

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

**FILED**

March 7, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

<b>WILLIAM P. LIVINGSTON, JR.,</b> *	C.C.A. No. 03C01-9902-CR-00064
Appellant,	*
VS.	*
<b>DAVID MILLS, WARDEN, and</b> *	MORGAN COUNTY
<b>STATE OF TENNESSEE</b>	Honorable E. Eugene Eblen, Judge
Appellee.	(Habeas Corpus)
	*

FOR THE APPELLANT:

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**JOHN EVERETT WILLIAMS,**  
Judge

**OPINION**

**INTRODUCTION**

The petitioner, William Livingston, Jr., appeals from the Morgan County Court's summary dismissal of his writ for habeas corpus. He now contends that the

trial court's dismissal was in error and that habeas relief is appropriate for the following reasons:

- (1) His constitutional protections against double jeopardy were violated by a multiplicitious indictment;
- (2) the indictment charging the count of conspiracy failed to allege an overt act;
- (3) the jury instructions regarding reasonable doubt were in violation of his constitutional rights;
- (4) the trial court erred in failing to provide the defendant a hearing for his habeas petition; and
- (5) the trial court erred in not addressing his motion for sanctions.

After careful review, we AFFIRM the trial court's order dismissing the petition.

### **BACKGROUND**

Convicted in 1985 of three counts of Selling a Schedule II controlled substance and one count of Conspiracy to Sell a controlled substance, the petitioner was sentenced to an effective 21 years. His convictions and sentences were thereafter affirmed by this Court. See State v. William Penn Livingston, Jr., No. 227 (Tenn. Crim. App., filed December 12, 1986, at Knoxville).

The petitioner has now filed a habeas petition challenging the legality of his continued incarceration. In January 1999, this petition was dismissed without a hearing. The trial court in its written order stated:

[The petitioner] raises no grounds upon which the judgments are rendered void but at most could be attacked as voidable. Petitioner does not allege that his term of imprisonment has expired.

From these findings and this dismissal, the petitioner now appeals.

### **ANALYSIS**

We review each of petitioner's five arguments separately; however, first we are obliged to note the very limited scope of habeas relief in Tennessee. It is a well-established principle of law that the remedy of habeas corpus is limited in scope as well as relief. See Archer v. State, 851 S.W.2d 157, 161-62 (Tenn. 1993); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992); State v. Warren, 740 S.W.2d 427, 428 (Tenn. Crim. App. 1986). In criminal cases, the remedy is limited to cases where

the judgment is void or the term of imprisonment has expired. See Tenn. Code Ann. § 29-21-101; State v. Passarella, 891 S.W.2d 619 (Tenn. Crim. App. 1994).

### **Multiplicitous Indictment**

The petitioner's first claim relates to the indictment under which he was originally charged and convicted. He argues that this indictment, which contained ten counts, was impermissibly multiplicitous. See, e.g., State v. Young, 904 S.W.2d 603, 606 (Tenn. Crim. App. 1995); that is, the indictments, petitioner argues, charged the same offense in different counts. Further, in connection with this allegedly flawed indictment, the petitioner argues that the trial court erred when it did not force the prosecution to elect the counts in the indictment it was proceeding on until after the close of all argument. This failure, the petitioner alleges, violated fundamental rights to due process and a unanimous verdict. See, e.g., State v. Brown, 823 S.W.2d 576, 580 (Tenn. Crim. App. 1991).

The petitioner's challenges are to the sufficiency of his indictments. At habeas in Tennessee, "the validity of an indictment and the efficacy of the resulting conviction may be addressed when the indictment is so defective as to deprive the court of jurisdiction." Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). In this instance, the defects complained of do not render the judgment void. Therefore, we find no merit in petitioner's claim.

### **Fatally Flawed Indictment**

Next, the petitioner alleges that the same indictment is fatally flawed because it fails to allege an overt act committed in furtherance of the conspiracy. This failure, he argues, infringes upon his constitutional rights to due process. See e.g., State v. Mencer, 798 S.W.2d 543 (Tenn. Crim. App. 1990).

Petitioner's claim is not supported by the record. This Court has reviewed the indictment and concludes that it does, in fact, allege overt acts. For example, the second count reads:

The Grand Jurors for the State and County aforesaid, upon their oath present and say that William Penn Livingston, Jr. and [co-conspirator] on or about the 11<sup>th</sup> day of February, 1985, in the State and County

aforesaid did unlawfully, and feloniously conspire together to sell or deliver hydromorphone, a Schedule II controlled substance, to Tennessee Bureau of Investigation Special Agent Mack Smith by jointly participating in the sale or delivery of forty-eight (48) dilaudid morphine tablets to Mack Smith for the sum of \$2,000.00

The other counts similarly lay out the overt acts. We conclude that each count is sufficient. Therefore, we find no merit in petitioner's claim.

### **Jury Instructions**

\_\_\_\_\_Next, the petitioner asserts that the jury instructions on "reasonable doubt" impermissibly lowered the burden of proof required in criminal trials. In so doing, petitioner argues, the instructions given deprived him of due process. See, e.g., Cage v. Louisiana, 498 U.S. 39, 41 (1990).

Again, the trial court correctly held that this argument does not fall within the scope of habeas corpus in Tennessee. See Passarella at 626-28; see also Hall v. Mills, No. 01C01-9510-CV-00339 (Tenn. Crim. App. at Nashville, August 1, 1996). Defective jury instructions, at best, render the judgment voidable, not void. Therefore, we find no merit in petitioner's claim.

### **Habeas Hearing**

The defendant argues that the trial court erred in failing to provide him a hearing. The trial court is not required to conduct a hearing when the petition fails to state a claim which, if true, would render the judgment void. See Tenn. Code Ann. § 29-21-109; Byrd v. Bomar 381 S.W.2d 280 (Tenn. 1964); Russell v. State ex rel. Willis, 437 S.W.2d 529 (Tenn. 1969). Again, petitioner's claims, taken as true, establish merely that the judgment is voidable. Therefore, we find no merit in petitioner's claim.

### **Motion for Sanctions**

Although we question the efficacy of a nonlawyer's signing a pleading for an attorney of record, the trial court's dismissal without addressing the defendant's motion for sanctions was not in error. The trial court may dismiss a habeas petition, as it did in this case, upon finding that the petition failed to set forth grounds upon which to render the judgment void. An answer in such a case is not required. Further, to state again, the scope at habeas is confined to "void judgments." See Passarella at 626-28. Therefore, we find no merit in petitioner's claim.

### **CONCLUSION**

Accordingly, we AFFIRM the trial court's order dismissing the petition.

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JOHN EVERETT WILLIAMS, Judge

CONCUR:

\_\_\_\_\_  
JOSEPH M. TIPTON, Judge

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ALAN E. GLENN, Judge