

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

**FILED**

October 8, 1996

Cecil W. Crowson  
Appellate Court Clerk

EDWARD WAYNE BERGDORF )

Appellant )

V. )

STATE OF TENNESSEE )

Appellee )

CCA NO. 01C01-9508-CC-00279

MACON COUNTY

HON. BOBBY CAPERS, JUDGE

(Post-Conviction; Habeas Corpus)

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OPINION FILED: \_\_\_\_\_

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

William M. Barker, Judge

## OPINION

The appellant, Edward Wayne Bergdorf, appeals as of right the dismissal of his consolidated petitions which sought both post-conviction relief and a writ of habeas corpus. For the reasons contained herein, we conclude that the trial court properly dismissed the appellant's petition for a writ of habeas corpus, but erred in dismissing his petition for post-conviction relief.

The appellant was convicted of second degree murder in May 1984 and sentenced to twenty-five (25) years in the Tennessee Department of Correction. He was paroled on this conviction in May of 1991. On May 3, 1993, the appellant was charged with assault with intent to commit murder, arrested and jailed. He was released on bond, but three days later was again arrested, this time for a parole violation.<sup>1</sup> The appellant was transported back to the penitentiary to await trial on the assault charge. He requested that his parole revocation hearing be delayed until after the assault charge was resolved.

On February 16, 1994, the appellant pled guilty to felonious reckless endangerment with use of a weapon and was sentenced to one (1) year to run concurrently with the previous sentence from which he had been paroled. The transcript from this proceeding reflects that the trial judge was not aware that appellant was on parole from the earlier charge. The district attorney told the judge that "he's [appellant] serving time now on another charge." The court accepted appellant's plea, sentencing him exactly as agreed and ordering the new sentence to run concurrently with his previous conviction.

On March 17, 1994 the Board of Pardons and Paroles held a parole revocation hearing for appellant and revoked his parole. The Board ordered the appellant to begin serving his new one (1) year sentence on March 1, 1996. Appellant

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<sup>1</sup>

Although not entirely clear in the record, the assault charge appears to have been the basis for the parole violation warrant.

would receive credit for 290 days of jail time<sup>2</sup> and 72 days of pretrial behavior credit on this new one year sentence. According to the Board, the appellant had served 362 days of the one (1) year sentence and would only be required to serve three days to complete the one year sentence. In effect, the Board required the new sentence to be served consecutively, not concurrently. The Board stated that the new sentence would therefore expire March 4, 1996. The Board also determined that the appellant could be recertified for parole consideration in March 1996 on his original twenty-five (25) year sentence.

Appellant filed a petition for post-conviction relief on April 11, 1994, Macon County No. 94-104. He filed a petition for a writ of habeas corpus on May 24, 1994, Macon County No. 93-139-A. Upon the request of counsel, the Criminal Court of Macon County consolidated appellant's petitions and ordered that they be heard together. After a hearing, the trial judge dismissed the post-conviction petition, finding that the appellant knowingly and voluntarily entered the guilty plea. On the petition for a writ of habeas corpus, the trial judge granted the State's motion to dismiss. Appellant appeals from the consolidated order entered in this case on June 22, 1995.

Appellant raises four issues in his brief, but primarily he challenges the dismissal of the petitions. We hold that appellant was not entitled to a writ of habeas corpus and the trial court's judgment is affirmed on that petition. However, we find that the appellant is entitled to post-conviction relief and the conviction must be set aside. It is unnecessary to address the other issues raised by the appellant.

We affirm the trial court's dismissal of appellant's petition for writ of habeas corpus for two reasons. First, the judgment does not demonstrate on its face that the court was without jurisdiction or authority to sentence appellant, and therefore, a writ

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<sup>2</sup>The record reflects that appellant was released on bond after his arrest for the reckless endangerment charge. He was then arrested and incarcerated for violating his parole. However, the record does not show that the original bond he posted was ever surrendered. It appears to us, therefore, that the 290 days spent in jail should be credited to his former sentence rather than his latter sentence. That issue, however, is not before this Court.

of habeas corpus would be improper. Secondly, the petition for the writ was improperly filed in the Macon County Criminal Court pursuant to Tennessee Code Annotated, Section 29-21-105 (1980). Because either factor alone would be sufficient to dismiss the petition for a writ of habeas corpus, we affirm the trial court's decision.

A writ of habeas corpus is an extraordinary remedy and has application only in very narrow and limited circumstances. As the supreme court recently stated,

“[H]abeas 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.”

Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993) (emphasis added). As it is commonly understood, habeas corpus is available only when a judgment is void, not merely when the judgment is voidable. See id at 161-62. See also Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992) (citations omitted). The judgment, as it appears in the record, was issued by a trial judge of the Macon County Criminal Court for a crime allegedly committed in Macon County. Nothing on the face of the judgment indicates that the court was without jurisdiction or authority to order the sentence. From all outward appearances, the judgment appears proper.

Furthermore, a habeas corpus petition is not the proper vehicle to launch a collateral attack on a final judgment rendered by a court of competent jurisdiction. Id. Appellant's argument is nothing more than a collateral attack. He cannot show that the judgment and sentence on the reckless endangerment charge is void on its face and the petition for writ of habeas corpus necessarily fails.

