APPENDIX A

No. 20-5872

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 16, 2020
DEBORAH S. HUNT, Clerk

JEFFREY S. WHITAKER,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
MIKE PARRIS, Warden,)
)
Respondent-Appellee.)

Before: GRIFFIN, Circuit Judge.

Jeffrey S. Whitaker, a pro se Tennessee prisoner, appeals the district court's order dismissing as untimely his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Whitaker moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a)(5).

In 1994, Whitaker pleaded guilty in the Roane County Criminal Court to eight counts of child rape. According to Whitaker's waiver of jury trial and request for acceptance of guilty plea, the State would recommend a forty-five-year sentence, the trial court would decide the sentence at a later hearing, and Whitaker would be sentenced under "Range I, Standard." Whitaker received an effective sentence of forty-five years of imprisonment. On each judgment, the box for "Standard 30% Range 1" was checked while the box for "Child Rapist" was not checked. Whitaker challenged his consecutive sentencing on direct appeal, and the Tennessee Court of Criminal Appeals affirmed. *State v. Whitaker*, No. 03C01-9509-CC-00256, 1996 WL 600375 (Tenn. Crim. App. Oct. 15, 1996), *perm. app. denied* (Tenn. Feb. 8, 1999).

After unsuccessfully seeking state post-conviction and federal habeas relief, Whitaker filed a habeas petition in the Morgan County Criminal Court, asserting in part that the trial court lacked jurisdiction to sentence him as a Range I, standard offender with eligibility for release after serving

thirty percent of his sentence because Tennessee Code Annotated § 39-13-523 requires child rapists to serve one hundred percent of their sentences. The habeas court dismissed Whitaker's petition. The Tennessee Court of Criminal Appeals affirmed the denial of habeas relief but remanded to the trial court for correction of the judgments to reflect that Whitaker must serve the entirety of his forty-five-year sentence for his child rape convictions. *Whitaker v. Morgan*, No. E2007-02884-CCA-R3-HC, 2009 WL 454256 (Tenn. Crim. App. Feb. 24, 2009), *perm. app. denied* (Tenn. Aug. 17, 2009). The trial court entered corrected judgments on July 27, 2009.

On April 7, 2011, Whitaker filed a petition for post-conviction relief, claiming that the State breached its promise that he would receive a sentence with a thirty percent release eligibility when the judgments were corrected to require him to serve one hundred percent of his sentence. After a hearing, the trial court denied relief because Whitaker's petition was time-barred and because his claims had been determined in his habeas case. The Tennessee Court of Criminal Appeals affirmed. *Whitaker v. State*, No. E2014-02240-CCA-R3-PC, 2016 WL 97608 (Tenn. Crim. App. Jan. 7, 2016), *perm. app. denied* (Tenn. June 23, 2016).

In 2017, Whitaker filed another § 2254 habeas petition, asserting that the State breached its promise that he would be sentenced as a Range I, standard offender with a thirty percent release eligibility. Upon the respondent's motion, the district court transferred Whitaker's habeas petition to this court to obtain authorization for its consideration. *See* 28 U.S.C. § 1631; *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Whitaker then moved this court for an order authorizing the district court to consider a second or successive habeas petition. This court denied Whitaker's motion as unnecessary and remanded the case to the district court for consideration of his habeas petition. *In re Whitaker*, No. 18-5700 (6th Cir. Feb. 25, 2019) (order). Upon remand, the district court dismissed Whitaker's habeas petition as untimely and declined to issue a certificate of appealability. This timely appeal followed.

Whitaker now moves this court for a certificate of appealability. To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court dismisses a habeas petition on procedural

grounds, as here, a certificate of appealability should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year statute of limitations for habeas petitions challenging state-court judgments. 28 U.S.C. § 2244(d)(1). The one-year limitations period typically runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). The district court determined that the one-year limitations period for challenging the corrected judgments entered on July 27, 2009, began to run on August 26, 2009, when Whitaker's thirty-day period for filing an appeal expired, *see* Tenn. R. App. P. 4(a), and therefore ended on August 27, 2010. The statute of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Whitaker's petition for post-conviction relief filed on April 7, 2011, did not revive the already expired limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Furthermore, Whitaker's petition for post-conviction relief was denied as time-barred and therefore was not "properly filed" for purposes of § 2244(d)(2). *See Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005). Reasonable jurists could not debate the district court's conclusion that Whitaker's habeas petition filed on April 21, 2017, was untimely under § 2244(d)(1)(A).

Nor could reasonable jurists debate the district court's conclusion that Whitaker was not entitled to equitable tolling. AEDPA's limitations period "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418. "Equitable tolling is granted sparingly and is evaluated on a case-by-case basis, with the petitioner retaining the 'ultimate burden of persuading the court that he or she is entitled to

equitable tolling.'" *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 462 (6th Cir. 2012) (quoting *Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011)).

Whitaker asserted that he was not served with copies of the corrected judgments when they were entered on July 27, 2009, and did not learn of their entry until he requested copies of his judgments on December 27, 2010. Whitaker was aware of the decision of the Tennessee Court of Criminal Appeals remanding for correction of the judgments given that he filed a pro se petition for rehearing of that decision two weeks later, on March 9, 2009. Yet Whitaker did not inquire about the corrected judgments until more than a year and a half later. Whitaker also asserted that the State did not announce its intent to no longer honor the plea agreement's thirty percent release eligibility until October 9, 2013. Whitaker failed to explain the significance of this date. In any event, the State consistently maintained throughout Whitaker's case that he was required to serve the entirety of his sentence under Tennessee Code Annotated § 39-13-523. Whitaker failed to demonstrate that he pursued his rights diligently or that an extraordinary circumstance stood in his way.

Reasonable jurists could not debate the district court's dismissal of Whitaker's habeas petition as untimely. Accordingly, this court **DENIES** Whitaker's motion for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Whitaker v. Phillips
United States District Court, E.D. Tennessee. July 1, 2020 Slip Copy 2020 WL 3578355 *(Approx. 5 pages)*

2020 WL 3578355
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.

Jeffrey S. WHITAKER, Petitioner,

v.

Shawn PHILLIPS, Respondent.

No.: 3:17-CV-178-TAV-HBG
Filed 07/01/2020

Attorneys and Law Firms

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John H. Bledsoe, III, Meredith Wood Bowen, Zachary L. Barker, Office of the Attorney General, Nashville, TN, for Respondent.

MEMORANDUM OPINION

Thomas A. Varlan, UNITED STATES DISTRICT JUDGE

***1** Petitioner has pro se filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his confinement under state-court judgments of conviction pursuant to a Roane County guilty plea [Doc. 1]. After reviewing the parties' filings and the relevant state court record, the Court has determined that the petition is untimely, Petitioner is not entitled to relief under § 2254, and no evidentiary hearing is warranted. *See* Rules Governing § 2254 Cases, Rule 8(a) and *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Accordingly, the § 2254 petition will be **DENIED**, and this matter will be **DISMISSED**. Because the petition is untimely, any amendment is futile and Petitioner's motion to amend [Docs. 27, 31] will also be **DENIED.**

I. BACKGROUND

In February 1994, a Roane County grand jury indicted Petitioner for twenty-two counts of rape of a child and four counts of aggravated sexual battery, relative to six victims under the age of thirteen [Doc. 17-1 p. 3–8]. On November 10, 1994, the trial court accepted Petitioner's plea agreement, in which he agreed to plead guilty to eight counts of rape of a child while the other eighteen charges were dismissed [Doc. 17-1 p. 19–23]. At the plea hearing, the State asserted that, although Petitioner was a Range I standard offender, "in accordance with the law that's provided for child rape, [his] sentence [was to be] serve[d] in its entirety" and stated that it would recommend an overall sentence of forty-five years at defendant's sentencing hearing [Doc. 17-2 p. 7]. Defense counsel stated that he agreed with this understanding of the plea agreement [*Id.*].

