

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

FILED
June 28, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

DAVID ANDREW HARVEY,)
)
 Appellee)
)
 V.)
)
 STATE OF TENNESSEE,)
)
 Appellant)

NO. 03C01-9510-CC-00307
CARTER COUNTY
HON. LYNN W. BROWN
JUDGE
(Habeas Corpus)

FOR THE APPELLANT:

David Andrew Harvey
Pro Se
Carter County Work Camp
Caller #1
Roan Mountain, Tennessee 37687

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Eugene J. Honea
Assistant Atty. Gen. & Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

David E. Crockett
District Attorney General
Route 19, Box 99
Johnson City, Tennessee 37601

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, David Andrew Harvey, appeals as of right from the dismissal by the Carter County Criminal Court of his petition for a writ of habeas corpus.

Upon entering pleas of guilty in November 1991, the appellant was convicted of second degree murder and especially aggravated robbery.

In his pro se petition for habeas corpus relief, filed April 27, 1995, the appellant alleged that his conviction for especially aggravated robbery violated the double jeopardy clause of the Constitution of the United States because the offense arose out of the same criminal episode as that resulting in the murder conviction. The trial court dismissed the petition sua sponte for failure to state a claim upon which relief could be granted.

We agree with the trial court. Habeas corpus relief is available only when it appears on the face of the judgment that a conviction is void or when the petitioner's term of imprisonment has expired. Tenn. Code Ann. § 29-21-101 (1980 Repl.); State v. Archer, 851 S.W2d 157, 164 (Tenn. 1993). Even if there were merit to the appellant's claim of double jeopardy, such a claim renders the conviction voidable, not void. William A. Ransom v. State, No. 01C01-9410-CR-00361 (Tenn. Crim. App., at Nashville, September 20, 1995) perm. to app. denied (Tenn. 1996); Dewayne Haynes v. State, No. 03C01-9402-CR-00054 (Tenn. Crim. App., at Knoxville, May 25, 1995) perm. to app. denied (Tenn. 1995). It is well settled that where a judgment is not void, but is merely voidable, such judgment may not be collaterally attacked in a suit for habeas corpus relief. State v. Archer, 851 S.W2d at 163 (Tenn. 1993); Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). We, therefore, hold that because the appellant has not alleged that he is being held upon an expired sentence or that the judgments against him are void, the trial court properly dismissed the petition.

We note that the trial court could have treated the habeas corpus petition as a post-conviction relief petition. Tenn. Code Ann. § 40-30-108 (1990 Repl.). However,

the record in this case clearly shows that the three-year statute of limitation applicable to a petition for post-conviction relief pursuant to Tennessee Code Annotated section 40-30-102 had expired. Therefore, the trial court's dismissal of the petition without considering it as one for post-conviction relief was entirely proper. See Fredrick v. State, 906 S.W.2d 927 (Tenn. Crim. App. 1993).

Accordingly, the judgment is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

GARY R. WADE, JUDGE

DAVID H. WELLES, JUDGE