. app. denied (Tenn. Jan. 22, 2018).<sup>1</sup> The Petitioner filed a pro se petition for writ of error coram nobis on March 10, 2020, which the coram nobis court summarily dismissed. It is from that judgment that the Petitioner now timely appeals.

## ANALYSIS

The Petitioner contends, "Reckless [a]ggravated [a]ssault is not a lesser included offense to an indictment for [a]ggravated [a]ssault because the indictment failed to allege [r]ecklessly[.]" He states that, as a result, his conviction for reckless aggravated assault is

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<sup>1</sup> In addition to these appeals, the Petitioner has also appealed the denial of his petition for restoration of his citizenship rights under Tennessee Code Annotated section 40-29-105, see Moffitt v. State, No. W2018-01108-COA-R3-CV, 2018 WL 6333620 (Tenn. Ct. App. Dec. 4, 2018), and he has filed suit for malicious prosecution against the other three persons involved in the altercation that led to his conviction. Moffitt v. McPeake, No. W2016-01706-COA-R3-CV, 2017 WL 4513568 (Tenn. Ct. App. Oct. 10, 2017).

illegal and unconstitutional. Citing Freshwater v. State, 160 S.W.3d 548 (Tenn. Crim. App. Sept. 1, 2004), the Petitioner argues that due process considerations tolled the statute of limitations because his claim establishes “actual innocence.” He also states that he was “totally unaware of the fact about [sic] the illegal and unconstitutional conviction” and that he “would have surely took [sic] advantage of this illegal conviction in his prior filings had he been aware of that fact.”

In response, the State contends that the trial court properly dismissed the Petitioner’s “untimely petition.” First, the State asserts that the petition was untimely because the Petitioner filed his petition “almost four and a half years after the limitations period had already expired.” The State also asserts that the Petitioner did not argue the correct standard for due process tolling of the statute of limitations, because, rather than presenting new evidence, he presented a “legal theory.” Additionally, the State contends that the Petitioner has presented the same claim in this Court multiple times. The State also asserts that the Petitioner’s claim is “so obviously non-meritorious” because “[t]he indictment did not need to allege that [the Petitioner] acted recklessly because it already alleged that he acted ‘intentionally and/or knowingly.’” We agree with the State.

A writ of error coram nobis is available to convicted defendants based on subsequently or newly discovered evidence. Tenn. Code Ann. § 40-26-105(a), (b) (2006). However, a writ of error coram nobis is an “extraordinary procedural remedy” that “fills only a slight gap into which few cases fall.” State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999) (citing Penn v. State, 670 S.W.2d 426, 428 (Ark. 1984)); State v. Workman, 111 S.W.3d 10, 18 (Tenn. Crim. App. 2002)).

“It may be granted only when the coram nobis petition is in writing, describes ‘with particularity’ the substance of the alleged newly discovered evidence, and demonstrates that it qualifies as newly discovered evidence.” Nunley v. State, 552 S.W.3d 800, 816 (Tenn. 2018) (citing and quoting Payne v. State, 493 S.W.3d 478, 484-85 (Tenn. 2016)). “In order to qualify as newly discovered evidence, ‘the proffered evidence must be (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible.’” Id. (quoting Payne, 493 S.W.3d at 484-85). Additionally, the coram nobis petition must show why the newly discovered evidence “‘could not have been discovered in a more timely manner with the exercise of reasonable diligence’ and how the newly discovered evidence, had it been admitted at trial, ‘may have resulted in a different judgment.’” Id. (quoting Payne, 493 S.W.3d at 484-85). “The statute presupposes that the newly discovered evidence would be admissible at trial.” Id. (citing Wilson v. State, 367 S.W.3d 229, 235 (Tenn. 2012); State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim.

App. 1995)).

Relief by petition for writ of error coram nobis is provided for in Tennessee Code Annotated section 40-26-105. The statute provides, in pertinent part:

(b) The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code Ann. § 40-26-105 (b). The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court. State v. Hall, 461 S.W.3d 469, 496 (Tenn. 2015). If a petition for coram nobis relief is granted, the judgment of conviction will be set aside and a new trial will be granted. Payne v. State, 493 S.W.3d 478, 485 (Tenn. 2016).

Petitions for coram nobis relief must be supported by affidavits that are “relevant, material, and germane to the grounds raised in the petition,” and “the affiant must have personal knowledge of the statements contained in the affidavit.” State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995). “Affidavits which fail to meet these criteria will not justify the granting of an evidentiary hearing since the information contained in the affidavits, taken as true, would not entitle the petitioner to relief.” Id. (citing State v. Todd, 631 S.W.2d 464, 466-67 (Tenn. Crim. App. 1981)).