At sentencing, the court imposed an effective sentence of forty-five years' imprisonment and granted Petitioner accrued pretrial jail credits [Doc. 17-2 p. 41–42]. But, while the State indicated at the sentencing hearing that "[u]nder the Child Rape Law" Petitioner's sentence must "be served 100 percent" [Doc. 17-2 p. 23],[1] the written judgments provided that Petitioner was being sentenced as a

Range I Standard Offender with a thirty percent release eligibility date rather than as a Child Rapist with a one-hundred percent release eligibility date [Doc. 17-1 p. 28–35]. Additionally, the judgments did not provide for pretrial jail credits [*Id.*].

Petitioner filed a direct appeal challenging his sentencing, arguing that the trial court erred in sentencing him to forty-five years and ordering that some of his sentences be served consecutively [Doc. 17-3]. The Tennessee Court of Criminal Appeals ("TCCA") affirmed, finding that the trial court considered the appropriate factors in determining Petitioner's sentence and holding that the record supported the imposition of consecutive sentences [Doc. 17-5]. Petitioner then applied for permission to appeal to the Tennessee Supreme Court ("TSC") [Doc. 17-6] but was denied [Doc. 17-8].

***2** On April 5, 1999, Petitioner filed a petition for post-conviction relief in the trial court in Roane County [Doc. 17-9 p. 1–10]. Petitioner claimed, inter alia, that his plea was not knowing and voluntary, that he was coerced into his confession and plea, and that his counsel was ineffective [*Id.*]. On August 17, 2001, the trial court held an evidentiary hearing and thereafter denied the petition [Doc. 17-9 p. 59]. Petitioner appealed to the TCCA [Doc. 17-11], which affirmed the trial court, finding that Petitioner had demonstrated neither that he received ineffective assistance of counsel nor that his guilty plea was unknowing and involuntary [Doc. 17-13].

Petitioner did not file an appeal to the TSC, but rather, on March 17, 2004, he filed a petition for a writ of habeas corpus in this district claiming that his counsel was ineffective and that his sentence was excessive. *Whitaker v. Morgan*, No. 3:04-CV-126, Doc. 2. The petition was ultimately denied, and a certificate of appealability was not issued by the district court. No. 3:04-CV-126, Doc. 13. Petitioner's application for a certificate of appealability to the Sixth Circuit was likewise denied. No. 3:04-CV-126, Docs. 16, 18.

Shortly after filing his federal petition, Petitioner filed a petition for writ of habeas corpus pursuant to Tenn. Code Ann. § 29-21-101 in Morgan County [Doc. 17-14 p. 5–25].[2] He argued that his sentence was illegal because (1) the trial court did not have jurisdiction to impose consecutive sentences and (2) the judgments provided that Petitioner was eligible for release after serving thirty percent of his sentence, rather than the one hundred percent service required by statute for child rapists [*Id.*]. The State filed a motion to dismiss the petition [*Id.* at 117–21], which the court granted [*Id.* at 122]. Petitioner appealed to the TCCA [Doc. 17-16], which affirmed the dismissal. The TCCA determined that the absence of the child rapist designation in the judgments was a clerical error that could be corrected under Tennessee law and remanded for entry of corrected judgments [Doc. 17-18]. Approximately two weeks later, on March 9, 2009, Petitioner pro se filed a motion for rehearing [Doc. 17-19], which was denied on March 12, 2009, both because the court generally did not accept pro se filings by represented parties and because Petitioner's motion did not raise issues "that [were] not considered by the court in reaching its previous decision in this case" [Doc. 17-20]. Petitioner then applied for permission to appeal to the TSC [Doc. 17-21], which was denied [Doc. 17-22].

The Roane County court entered corrected judgments on July 27, 2009 [Doc. 17-23]. These judgments included the child rapist designation and the corresponding one-hundred percent service requirement but did not include Petitioner's accrued

pretrial jail credits [*Id.*]. Additionally, the corrected judgments imposed community supervision for life [*Id.*].

Next, on April 7, 2011, Petitioner filed a second post-conviction petition in Roane County arguing that (1) the State breached the plea agreement when the judgments were corrected to require one-hundred percent service, (2) the trial court's imposition of consecutive sentences violated the plea agreement, and (3) the imposition of community supervision for life in the corrected judgments violated the plea agreement [Doc. 17-24 p. 3–12; Doc. 17-25 p. 3–22].[3] The trial court dismissed this petition as untimely, finding that no exceptions to the statute of limitations applied and that Petitioner's claims related to his plea agreement and the percentage of his sentence to be served had been previously litigated [Doc. 17-26 p. 27]. The court did, however, vacate the imposition of lifetime community supervision in the corrected judgments [*Id.*].

***3** On appeal, the TCCA held that (1) the petition was clearly outside of the statute of limitations and did not meet any of the requirements for reopening his petition, (2) the correction of the clerical errors in his judgments did not retrigger the statutory period for filing or entitle Petitioner to due process tolling, (3) Petitioner's claim was not "later arising" because the record shows that the State, the defense attorney, and the trial court all understood that the sentence would be served at one hundred percent, (4) Petitioner's claim that he was not aware of the corrected judgments until 2011 was not credible because the court had filed an opinion discussing corrected judgments in February of 2009 and Petitioner had pro se filed a motion for rehearing approximately two weeks later, and (5) even if Petitioner's claims were reviewed on the merits, he would not be entitled to relief, because the record demonstrates that the parties understood that Petitioner's sentence would be served in its entirety [Doc. 17-30]. Petitioner then applied for permission to appeal to the TSC [Doc. 17-31], which was denied [Doc. 17-33].

On April 21, 2017, Petitioner filed the instant petition [Doc. 1] and shortly thereafter filed an amended petition [Doc. 4]. The State filed a motion to transfer Petitioner's petition to the Sixth Circuit as a successive petition [Docs. 10, 11], which the Court granted [Doc. 14]. However, the Sixth Circuit determined that the petition was not successive because the corrected judgments "chang[ed] the substance of" Petitioner's sentence by requiring one-hundred percent service and thus constituted a new judgment [Doc. 15 p. 4]. Thus, the Sixth Circuit held, Petitioner did not require authorization before this Court could consider the instant petition [*Id.*]. On remand, Respondent filed a response [Doc. 18], and Petitioner replied [Doc. 25]. Petitioner then filed a motion for leave to amend [Doc. 27], which Respondent opposed [Doc. 29]. Petitioner replied to Respondent's opposition and filed an accompanying amendment [Docs. 30, 31].[4] The matter is now ripe for review.

II. LEGAL STANDARD

Federal habeas petitions pursuant to § 2254 are subject to a one-year statute of limitations set out by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2244(d). Specifically, a petitioner has one year to file an application from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d). In most cases, subsection (A) provides the operative date and the one-year limitations period begins to run on "the date on which the judgment became final by the conclusion or direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A); *see* Fed. R. Civ. P. 6(a) (providing "the day of the act, event, or default from which the designated period of time begins to run shall not be included").

