

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

**FILED**

<b>WILLIAM HIGHTOWER,</b>	)	
Appellant,	)	C.C.A. NO. 01C01-9708-CC-00356
	)	(No. 397-84 Below) November 4, 1997
VS.	)	WILLIAMSON COUNTY
	)	The Hon. Donald P. Harris
	)	Cecil W. Crowson
	)	Appellate Court Clerk
<b>STATE OF TENNESSEE,</b>	)	(Denial of Motion to Correct Illegal
Appellee.	)	Sentence)
	)	<b>AFFIRMED PURSUANT TO RULE 20</b>

**ORDER**

This matter is before this Court upon the State's motion to affirm the lower court's judgment pursuant to Rule 20, Rules of the Court of Criminal Appeals. Finding the motion to be well taken, the judgment of the trial court is affirmed.

In 1988, the appellant pled guilty to numerous counts of forgery. In setting sentence, the trial court stated as follows:

[O]n your plea of guilty to the offense of forgery of an instrument representing a monetary value in excess of two hundred dollars in counts three and seven, I find you are guilty of that offense in each of those cases. On each of those counts, I sentence you to four years in the Department of Corrections as a standard offender. The sentence in each of those cases to run consecutive, one to another.

On June 3, 1997, the appellant filed his "Motion to Correct Illegal Sentence" contending that the consecutive sentences are illegal. The trial court denied the motion, noting that "[r]equiring two legal sentences to be served consecutively [does] not make them illegal sentences" and ruling that the motion "actually seeks to have the court . . . modify his sentence and, in accordance with Rule 35, Tennessee Rules of Criminal Procedure, the authority of the court to modify a sentence may only be granted if the application therefor is filed within 120 days after the date the sentence is imposed."

The state now argues that we should affirm pursuant to Rule 20 because the court below "correctly concluded that this motion was untimely filed under Tenn. R. Crim. P., Rule 35." The state also argues that the motion would be untimely if treated as a post-conviction petition and that, were it considered as a petition for a writ of habeas corpus, it

must be dismissed for having been filed in the wrong court. The state does not address the merits of the appeal. However, it is upon our conclusion that the appellant's contention has no merit that we grant the state's motion.

At the time the appellant was sentenced, consecutive sentencing was left to the discretion of the trial judge, "provided, that the exercise of the discretion of the trial judge shall be reviewable by the Supreme Court on appeal." T.C.A. § 40-20-111(a) (1982). In the seminal case of Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976), our Supreme Court set forth five categories of offenders for whom consecutive sentencing is appropriate, including "the professional criminal, [that is] one who has knowingly devoted himself to criminal acts as a major source of livelihood or who has substantial income or resources not shown to be derived from a source other than criminal activity" and "the multiple offender, [that is] one whose record of criminal activity is extensive[.]" In this case, the transcript of the sentencing hearing reveals that the appellant had been employed as a bookkeeper for the Advent Group and during the period from January 1986 to April 1987, forged over two hundred thousand dollars (\$200,000) worth of checks. This activity classifies the appellant as a professional criminal, for whom consecutive sentences are appropriate. See, e.g., State v. Walker, 713 S.W.2d 332 (Tenn. Crim. App. 1986). That the appellant pled guilty to over sixty counts of forgery also puts him in the category of multiple offender. Id. Thus, the appellant's claim that his consecutive sentences on two of the multiple counts are illegal is wholly without merit.

Had the court below considered the appellant's pleading as a petition for post-conviction relief, summary dismissal would have been appropriate because it states no constitutional violation. See T.C.A. §§ 40-30-203 and 40-30-206(f) (1997). Moreover, had the court below considered the appellant's pleading as a petition for writ of habeas corpus, summary dismissal would likewise have been appropriate because the appellant's sentence is valid and he makes no claim that it has expired. See, e.g., Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993).

Because the action below is not a determination of guilt, and because the evidence does not preponderate against the finding of the trial judge, the judgment below is affirmed pursuant to Rule 20, Rules of the Court of Criminal Appeals.

ENTER, this the \_\_\_\_ day of \_\_\_\_\_, 1997.

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JOHN H. PEAY, JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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THOMAS T. WOODALL, JUDGE