IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

EVAY MARKEL KELLEY V. CHERRY LINDAMOOD, WARDEN

Direct Appeal from the Circuit Court for Wayne County
No. 14464 Robert L. Jones Judge

No. M2008-02738-CCA-R3-HC - Filed September 4, 2009

Petitioner, Evay Markel Kelley, appeals the trial court's denial of his petition for writ of habeas corpus. The State has filed a motion pursuant to Rule 20, Rules of the Court of Criminal Appeals of Tennessee, for this Court to affirm the judgment of the trial court by memorandum opinion. We grant the motion and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Wayne County Circuit Affirmed Pursuant to Rule 20 of the Tennessee Court of Criminal Appeals

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Evay Markel Kelley, Clifton, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General, and T. Michel Bottoms, District Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

In November of 1998, Petitioner was convicted of second degree murder by a Hamilton County Jury and was sentenced to twenty-five years in confinement. On appeal, this court affirmed the conviction and sentence. See State v. Kelley, 34 S.W.3d 471 (Tenn. Crim. App. 2000).

On July 3, 2008, Petitioner filed a pro se petition for habeas corpus relief essentially alleging that his sentence was illegal because it was enhanced beyond the presumptive minimum sentence in violation of Blakely v. Washington, 542 U.S. 296 (2004) and Cunningham v. California, 127 S. Ct. 856 (2007). He also alleged that the trial court provided erroneous jury instructions. The habeas court summarily dismissed the petition. The petitioner now appeals.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated sections 29-21-101 through 29-21-130 codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be

issued are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. See Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007); Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. Archer, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. See Taylor, 995 S.W.2d at 83. The burden is on the petitioner to establish by a preponderance of the evidence, that the sentence is void or that the confinement is illegal. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. See Summers, 212 S.W.3d at 260; Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

First, Petitioner asserts that his sentence has expired because the trial court applied enhancement factors not found by a jury in violation of his Sixth Amendment rights as set forth in Blakely v. Washington, 542 U.S. 296 (2004) and Cunningham v. California, 549 U.S. 856 (2007).

Upon review, we note that this court has held that Blakely violations do not apply retroactively to cases on collateral appeal. See, e.g., Bobby Taylor v. State, No. M2008-00335-CCA-R3-PC, 2009 WL 2047331 (Tenn. Crim. App., at Nashville, July 14, 2009); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486 (Tenn. Crim. App., at Nashville, Nov. 13, 2007); Timothy R. Bowles v. State, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594 (Tenn. Crim. App., at Nashville, May 1, 2007); James R.W. Reynolds v. State, No. M2004-02254-CCA-R3-HC, 2005 WL 736715 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), perm. app. denied (Tenn. Oct. 10, 2005). Additionally, Blakely and Cunningham have not been applied to cases of negotiated plea agreements. See Hoover 215 S.W.3d at 779-80; Keith T. Perry v. Turner, No. W2007-01176-CCA-R3-CD, 2008 WL 185810 (Tenn. Crim. App., at Jackson, Jan. 22, 2008), perm. to app. denied (July 7, 2008). We also note that the decisions of Blakely and Cunningham relate to constitutional violations which, even if proven true, would merely render the judgment voidable and not void. See, e.g., Meeks, 2007 WL 4116486; Bowles, 2007 WL 1266594; Donovan Davis v. State, No. M2007-00409-CCA-R3-HC, 2007 WL 2350093, (Tenn. Crim. App., at Nashville, Aug. 15, 2007), perm. app. denied (Tenn. Nov. 13, 2007). The trial court properly dismissed this claim.

Next, Petitioner argues that his conviction and sentence are void because the trial court erroneously instructed the jury on the lesser-included offenses of first degree murder. A claim of erroneous jury instructions does not meet any of the requirements for habeas corpus relief. Such a claim gives rise to a voidable, not void, judgment. See Rodney L. Tipton v. Howard Carlton, No. E2007-02625-CCA-R3-HC, 2008 WL 3539727 (Tenn. Crim. App., at Knoxville, Aug. 14, 2008), perm. app. denied (Dec. 8, 2008). The trial court also properly dismissed this claim.

Nothing on the face of the petitioner's judgment indicates that the convicting court was without jurisdiction to sentence the petitioner or that the sentence has expired. As a result, the court's summary dismissal was proper. See Summers, 212 S.W.3d at 260.

Upon review of this matter, this Court concludes that no error of law requiring a reversal of the judgment of the trial court is apparent on the record.

CONCLUSION

Accordingly, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, JUDGE