However, the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). An appeal is properly filed when "its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). To determine if Petitioner's collateral attack was properly filed, the Court looks to how the state courts treated it. *Griffin v. Lindamood*, No. 2:16-cv-188, 2017 WL 3974463, at *4 (E.D. Tenn. Sept. 6, 2017) (citing *Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000)). Federal proceedings, regardless of proper filing, do not toll the statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

***4** The one-year limitations period for § 2254 petitions is also subject to equitable tolling where appropriate. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). Petitioner is " 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). This doctrine is applied sparingly by federal courts. *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003).

III. ANALYSIS

The AEDPA one-year statute of limitations for Petitioner to challenge the corrected judgments (entered on July 27, 2009) began on August 26, 2009, when Petitioner's thirty-day period for filing an appeal expired. *King v. Morgan*, 807 F.3d 154, 159–60 (6th Cir. 2015); *see* Tenn. R. App. P. 4(a) (notice of appeal "shall be filed ... within 30 days after entry of the judgment appealed from"). The AEDPA statute of limitations thus expired on August 27, 2010, well before Petitioner filed the instant petition for habeas corpus relief on April 18, 2017. As a result, the petition, which was filed nearly seven years after the limitations period had expired, is untimely.

Although state collateral proceedings can statutorily toll the limitations period pursuant to § 2244(d)(2), Petitioner's second petition for post-conviction relief in Roane County (filed on April 7, 2011), and the appellate proceedings related thereto, did not toll the limitations period. As the Roane County trial court concluded, and the TCCA affirmed on appeal, that state-court post-conviction petition was not timely and thus not "properly filed" under Tennessee law. Furthermore, that petition was filed after the AEDPA statute of limitations had

already expired. *See Vroman v. Brigano*, 346 F.3d 598, 602–03 (6th Cir. 2003) (holding that an untimely petition is not "properly filed," and that a petition cannot restart an already-expired limitations period). For these reasons, the statute of limitations was not statutorily tolled.

It was not equitably tolled either. To demonstrate that he is entitled to equitable tolling, Petitioner must show that he was diligently pursuing his rights under § 2254 and some external factor prevented his timely filing. *Holland*, 560 U.S. at 649. He has not done so. Petitioner argues that he was prevented from timely filing because (1) he was not served with copies of the corrected judgments when they were entered and did not learn of their entry until 2011; (2) the state actively misled him and concealed the entry of the corrected judgments by "continuing to honor the 30% release eligibility until October 9, 2013"; and (3) the post-conviction court was untimely in its handling of Petitioner's post-conviction petition [Doc. 25 p. 9]. But the TCCA found that Petitioner's assertion that he did not know of the corrected judgments until 2011 was not credible given its opinion remanding for entry of the judgments and Petitioner's subsequent motion for rehearing. Even accepting this assertion as true, Petitioner waited six years after he supposedly learned of the corrected judgments—and nearly four years after he claims the state ceased honoring the thirty percent release eligibility—to file his federal petition.[5] As to Petitioner's final claim, the timeliness of the state court's decision with respect to his post-conviction petition had no bearing on Petitioner's ability to file his federal petition. Overall, Petitioner has not shown how any of these circumstances prevented him from timely filing his federal petition. For these reasons, the Court finds that Petitioner is not entitled to equitable tolling of the limitations period.

IV. CONCLUSION

***5** In sum, because the instant petition was filed after the expiration of the limitations period, and because the limitations period was not tolled, the petition is untimely. Accordingly, Petitioner's petition for a writ of habeas corpus [Doc. 1] will be **DENIED,** and this action will be **DISMISSED**. Because the petition is untimely, any amendment is futile and Petitioner's motion to amend [Docs. 27, 31] will likewise be **DENIED.**

V. CERTIFICATE OF APPEALABILITY

The Court must now consider whether to issue a certificate of appealability ("COA") should Petitioner file a notice of appeal. Under 28 U.S.C. § 2253(a) and (c), a petitioner may appeal a final order in a habeas proceeding only if he is issued a COA, and a COA may only be issued where a Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition on a procedural basis without reaching the underlying claim, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, reasonable jurists would not disagree that Petitioner's petition is untimely. Accordingly, a **COA SHALL NOT ISSUE.**

AN APPROPRIATE ORDER WILL ENTER.

All Citations

Slip Copy, 2020 WL 3578355

Footnotes

1 In addition to the Prosecutor's statements, Petitioner's counsel made several statements that vaguely indicated he understood the sentence was to be served at one-hundred percent [*see* Doc. 17-2 p. 31 ("I think the very least the Court could do under the law would be to sentence him to 15 years, day for day, no parole, no good and honor time.... Fifteen years that he has to serve day for day; no credits, none.")]. The court also noted during sentencing that "of course that is a sentence to serve, as you already know. There's no portion with that." [*Id.* at 42].

2 In this filing, Petitioner indicated that it was his third application for habeas corpus in the Morgan County Criminal Court [Doc. 17-14 p. 7].

3 In addition to these filings, Petitioner also filed a motion to correct an illegal sentence on November 8, 2013 as well as a later amended motion on April 13, 2016. He likewise filed a motion to enforce his plea agreement on June 25, 2014.

4 It appears that Petitioner has again filed for permission to file a second or successive petition with the Sixth Circuit [Doc. 32].

5 Although it remains unclear on what grounds Petitioner alleges that the State first evinced an intent to cease honoring the thirty percent release eligibility in October of 2013, the Court notes that any argument that the corrected judgments were concealed from him until this date is inconsistent with Petitioner's own admission that he knew of the judgments by at least 2011.

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APPENDIX C

Whitaker v. State
Court of Criminal Appeals of Tennessee, AT KNOXVILLE. January 7, 2016 Slip Copy 2016 WL 97608 (Approx. 9 pages)

2016 WL 97608
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT KNOXVILLE.

Jeffrey S. **Whitaker**

v.

State of Tennessee

No. E2014-02240-CCA-R3-PC
August 18, 2015 Session
Filed January 7, 2016
Application for Permission to Appeal Denied by Supreme Court June 23, 2016.

Appeal from the Criminal Court for Roane County, No. 10920, E. Eugene Eblen, Judge

Attorneys and Law Firms

Cashauna C. Lattimore, Knoxville, Tennessee, for the Petitioner, Jeffrey S. **Whitaker**.

Robert E. Cooper, Jr., Attorney General and Reporter; Nicholas W. Spangler, Assistant Attorney General; Russell Johnson, District Attorney General; and Frank A. Harvey, Assistant District Attorney General, for the Appellee, **State** of Tennessee.

Opinion

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and TIMOTHY L. EASTER, JJ., joined.

OPINION

CAMILLE R. McMULLEN, J.

***1** The Petitioner, Jeffrey S. **Whitaker**, appeals the Roane County Criminal Court's dismissal of his second petition for post-conviction relief. On appeal, the Petitioner argues that the one-year statute of limitations should be tolled based on the later-arising claims doctrine and the discovery rule of contract law, that his plea agreement was breached when his judgments were corrected to show a release eligibility of 100% and when the trial court imposed partially consecutive sentences, and that the post-conviction court erred in failing to apply the doctrine of judicial estoppel against the **State**. Upon review, we affirm the judgment of the post-conviction court.

