IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

FILED

December 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

THEODORE HOWARD,	)	**C.C.A. NO. W1998-00588-CCA-R3-PC**
	)	
Appellant,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. L.T. LAFFERTY,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	**(Post-Conviction)**

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

FOR THE APPELLANT:

CRAIG B. FLOOD, II
100 North Main, Suite 2400
Memphis, TN 38103

FOR THE APPELLEE:

PAUL. G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

R. STEPHEN JOBE
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0493

WILLIAM GIBBONS
District Attorney General

RHEA CLIFT
Assistant District Attorney General
Criminal Justice Complex, Suite 301
201 Poplar Avenue
Memphis, TN 38103

OPINION FILED ______________________

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Theodore Howard, appeals the trial court's denial of his post-conviction petition after an evidentiary hearing. We affirm the judgment of the trial court.

The Defendant was indicted for aggravated burglary on January 10, 1995. On January 19, 1995, the trial court appointed Tony Brayton, an assistant public defender, to represent the Defendant. The case was tried before a jury on May 30, 1995, and the Defendant was found guilty of aggravated burglary. Though defense counsel requested that the trial court charge the jury on the lesser included offense of burglary, the trial court refused to charge any lesser included offenses.

We reviewed this case on direct appeal, setting forth the facts as follows:

> At about 10:00 a.m. on September 4, 1994, a neighbor to the house located at 1155 Central Avenue in Memphis heard a loud banging noise. The neighbor and his wife went to their back door and observed a man, who they later identified as the Appellant, breaking out a window on the back door of the house with a brick. The property known as 1155 Central Avenue was then in the possession of United American Bank due to a foreclosure on the property. The house on that property had been vacant for approximately two months prior to September 4, 1994. No one other than the bank's agents had permission to enter to take any property from 1155 Central Avenue. The neighbors saw the Appellant enter the house. The neighbors notified the police, and then the wife and another neighbor waited at the front of the house while her husband, armed with a shotgun, waited at the back of the house for the police to arrive.
>
> The Appellant attempted to leave the house with a ceiling fan, but then saw the neighbor waiting at the back of the house. The Appellant put the fan down in the doorway of the house. The neighbor observed what appeared to be a shiny weapon in the Appellant's hand, and he followed the Appellant to the front of the house. He told the Appellant to put his weapon down and to get down on the sidewalk. The Appellant complied and was held there by the neighbor until the police arrived. The police officer who arrived took the Appellant into custody based upon the information of the witnesses. Appellant gave a statement to the police, introduced into evidence, in which he admitted breaking into the house, taking the fan, and being caught and detained by the neighbors until the police arrived.

State v. Theodore F. Howard, C.C.A. No. 02C01-9508-CR-00237, 1997 WL 170326, at *1 (Tenn. Crim. App., Jackson, Apr. 11, 1997).

Mr. Brayton represented the Defendant on direct appeal to this Court, arguing only that the trial court committed reversible error by failing to charge the jury with the lesser included offense of burglary. We affirmed the judgment of the trial court, holding that "[a]s the evidence is clear as to the nature of the habitation which the Appellant admittedly entered, the issue of the Court's failure to give an instruction on the lesser offense of burglary is without merit." Id. at *2. Permission to appeal was denied by our supreme court on November 3, 1997. Subsequently, the Defendant filed a pro se petition for post-conviction relief on January 7, 1998 alleging several grounds for relief. Counsel was appointed, and the petition was amended. A hearing on the petition was conducted on May 14, 1998, and an order denying the petition was entered by the trial court on May 26, 1998. The trial court found that one of the Defendant's issues had been previously determined and that all of the issues lacked merit. The Defendant now appeals that denial to this Court, raising the following issues:

> 1. Is the statute, Tennessee Code Annotated § 39-14-403, aggravated burglary, under which the Defendant was convicted unconstitutionally vague and, therefore, void?
>
> 2. Was the Defendant denied his Sixth Amendment right to a trial by jury for the trial court's refusal to include the charge of burglary, Tennessee Code Annotated § 39-14-402, as a lesser included offense of the charge of aggravated burglary, Tennessee Code Annotated § 39-14-403, to the jury?

We find that the Defendant's first issue, though also waived, lacks merit and that his second issue has been previously determined. Accordingly, we affirm the judgment of the trial court denying post-conviction relief.

