IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 4, 2023

STATE OF TENNESSEE v. KEVIN MCDOUGLE

Appeal from the Criminal Court for Shelby County
Nos. 06-04208, 06-04209 W. Mark Ward, Judge

No. W2022-01103-CCA-R3-CD

The petitioner, Kevin McDougle, appeals from the Shelby County Criminal Court's summary denial of his sixth pro se motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. Based on our review of the record, the parties' briefs, and the applicable law, we affirm the decision of the trial court.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and JILL BARTEE AYERS, JJ., joined.

Kevin McDougle, Henning, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The petitioner is currently serving an effective fifty-six-year sentence in the Tennessee Department of Correction for crimes committed in Case Numbers 06-04208, 06-04209, and 07-01739.[1] His sentence stemmed from two separate trials resulting in seven convictions, including: three counts of aggravated robbery, three counts of aggravated assault, and one count of unlawful possession of a handgun. In two separate appeals, the petitioner unsuccessfully challenged his convictions and sentences. *State v.*

[1] Case Numbers 06-04209 and 07-01739 were consolidated at trial.

Kevin McDougle, No. W2007-01877-CCA-R3-CD, 2010 WL 2219591, at *1 (Tenn. Crim. App. May 24, 2010), *no perm. app. filed.*; *State v. Kevin McDougle*, No. W2009-01648-CCA-R3-CD, 2010 WL 2490752, at *1 (Tenn. Crim. App. June 11, 2010), *no perm. app. filed*. The petitioner next sought post-conviction relief for his cases, but he was again unsuccessful in both the trial court and on appeal. *Kevin McDougle v. State*, No. W2011-01430-CCA-R3-PC, 2012 WL 12932002, at *11 (Tenn. Crim. App. June 27, 2012), *no perm. app. filed*.

The record reflects that the petitioner filed motions to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1 on April 18, 2018; April 25, 2019; September 9, 2019; March 23, 2020; and January 7, 2022. The trial court summarily denied each motion. The petitioner only appealed the trial court's denial of his first and fourth motions to this Court.[2] *See State v. Kevin McDougle*, No. W2018-00996-CCA-R3-CD, 2019 WL 1409329 (Tenn. Crim. App. at Jackson, Mar. 27, 2019), *perm. app. denied*, (Tenn. July 18, 2019) and *State v. Kevin McDougle*, No. W2020-00376-CCA-R3-CD, 2021 WL 4451015 (Tenn. Crim. App. Sept. 29, 2021), *no perm. app. filed.* On both occasions, this Court affirmed the decision of the trial court. *Id.*

On July 21, 2022, the petitioner filed his sixth motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. Citing Case Numbers 06-04208 and 06-04209, the petitioner alleged his effective fifty-six-year sentence is illegal because the "[r]ange one applicable statute does not authorize a multiple offender sentence." In its written order denying the petitioner's Rule 36.1 motion, the trial court found:

> This matter comes before the Court on a MOTION TO CORRECT AN ILLEGAL SENTENCE, filed by [p]etitioner on July 21, 2022. Although the record is unclear, it appears that this is at least the 5th filing by the [petitioner] of such a motion. The last previous motion was filed on March 23, 2020, which raised the same issue that is being raised in the present motion.[3] That motion was summarily denied by the trial court and affirmed on appeal. *See State v. Kevin McDougal*, 2021 WL 4451015 (Tenn. Crim. App. Sept. 9, 2021). The tortured history of the case is contained in the intermediate appellate court opinion.
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> For the same reasons cited therein by this Court and by the Court of Criminal Appeals in the last such motion, the present Motion to Correct an Illegal Sentence is denied for failure to state a colorable claim.

[2] The petitioner attempted to appeal the denial of his fifth motion to correct an illegal sentence; however, his appeal was dismissed because the petitioner failed to file a brief. *State v. Kevin McDougle*, W2022-00144-CCA-R3-CD (Tenn. Crim. App. July 12, 2022).

[3] The trial court appears not to account for the Rule 36.1 motion filed by the petitioner on January 7, 2022.

The petitioner timely appealed.

