

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 29, 2009

GUADALUPE ARROYO v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
No. 84012 Kenneth F. Irvine, Jr., Judge**

No. E2008-01220-CCA-R3-PC - Filed August 17, 2009

The petitioner, Guadalupe Arroyo, appeals as of right from the Knox County Criminal Court's summary dismissal of his petition for post-conviction relief challenging his conviction for two counts of vehicular homicide. The post-conviction court dismissed the pro se petition for failure to state a factual basis in support of his allegation of ineffective assistance of counsel. On appeal, the petitioner argues that the post-conviction court should have given him "a reasonable opportunity to investigate and amend the petition" before dismissing the petition. Following our review, we conclude that the post-conviction court erred in summarily dismissing the petition after the appointment of counsel. Accordingly, we reverse the judgment of the post-conviction court and remand the case for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed; Case Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Guadalupe Arroyo.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in January 2002, the petitioner pled guilty to two counts of vehicular homicide, both Class B felonies, with the range and manner of the petitioner's sentences to be determined by the trial court. After a sentencing hearing, the trial court sentenced the defendant to the maximum term of twelve years on each count, with the sentences to be served consecutively. The defendant appealed, arguing that the length and manner of his sentences were excessive. On appeal, this court remanded the case to the trial court for resentencing, concluding that the trial court

misapplied certain enhancement factors to the defendant's individual sentences and did not make requisite findings regarding the imposition of consecutive sentences. State v. Guadalupe Arroyo, Alias, No. E2002-00639-CCA-R3-CD, 2003 WL 1563209, at *3-5 (Tenn. Crim. App. Mar. 27, 2003).

Upon remand, the trial court again imposed the maximum term of twelve years for each conviction and imposed consecutive sentences. The defendant appealed, and on review this court remanded the case to the trial court for a third sentencing hearing in light of the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296 (2004), and because the trial court again failed to make requisite findings regarding the imposition of consecutive sentences. State v. Guadalupe Arroyo, Alias, No. E2003-02355-CCA-R3-CD, 2004 WL 1924033, at *3-4 (Tenn. Crim. App. Aug. 30, 2004). Although the judgments resulting from the third sentencing hearing do not appear in the record, the post-conviction petition suggests that in February 2005, the trial court again imposed an effective sentence of twenty-four years. The petitioner did not appeal this sentence.

The petitioner subsequently filed a pro se petition for post-conviction relief in which he alleged that he received the ineffective assistance of counsel. The post-conviction court dismissed the petition as untimely. The petitioner appealed, arguing that the petition was timely filed. The State conceded on appeal that the petition was timely but argued that this court should still affirm the post-conviction court's dismissal order because the petition failed to state factual allegations supporting his ineffective assistance of counsel claim. This court remanded the case to the post-conviction court for further proceedings, concluding:

While we agree with the State that the Appellant's petition fails to include any facts supporting his ineffectiveness claim, we cannot agree that affirmance is the proper course of action. If the post-conviction court had dismissed the petition upon grounds that it failed to allege necessary facts, we would affirm that decision

However, the post-conviction court in this case dismissed the petition solely upon the ground that it was time-barred. . . . [F]or this court to dismiss upon grounds that were never considered by the post-conviction court would implicate fact-finding authority, which this court does not possess as our jurisdiction is appellate only. See T.C.A. § 16-5-108 (2003).

Guadalupe Arroyo v. State, No. E2006-01037-CCA-R3-PC, 2007 WL 3144999, at *3 (Tenn. Crim. App. Oct. 29, 2007).

Upon remand from this court, on January 23, 2008, the post-conviction court filed an order appointing counsel to represent the petitioner. The post-conviction court's order also directed that counsel was "allowed 30 days from the date of this Order to file any amendments to the original petition, which he may deem necessary." See Tenn. Code Ann. § 40-30-107(b)(2). The post-conviction court's order further directed that the State file an answer to any amendment within thirty days of the filing of the amendment. See Tenn. Code Ann. § 40-30-108(a). An evidentiary hearing was also scheduled for April 30, 2008. However, no amended petition or responsive pleadings were

filed within the prescribed time period. On May 1, 2008, the State filed a motion to dismiss the petitioner's initial pro se petition for post-conviction relief for "fail[ure] to allege facts supporting each claim for relief." On May 2, 2008, counsel for the petitioner filed an amended petition which alleged additional facts to support his claim that ineffective assistance of counsel rendered his guilty plea unknowing and involuntarily. The amended petition also alleged that the petitioner needed additional time to obtain transcripts and "to investigate and potentially amend the petition to include additional claims." By separate motion filed the same day, the petitioner, through counsel, requested additional time to amend the petition.

