

**IN THE CIRCUIT COURT OF TENNESSEE
SIXTEENTH JUDICIAL DISTRICT AT MURFREESBORO**

CARLOS CONSTANTINO-GONZALEZ,)	
)	
Petitioner,)	
)	NO. 71021
v.)	
)	(Post-Conviction)
STATE OF TENNESSEE,)	
)	
Respondent.)	

ORDER DENYING POST-CONVICTION RELIEF

This cause came on to be heard on April 23, 2014, upon the Petition for Post-Conviction Relief filed by the Petitioner, CARLOS CONSTANTINO-GONZALEZ, on December 11, 2013. Prior to hearing evidence on the merits of the Petition, the Court heard arguments from counsel as to whether the one-year statute of limitations should be tolled in this case. Having considered the applicable authorities, argument of counsel, and the entire record in this cause, the Court finds that the Petition for Post-Conviction Relief must be DISMISSED pursuant to the following findings of fact and conclusions of law:

I. FACTS

On November 13, 2012, the Petitioner pled guilty to DUI 1st Offense, Possession of a Handgun while Under the Influence, and Driving without a License in the Smyrna Municipal Court, which has General Sessions jurisdiction. As part of the Petitioner's plea agreement, the Smyrna Court dismissed a Violation of Implied Consent charge. The Smyrna Court's Judgment form for the DUI 1st charge contains a notation stating, "Court advised of immigration consequences." The Smyrna Judgments were not appealed, and became final on November 26,

2012.¹ The Petitioner's post-conviction relief petition was filed over one year later, on December 11, 2013. According to the Petition, Mr. Constantino-Gonzalez, an illegal alien, was taken into custody by U.S. Immigration and Customs Enforcement (ICE) officials after he entered his plea in the Smyrna Court. The Petitioner was subsequently released after posting an immigration bond, and is now awaiting a June 11, 2014 hearing in federal immigration court. The Petitioner alleges that his trial counsel was ineffective in failing to advise him of the potential immigration consequences of his guilty plea; specifically, the Petitioner argues that his guilty plea to the handgun charge "unknowingly cemented his removal from the United States by eliminating his ability to seek cancellation of his removal before an immigration judge." Petitioner cites to 8 U.S.C. § 1229b in support of this argument; that statute provides that an alien may seek relief from removal unless convicted of certain disqualifying crimes, one of which includes the possession of any firearm.

II. LAW

Pursuant to T.C.A. § 40-30-102, a post-conviction petition must be brought within one year of the date on which the judgment becomes final, and failure to file the case within the limitations period bars relief and removes the case from the Court's jurisdiction.² However, the statute allows the filing of a petition that would otherwise be time-barred when, as pertinent to the case at bar, the claim in the petition is "based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted." *See* T.C.A. § 40-30-102(b)(2). In order to prevail on a post-conviction claim based

¹ Pursuant to T.C.A. § 27-5-108(a), appeals from General Sessions to Circuit Court must be perfected within ten days. In the case at bar, the tenth day fell on the Friday after Thanksgiving, a day on which the Clerk's office was closed. Therefore, pursuant to Tenn. R. Crim. P. 45(a)(2)(B), the petitioner's deadline to file an appeal was extended through the following Monday, November 26, 2012.

² This statute of limitations is extended in cases where the judgment under attack is appealed; there was no appeal filed in the case at bar.

on new evidence establishing one's actual innocence, a petitioner must prove, by clear and convincing evidence, that that no jury would have convicted him in light of the new evidence. See Cribbs v. State, 2009 WL 1905454 at *35 (Tenn. Crim. App. 2009), *perm. app. denied* 12/21/09. Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Grindstaff v. State, 297 S.W.2d 208, 216 (Tenn. 2009).

