

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

TONY LYNN HICKS,

Petitioner,

vs.

FRED J. RANEY, WARDEN,

Respondent.

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C. C. A. NO. 02C01-9701-CC-00038

LAKE COUNTY

No. 96-7583

FILED

April 28, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

ORDER

This matter is before the Court upon the state's motion to affirm the judgment of the trial court under Rule 20, Rules of the Court of Criminal Appeals. This case represents an appeal from the trial court's denial of the petitioner's petition for writ of habeas corpus. The record was filed on February 12, 1997, and the petitioner filed his brief on March 7, 1997. The state filed the present motion on April 16, 1997, accompanied by a motion to accept the late-filed motion. Having reviewed the motion, the Court hereby finds good cause to allow the state to late-file its motion to affirm the judgment of the trial court under Rule 20.

The petitioner was originally indicted on one count each of theft, burglary and evading arrest, and two counts of attempted first degree murder. The petitioner subsequently pled guilty to two counts of aggravated assault, for which he received consecutive ten year sentences. The record also reflects that the petitioner was sentenced to four years for one count of burglary, to be served concurrently with the aggravated assault counts. In the present appeal, the petitioner raises three issues: 1) the indictment charging attempted murder is defective; 2) his guilty plea was involuntarily entered; and 3) the trial judge improperly imposed consecutive sentences.

The trial judge dismissed the petitioner's petition stating that "[t]he judgment is not void on its face, nor has the sentence expired. Allegations concerning

the sufficiency of an indictment are not subject to habeas corpus relief.” It is well established that challenges to the sufficiency of an indictment cannot be tested in a habeas corpus proceeding. See Haggard v. State, 475 S.W.2d 186, 187 (Tenn. Crim. App. 1971); Brown v. State, 445 S.W.2d 669, 674 (Tenn. Crim. App. 1969). A panel of this Court recently held the same in a capital case. Barber v. State, No. 01C01-9408-CR-00281 (Tenn. Crim. App., Feb. 23, 1995).

Nonetheless, the petitioner's claim in this respect must fail. The petitioner alleges that the indictment charged the offense of attempted felony murder, which is no longer recognized as a crime in Tennessee, see State v. Kimbrough, 924 S.W.2d 888 (Tenn. 1996), and is therefore void on its face. The indictment in the record before us charged that the petitioner “did unlawfully commit criminal attempt to commit first degree murder . . . in that said defendants did unlawfully, premeditatedly, intentionally, and deliberately attempt to kill [the victim] by firing a firearm at his person.” Contrary to the petitioner's assumption, this language charges the petitioner with attempted first degree murder. It does not specifically refer to attempted felony murder. The indictment in this case is valid.

The petitioner also contends that his guilty plea was not voluntary. In response, the state contends that this issue is not properly before the Court because the petitioner raises it for the first time on appeal. Moreover, the state asserts that this is not a proper issue for habeas corpus relief. We agree with the state. Since the petitioner failed to raise the issue below, this Court is precluded from considering it on appeal. See T.R.A.P. 36(a). Nonetheless, this issue is not subject to habeas corpus relief, but must be raised under the Post-Conviction Procedure Act. See T.C.A. § 40-30-201 et. al. As the state notes, however, the statute of limitations has already expired in the petitioner's case.

Finally, the petitioner claims that his aggravated assault sentences should have been ordered to run concurrently. It appears the petitioner is essentially asking

this Court to review the sentence imposed. The petitioner pled guilty to two counts of aggravated assault. Ordinarily, an appeal does not lie from a guilty plea, and the petitioner failed to take the appropriate steps for perfecting one in this case. See T.R.A.P. 3(b); Tenn. R. Crim. P. 37(b)(2). Accordingly, this issue is not properly before the Court.

Having reviewed the state's motion in light of the petitioner's brief and the entire record on appeal, we conclude that the motion is well-taken and should be granted. For the reasons stated above, it is hereby ORDERED, pursuant to Rule 20, Rules of the Court of Criminal Appeals, that the judgment of the trial court dismissing the petition for writ of habeas corpus is affirmed. Costs of this appeal shall be assessed against the petitioner.

Enter, this the \_\_\_\_ day of April, 1997.

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PAUL G. SUMMERS, JUDGE

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DAVID G. HAYES, JUDGE

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JOE G. RILEY, JUDGE