

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 18, 2007

FALLON LYNN TALLENT v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Wilson County
No. 01-03-0679 John D. Wooten, Jr., Judge**

No. M2007-01336-CCA-R3-PC - Filed March 24, 2008

The petitioner, Fallon Lynn Tallent, was convicted of two counts of first degree murder and received consecutive life sentences. The petitioner's convictions were affirmed on appeal. The petitioner filed a post-conviction petition for relief which was dismissed. The petitioner appeals the decision of the post-conviction court. On appeal, she argues that she received the ineffective assistance of trial counsel and that her constitutional right to due process was violated because she was denied a preliminary hearing. Upon review of the record and the parties' briefs, we reverse the decision of the post-conviction court and remand for appointment of counsel.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Post-Conviction Court Reversed
and Remanded**

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Fallon Lynn Tallent, Pro Se, T.P.F.W., Nashville, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The petitioner, Fallon Lynn Tallent, was convicted of two counts of first degree murder and received consecutive life sentences. The petitioner's convictions were affirmed on direct appeal and the supreme court denied permission to appeal. *See State v. Fallon L. Tallent*, No. M2005-00183-CCA-R3-CD, 2006 WL 47090 (Tenn. Crim. App., at Nashville, Jan. 10, 2006), *perm. app. denied* (Tenn. May 1, 2006). The facts of this case were provided by this court in the defendant's direct appeal as follows:

This case arises from the killing of two police officers, both of whom died as a result of being struck by a car the Defendant was driving. On July 8, 2003, the Defendant

exchanged approximately fifty dollars worth of crack cocaine for a Mercedes Benz. Later that day, the Defendant picked up Dorothy Cash, a former lover and fellow Knoxville prostitute, and Cash and the Defendant spent the night smoking crack and driving around Knoxville and the surrounding areas.

At approximately 8:00 a.m. on July 9, 2003, Officer Blake Barham, of the Knoxville Police Department, noticed the Mercedes parked in a local housing project, the Walter P. Taylor Homes. Officer Barham was informed by his dispatcher that the Mercedes had been reported stolen and exited his cruiser to investigate. Upon exiting his vehicle the officer recognized the driver of the Mercedes, who he later identified as Fallon Tallent, but, before he reached the Mercedes, the Defendant started her car, shifted it into reverse and drove it into Officer Barham's cruiser. Officer Barham testified that he jumped out of the path of the Mercedes to avoid being struck as it made its way toward his vehicle. After hitting Officer Barham's cruiser, the Defendant quickly drove away.

Officer Barham pursued the Defendant in Knoxville on residential and commercial streets at speeds of up to 70 miles per hour in 30 mile per hour zones. After the Defendant passed several vehicles and began to run through stop signs and stop lights, Officer Barham's supervisor advised him to terminate his pursuit for the public's safety.

Shortly after the chase ended, the Defendant entered Interstate 40 heading west toward Nashville driving at an excessive rate of speed. Cash testified that the Defendant was trying to get the car to go 150 miles per hour, and the Defendant testified that she was going 130 miles per hour on the Interstate. During the course of the trip to Nashville, several motorists called the police to report that the Defendant was driving recklessly. A truck driver, Jerry Carter, called 9-1-1 and stated that if the Defendant was not stopped, someone was going to get killed. Nonetheless, the Defendant continued westbound on Interstate 40, swerving in and out of traffic, passing cars and trucks, and even driving on the shoulder to pass vehicles when necessary.

During the trip from Knoxville to Nashville, the Defendant and Cash smoked the remainder of the crack cocaine in their possession. Police from different jurisdictions pursued the Defendant, yielding pursuit to other units as the Defendant and Cash crossed jurisdictional lines. However, even when the Defendant was not being pursued [sic], she continued to drive at speeds of up to 120 miles per hour, dodging her way through traffic and running vehicles off the road, according to the testimony of the police and other drivers.

As the Defendant approached the main Mount Juliet exit, exit number 226, she warned Cash to be on the lookout for police deploying "spike strips." The Defendant testified that she was familiar with this method of stopping a fleeing vehicle because she had been involved in a high speed chase with the police in March of 2003, in

another vehicle which she had acquired in exchange for crack cocaine. That chase ended when the police placed a stinger strip on Interstate 40 in front of the Defendant's vehicle, which she subsequently drove over, flattening her tires.

Shortly after the Defendant warned Cash to be on the lookout for stinger strips, Sergeant Jerry Mundy, of the Mount Juliet Police Department, deployed a stinger strip in an attempt to stop the Defendant's vehicle. The stretch of road in the vicinity of exit 226 is a wide section of road. There is a shoulder on the extreme left side of the road; an HOV (high occupancy vehicle) lane; a center lane; a right lane; and finally the gore, which separates the right lane from the on-ramp. Evidence was presented showing that the Defendant could have avoided the stinger strip by steering her vehicle to the left, or she could have simply driven over it. However, after the stinger strip was deployed, the Mercedes changed course, moving from the center lane toward the right side of the road, in what seven witnesses described as a controlled turn. Traveling at an estimated 80 to 120 miles per hour, the Mercedes struck Sergeant Mundy. Immediately thereafter, it hit Wilson County Sheriff's Deputy John Musice, who was on the scene in support of Sergeant Mundy. Both Sergeant Mundy and Deputy Musice were killed immediately upon being struck by the Mercedes; their bodies being thrown from the points of impact 280 and 270 feet respectively.

There was no evidence that the Defendant attempted to use her brakes before the Mercedes hit Sergeant Mundy, but the impact with his body rendered the vehicle inoperable, shattering the windshield and crushing the driver's side fender, which caused the front driver's side tire to explode. The Mercedes eventually came to a stop after hitting the two officers and smashing into Deputy Musice's cruiser. The Defendant and Cash were taken into custody at the scene and transported via helicopter to the Vanderbilt University Medical Center.