On November 10, 1994, the Petitioner pled guilty to eight counts of child rape in the Roane County Criminal Court, and the **State** agreed to dismiss the remaining eighteen counts involving child rape and aggravated sexual battery. *See **State** v. Jeff **Whitaker**,* No. 03C01-9509-CC-00256, 1996 WL 600375, at *1-2

(Tenn.Crim.App. Oct. 15, 1996), *perm. app. denied* (Tenn. Feb. 8, 1999). The written plea agreement **stated** that the Petitioner was pleading guilty to eight counts of child rape in exchange for the following conditions:

1. The **State** would recommend a forty-five-year sentence (a cap);

2. The trial court would determine the Petitioner's sentence at a later hearing;

3. The Petitioner would be sentenced as a "Range I, Standard" offender; and

4. Counts 4–10; 12–15; 19–22; and 24–26 of the indictment would be dismissed.

At the guilty plea hearing, the **State** summarized the facts underlying the Petitioner's guilty plea:

> With regard to all counts upon which pleas are being entered, we would stipulate that the offenses occurred between July and December of 1993 at the residence of the defendant located in Roane County. In Counts 1, 2 and 3, during that time period, we would stipulate that the defendant engaged in sexual penetration of [A.D.],[1] a child under the age of 13. In Count 11 that he engaged in unlawful sexual penetration of [V.B.], a child under the age of 13. In Counts 16 through 18, on three occasions he engaged in unlawful sexual penetration of [L.G.], a child under the age of 13. And in Count 23, likewise, during the same time period, he engaged in unlawful sexual penetration of [B.S.], a child under the age of 13.

The **State** then made the following statement to the trial court:

> Your Honor, our recommendation first is that the defendant would fall in the Standard Range One Category. We will have a further sentencing hearing on the 27 th day of February. At which time either side can present evidence to Your Honor concerning mitigating and aggravating factors. The **State** will recommend a sentence of 45 years at the conclusion of that hearing. Of course the ultimate sentence will be up to Your Honor. And in accordance with the law that's provided for child rape, the sentence will be to serve in its entirety.

The trial court then accepted the Petitioner's guilty plea to the eight counts of child rape.

***2** At the March 20, 1995 sentencing hearing, the **State** made the following assertions to the court after the close of proof:

> Your Honor, by way of a starting point in this case, the defendant has entered guilty pleas in eight counts of child rape. That sentence, of course, is to be served by law. Under the Child Rape Law it is to be served 100 percent. As part of the plea agreement, the **State** agreed that it would recommend 45 years. The Court is to determine the total sentence within the appropriate range, and whether it is concurrent or consecutive to the Anderson County sentence.

Later, the **State** and defense counsel made the following arguments regarding the Petitioner's sentence:

> [The **State**]: Your Honor has the decision of sentencing the defendant here on eight counts of child rape. The sentence range is a Range One Offender, is

between 15 to 25 years on each one of those sentences. As indicated as part of the plea agreement, the **State** is simply recommending 45 years....

Defense Counsel: May the Court, please, I don't think there's any question about that. I think the very least the Court could do under the law would be to sentence him to 15 years, day for day, no parole, no good and honor time. I know you often times read things about people getting parole, getting out of prison. It's not going to happen to [the Petitioner]. Fifteen years that he has to serve day for day, no credits, none.

....

...This is a 32-year old man.... [I]f the court gave him the minimum sentence, he could be 47 years old before he was out-or 46. I guess he's been in about a year or so now, so that would be-with credit for that he'd be 46 or 47, at the very minimum the Court could do.

...I don't know necessarily that ... we believe that a 15-year sentence is the appropriate sentence. I'm not going to suggest that. I'm not going to suggest that. I'm just going to say that I think that 45 years is too much, [a]nd that probably somewhere between [15] and 45 years is the appropriate sentence. We could ask for a 15-year sentence. As an advocate, I say that, understanding the Court has within that 30 year span, the ability to make ... consecutive [or] concurrent. And there is no question, also, that these can be consecutive by statute. There's no question about that. And I think the Court would have to find by a preponderance of the evidence that certain factors exist, one of which is that has to do with sexual abuse of minor children. And I don't think there's any question about that. So that these could be consecutive sentences. That is under the Section 40-35-115. That is Number 5, that it involved-two or more statutory offenses involved in the sexual abuse of a child. It is within your power to make these consecutive. We'd ask the Court to look at the entire case.

After hearing the parties' arguments, the trial court imposed fifteen-year sentences for each of the eight counts and ordered counts 1, 11, and 16 served consecutively to one another for an effective sentence of forty-five years.[2] *See id.* The court specifically noted that the fifteen-year sentences were "to serve, as you already know" and that there was "no portion with that." Although the **State**, defense counsel, and the trial court **stated** that the fifteen-year sentences were to be served at 100% pursuant to the "child rape law," the original judgments entered reflect a release eligibility of 30% for the convictions. On direct appeal, the Petitioner asserted that the trial court erred in ordering three of the sentences served consecutively, and this court affirmed the judgments of the trial court. *See id.* at *4.

***3** On April 5, 1999, the Petitioner filed a post-conviction petition, asserting that his plea was involuntary and that he received ineffective assistance of counsel. *See Jeffrey **Whitaker** v. **State**,* No. E2001-02399-CCA-R3-PC, 2003 WL 21276125, at *1 (Tenn.Crim.App. June 3, 2003). The **State** filed a response, asserting the following:

On March 20, 1995, Petitioner was sentenced to 15 yrs. On each of eight Counts with two to run consecutive, for a total effective sentence of 45 yrs, at 30%. The Department of Corrections first rejected this 30% classification, but later notified all parties that this sentence would indeed be honored, thereby giving Petitioner "the benefit of his bargain."

....

> Petitioner['s] trial counsel provided advice and service to petitioner well beyond that required by relevant case law. Petitioner was facing 21 Counts of child rape, each subject to a minimum penalty of 15 years and maximum of 25 years in Range One. (Petitioner knew that the **State** would request the Court to run only two sentences consecutive. See Guilty Plea set attached as Exhibit No. 1)[.] Petitioner had clearly given non-custodial incriminating statements regarding most or all victim[s'] allegations. The sentencing statutes required service of all sentences imposed. Counsel was able to negotiate Range One, Standard sentences. This means service at 30% prior to release eligibility. There were multiple child victims available to give evidence of Petitioner['s] crimes. His own daughter had made rape allegations against him. Petitioner ['s] counsel was able to negotiate Guilty Pleas on only eight of 26 counts pending against Petitioner. This outcome avoided potential damage to very young child victims during lengthy litigation. The agreed sentences were set at the minimum of 15 yrs. on each with the Court to decide the issue of concurrent/consecutive sentencing. His outcome of 45 years at 30% under his circumstances speaks volumes about the competence of his trial counsel.

The Petitioner then filed a "Rebuttal to **State's** Response to Petition for Post -Conviction Relief." In it, the Petitioner argued that his sentence was the result of ineffective assistance of trial counsel:

> The petitioner did not receive "the benefit of his bargain" but rather was lulled into believing that his pretrial statement had sealed his fate and that there was no other alternative. And, in spite of his Range I 30% classification, it is commonly known among inmates that the Parole Board does not parole sex offenders. Therefore, even if petitioner is fortunate enough to receive all of his sentence reduction credits, he will still be required to serve thirty (30) calendar years before expiring his term of imprisonment.

He also argued that trial counsel was ineffective in allowing the trial court to sentence him to consecutive sentences without requiring proof of the aggravating circumstances by a preponderance of the evidence:

> [T]he **State**, through their response, has continually praised counsel's ability to negotiate Range I, Standard sentences on only eight (8) counts of twenty-six (26) counts pending against the petitioner and considers the outcome of 45 years at 30% to be a great accomplishment on the part of counsel. Yet at sentencing, counsel allowed the court to sentence petitioner consecutively based entirely upon enhancement factors which is clearly in direct contravention of the 1989 Sentencing Reform Act.....

