

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED
September 19, 1996
Cecil W. Crowson
Appellate Court Clerk

GARVIN T. SHEPHERD,)
)
Appellant,)
)
v.)
)
JAMES M. DAVIS, Warden,)
and STATE OF TENNESSEE,)
)
Appellees.)

No. 01C01-9601-CC-00007

Wayne County

Hon. Jim T. Hamilton

(Habeas Corpus)

For the Appellant:

For the Appellee:

Garvin T. Shepherd, Pro Se

Charles W.

Burson

TDOC No. 70426
Wayne County Boot Camp
Geriatrics Unit
P.O. Box 182
Clifton, TN 38425

Attorney General of Tennessee
and
Eugene J. Honea
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

T. Michael Bottoms
District Attorney General
and
James G. White
Assistant District Attorney General
P.O. Box 459
Lawrenceburg, TN 38464

OPINION FILED: _____

REVERSED AND REMANDED

Joseph M. Tipton
Judge

OPINION

The petitioner, Garvin T. Shepherd, appeals as of right from the Wayne County Circuit Court's dismissing his petition for a writ of habeas corpus. In 1972, the petitioner was sentenced to ninety-nine years imprisonment for the offense of rape. In 1984, the sentence was conditionally commuted to twenty years. In 1987, the petitioner was again convicted of rape, sentenced to twelve years imprisonment, and his commutation was revoked. The petitioner now claims that his commuted sentence of twenty years "expired" before the commutation was revoked, thereby making the revocation void, and that the subsequent sentence of twelve years received in 1987 has now "expired" after his service of eight years and eleven months.

The trial court order states, without further explanation, that the petition is "dismissed because of lack of jurisdiction." This action resulted from the state's response to the petition that essentially claimed that the petitioner's allegations only involved "release eligibility" computations not subject to the trial court's determinations and that the allegations, if allowable at all, could only be brought through a post-conviction relief petition. On appeal, although acknowledging that the petitioner is claiming that his commutation revocation was invalid and that his sentences have, therefore, already expired, the state responds that his "assertions are without basis in fact." Also, the state contends that the petitioner does not understand the scope of a writ of habeas corpus, that his convictions are not void and that his sentences have not expired. It asserts that the trial court was correct in dismissing the petition without a hearing.

Unfortunately, misapprehension is not the exclusive province of the petitioner in this case. Simply put, the petitioner asserts that his original sentence, commuted to

twenty years, expired before the commutation revocation was undertaken. Such a circumstance would, in fact, render the revocation and reinstatement of the original sentence void. See Rowell v. Dutton, 688 S.W.2d 474, 477 (Tenn. Crim. App.), app. denied, (Tenn. 1985). Further, the petitioner claims that both his commuted sentence of twenty years and his subsequent sentence of twelve years have expired when sentencing credits are considered. Certain sentence reduction credits have been considered by this court previously for determining whether, in fact, a particular sentence has expired. Id.; see Ricks v. State, 882 S.W.2d 387 (Tenn. Crim. App.), app. denied, (Tenn. 1994). Moreover, this court has recognized that a petitioner can be entitled to an evidentiary hearing and the appointment of counsel to assist in determining whether the petitioner's sentences have expired as his petition succinctly claims. See Carroll v. Raney, 868 S.W.2d 721 (Tenn. Crim. App. 1993).

Under these circumstances, we are unable to determine the reason for the trial court's conclusion that it lacked jurisdiction. Likewise, the state's position in the trial court relative to "release eligibility" does not address what we see to be the primary complaints by the petitioner. The same is true for the state's brief on appeal. Finally, we believe that the record is insufficient for us to determine, as the state now claims, that the petitioner's "assertions are without basis in fact." In sum, the case is remanded to the trial court for determination of whether the commutation revocation is void and the actual sentences expired, given the sentence credits to which the petitioner is entitled. Accordingly, the judgment is reversed.

Joseph M. Tipton, Judge

CONCUR:

John H. Peay, Judge

David H. Welles, Judge