At the hearing on the State's motion to dismiss the petition, counsel for the petitioner admitted that he did not file an amended petition within the thirty-day limit established by the post-conviction court but argued that he did not do so because he did not "have all the information that I need in order to state in amended petition that I've raised every claim which may be the basis for post-conviction relief." He also argued that he needed time to review the record, particularly the transcripts of the sentencing hearings. The post-conviction court dismissed the petition; in its written order, the court stated that the petition "provides nothing more than bare allegations that a constitutional right has been violated. [The] petition contains mere conclusions of law which are not sufficient to warrant any further proceedings." Notably, the transcript from the hearing reflects that the post-conviction court specifically held that it was not dismissing the petition for failure to file an amended petition within the period established by the order appointing counsel, but solely because the petition failed to allege a sufficient factual basis in support of the claims. The petitioner subsequently filed a timely notice of appeal.

ANALYSIS

The State first contends that the petitioner's appeal should be dismissed because the petitioner's brief fails to cite to any legal authority in support of his argument. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Indeed, the petitioner's brief does contain scant references to the record. We note, however, that the brief does cite to this court's holding in the first appeal of the post-conviction case and to the Post-Conviction Procedure Act sufficiently to reflect the issues and applicable law to be considered by this court. Accordingly, we will consider the petitioner's appeal.

A post-conviction court's dismissal of a petition for post-conviction relief is an issue of law; accordingly, we review the issue de novo on the record without a presumption of correctness. Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002); Fields v. State, 40 S.W.3d 450, 457 (Tenn. 2001). The Post-Conviction Procedure Act provides in pertinent part:

(d) The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of

the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

Tenn. Code Ann. § 40-30-106(d) (2006). Additionally, Tennessee Code Annotated section 40-30-107(a) permits the entry of a preliminary order “[i]f the petition is not dismissed upon preliminary consideration [pursuant to Tennessee Code Annotated section 40-30-106].” When issuing a preliminary order, the post-conviction court is required to appoint counsel for an indigent petitioner and allow for the filing of an amended petition within thirty days of the entry of the colorable claim order. Tenn. Code Ann. § 40-30-107(b)(1)-(2).

The record in this case clearly shows that in his pro se post-conviction petition, the petitioner alleged that he received the ineffective assistance of counsel but included no factual allegations to support his claim. Accordingly, upon remand from this court, the post-conviction court would have been justified in summarily dismissing the petition. See Tenn. Code Ann. § 40-30-106(d); see also Guadalupe Arroyo, at *3. However, as noted by this court in the first appeal of this post-conviction case, “the [post-conviction] court’s determination of whether to allow a petitioner to amend a petition . . . is a discretionary one. . . . [I]t is clearly a decision which should be considered and made by the post-conviction court.” Id. Therefore, it is apparent that upon remand the post-conviction court chose to exercise that discretion to allow the amendment of the petition with the assistance of counsel. Furthermore, although the post-conviction court’s January 23, 2008, order failed to state specifically whether the petition stated a colorable claim – a determination which is required under the Rules of the Tennessee Supreme Court, Tenn. Sup. Ct. R. 28, § 6(B)(2) – the order did appoint counsel and direct counsel to file an amended petition within thirty days. Thus, the order appears to be a preliminary order pursuant to Tennessee Code Annotated section 40-30-107.

When counsel failed to file an amended petition within thirty days, the State filed a motion to dismiss the appeal based upon insufficient factual allegations contained in the initial petition. The State could have sought dismissal based upon counsel’s failure to file an amended petition within the thirty-day filing period, but it did not do so, and the post-conviction court did not dismiss the petition on this ground. Rather, the post-conviction court dismissed the appeal for failing to raise factual allegations in the initial petition – a course of action it chose not to follow two and a half months earlier at the preliminary consideration stage following this court’s remand. Although we find counsel’s failure to file an amended petition in a timely fashion concerning, we are more concerned by the post-conviction court’s reversal of course in addressing the petition on remand. The post-conviction court initially declined to dismiss the petition for failure to state factual allegations, only to dismiss the petition on that basis following the appointment of counsel and late amendment of the petition. As previously discussed, the appointment of counsel implicates Tennessee Code Annotated section 40-30-107; therefore, we conclude that dismissal pursuant to 40-30-106(d) was no longer appropriate. Accordingly, we reverse the post-conviction court’s order summarily dismissing the petition and remand this case to the post-conviction court to allow any necessary amendment of the petition and an evidentiary hearing.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is reversed. The case is remanded to the post-conviction court for further proceedings consistent with this opinion.

D. KELLY THOMAS, JR., JUDGE.