***4** At the evidentiary hearing, trial counsel testified that he discussed with the Petitioner that "the minimum sentence on child rape was 15 years, and that that [was] served at 100%, with no credits for good time or any other time." He added, "I explained to [the Petitioner] that there was no parole; that [the sentence] was to be served at 100%; that the minimum sentence is fifteen years." The Petitioner testified that trial counsel never reviewed the plea agreement with him before asking him to sign it. Following this hearing, the post-conviction court denied post-conviction relief, finding that the Petitioner's guilty pleas were voluntary and knowing and that trial counsel had rendered effective assistance. *See id.* at *3. On appeal, this court affirmed the denial of post-conviction relief. *See id.* at *4–5.

Thereafter, the Petitioner filed a petition for habeas corpus relief[3] in the Morgan County Criminal Court, arguing that he was sentenced illegally and that the trial court erred in not applying the doctrine of judicial estoppel against the **State**. *See Jeffrey S. **Whitaker** v. Morgan,* No. E2007-02884-CCA-R3-HC, 2009 WL 454256, at *1 (Tenn.Crim.App. Feb. 24, 2009), *perm. app. denied* (Tenn. Aug. 17, 2009). After appointing counsel and conducting a hearing on the petition, the habeas corpus court dismissed the petition, finding that the Petitioner had not established that the judgments were void because the failure to place a check in the child rapist box was a clerical error and that the Petitioner failed to establish that his sentences had expired. *See id.*

On appeal, the Petitioner argued that the trial court lacked jurisdiction to sentence him as a Range I, standard offender with a release eligibility of 30% because this sentence was contrary to Tennessee Code Annotated section 39-13-523, requiring a release eligibility of 100% for child rapists, and that any ambiguities in the plea agreement should be construed in his favor. *See id.* at *2. He also asserted that the **State** should have been precluded from arguing that he did not receive a sentence providing for an early release date after the **State** claimed during his post-conviction case that he received the benefit of his bargain when he received a sentence with a 30% release eligibility. *See id.* at *3.

In considering these issues, this court meticulously evaluated the appellate record:

> The eight judgments in the record reflect that the petitioner was sentenced to fifteen years as a Range I, standard offender for each conviction. The box for "child rapist" is not checked on any of the eight judgments, although Tennessee requires a child rapist to serve a sentence in its entirety, "undiminished by any sentence reduction credits such person may be eligible for or earn." T.C.A. § 39 -13-523(b) (Supp.1994) (amended 1998, 2007). The record reflects that other counts against the petitioner for child rape and aggravated sexual battery were dismissed pursuant to the plea agreement, on which the petitioner was labeled a "Range I, standard" offender....
>
> The guilty plea acceptance hearing transcript reflects that the parties understood the agreement involved a sentence of forty-five years to be served "in its entirety," even though the petitioner was a Range I offender. The sentencing hearing transcript reveals the **State** began its argument for a sentence of forty-five years at one hundred percent. The transcript shows defense counsel **stated** that the minimum sentence available to the trial court was a fifteen-year sentence "day for day, no parole, no good and honor time" and that the petitioner would have to serve the sentence with no credits and would not receive parole. The sentencing transcript shows the trial court imposed a "sentence to serve" consisting of three consecutive fifteen-year sentences, with the other sentences running concurrently.

***5** *Id.* at *1. As to the Petitioner's claim that his sentences were illegal, this court held that he was not entitled to relief:

> [T]he petitioner has not met his burden to demonstrate that the sentences actually imposed were illegal. Review of the sentencing hearing transcript reveals that the **State**, defense counsel, and the court **stated** that the fifteen-year sentences were to be served at one hundred percent in compliance with the "child rape law." Although the trial court **stated** that "the sentence will have to be 15 years on each count, as a Range I offender, by law," the trial court imposed, in its next sentence, three consecutive sentences and said that each was a "sentence to serve. There's no portion with that." The judgments, in contrast, do

> not include the one hundred percent service time. Where the transcript and judgments conflict, the transcript controls. ***State*** *v. Davis,* 706 S.W.2d 96, 97 (Tenn.Crim.App.1985) (citing ***State*** *v. Zyla,* 628 S.W.2d 39, 42 (Tenn.Crim.App.1981)).

Id. at *2. As to the Petitioner's judicial estoppel argument, the trial court noted that the **State** "respond[ed] to this claim in a footnote, in which it **states** that the **State's** post-conviction pleading included the 'erroneous statement' that the petitioner received the benefit of his sentencing bargain." *Id.* at *3. This court also held that the Petitioner was not entitled to relief on this issue:

> [T]he record does not show that the petitioner's judgments are void. While we acknowledge that the judgments should have been corrected earlier, the petitioner's allegations of judicial estoppel require examination outside the record. *See Taylor v.* ***State,*** 995 S.W.2d at 83 (holding that "[a] voidable conviction or sentence is one which is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity.")[.] Because the petitioner alleges a claim for relief from a voidable judgment, this is not a cognizable claim for habeas corpus relief, which may only be granted for void judgments. The petitioner is not entitled to relief.

Id. This court affirmed judgment of the habeas corpus court but remanded the case for correction of the judgments[4] to reflect a release eligibility of 100% because the Petitioner had been convicted of child rape. *See id.* Approximately two weeks after this court filed its opinion in the habeas corpus case, the Petitioner filed a pro se petition for rehearing, despite the fact that he was represented by counsel.[5] After determining that the Petitioner had raised no issues that had not been considered by the court in reaching its decision, this court denied the motion three days later. The Tennessee Supreme Court denied permission to appeal a few months later. *See id.* at *1.

***6** On April 7, 2011, the Petitioner filed a second post-conviction petition pro se, which is the subject of this appeal. In this petition, he alleges that he has later-arising claims. First, he argues that the **State** breached its promise that he would receive a sentence with a 30% release eligibility pursuant to the terms of his plea agreement, and then denied making such a promise in a later proceeding, which resulted in entry of corrected judgments reflecting sentences with 100% release eligibility. Second, he contends that his plea agreement was breached when the judgments were corrected to reflect three consecutive fifteen-year sentences at 100% release eligibility. Third, he argues that the terms of the plea agreement were breached when the corrected judgments required him to serve a sentence of community supervision for life pursuant to Tennessee Code Annotated section 39 -13-524 upon the expiration of his sentences.

On June 17, 2011, the Petitioner filed a supplement containing authorities in support of his second post-conviction petition. On December 22, 2011, the post-conviction court appointed counsel for the Petitioner. However, on April 9, 2012, the Petitioner, pro se, filed an amended petition for post-conviction relief and memorandum of law, alleging that the trial court violated Article I, section 25 of the Tennessee Constitution when it accepted and imposed a sentence pursuant to an agreed upon sentencing cap. On June 4, 2012, appointed counsel adopted the pro se post-conviction petition and the amended petition.

On April 2, 2013, the Petitioner filed a pro se "Motion for Mandatory Answer," asking for an order directing the **State** to respond to his post-conviction petition. On June 12, 2014, the **State** filed a "Response to Post-Conviction Petition,"

contending that the Petitioner filed his petition outside the one-year statute of limitations, that none of the exceptions to the statute of limitations applied, and that a prior petition for writ of habeas corpus attacking the merits of the convictions had been resolved on the merits.