Appellant contends that the judgment is void on its face because the trial judge sentenced the appellant contrary to the statutory mandate of Tennessee Code Annotated, Section 40-28-123(a) (1990). This statute requires:

“if any prisoner be convicted in this state of a felony, committed while on parole from a state prison, jail or workhouse, he shall serve the remainder of his sentence under which he was paroled, or such part of that sentence, as the board may determine before

he commences serving the sentence received for the felony committed while on parole.”

Id. The trial judge ordered appellant to serve his sentences concurrently, but the statute requires consecutive sentences in these circumstances. According to appellant, this deficiency makes the judgment void on its face.

In support of this contention, appellant relies almost exclusively on the case of Henderson v. State ex rel. Lance, 419 S.W.2d 176 (Tenn. 1967). The paroled defendant in that case was also ordered to serve his sentences concurrently, not consecutively. The same statute was in effect at that time and the court’s judgment was contrary to the statutory mandate. The court held that the defendant’s petition for a writ of habeas corpus was proper. Appellant urges this court to do the same.

We believe the Henderson case is distinguishable. It is unclear from that opinion whether the trial judge was aware of the defendant’s paroled status, or if such information appeared on the judgment. However, in this case, the record clearly reflects that the judge was not made aware of all the attendant circumstances. In addition, the face of the judgment in no way reflects that appellant was on parole. Thus, it is not clear on the face of the judgment that it is void. We must inquire beyond the face of the judgment into the transcript of the appellant’s guilty plea, as well as the transcript from the post-conviction hearing to discover this necessary fact. In light of the court’s holding in Archer, the deficiency in the judgment must be present on its face before a writ of habeas corpus will issue. 851 S.W.2d at 164. We are unable to ascertain if this was true in Henderson. However, we are sure it is not the case here and the petition was properly dismissed.

Nothing more is necessary to justify dismissal of appellant’s petition for writ of habeas corpus. However, we note that appellant’s petition was deficient in another respect. The statute which provides for writs of habeas corpus provides that an application for a writ should be made to the court that is most convenient in point of distance to the applicant, unless a sufficient reason is given in the petition. Tenn.

Code Ann. §29-21-105 (1980). The procedural provisions of the habeas corpus statute are mandatory and must be scrupulously followed. Archer, 851 S.W.2d at 165 (citing Bateman v. Smith, 194 S.W.2d 336, 337 (Tenn. 1946)). It appears that appellant did not follow the statute which dictates the proper court in which to file his petition. At the time of filing, appellant was incarcerated at the Northeast Correctional Center in Mountain City, which is located in Johnson County. Clearly, the court most convenient to the applicant would have been the Criminal Court of Johnson County. However, he filed his petition in the Criminal Court for Macon County, without providing a reason for filing in this distant court. Appellant failed to comply with the mandate of the statute and this requires dismissal of the habeas corpus petition as well. We affirm the trial court's ruling on this petition.

Although appellant's petition for habeas corpus was improper, he is entitled to relief under the post-conviction statute. A review of the record reveals that the trial judge issued an illegal sentence and this makes the conviction and subsequent sentence voidable. On its face, the judgment appeared proper, but a closer inspection of the facts and circumstances reveal that the sentence ordered was contrary to statutory mandate. We must set aside the conviction and remand the case to the trial court.

In post-conviction relief proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983). The evidence offered by appellant at the post-conviction hearing does preponderate against the judgment as it was ordered.

When appellant's plea was offered to the trial judge, the district attorney informed the judge of the agreed sentence. The district attorney specifically told the judge that appellant was "serving time now on another charge." The judge inquired of

appellant as to how much time was left on his current sentence and he replied, “thirteen years.” The judge then stated, “so this wouldn’t add anything to it then.” The district attorney agreed. However, unknown to the trial judge, the appellant was on parole for the sentence he was serving. No party to the exchange ever made the judge aware of this fact. Absolutely nothing during the hearing on the guilty plea indicates that appellant was on parole. Neither did anyone call attention to Tennessee Code Annotated, Section 40-28-123(a) (1990), quoted above, which requires consecutive sentencing in appellant’s case. The judge, unaware of the circumstances, erroneously ordered the new sentence to run concurrently with appellant’s prior sentence. The court was operating under a mistake of fact that is not attributable to the trial judge. However, it remains that the judgment was contrary to statutory mandate and is therefore illegal.

It was necessary for us to look beyond the face of the judgment to determine the attendant facts and circumstances, hence the judgment is a voidable one and proper for post-conviction relief. See Archer, 851 S.W.2d 157, 164 (Tenn. 1993) and Tenn. Code Ann. §40-30-203 (Supp. 1995). The court did not have authority to sentence the appellant in such a manner. The judgment is therefore illegal and the conviction must be set aside. Accordingly, the case is remanded to the trial court for further proceedings.

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WILLIAM M. BARKER, JUDGE

CONCUR BY:

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GARY R. WADE, JUDGE

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JOSEPH M. TIPTON, JUDGE