

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

FILED

May 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM D. CARROLL, * C.C.A. # 02C01-9510-CR-000314
Appellee, * LAUDERDALE COUNTY
VS. * Hon. Joseph H. Walker, Judge
FRED RANEY, WARDEN, * (Habeas Corpus)
Appellant. *

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OPINION FILED: _____

JUDGMENT REVERSED; HABEAS CORPUS PETITION DISMISSED

GARY R. WADE, JUDGE

OPINION

The State of Tennessee appeals from a judgment granting the petitioner, William D. Carroll, habeas corpus relief on the basis that his sentence had been fully served. Earlier this court had remanded the cause for an evidentiary hearing. See Carroll v. Raney, 868 S.W.2d 721 (Tenn. Crim. App. 1993). The single issue presented for review is whether the trial court erred by determining that the petitioner's commuted sentence had expired prior to being revoked by act of the governor. We reverse the judgment of the trial court and dismiss the petition.

In 1962, the petitioner was convicted of rape and sentenced to death by electrocution. See Tenn. Code Ann. §§ 39-3701 and 39-3702. Two years later, Governor Frank Clement commuted the sentence to life in prison. See Tenn. Const. art. 3, § 6; Tenn. Code Ann. § 40-27-101 et seq.; Smith v. Thompson, 584 S.W.2d 253 (Tenn. Crim. App. 1979). On November 16, 1972, Governor Winfield Dunn commuted the sentence to twenty-two years to life.¹ Shortly thereafter, the petitioner was released on parole.

During his period of parole, the petitioner committed an armed robbery and, on June 28, 1973, he was sentenced to forty years for that crime. On March 19, 1974, Governor Dunn revoked the 1972 commutation and restored the

¹The pleadings, documents, and supporting affidavits placed in the record prior to the original appeal referred to twenty-two years as the commuted sentence. See Carroll v. Raney, 868 S.W.2d 721 (Tenn. Crim. App. 1993). At the evidentiary hearing required by this court on remand, the state and the petitioner stipulated that the sentence actually had been commuted to "22 years to life."

life sentence on the rape conviction. Thereafter, the petitioner completed his forty-year sentence for the armed robbery as well as earlier sentences of three, five, and ten years he had received as the result of 1965 Shelby County convictions.

In 1992, the petitioner, an inmate in the geriatric unit of the Tennessee Department of Correction, filed this petition for habeas corpus claiming he had served the commuted sentence before the revocation. The trial court denied relief without granting an evidentiary hearing. On direct appeal, this court reversed and remanded the cause to the trial court to determine whether the sentence for rape had expired by the time Governor Dunn acted to revoke the commutation. Carroll v. Raney, 868 S.W.2d at 724.

The basis of this court's ruling was the earlier opinion of Rowell v. Dutton, 688 S.W.2d 474 (Tenn. Crim. App. 1985). In Rowell, this court held that a governor's authority to revoke an unconditional commutation of sentence terminated at the expiration of the sentence. In that case, the petitioner was able to establish at the evidentiary hearing that the sentence, because of accumulated sentence credits, had been fully served before the governor revoked the commutation. The following passage was deemed to be controlling on the issue:

[A] records clerk at the Tennessee State Penitentiary and ... the senior records clerk at the Central Records Division of the Department of Correction ... revealed that the appellant had also received two hundred sixty (260) days of Program

Participation Sentence Credits (PPSC) as of the date that his sentence was commuted in December 1979. After he returned to the penitentiary ..., the appellant ... received ... credits ... for thirteen months for a total of one hundred fifty-six (156) additional days of PPSC. These days ... yielded a credit of four hundred sixteen (416) days which are subtracted from the January 3, 1985 expiration date ... and ... yielded an expiration date of November 15, 1983....

* * *

Thus, the net result of all these calculations is that at the time that Governor Alexander signed the revocation of clemency on November 22, 1983, the appellant's sentence had already expired. There simply was no sentence to revoke.

Rowell v. Dutton, 688 S.W.2d at 476.

A commutation of a sentence by the governor is the substitution of a lesser for a greater punishment. Bowen v. State, 488 S.W.2d 373, 376-78 (Tenn. 1972); see also State ex rel. Murphy v. Wolfer, 127 Minn. 102, 148 N.W. 896 (1914). The governor, however, has the authority to attach conditions to any commutation. Upon a violation, the governor may revoke a commutation and reinstate the original term absent any right on the part of the prisoner to judicial review. White v. Livesay, 715 F. Supp. 202 (M.D. Tenn. 1989); State ex rel. Rowe v. Conners, 166 Tenn. 393, 396-97, 61 S.W.2d 471, 472 (1933).

In the first appeal by the petitioner, this court could not conclude from the documents in the record that the rape sentence had expired by the time Governor Dunn revoked or whether any conditions had been placed on the commutation.

The information available suggested that the petitioner had a "twenty-two year sentence" which began on or about September 9, 1961. The cause was remanded to the trial court for a factual determination of whether the sentence had been served and whether there were any conditions to the commutation. In determining whether the petitioner had served his sentence by the time of the 1974 revocation, the trial court was directed not to consider anything other than uncontested sentence credits.

