



## OPINION

Petitioner, Richard Janak, appeals the Order of the Circuit Court Williamson County dismissing his petition for writ of habeas corpus. He is presently serving sentences of six years for theft, and four years for failure to appear.

### Procedural History

In April, 1992, the petitioner was found guilty by a jury of driving under the influence, second offense, and driving on a revoked license. The case was appealed, and affirmed by the Court of Criminal Appeals in March, 1993.

In March, 1993, the petitioner entered a plea of guilty to the offense of theft, and was sentenced as a Range III persistent offender to six years. That sentence was to run consecutive to the sentences for driving under the influence and driving on a revoked license. He also entered a plea of guilty to the offense of failure to appear, and was sentenced as a Range III persistent offender to four years, concurrent with the six year sentence. He was placed on Community Corrections alternate sentencing effective January 24, 1994.

In July, 1994, a warrant was issued, alleging that petitioner had violated the terms of the alternate sentencing with Community Corrections.

A probation revocation hearing was held on May 25, 1995. Petitioner was represented by counsel, appeared in open court, and plead true to the violations charged, that he did violate the terms of his Community Corrections sentence. By consent, his probation in each case was revoked, and his sentences were transferred to the Department of Corrections, and he was remanded to their custody.

Petitioner filed for a writ of habeas corpus in the convicting court, that is the Circuit Court of Williamson County. That court dismissed the petition since the petitioner was incarcerated at the Morgan County Regional Facility, and the Circuit Court of Williamson County is not the court most convenient in point of distance. T.C.A. 29-21-105. State ex rel Leach v. Avery 387 S.W.2d 346 (1965).

The trial judge then considered the petition as one for post-conviction relief, as the petition was filed in the court of conviction. The trial judge properly determined that the petitioner was not entitled to any relief under the post conviction statutes.

### **I.**

The petitioner complains that the revocation proceeding was not conducted by the trial judge who originally imposed sentence. That procedure is required by T.C.A. 40-35-311(b), which provides that the trial judge “granting...probation and suspension of sentence, or his successor, shall...inquire into the charges and determine whether or not a violation has occurred....”

However, neither petitioner, nor his attorney, raised objection at the revocation hearing in May, 1995, that the hearing was being conducted by a different trial judge than the judge who granted alternate sentencing. No appeal was filed from the probation revocation. After the time for appeal expired, the petitioner lost his right to assert the error of having a different judge preside over his revocation. Kiser v. State, 1995 Tenn.Crim.App. LEXIS 953 (1995), No. 01C01-9503-CC-00071.

### **II.**

Even if the petition were properly filed, it did not state a ground for relief. Habeas corpus relief is available in Tennessee only if it appears upon the face 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 the defendant, or that defendant’s sentence of imprisonment or other restraint has expired. Archer v. State, 851 S.W.2d 157 (1993); Passarella v. State, 891 S.W.2d 619 (Tenn.Crim.App.1994). The trial court properly found that the petition was not filed in the proper county.

### **III.**

The trial court, treating the petition as one for post-conviction relief, addressed the issues raised by petitioner, and properly determined that the petitioner was entitled to no relief.

The petitioner alleged ineffective assistance of counsel, claiming that his attorney should have informed him of his right to object to a different judge presiding over the probation

revocation proceeding. The trial judge properly found that petitioner had the burden to establish that the appropriate action of counsel would have caused a different result to have occurred in the probation revocation hearing, citing Baxter v. Rose, 523 S.W.2d 930 (1975); and Bankston v. State, 815 S.W.2d 213, 215 (Tenn.Crim.App.1991). The trial judge properly found that in “petitioner’s case he entered a plea of true to all of the charges made in the probation violation warrant. He waived his right to any further hearing whatsoever and consented to the revocation and remand to custody to serve the remainder of his sentences. Based on the position taken by the defendant, the outcome of the hearing would have been the same no matter what judge was presiding.” Further, the petition did not raise a constitutional issue. The right to counsel is not constitutionally guaranteed at the revocation hearing. Plus the effectiveness of counsel at a revocation hearing is not normally a constitutional issue.

The judgment of the trial is affirmed.

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JOE H. WALKER, III  
Sp. JUDGE

CONCUR:

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JOE G. RILEY, JUDGE

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J. CURWOOD WHITT, JR., JUDGE