“[C]oram nobis petitions with inadequate allegations are susceptible to summary dismissal on the face of the petition, without discovery or an evidentiary hearing.” Nunley, 552 S.W.3d at 831. “This holding correlates with the “less intense” abuse-of-discretion standard of appellate review for a trial court’s decision on whether to grant a writ of error coram nobis.” Id. at 826.

In addition to the requirements regarding specificity, petitions for writ of error coram nobis are subject to a one-year statute of limitations. Tenn. Code Ann. § 27-7-103. The statute of limitations is calculated from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely, post-trial motion. Payne, 493 S.W.3d at 484; Mixon, 983 S.W.2d at 670. A petition for a writ of error coram nobis may be summarily

dismissed if it fails to show on its face that it has been timely filed because the timely filing requirement in Code section 27-7-103 is an essential element of a coram nobis claim. Nunley, 552 S.W.3d at 828. “[T]he statute of limitations set forth in Section 27-7-103 is not an affirmative defense that must be specifically raised by the State in error coram nobis cases; instead, the coram nobis petition must show on its face that it is timely filed.” Id.

Due process considerations may toll the one-year statute of limitations when a petitioner seeks a writ of error coram nobis. Workman, 41 S.W.3d at 101-102. Due process requires the tolling of a statute of limitations period when a petitioner would otherwise be denied “an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” Id. at 102 (quoting Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992)). “To accommodate due process concerns, the one-year statute of limitations may be tolled if a petition for a writ of error coram nobis seeks relief based upon new evidence of actual innocence discovered after expiration of the limitations period.” Nunley, 552 S.W.3d at 828-29 (citing Wilson, 367 S.W.3d at 234).

In accordance with the extraordinary nature of the writ, petitioners must plead specific facts demonstrating why they are entitled to equitable tolling of the statute of limitations:

To be entitled to equitable tolling, a prisoner must demonstrate with particularity in the petition: (1) that the ground or grounds upon which the prisoner is seeking relief are “later arising” grounds, that is grounds that arose after the point in time when the applicable statute of limitations normally would have started to run; [and] (2) that, based on the facts of the case, the strict application of the statute of limitations would effectively deny the prisoner a reasonable opportunity to present his or her claims . . . . A prisoner is not entitled to equitable tolling to pursue a patently non-meritorious ground for relief.

Id. at 829.

“If a petition for a writ of error coram nobis fails to show on its face either that it has been timely filed in accordance with Tennessee Code Annotated section 27-7-103 or specific facts showing why the petitioner is entitled to equitable tolling of the statute of limitations, the trial court is within its discretion to summarily dismiss it.” Id. A trial court is not required to conduct an evidentiary hearing prior to dismissing a coram nobis petition if the petition fails to meet the necessary prerequisites for granting coram nobis relief. Id. (citation and internal quotation marks omitted). Moreover, “[i]f the averments in the petition are insufficient to warrant relief, the petition may be dismissed prior to any response from the state and without a hearing.” Id. (citation and internal quotation marks

omitted).

We conclude that the coram nobis court properly dismissed the petition for coram nobis relief. The record shows that the petition was filed on March 10, 2020. We agree with the State that the coram nobis court incorrectly determined that the one-year statute of limitations began to run on July 31, 2014, because, according to the record before us, this was the date that the Petitioner was convicted by a jury. The Petitioner's motion for new trial was denied on October 30, 2014, starting the one-year statute of limitations from that date. See Payne, 493 S.W.3d at 484. Therefore, the Petitioner had one year from that date to file his petition, which he did not do until over four years later. We also conclude that the Petitioner has failed to establish equitable tolling of the statute of limitations because he did not present "new evidence of actual innocence discovered after the expiration of the limitations period." Nunley, 552 S.W.3d at 828-29. First, the Petitioner's claim that he is entitled to relief because the indictment failed to allege "recklessly" is not a claim of actual innocence. Second, the Petitioner avers that he was "totally unaware" of this claim until he filed this petition; however, as the State points out, in both the Petitioner's habeas corpus and post-conviction cases, the Petitioner argued that the indictment was defective. Lastly, the Petitioner's reliance on Freshwater v. State is misplaced, as that case addressed newly discovered evidence in the context of Brady v. Maryland, which is not what the Petitioner has claimed here. 160 S.W.3d 548, 555-56 (Tenn. Crim. App. Sept. 1, 2004), abrogated by Nunley, 552 S.W.3d 800. Although our inquiry need go no further, we also conclude that the grounds that the Petitioner raises are non-meritorious, as, by alleging that the Petitioner acted intentionally and/or knowingly, the indictment also covered the mental state of recklessness. See Tenn. Code Ann. § 39-11-301. The Petitioner is not entitled to relief.

### **CONCLUSION**

Based on the foregoing authority and analysis, we affirm the judgment of the coram nobis court.

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CAMILLE R. McMULLEN, JUDGE