At trial, the Defendant was convicted of two counts of first degree murder, and the trial court sentenced her to serve two consecutive life sentences with the Tennessee Department of Correction.

Id. (Footnotes omitted).

After the supreme court denied the petitioner's application for permission to appeal, she filed a pro se petition for post-conviction relief. This petition was dismissed by order of the post-conviction court. The petitioner then filed a notice of appeal from the dismissal of her petition for post-conviction relief. The record indicates that after filing her notice of appeal, the petitioner also filed an amended pro se petition for post-conviction relief which was also dismissed by order of the post-conviction court.

II. ANALYSIS

On appeal, the petitioner argues that her Fourteenth Amendment right to due process was violated when she was denied a preliminary hearing in her case. She also contends that her Sixth Amendment right to effective assistance of counsel was violated because: (a) trial counsel did not permit her to accept a plea bargain offered by the state, (b) because trial counsel did not effectively argue for a change of venue thereby denying her a fair and unbiased trial, and (c) trial counsel failed to request a second mental evaluation of the petitioner.

In lieu of addressing the petitioner's claims, we are obligated to address her petition for post-conviction relief. We begin our review by noting that the petitioner filed a pro se, fill-in-the-blank "Petition for Relief from Conviction or Sentence," a "Motion in Forma Pauperis," and a "Motion for Appointment of Counsel." In her petition, the petitioner claimed that counsel failed to object to the testimony of a witness at trial who was not disclosed during discovery. The petitioner also claimed that counsel failed to object to the trial court's imposition of consecutive sentencing.

The petitioner raised the same improper witness testimony and consecutive sentencing issues in the direct appeal of her case, though the error alleged in the direct appeal was ascribed to the trial court and not to petitioner's trial counsel. These errors were addressed and affirmed by this court on direct appeal. *See Tallent*, 2006 WL 47090, at *2-6. Subsequently, the petition for post-conviction relief was dismissed by the post-conviction court which stated in its order that, "[t]he factual allegations contained in the petition are the same as asserted on direct appeal from this Court to the appellate courts of the State of Tennessee. The Post-Conviction Procedure Act, specifically T.C.A. § 40-30-106, requires dismissal if the claims for relief have been previously determined."

Whether a post-conviction court properly dismissed a petition for failure to state a claim is a question of law and is therefore reviewed de novo. *See Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002); *Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001). Pursuant to the Post-Conviction Procedure Act, a post-conviction petition must specify grounds for relief including disclosure of the factual basis of those grounds. Tenn. Code Ann. § 40-30-106(d). Section 40-30-106 of 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.

(e) If a petition amended in accordance with subsection (d) is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition. Counsel may file an amended petition within thirty (30) days of appointment.

(f) Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

Tenn. Code Ann. § 40-30-106(d)-(f). *See Toney L. Conn v. State*, No. M2004-00220-CCA-R3-PC, 2005 WL 901131 (Tenn. Crim. App., at Nashville, Apr. 19, 2005).

We note that in the petitioner's direct appeal, she argued that she was entitled to relief regarding the two issues she raised due to error of the trial court. In her petition for post-conviction relief, the petitioner argues that she is entitled to relief based on those same two issues, this time due to the ineffective assistance of trial counsel. While the petitioner's claims appear to be nothing more than a thinly veiled attempt to re-litigate issues previously determined on appeal, because she filed her petition pro se and the issues raised in the petition were framed under a constitutionally recognized ground for post-conviction review, we are obligated to review the order of dismissal issued by the post-conviction court.

Looking to the Tennessee Supreme Court Rules, we note that once a petition is filed, a judge shall review the petition and determine whether the petition states a colorable claim. Tenn. Sup. Ct. R. 28, § 6(B)(2). A colorable claim is "a claim in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004) (quoting Tenn. Sup. Ct. R. 28, § 2(H)). "Post-conviction relief is available only when 'the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.'" *Id.* (quoting Tenn. Code Ann. § 40-30-103). In determining whether a colorable claim exists "pro se petitions are to be held to less stringent standards than formal pleadings drafted by lawyers." *Allen v. State*, 854 S.W.2d 873, 875 (Tenn.1993) (citations omitted). "In the event a colorable claim is stated, the judge shall enter a preliminary order which . . . appoints counsel, if petitioner is indigent." Tenn. Sup. Ct. R. 28, § 6(B)(3)(a). "In the event the court concludes after the preliminary review that a colorable claim is not asserted by the petition, the court shall enter an order dismissing the petition or an order requiring that the petition be amended." *Id.* at § 6(B)(4)(a). However, "[n]o pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition *with* the assistance of counsel." *Id.* at § 6(B)(4)(b) (emphasis added); *see also Conn*, 2005 WL 901131 at *2; *see also Allen*, 854 S.W.2d at 875.

When viewed in the light most favorable to petitioner, the petitioner's claims, as presented in her original pro se petition, along with the petitioner's request for counsel, entitle her to the appointment of counsel. Thus, when requested by the petitioner, the post-conviction court should have appointed counsel to assist her. *See Conn*, 2005 WL 901131 at *3. Therefore, the dismissal of the petitioner's post-conviction petition is reversed and the case is remanded for appointment of counsel to assist the petitioner in drafting an amended petition for post-conviction relief.

CONCLUSION

Based upon the foregoing reasoning and authority, the judgment of the post-conviction court is reversed, and the case is remanded for reconsideration consistent with this opinion.

J.C. McLIN, JUDGE