On June 25, 2014, the Petitioner filed a pro se "Motion to Enforce Plea Agreement" and accompanying memorandum of law, asking the post-conviction court to enforce the plea agreement, which he claimed entitled him to fifteen-year sentences for each of the eight counts to be served concurrently with one another and concurrently with the Anderson County sentences, or to vacate the plea agreement and restore the parties to the status they held prior to entry of the plea agreement. Also on June 25, 2014, the Petitioner filed a pro se "Reply in Opposition of **State's** Response to Petition for Post Conviction Relief." In it, the Petitioner argued, *inter alia,* that he had a later-arising claim because the plea agreement was not breached until the judgments were corrected to reflect a release eligibility of 100%, that his claims regarding the consecutive nature of his sentences did not arise until after the corrected judgments were entered, that his claims were not previously determined because neither the habeas corpus court nor the Tennessee Court of Criminal Appeals had determined whether the 30% release eligibility was an element of the plea agreement, and that despite the **State's** claims to the contrary, the corrected judgments did not show "the true **state** of [the] plea agreement."

On June 30, 2014, the trial court conducted a hearing on the second post-conviction petition. No proof was presented, although the trial court heard arguments from both parties. Petitioner's counsel[6] **stated** that she had received copies of the Petitioner's pro se filings and asserted that the issues raised in those filings were appropriate. Although she acknowledged that the petition had been filed outside the statute of limitations, she claimed, citing *Sands v.* ***State,*** 903 S.W.2d 297 (Tenn.1995), and *Burford v.* ***State,*** 845 S.W.2d 204 (Tenn.1992), that the statute of limitations should be equitably tolled because the Petitioner's grounds for relief arose after the expiration of the statute of limitations period. She explained that the Petitioner's judgments were corrected on July 27, 2009, to show a release eligibility of 100%, following the unsuccessful appeal of his habeas corpus case, and that the Petitioner did not receive copies of the corrected judgments until January 2011, which was well beyond the statute of limitations period. Consequently, she argued that a strict application of the statute of limitations would deny the Petitioner a reasonable opportunity to present his claims.

***7** As to the merits of the petition, counsel argued that the **State** breached the plea agreement when the judgments were corrected to show a release eligibility of 100% because the plea agreement classified the Petitioner as a Range I, standard offender. She **stated** that although the Tennessee Court of Criminal Appeals remanded the case for entry of corrected judgments in the habeas corpus case because it believed the 30% release eligibility was a clerical error, she referenced the **State's** July 2, 2001 response to the Petitioner's first post-conviction petition, wherein the prosecutor **stated** that the Petitioner received a sentence of forty-five years with a release eligibility of 30%, that the Department of Correction initially honored the sentence containing a 30% release eligibility, and that the Petitioner received the benefit of his bargain. She said that despite these assertions, the **State** later changed its position during the Petitioner's habeas corpus case and argued that the 30% release eligibility was a clerical error, which resulted in the entry of the corrected judgments reflecting a release eligibility of 100%. Counsel claimed, citing *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001), that the doctrine of judicial estoppel should preclude the **State** from using one argument in one phase of the case and using a different argument in a later phase of the case

simply because its interests have changed. Moreover, citing *Santobello v. New York,* 404 U.S. 257, 262 (1971), she argued that the Petitioner bargained for and received a 30% release eligibility, and the **State** breached this agreement when the judgments were corrected to reflect a 100% release eligibility. She also claimed the Petitioner bargained for the Roane County sentences to be served concurrently to one another and that the **State** breached the plea agreement when the sentences were ordered to be served consecutively to one another. For these reasons, counsel argued that the post-conviction court should allow the Petitioner to withdraw his guilty plea and return the parties to the positions they had prior to the plea negotiations.

The **State** argued that the Petitioner's second post-conviction petition had been filed outside the one-year statute of limitations and that none of the exceptions to the statute of limitations applied. The **State** conceded that because the Petitioner's offenses fell "outside of the July 1st, [19]96 date set out in the applicable statute," the Petitioner should not have been placed on community supervision for life. However, the **State** argued that the remaining issues in the second petition were not late-arising because these issues had already been addressed by the trial court and the Tennessee Court of Criminal Appeals in the Petitioner's habeas corpus case. As to the issue regarding the manner of service of the sentences, the **State** asserted that the issue of whether the sentences would be served concurrently or consecutively was not included in the plea agreement and that the trial court made the decision to impose partially consecutive sentences after a sentencing hearing. As to the claim that the plea agreement was breached, the **State** asserted that the transcript of the sentencing hearing established that the trial court, the **State**, and defense counsel **stated** that the Petitioner's sentence had a release eligibility of 100%. The **State** explained that the district attorney's office simply "got it wrong" in the first post-conviction case when it asserted that the Petitioner's release eligibility was 30%, and the **State** later realized its mistake after reviewing the record, and the judgments were corrected. It **stated** that the Petitioner was not "wanting the benefit of the bargain that he got," he was "want[ing] the benefit of that ... clerical mistake that was corrected." Finally, the **State** argued that the Petitioner was not entitled to equitable tolling because the corrected judgments were filed in 2009, and the Petitioner's attorney at the time was made aware of the court's opinion regarding the correction of the judgments. At the conclusion of the hearing, the post-conviction court held that the Petitioner was not subject to lifetime supervision but that all other claims for post-conviction relief were denied.

On July 15, 2014, the Petitioner filed a premature notice of appeal which was considered timely pursuant to Tennessee Rule of Appellate Procedure 4(d). By written order entered on November 12, 2014, the post-conviction court ordered that the imposition of the lifetime supervision provision on the corrected judgments be "lifted" but denied post-conviction relief as to the remaining claims because the petition was time-barred and because the claims had been previously determined in the Petitioner's habeas corpus case.

ANALYSIS

The Petitioner initially asserts that the one-year statute of limitations for post-conviction petitions should be tolled based on the later-arising claims doctrine, *see Whitehead v. **State**,* 402 S.W.3d 615, 623 (Tenn.2013); *Burford,* 845 S.W.2d at 208, and the discovery rule of contract law, *see Pero's Steak & Spaghetti House v. Lee,* 90 S.W.3d 614, 621 (Tenn.2002); *Foster v. Harris,* 633 S.W.2d 304, 305 (Tenn.1982). He contends that his plea agreement was breached when his judgments were corrected to show a release eligibility of 100% and when the trial court imposed partially consecutive sentences resulting in an effective sentence of

forty-five years. *See* ***State*** *v. Mellon,* 118 S.W.3d 340, 346 (Tenn.2003). The Petitioner also argues that the **State** should be judicially estopped from arguing that the 30% release eligibility was merely a clerical error on the original judgments entered in his case when it argued during his first post-conviction case that the 30% release eligibility was a bargained-for element of the plea agreement. *See New Hampshire,* 532 U.S. at 749; *Marcus v. Marcus,* 993 S.W.2d 596, 602 (Tenn.1999); *Cardin v. Campbell,* 920 S.W.2d 222, 223–24 (Tenn.Ct.App.1995). We conclude that the Petitioner is not entitled to relief because this is the Petitioner's second post-conviction petition, because this case does not require due process tolling, and because the claims in this petition have been previously determined.

***8** Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgement of a constitutional right. T.C.A. 40–30–103. The Post–Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief," and a petitioner may not file more than one post-conviction petition "attacking a single judgment." *Id.* § 40–30–102(c). If a prior petition has been resolved on the merits by a court of competent jurisdiction, any second or subsequent post-conviction petition shall be summarily dismissed. *Id.* "A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40–30117." *Id.*

A person in custody under a sentence of a court of this **state** must petition for post-conviction relief within one year of the date of the final action of the highest **state** appellate court to which an appeal is taken or, if no appeal is taken, within one year of the date on which the judgment becomes final. *Id.* § 40–30–102(a). "The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity." *Id.* Moreover, "[t]ime is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise." *Id.* If it plainly appears on the face of the post-conviction petition that the petition was filed outside the one-year statute of limitations or that a prior petition attacking the conviction was resolved on the merits, the trial court must summarily dismiss the petition. *Id.* § 40–30–106(b). In addition, "[i]f, on reviewing the petition, the response, files, and records, the court determines conclusively that the petitioner is entitled to no relief, the court shall dismiss the petition." *Id.* § 40–30–109(a) (2006).