Relief under our Post-Conviction Procedure Act will only be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by either the Tennessee Constitution or the United States Constitution. Tenn. Code Ann. § 40-30-203. At a post-conviction hearing, the

petitioner has the burden of proving the allegations of fact by clear and convincing evidence. Id. § 40-30-210(f). The findings of fact made by the trial court are conclusive on appeal unless the evidence preponderates otherwise. Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993).

To be considered, a petition for post-conviction relief must show that the claims for relief have not been waived or previously determined. See Tenn. Code Ann. § 40-30-206(f). A ground for relief is waived if the petitioner failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. Id. § 40-30-206(g). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Id. § 40-30-206(h). A full and fair hearing occurs where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence. Id. There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived. Id. § 40-30-210(f).

The Defendant argues that the aggravated burglary statute is unconstitutionality vague because persons of reasonable intelligence cannot determine clearly what conduct is prohibited by the statutory definition of habitation. Because this is an issue that could have been presented for determination to the trial court during the original trial and to this Court on direct appeal, and because the Defendant did not set forth any facts explaining why this ground for relief was not presented at any previous proceeding, this issue has been waived. See Tenn. Code Ann. §§ 40-30-204(e), -206(g), -210(f). However, we have also considered the issue on the merits, and we find that the statute is not unconstitutionally vague.

Constitutional due process guarantees prohibit states from holding a person "criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harris, 347 U.S. 612, 617 (1954). Due process requirements are met if reasonable notice of prohibited conduct is given and the statutory boundaries are sufficiently distinct for judicial administration. State v. Wilkins, 655 S.W.2d 914, 915 (Tenn. 1983). Due process

> does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness for "[i]n most English words and phrases there lurk uncertainties." Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what statutes may compel or forbid.

Rose v. Locke, 423 U.S. 48, 50 (1975) (quoting Robinson v. United States, 324 U.S. 282, 286 (1945)). Thus, absolute precision in drafting prohibitory legislation is not required. Wilkins, 655 S.W.2d at 916. The clarity in meaning may be derived from sources other than the statute itself, such as judicial interpretations or legislative history. See Rose, 423 U.S. at 50; Wilkins, 655 S.W.2d at 916; State v. Hayes, 899 S.W.2d 175, 181 (Tenn. Crim. App. 1995). "'That is not uncertain or vague which by the orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.'" Donathan v. McMinn County, 213 S.W.2d 173, 176 (Tenn. 1948) (quoting State v. Northwest Poultry & Egg Co., 281 N.W. 753, 756 (Minn. 1938) (Stone, J. dissenting)).

The statute in question provides that aggravated burglary is the burglary of a habitation. Tenn. Code Ann. § 39-14-403(a). A "habitation"

> (A) [m]eans any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;
> (B) [i]ncludes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; and
> (C) [i]ncludes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle.

Id. § 39-14-401(1). As readily evident by the language of the statute, only the first definition is relevant to this case. Thus, for our purposes, a "habitation" is "any structure . . . which is designed or adapted for the overnight accommodation of persons . . . ." Id. § 39-14-401(1)(A). There is no requirement in this definition that the structure be currently occupied to be a habitation. See id.

It does not take dictionary definitions, treatises, or judicial interpretations for a person of reasonable intelligence to understand that a house is a structure "designed" for the overnight accommodation of persons. Every child learning the English language understands that a house is a place where people live. The Defendant, however, argues that persons of reasonable intelligence could easily reason that the structure must have been actually adapted and *used* for the overnight accommodations of persons at the time of the offense. He relies on a decision of the Court of Criminal Appeals of Texas, which held that "the structure or vehicle must at the time of the alleged offense have been actually 'adapted for the overnight accommodation of persons' or at least at some prior time used for the overnight accommodation of persons and still 'adapted for the overnight accommodation of persons.'" Jones v. State, 532 S.W.2d 596, 600 (Tex. Crim. App. 1976) (emphasis added). This holding was based on the Texas statute which defines a "habitation" as "a structure or vehicle that is adapted for the overnight accommodation of persons." Tex. [Penal] Code Ann. § 30.01 (emphasis added). The Jones court reasoned that the question of what is meant by the term "habitation" turned on the word "adapted." Jones, 532 S.W.2d at 599. Thus, the reasoning of both the Court of Criminal Appeals of Texas and the Defendant completely ignores the language of our statute, which defines a "habitation" as a structure "designed or adapted for the overnight accommodation of persons." Tenn. Code Ann. § 39-14-401(1)(A) (emphasis added).