In addition to the statutory exceptions, the Tennessee Supreme Court has recognized that, on occasion, due process requires that the statute of limitations be tolled. See Williams v. State, 44 S.W.3d 464, 468 (Tenn. 2001). Generally, due process tolling requires that circumstances beyond the petitioner's control precluded raising the post-conviction claims in a timely manner. Id. at 469. In addition, a petitioner seeking due process tolling must demonstrate that his grounds for relief are "later-arising," i.e., that the grounds did not exist during the limitations period. See Sands v. State, 903 S.W.2d 297 (Tenn. 1995). Merely discovering that a claim exists, or lacking the knowledge that there may be a claim, does not make the claim later-arising. See Brown v. State, 928 S.W.2d 453, 456 (Tenn. Crim. App. 1996).

III. ANALYSIS

In the case at bar, the Petitioner argues that the statute of limitations should be tolled on both statutory and due process grounds. The Petitioner's statutory argument is based on T.C.A. § 40-30-102(b)(2), which permits tolling for claims "based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted." Specifically, the Petitioner argues that the handgun that was found in his vehicle should be tested for fingerprints, and that he anticipates that such testing will reveal that his fingerprints are not on the gun, thereby exonerating him. The Court is not persuaded by

this argument. First off, there is no “new scientific evidence” in this case. Although the Petitioner asserts that, unbeknownst to him, the gun had been placed in his vehicle by a third party, it is undisputed that the Petitioner was informed by police at the time of his arrest that the gun was found in his vehicle. The Petitioner was aware of the existence of the gun at the time of his guilty plea, and could have pursued fingerprint analysis at that time. Moreover, even assuming *arguendo* that the Petitioner had a fingerprint analysis showing that his fingerprints were not on the gun, he cannot show by clear and convincing evidence that no jury would have convicted him. The pattern jury instruction for Unlawful Possession of a Handgun While Under the Influence includes the following definition of “possession”:

“Possession” may be actual or constructive. A person who knowingly has direct physical control over an object at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention at any given time to exercise dominion and control over an object is then in constructive possession of it.

T.P.I. Crim. 36.12. Accordingly, a jury could find that the Petitioner had possession of the handgun without ever having handled it, thereby eliminating the relevance of fingerprint evidence altogether.

With regard to due process, the Petitioner’s claim is not later-arising, as the possibility of deportation existed at the time of his plea; whether or not the Petitioner was aware of the deportation consequence of his plea at that time is immaterial, as Tennessee Courts have specifically refused to engraft a “discovery rule” over the statute of limitations in post-conviction cases. See Rodriguez v. State, 2012 WL 4470675 at *7 (Tenn. Crim. App. 2012) (Internal Citations Omitted). In short, nothing “arose” with regard to the Petitioner’s claim after the statute of limitations commenced. See Stamegna v. State, 2011 WL 5971275 at *6 (Tenn. Crim. App. 2011).

Finally, this Court notes with interest the lengthy dicta contained in the Tennessee Supreme Court's recent Opinion in Garcia v. State, --- S.W.3d --- (Tenn. 2013), 2013 WL 6795210 at fn8. In that case, our Supreme Court noted that "courts have consistently held that an illegal alien who pleads guilty cannot establish prejudice [under Strickland v. Washington], even if defense counsel failed to provide advice about the deportation consequences of the plea as Padilla requires, because a guilty plea does not increase the risk of deportation for such a person." Therefore, even if this Court reached the merits of Mr. Constantino-Gonzalez's Petition, his status as an illegal alien would appear to be a major obstacle to his chance of success under the current law of this State.

IV. CONCLUSION

This Court holds that the Petitioner's post-conviction relief claims are time-barred, and that he has failed to show any basis upon which this Court may toll the statute of limitations. For the reasons stated above, the Petition for Post-Conviction Relief is hereby DISMISSED.

IT IS SO ORDERED.



M. KEITH SISKIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been delivered via U.S. Mail (to last address on file), postage prepaid, to the following:

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On this the _____ day of _____, 20____.

Deputy Clerk