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Appendix B

Sales v. State

Court of Criminal Appeals of Tennessee, AT NASHVILLE. April 17, 2023 Slip Copy 2023 WL 2962280 (Approx. 3 pages)

2023 WL 2962280

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SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.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

Michael Dominic SALES

v.

STATE of Tennessee

No. M2022-01280-CCA-R3-PC

FILED April 17, 2023

Appeal from the Circuit Court for Lincoln County, No. 2016-CR-23, Forest A. Durard, Jr., Judge

Attorneys and Law Firms

Dustin Faeder, Brentwood, Tennessee, for the Appellant, Michael Dominic Sales.

Jonathan Skrmetti, Attorney General and Reporter; and Benjamin A. Ball, Assistant Attorney General, for the Appellee, State of Tennessee.

Jill Bartee Ayers, J., delivered the opinion of the court, in which Robert W. Wedemeyer and Robert L. Holloway, Jr., JJ., joined.

MEMORANDUM OPINION

Jill Bartee Ayers, J.

*1 The Appellant, Michael Dominic Sales, appeals the post-conviction court's order dismissing his post-conviction petition as untimely. Appointed counsel has moved to withdraw pursuant to Court of Criminal Appeals Rule 22. That motion is denied. Upon review of the appellate record on file, this Court hereby affirms the judgment of the post-conviction court pursuant to Court of Criminal Appeals Rule 20.

The Appellant is appealing the dismissal of his petition seeking post-conviction relief. He was represented by appointed counsel during the proceeding in the post-conviction court but received the appointment of new counsel on appeal. The record has been filed. Appointed counsel now moves this Court to withdraw pursuant to Court of Criminal Appeals Rule 22. Counsel contends this appeal is frivolous. *See Anders v. California*, 386 U.S. 738 (1967). Having reviewed the entire record on appeal, including counsel's motion to withdraw, the Court disagrees this appeal is frivolous.

An attorney may be permitted to withdraw from further representation on appeal if the attorney determines the appeal is frivolous and continued representation would violate the Code of Professional Responsibility. *Id.* When a motion to withdraw and accompanying brief are filed pursuant to Rule 22, an attorney has presumably engaged in a conscientious examination of the entire record and the applicable law. Rule 22, however, dictates "[c]ounsel should not seek to withdraw from a case merely because he or she determines that the appeal lacks merit." *Id.* Instead, counsel must conclude the appeal is frivolous:

A "frivolous" appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit that there is little, if any, prospect that it can ever succeed. To be frivolous, an appeal must be so clearly untenable or manifestly insufficient that its character may be determined by a bare inspection of the record, without argument or research. An appeal is not frivolous when a substantial justiciable question can be identified from the whole record or any part of it, even though such question is unlikely to be decided other than as decided by the lower court.

Id.

This Court does not agree with counsel's assessment. Rule 22 distinguishes between frivolous and meritless appeals. In this case, the trial court determined the Appellant did not timely file his petition. The court further concluded neither statutory nor due process tolling of the limitation period for filing the petition was warranted. *See* Tenn. Code Ann. § 40-30-102(b); *Whitehead v. State*, 402 S.W.3d 615 (Tenn. 2013). Before dismissing the petition, the court held a hearing on the matter during which the only proof presented was the Appellant's testimony. The court obviously did not find the Appellant's testimony credible enough to warrant tolling of the statute of limitations. However, such a credibility determination may be appealed, as of right, to this Court. Tenn. R. App. P. 3(b); *see Brian Shawn Blevins v. State*, No. E2021-01312-CCA-R3-PC, 2022 WL 3226793 (Tenn. Crim. App. Aug. 10, 2022), *perm. app. denied* (Tenn. Dec. 14, 2022). Accordingly, and contrary to counsel's position, there remains a "substantial justiciable question" available on appeal. *See Anders*, 386 U.S. at 744 (if there are any "legal points arguable on their merits," then an appeal should not be deemed frivolous).

*2 Accordingly, counsel's motion to withdraw is denied. That being said, the Court has decided to suspend the briefing schedule and address the merits of this appeal on the record alone. Tenn. R. App. P. 2 (this Court "may suspend the requirements or provisions of any of [the Rules of Appellate Procedure] in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion").

Again, the post-conviction court decided tolling of the applicable one-year statute of limitations was not warranted in this case. The Appellant filed his petition approximately two months *after* the expiration of the one-year filing deadline. On January 13, 2021, the supreme court denied permission to appeal this Court's opinion on direct appeal. Docket No. M2017-01116-SC-R11-CD (Order). The Appellant filed his petition on March 1, 2022. Thus, his petition was untimely on its face. § 40-30-102(a). None of the statutory exceptions to the one-year filing deadline apply in this case. § 40-30-102(b). In order to qualify for due process tolling of the filing deadline, a petitioner must establish "(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). During the hearing, the Appellant offered the following explanation for his tardiness: "Yes, sir, because we get locked down a lot due to overdoses and Covid have [sic] us locked down a lot, so it is a *possibility* we was [sic] locked down and I was not able to get to the law library and get the [form] application." (Emphasis added). The Appellant offered no proof in support of his testimony. Relying on recent opinions by this Court, the post-conviction court concluded the Appellant's testimony, alone, was not enough to overcome the tolling hurdle. *See Blevins v. State*, 2022 WL 3226793; *Markist Cole v. State*, No. W2021-00973-CCA-R3-PC, 2022 WL 1077313 (Tenn. Crim. App. Apr. 11, 2022).

As this Court stated in *Blevins*, "[o]ther than his own testimony, the Petitioner offered no proof that his written requests for access to legal materials and/or the law library was denied, either before or after the pandemic." 2022 WL 3226793 at * 5. Similarly, in *Cole* the Court observed:

We note that prior to the Petitioner's testifying at the hearing to address the timeliness of his motion, the post-conviction court discussed multiple times that documentation from the prison authorities confirming the alleged lockdown would be beneficial to the Petitioner because the petition was otherwise time-barred if the post-conviction court could not find an exception. The Petitioner did not present such proof at the hearing but relied on his own testimony.

2022 WL 1077313 at *3. In both of those cases, this Court held the appellate records did not establish sufficient cause for due process tolling. *See also Darrell Wren v. State*, No. W2021-00485-CCA-R3-PC, 2022 WL 1499490 (Tenn. Crim. App. May 11, 2022) ("We cannot conclude that the COVID-19 pandemic, by itself, created such extraordinary circumstances" as contemplated in *Bush v. State*). In the case at hand, the Appellant's only attempt to satisfy the *Bush v. State* standard for due process tolling was his own, unsubstantiated testimony. Indeed, as highlighted above, the Appellant testified it was merely *possible* institutional restrictions caused him to miss the filing deadline. As discussed above, that simply is not enough. Upon our *de novo* review, this Court concludes there is nothing in the record demonstrating the post-conviction court erred in dismissing the Appellant's petition as untimely.

*3 For these reasons, we affirm the judgment of the post-conviction court pursuant to Court of Criminal Appeals Rule 20. Because the Appellant is indigent, costs are taxed to the State. The Clerk shall forward a copy of this Memorandum Opinion to both counsel and the Appellant. Counsel may, hereinafter, file a motion to withdraw pursuant to Supreme Court Rule 14.

All Citations

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

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Clerk of the
Appellate Courts

MICHAEL DOMINIC SALES v. STATE OF TENNESSEE

**Circuit Court for Lincoln County
No. 2016-CR-23**

No. M2022-01280-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Michael Dominic Sales and the record before us, the application is denied.

PER CURIAM

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