IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

JOHNNY JOE CRASS, JR.,	)	C.C.A. NO. 03C01-9304-CR-00135
	)	
	)	JOHNSON COUNTY
Appellant	)	
	)	HON. LYNN W. BROWN
v.	)	JUDGE
	)	
STATE OF TENNESSEE,	)	Habeas Corpus--
	)	burglary 2d degree; grand larceny;
	)	burglary of an auto; possession of
Appellee	)	stolen property; burglary 1st degree

FOR THE APPELLANT

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Pro se

FOR THE APPELLEE

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OPINION FILED _____

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

O P I N I O N

The appellant appealed from the summary dismissal of his petition for habeas corpus relief in which he alleged his continued incarceration was illegal because the sentence upon which he was being held had expired.

The appellant specifically alleges that:

> A. Since the Board of Paroles ordered the petitioner to begin serving time on the sentence for the felony committed while on parole on December 1, 1991, they effectively vacated the remainder of the prior sentence being served on the 1983 Grand Larceny conviction as of that date.
>
> B. Petitioner should have been granted a hearing on his Petition for Writ of Habeas Corpus.

We affirm the judgment of the trial court.

In March 1983, the appellant was convicted in Knox County for burglary second degree, grand larceny, burglary of an auto, possession of stolen property and burglary first degree. He was sentenced to serve ten years on each of these sentences. The sentence for grand larceny and the sentence for burglary second degree were entered to be served consecutively, and all other sentences were to be served concurrently. The effective sentence was 20 years.

On February 1, 1988, the petitioner-appellant was released on parole. On April 4, 1990, the Board of Paroles revoked the parole because of a murder charge brought against the appellant. All of the 1983 sentences imposed on the appellant expired on June 20, 1991, with the exception of the sentence for grand larceny, which would, by order of the trial court, commence to run on that date and was not scheduled to expire until June 2001.

On October 10, 1990, the appellant was convicted of second degree murder and sentenced to serve 36 years. The Board of Paroles directed that this sentence commence to run on December 1, 1991. The second degree murder conviction was

reversed. The appellant argues that the sentence for grand larceny expired because the parole board permitted him to start serving the sentence for murder before the grand larceny sentence had expired. He claims this terminated the sentence by implication because by law he could not serve the sentence for murder until the sentence for larceny had been served.

In *Archer v. State*, 851 S.W.2d 157 (Tenn. 1993), the Court said:

> Habeas corpus relief is available in Tennessee only when "it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered" that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired.

The trial court correctly dismissed the petition on this issue.

In *Willie Lee Fletcher v. Gary Livesay, et al.* (C.C.A. No. 88-197-III, Davidson County, filed at Nashville, December 28, 1988), the petitioner filed a petition for a writ of mandamus to be released for the same reason the appellant raises here.

Fletcher was serving a 99-year sentence for murder, which was imposed in February 1971. On November 13, 1981, the governor commuted the sentence to time served but imposed parole, and the petitioner was placed on supervised parole until June 18, 2021. On February 7, 1986, Fletcher was sentenced to serve one year on a petit larceny conviction. On January 27, 1987, the Board of Pardons and Paroles ordered the sentence to begin from the date of its imposition. This terminated the larceny sentence.

Fletcher claimed that because TENN. CODE ANN. § 40-28-123 requires a sentence for an offense committed while the prisoner is on parole to be served consecutively to the sentence for which the prisoner is on parole, the action of the board caused the 99-year murder sentence to be absorbed, merged or "gobbled-up" by the 1-year larceny sentence and that he had served all sentences by January 27, 1987. The effect would have been to reduce the 99-year sentence to 1 year.

The Court held the result would be preposterous and absurd. Further, the Court held such result was contrary to the clear requirement of the law (requiring consecutive sentences for offenses committed while on parole).

We apply the holding of *Fletcher* to this case also and affirm the judgment of the trial court. Costs are taxed to the appellant, Johnny Joe Crass, Jr.

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John K. Byers, Senior Judge

CONCUR:

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Gary R. Wade, Presiding Judge

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Joseph M. Tipton, Judge