This Court has previously addressed this issue in the case of State v. James Ford, III, C.C.A. No. 02C01-9304-CR-00078, 1994 WL 398811, at *1

(Tenn. Crim. App., Jackson, Aug. 3, 1994), in which a defendant was convicted of aggravated burglary upon proof that he broke into a vacant house and stole two air conditioners. That defendant argued that the statutory definition of "habitation" must be read to mean "presently fit to accommodate persons overnight" and that "since a vacant house would not have 'water(,) a working commode, lights, warmth and a bed, (a) lavatory, shower or bath, (or) cooking and food accoutrements [sic]' it would not be 'presently fit' for habitation and, therefore, would not be designed or adapted for overnight accommodation of persons." Id. We rejected that argument, stating,

> If the building only needed to be "adapted" for such accommodation of persons, we might agree. However, the provision is that the building be "designed" or "adapted." A "house," though vacant, was clearly "designed" for the overnight accommodation of persons, since by the dictionary definition and common understanding, a "house" is "a building for human beings to live in."

Id. (quoting Webster's New World Dictionary of the American Language, 680 (2d college ed. 1980)). Therefore, based on common understanding and judicial interpretation, a vacant house is clearly included within our statutory definition of "habitation," and the statute is thereby not unconstitutionally vague.

The Defendant poses a number of interesting hypothetical situations to test the definition of "habitation," giving examples of structures that were originally designed for the overnight accommodation of persons but were at some point converted into places of business and arguing that the application of the statute to such structures makes the statute vague. This ignores the principle that "the uncertainty in a statute which will amount to a denial of due process of law 'is not the difficulty of ascertaining whether close cases fall within or without the prohibition of a statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved.'" Donathan, 213 S.W.2d at 176 (quoting State v. Lanesboro Produce & Hatchery Co., 21 N.W.2d 792, 795 (Minn. 1946)). This statute is not so uncertain that it cannot be determined that particular acts are

disapproved. It is clear from the statute that breaking into a vacant house, which has not been converted into any sort of business, with the intent to steal is prohibited. Therefore, these unusual situations or "close cases" which may come before the courts at some point for resolution through judicial interpretation do not make the statute itself unconstitutionally vague.

The Defendant also argues that he was denied his right to trial by jury because the trial court refused to instruct the jury on the lesser included offense of burglary. Burglary, as relevant to this case, occurs when a person enters a building other than a habitation not open to the public with the intent to commit a felony, theft, or assault. Tenn. Code Ann. § 39-14-402(a)(1). Aggravated burglary is the burglary of a habitation. Id. § 39-14-403(a). As already stated, a "habitation" is defined as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons." Id. § 39-14-401(1)(A).

The proof at the post-conviction hearing showed that defense counsel at trial, Mr. Brayton, requested that the trial court instruct on the lesser included offense of burglary, but the trial court refused. Mr. Brayton then again argued this issue to the trial court in his motion for a new trial and to this Court in the Defendant's direct appeal. We considered the issue and affirmed the judgment of the trial court, finding the evidence clear as to the nature of the structure that the Defendant entered. The Defendant admitted that he entered a house, but argued that the house ceased to be a "habitation" because it was unoccupied. This Court relied on State v. James Ford, III, C.C.A. No. 02C01-9304-CR-00078, 1994 WL 398811 (Tenn. Crim. App., Jackson, Aug. 3, 1994), in which we held that "[a] 'house,' though vacant, was clearly 'designed' for the overnight accommodation of persons," to find that the house which the Defendant entered "was obviously designed for overnight accommodation and, therefore, was within the Legislature's definition of a 'habitation.'" See State v. Theodore F. Howard,

C.C.A. No. 02C01-9508-CR-00237, 1997 WL 170326, at *2 (Tenn. Crim. App., Jackson, Apr. 11, 1997); James Ford, III, 1994 WL 398811, at *1. Because the evidence showed that the place the Defendant burglarized was a habitation, we found that it was not error for the trial court to refuse to instruct on the lesser included offense of burglary. See Theodore F. Howard, 1997 WL 170326, at *2. Because this issue has been previously determined by this Court on direct appeal, it cannot again be considered in a post-conviction proceeding. See Tenn. Code Ann. § 40-30-206(f).

Accordingly, we affirm the trial court's denial of the Defendant's post-conviction petition.

____
DAVID H. WELLES, JUDGE

CONCUR:

____
JERRY L. SMITH, JUDGE

____
JAMES CURWOOD WITT, JR., JUDGE