Tennessee Code Annotated section 40–30–102(b) provides three exceptions to the statute of limitations for petitions for post-conviction relief: (1) claims based on a final ruling of an appellate court establishing a constitutional right not recognized as existing at the time of trial and given retroactive effect by the appellate courts; (2) claims based upon new scientific evidence establishing that the petitioner is actually innocent of the conviction offense; and (3) claims seeking relief from a sentence that was enhanced because of a previous conviction and the previous conviction was later held to be invalid. *Id.* §§ 40–30–102(b)(1)–(3), –117(a)(1)–(3) (establishing the same requirements for reopening a post-conviction petition).

As previously **stated**, the Post–Conviction Relief Act contemplates the filing of one petition for post-conviction relief, and this is the Petitioner's second post-conviction petition. He does not dispute that it was filed well outside the statute of limitations. In addition, it is clear that none of the exceptions to the one-year statute of

limitations are applicable and that the Petitioner did not meet the requirements for reopening a post-conviction petition.

Nevertheless, due process concerns may toll the statute of limitations for post-conviction relief. The Tennessee Supreme Court recently clarified the standard for due process tolling, holding that a post-conviction petitioner is entitled to tolling of the statute of limitations upon a showing "(1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing." *Bush v.* ***State,*** 428 S.W.3d 1, 22 (Tenn.2014) (citing *Whitehead,* 402 S.W.3d at 631). The court explained that pursuing one's rights diligently " 'does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts [to pursue his or her claim].' " *Id.* (quoting *Whitehead,* 402 S.W.3d at 631). However, it stressed that due process tolling " 'must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.' " *Id.* (quoting *Whitehead,* 402 S.W.3d at 631–32). The court also identified three circumstances in which due process required a tolling of the statute of limitations: (1) when the claim for relief arises after the statute of limitations has expired; (2) when a prisoner's mental incompetence prevents him or her from complying with the statute of limitations; and (3) when a prisoner has been misled by attorney misconduct. *Id.* at 23 (citing *Whitehead,* 402 S.W.3d at 623–24). "The question of whether the post-conviction statute of limitations should be tolled is a mixed question of law and fact that is ... subject to de novo review." *Id.* at 16 (citing *Smith v.* ***State,*** 357 S.W.3d 322, 355 (Tenn.2011)); *Whitehead,* 402 S.W.3d at 621.

9** At first glance, this case could be considered one in which the grounds for overturning the conviction arose after the expiration of the one-year statute of limitations. The Petitioner asserts that he did not discover the July 29, 2009 corrected judgments until January 2011, which is when he claims the statute of limitations should have begun to run, and that he diligently filed the instant post-conviction petition on April 7, 2011. However, as noted by the **State**, this court has consistently held that the correction of a clerical error on a judgment of conviction "does not re-trigger the statutory period for filing a petition for post-conviction relief." *Lonnie Jones v.* ***State, No. W2001–00741–CCA–R3–PC, 2001 WL 1516977, at *2 (Tenn.Crim.App. Nov. 21, 2001); *Alan Hall v.* ***State,*** No. E2000–01522–CCA –R3–PC, 2001 WL 543426, at *3 (Tenn.Crim.App. May 23, 2001) (holding that the judgment became final after entry of the original judgment of conviction and that the entry of the corrected judgment, showing that the petitioner would serve 100% of his sentence in confinement rather than 30% as was erroneously reflected on the original judgment, did not give the petitioner an additional year in which to file a petition for post-conviction relief); *Kenneth J. Hall v.* ***State,*** No. 03C01–9609–CR –00342, 1998 WL 208080, at *2 (Tenn.Crim.App., at Knoxville, Apr. 15, 1998) (**stating** that "correction of a judgment pursuant to Rule 36 does not extend the statutory period for filing a petition for post-conviction relief"). This claim was not later-arising because the transcript from the sentencing hearing shows that the **State**, the defense attorney, and the trial court all **stated** that the Petitioner was to receive a sentence with a release eligibility of 100% for his convictions for child rape. *See* T.C.A. § 39–13–523(b). The Petitioner then had one year from the date of the final action of the highest **state** appellate court to petition for post-conviction relief. *See id.* § 40–30–102(a). Because the Tennessee Supreme Court denied permission to appeal his case on February 8, 1999, the Petitioner had until February 8, 2000, to file his post-conviction petition. Nevertheless, the Petitioner

did not file his second post-conviction petition until April 7, 2011, more than eleven years after the one-year statute of limitations expired.

Even if we conclude that entry of the corrected judgments tolled the statute of limitations on due process grounds, the Petitioner filed his second post-conviction petition nearly a year after the statute of limitations expired. Although the Petitioner asks this court to toll the statute of limitations until January 2011, the time he claims he first became aware of the corrected judgments, it is clear that the Petitioner was aware of the correction of his judgments long before then. First, this court filed its opinion in the habeas corpus case on February 24, 2009, at a time when the Petitioner was still represented by counsel. Second, and most importantly, the Petitioner filed a pro se petition for rehearing approximately two weeks later on March 9, 2009, which this court promptly denied. This filing of this court's opinion in the habeas corpus case and the filing of this the pro se petition for rehearing belies the Petitioner's claims that he did not know the outcome of his habeas corpus case or the fact that his case was remanded for corrected judgments until January 2011. Even if we adopt the Petitioner's erroneous interpretation regarding when the statute of limitations began to run, which we decline to do, the Petitioner did not diligently pursue his rights under the first prong of the test outlined in *Whitehead.* Given the "General Assembly's clear preference that the post-conviction statute of limitations be strictly construed," we conclude that this case does not require the tolling of the statute of limitations under the later-arising claims doctrine or the discovery rule. *Bush,* 428 S.W.3d at 23.

We also conclude that the Petitioner is not entitled to relief because his claims have been previously determined. In dismissing the instant petition, the post-conviction court held not only that the Petitioner's second petition was time-barred and that his claims did not fall within the exceptions to the statute of limitations but also that the Petitioner's "specific complaints concerning his plea agreement and the percentage of his sentence to be served [had] been previously litigated, either by this Court and/or the Court of Criminal Appeals in [the Petitioner's] earlier Habeas Corpus Petition." The record fully supports the findings of the post-conviction court. *See* T.C.A. § 40–30106(h) ("A ground for relief is previously determined if a court of competent jurisdiction has ruled on it on the merits after a full and fair hearing ... where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence."); Tenn. Sup.Ct. R. 28, § 2(E) ("A claim for relief is previously determined if a court of competent jurisdiction has ruled on the merits of the claim after a full and fair hearing at which petitioner is afforded the opportunity to call witnesses and present evidence."). All of the Petitioner's issues regarding his release eligibility were resolved during his habeas corpus case. Specifically, this court held that there was a clerical error in the judgments because "[r]eview of the sentencing hearing transcript reveal[ed] that the **State**, defense counsel, and the court **stated** that the fifteen-year sentences were to be served at one hundred percent in compliance with the 'child rape law.' " *See Jeffrey S.* ***Whitaker,*** 2009 WL 454256, at *2. The Petitioner's claims regarding judicial estoppel were also addressed during his habeas corpus case. After noting what was obviously a clerical error in the judgments, this court held that the Petitioner was not entitled to relief regarding his judicial estoppel claim and remanded the case for correction of the judgments to show a release eligibility of 100%.