Analysis

The petitioner asserts the trial court erred in denying his Rule 36.1 motion to correct an illegal sentence for failure to state a colorable claim, arguing that his effective fifty-six-year sentence is illegal because the trial court relied on "an enhancement factor" that was not submitted to the jury and proven beyond a reasonable doubt in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). The State disagrees, arguing the trial court did not err in denying the Rule 36.1 motion. Additionally, the State notes that the petitioner did not raise this argument at trial and is raising it for the first time on appeal. Upon our review, it is clear the defendant is not entitled to relief.

Whether a motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law calling for de novo review. *State v. Wooden*, 478 S.W.3d 585, 589 (Tenn. 2015) (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007)). Rule 36.1 provides that the petitioner "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." A sentence is illegal if it is not authorized by the applicable statutes or directly contravenes an applicable statute. Tenn. R. Crim. P. 36.1 (a)(2). If the motion states a colorable claim, the trial court shall appoint counsel if the petitioner is indigent and not already represented by counsel and hold a hearing on the motion, unless the parties waive the hearing. Tenn. R. Crim. P. 36.1 (b)(3). A "'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 movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents." Tenn. R. Crim. P. 36.1 (a)(1).

Initially we note, as did the State, that the petitioner failed to raise the issue presented on appeal in the trial court. More specifically, the petitioner's initial pleading makes no mention of an alleged violation of *Blakely*. Rather, the only issue presented in his initial filing with the trial court was that the "[r]ange one applicable statute does not authorize a multiple offender sentence." Because the petitioner failed to raise the instant claim at the trial level and raised it for the first time on appeal, the issue is waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *State v. Franklin*, No. M2017-00180-CCA-R3-CD, 2018 WL 1100962, at *4 (Tenn. Crim. App. Feb. 27, 2018) (holding the defendant's issue was "waived because the [d]efendant raise[d] it for the first time on appeal"); *State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016) ("It is well-

settled that a defendant may not advocate a different or novel position on appeal."); *State v. Johnson*, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996) ("Issues raised for the first time on appeal are considered waived.").

Despite the petitioner's waiver, a *Blakely* violation, if true, would not render the judgments void. *See Duane M. Coleman v. State,* M2012-00848-CCA-R3-PC, 2013 WL 948430, at *3 (Tenn. Crim. App., March 11, 2013), *no perm app. filed*; *Timothy R. Bowles v. State,* No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at *3 (Tenn. Crim. App., May 1, 2007), *no perm. app. filed*. Because a *Blakely* violation does not meet the Rule 36.1 definition of an illegal sentence and does not establish a void or otherwise illegal judgment, the petitioner has failed to state a colorable claim for relief and is, therefore, not entitled to relief. *Wooden*, 478 S.W.3d at 593.

Finally, concerning the claim raised by the petitioner in the trial court--"[r]ange one applicable statute does not authorize a multiple offender sentence," we note that the petitioner has once again failed to satisfy the procedural requirements of Rule 36.1. Specifically, the rule requires the petitioner to "attach to the motion a copy of each judgment order at issue." Tenn. R. Crim. P. 36.1(a)(1). However, the record in the instant matter reveals that the petitioner failed to attach copies of the judgments for his seven convictions to his motion filed with the trial court, and therefore, failed to comply with the procedural requirements and is not entitled to relief. Absent copies of the judgments, we cannot appropriately review the petitioner's claims. Finally, as noted by the trial court, the Court has previously reviewed the petitioner's claim and determined the petitioner is not entitled to relief. *See McDougle,* 2021 WL 4451015, at *2 ("The Appellant also claimed that 'range one applicable statutes does not authorize multiple offender sentence.'"). "Rule 36.1 may not be used to relitigate those issues that have been previously determined." *State v. Brown*, No. M2015-01754-CCA-R3-CD, 2016 WL 987641, at *2 (Tenn. Crim. App. Mar. 15, 2016), *perm. app. denied* (Tenn. Aug. 18, 2016). As this Court already concluded, "the judgments clearly reflect that the trial court sentenced the [petitioner] in both cases as a Range I, standard offender." *McDougle*, 2021 WL 4451015, at *2. Accordingly, the petitioner's claim has been previously determined by this Court, and he is not entitled to relief.

Conclusion

Based on the foregoing, we affirm the judgment of the trial court.

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J. ROSS DYER, JUDGE