After further proceedings, the trial court ruled in pertinent part as follows:

- (1) That the petitioner had 264 days of pretrial jail credit at the time of his original sentence on May 31, 1962.
- (2) The sentence of death was commuted to a life sentence on July 13, 1964, and, on November 16, 1972, further commuted to 22 years to life.
- (3) The 1972 commutation was unconditional.
- (4) The petitioner was released on parole December 12, 1972, and then returned to prison four months later.
- (5) In March 1974, the governor attempted to revoke the commutation and restore the life sentence.
- (6) That based upon the facts presented, the petitioner had served his sentence of 22 years to life prior to its revocation on March 19, 1974.
- (7) That all other sentences have expired and that the petitioner should be granted the writ of habeas corpus and released from custody.²

²On June 11, 1982, Governor Lamar Alexander again granted the petitioner clemency to the extent necessary to make him eligible for parole. The petitioner was returned from parole in 1983. In 1985, Governor Alexander revoked the 1982 order of clemency.

In its appeal from that order, the state contends that the "22-year to life commutation" was an indeterminate sentence for the maximum period, subject to termination only by the parole board. Their claim is that the twenty-two-year to life sentence could expire only upon the death of the prisoner whereas a twenty-two-year sentence would have been fully served before the 1974 commutation.

If the sentence had been twenty-two years, it would have apparently expired some six months prior to the 1974 revocation. Tenn. Code Ann. § 40-3612 (1975) (current version at Tenn. Code Ann. § 40-28-115). Ordinarily, the findings by the trial judge on questions of fact are conclusive on appeal unless the evidence preponderates against the judgment. Graves v. State, 512 S.W.2d 603, 604 (Tenn. Crim. App. 1973). The stipulation that the commuted sentence was actually "22 years to life," however, casts new light on this situation. At first blush, the sentence imposed by Governor Dunn appears to be indeterminate. The applicable statute provided in part as follows:

Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board. The time of his release shall be discretionary with the board, but no such person shall be released until he has served such minimum sentence nor until he shall have served one (1) year.

Every person sentenced to a determinate sentence and confined in a state prison, when he has served a period of time equal

to one-half (½) of the sentence imposed by the court for the crime for which he was convicted, but in no event less than one (1) year, shall likewise be subject to parole in the same manner provided for those sentenced to an indeterminate sentence.

Tenn. Code Ann. § 40-3612.

Other authorities also suggest that a "22-year to life" sentence should be classified as indeterminate:

An indeterminate sentence [is] one where the court does not fix duration but only fixes maximum and minimum limits, and as one for the maximum period, subject to termination by a parole board ... at any time after the minimum term has been served.

24 C.J.S. Criminal Law § 1468.a. (1989); cf., Matthew S. Prince, Comment, "The Indeterminate Sentence Law in Tennessee," 25 Tenn. L. Rev. 366 (1958).

At the time, however, our statutory law specifically provided that a sentence for rape had been excluded from the indeterminate sentence law and qualified as determinate. Tenn. Code Ann. § 40-2707(1975) (current version at Tenn. Code Ann. § 40-20-107(b)); Frank v. State, 187 Tenn. 174, 186, 213 S.W.2d 105, 109-110 (1948). The petitioner argues, therefore, that Governor Dunn imposed an illegal sentence and that this court should interpret the sentence as one for twenty-two years.

In the exercise of clemency, however, the governor is not subject to the control of the general assembly. State ex rel. Rowe v. Connors, 166 Tenn. 393, 396, 61 S.W.2d 471, 472 (1933). The "power to grant reprieves and pardons" has

traditionally included the commutation of a sentence. Rickes v. State, 882 S.W.2d 387, 391 (Tenn. Crim. App. 1994). The governor has the unbridled discretion to impose conditions, limitations or restrictions on a commutation. See Spencer v. State, 125 Tenn. 64, 140 S.W. 597 (1911). The prisoner has the right to refuse the grant if unwilling to comply with any of the conditions imposed. State ex rel. Bedford v. McCorkle, 163 Tenn. 101, 104-05, 40 S.W.2d 1015, 1016 (1931). Here, of course the petitioner accepted the largess of the governor but soon thereafter committed a serious offense.

In our view, the additional provision, "to life," rendered the commutation conditional. Clearly, Governor Dunn reserved the authority to exercise control over the petitioner throughout the remainder of his natural life. Because the terminology served as a condition to the commutation, the prisoner was subject to a revocation in 1974. See State ex rel. Garvin Shepherd v. Jack Morgan, No. 89-287-III (Tenn. Crim. App., at Nashville, June 13, 1990) (sentence commuted to twenty years with condition that petitioner be subject to parole supervision for 99-year term of original sentence).

A parolee whose sentence has not been fully served remains under confinement of his sentence during any parole. Doyle v. Hampton, 207 Tenn. 399, 403-04, 340 S.W.2d 891, 893 (1961). The grant of parole, however, does not conflict with the powers of the governor. See Woods v. State, 130 Tenn. 100, 169 S.W. 558 (1914). While the trial court made findings to the contrary, it appears that, as a matter of law, the

sentence was in fact conditional and had not expired by the time of the 1974 commutation. The judgment must, therefore, be reversed and the habeas corpus petition dismissed.

Gary R. Wade, Judge

CONCUR:

Joe B. Jones, Presiding Judge

William M. Barker, Judge