***10** After reviewing the record, we can comfortably conclude that the Petitioner would not have been entitled to any relief even if we had reviewed his issues on their merits. As this court previously observed, the transcript of the guilty plea submission hearing clearly shows that the parties and the trial court understood

that the Petitioner's sentence would be served "in its entirety" based on the "the law that's provided for child rape." The transcript of the sentencing hearing reflects that the **State** argued for a forty-five-year sentence "to be served [at] 100%" pursuant to the "Child Rape Law" and that the defense argued for a minimum sentence of fifteen years, recognizing that this sentence would be served "day for day, no parole, no good and honor time" and "no credits, none." Finally, the transcript shows that the trial court ultimately imposed a "sentence to serve, as you already know" of three consecutive fifteen-year sentences with the remaining sentences served concurrently, for an effective sentence of forty-five years. Accordingly, we affirm the denial of post-conviction relief.

CONCLUSION

Based on the aforementioned authorities and analysis, we conclude that the Petitioner is not entitled to relief because this is the Petitioner's second post-conviction petition, because this case does not require due process tolling, and because the claims in this petition have been previously determined. Accordingly, the judgment of the trial court is affirmed.

All Citations

Slip Copy, 2016 WL 97608

Footnotes

1 It is the policy of this court to refer to minor victims of sexual offenses by their initials.

2 The Petitioner made the guilty plea transcript an exhibit to his second petition for post-conviction relief. Although page thirty-eight of the thirty-nine-page transcript was omitted from the exhibit, the remainder of the transcript makes it clear that the court imposed fifteen-year sentences for each of the eight counts and ordered counts 1, 11, and 16 served consecutively to one another for an effective sentence of forty-five years. The original judgments of conviction also reflect this sentence.

3 A copy of the petition for writ of habeas corpus was not included in the appellate record.

4 Only one corrected judgment, which was filed on July 27, 2009, was included in the appellate record. This corrected judgment shows that the Petitioner was convicted of the offense of child rape in count 23, and the box for "community supervision for life" is checked. All eight of the original judgments, which were entered on March 20, 1995, were attached as an exhibit to the Petitioner's second post-conviction petition.

5 We have taken judicial notice of the Petitioner's pro se petition for rehearing and this court's denial of the petition, as it was not included in the appellate record.

6 The appellate record does not contain an order appointing counsel of record to represent the Petitioner, although it appears that she made her first appearance on behalf of the Petitioner at the June 30, 2014 hearing.

End of Document

APPENDIX D

No. 20-5872

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 19, 2021
DEBORAH S. HUNT, Clerk

JEFFREY S. WHITAKER,

Petitioner-Appellant,

v.

MIKE PARRIS, WARDEN,

Respondent-Appellee.

ORDER

Before: NORRIS, WHITE, and BUSH, Circuit Judges.

Jeffrey S. Whitaker, a pro se Tennessee prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. *See* Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX E

No. 20-5872

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 08, 2021
DEBORAH S. HUNT, Clerk

JEFFREY S. WHITAKER,

Petitioner-Appellant,

v.

MIKE PARRIS, WARDEN,

Respondent-Appellee.

ORDER

Before: NORRIS, WHITE, and BUSH, Circuit Judges.

Jeffrey S. Whitaker petitions for rehearing en banc of this court's order entered on December 16, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX F

No. 20-5410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 24, 2020
DEBORAH S. HUNT, Clerk

In re: JEFFREY S. WHITAKER,

Movant.

ORDER

Before: SUTTON, COOK, and WHITE, Circuit Judges.

Jeffrey S. Whitaker, a pro se Tennessee prisoner, moves this court for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b).

In 1994, Whitaker pleaded guilty in the Roane County Criminal Court to eight counts of child rape. Whitaker subsequently received an effective sentence of 45 years of imprisonment, which the Tennessee Court of Criminal Appeals affirmed on direct appeal. *State v. Whitaker*, No. 03C01-9509-CC-00256, 1996 WL 600375 (Tenn. Crim. App. Oct. 15, 1996), *perm. app. denied* (Tenn. Feb. 8, 1999). In 1995, Whitaker pleaded guilty in the Anderson County Criminal Court to aggravated rape and incest and received an effective sentence of 15 years of imprisonment to be served concurrently with his Roane County sentence. According to his current motion, Whitaker did not appeal his convictions or sentence in the Anderson County case.

After unsuccessfully seeking state post-conviction relief, *see Whitaker v. State*, No. E2001-02399-CCA-R3-PC, 2003 WL 21276125 (Tenn. Crim. App. June 3, 2003), Whitaker filed a § 2254 habeas petition challenging his Roane County convictions. The district court denied Whitaker's habeas petition and declined to issue a certificate of appealability. Whitaker appealed, and this court denied him a certificate of appealability.

Whitaker returned to the state courts and filed a habeas petition, challenging his sentence in the Roane County case on the basis that he was sentenced as a Range I, standard offender with

eligibility for release after serving thirty percent of his sentence. The trial court denied Whitaker's habeas petition. The Tennessee Court of Criminal Appeals affirmed the denial of habeas relief but remanded for correction of the judgments to reflect that he must serve the entirety of his 45-year sentence for his child rape convictions. *Whitaker v. Morgan*, No. E2007-02884-CCA-R3-HC, 2009 WL 454256 (Tenn. Crim. App. Feb. 24, 2009), *perm. app. denied* (Tenn. Aug. 17, 2009). Whitaker subsequently filed a petition for post-conviction relief. The trial court denied Whitaker's petition, and the Tennessee Court of Criminal Appeals affirmed. *Whitaker v. State*, No. E2014-02240-CCA-R3-PC, 2016 WL 97608 (Tenn. Crim. App. Jan. 7, 2016), *perm. app. denied* (Tenn. June 23, 2016).

In 2017, Whitaker filed another § 2254 habeas petition, asserting that the State breached his plea agreement in the Roane County case. Upon the respondent's motion, the district court transferred Whitaker's habeas petition to this court to obtain authorization for its consideration. *See* 28 U.S.C. § 1631; *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Whitaker then moved this court for an order authorizing the district court to consider a second or successive habeas petition. This court denied Whitaker's motion as unnecessary because he had not yet filed a habeas petition following the corrected judgments requiring him to serve the entirety of his 45-year sentence and because he asserted claims relating to events that occurred after the denial of his first habeas petition. This court remanded the case to the district court for consideration of Whitaker's habeas petition, which is still pending.

Whitaker again moves this court for an order authorizing the district court to consider a second or successive habeas petition. *See* 28 U.S.C. § 2244(b). Seeking to challenge the state-court judgments in both the Roane County and the Anderson County cases, Whitaker claims that he recently discovered exculpatory statements made by the alleged victims and withheld by the State in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that this new evidence of his actual innocence renders his guilty pleas involuntary and unknowing.

Whitaker's motion is unnecessary. Whitaker has never filed a habeas petition challenging his Anderson County convictions. And because of our prior order, Whitaker does not need authorization to challenge his Roane County convictions either.

For these reasons, we **DENY** as unnecessary Whitaker's motion for an order authorizing the district court to consider a second or successive habeas petition. Whitaker's motion for leave to amend his memorandum of law is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.