

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY SESSION, 1998

**FILED**  
March 24, 1998  
Cecil Crowson, Jr.  
Appellate Court Clerk

<b>GROVER LIVESAY,</b>	)	<b>C.C.A. NO. 03C01-9707-CR-00244</b>
	)	
Appellant,	)	
	)	<b>HAMBLEN COUNTY</b>
<b>V.</b>	)	
	)	
	)	<b>HON. JAMES E. BECKNER, JUDGE</b>
<b>STATE OF TENNESSEE,</b>	)	
	)	
Appellee.	)	<b>(POST-CONVICTION)</b>

FOR THE APPELLANT:

FOR THE APPELLEE:

**GROVER LIVESAY, *pro se***  
#218956, N.W.C.C.  
P.O. Box 5000  
Mt. City, TN 37683

**JOHN KNOX WALKUP**  
Attorney General & Reporter

**SANDY C. PATRICK**  
Assistant Attorney General  
2nd Floor, Cordell Hull Building  
425 Fifth Avenue North  
Nashville, TN 37243

**C. BERKELEY BELL, JR.**  
District Attorney General  
Greene County Office Complex  
113-J West Church Street  
Greeneville, TN 37745

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

AFFIRMED

THOMAS T. WOODALL, JUDGE

# OPINION

The Petitioner, Grover Livesay, appeals as of right the trial court's dismissal of his petition for post-conviction relief. We affirm the judgment of the trial court.

On October 11, 1993, Petitioner was indicted on one count of rape of a child in violation of Tennessee Code Annotated section 39-13-522. Following a jury trial in March 1995, Petitioner was convicted of the indicted offense and sentenced to twenty-five years confinement. See State v. Grover Livesay, C.C.A. No. 03C01-9510-CC-00298, Hamblen County (Tenn. Crim. App., Knoxville, Oct. 9, 1996), perm. to appeal denied (Tenn. 1997). On May 15, 1997, Petitioner filed a petition for post-conviction relief in the Hamblen County Criminal Court which is the subject of this appeal. Petitioner argues that the indictment in his case was fatally insufficient in that it did not adequately set forth the culpable mental state for rape of a child.

In support of his argument, Petitioner relies upon the decision of this Court in State v. Roger Dale Hill, C.C.A. No. 01C01-9508-CC-00267, Wayne County (Tenn. Crim. App., Nashville, June 20, 1996). However, our supreme court reversed this Court's decision in Hill. See State v. Hill, 954 S.W.2d 725 (Tenn. 1997). The Tennessee Supreme Court held in Hill as follows:

[F]or offenses which neither expressly require nor plainly dispense with the requirement for a culpable mental state, an indictment which fails to allege such mental state will be sufficient to support prosecution and conviction for that offense so long as

(1) the language of the indictment is sufficient to meet the constitutional requirements of notice to the accused of the charge against which the accused must defend, adequate basis for entry of a proper judgment, and protection from double jeopardy;

(2) the form of the indictment meets the requirements of Tenn. Code Ann. § 40-13-202; and

(3) the mental state can be logically inferred from the conduct alleged.

Id. at 726-27.

Tennessee Code Annotated section § 39-13-522 defines rape of a child as the “unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age.” This statute does not specify a mental state, but the required mental state may be inferred from the nature of the criminal conduct alleged in the indictment in the Petitioner’s case. The indictment in the instant case alleged that:

[Petitioner] on or about the 27th day of July, 1993 in the State and County aforesaid, and before the finding of this indictment, did unlawfully have sexual penetration, to wit: fellatio of [victim] by the defendant and the said victim, [ ] is a child less than thirteen (13) years of age, all in violation of T.C.A. § 39-13-522, a Class A felony, all of which is against the peace and dignity of the State of Tennessee.”

Obviously, the act for which Petitioner is indicted, unlawful sexual penetration of a victim under the age of thirteen (13), is “committable only if the principal actor’s mens rea is intentional, knowing, or reckless.” Hill, 954 S.W.2d at 729. Also, the language of the indictment sufficiently apprised Petitioner of the offense charged, and the indictment was stated in ordinary and concise language so that a person of common understanding would know what was intended. Tenn. Code Ann. § 40-13-202. Furthermore, the language in the indictment adequately protects Petitioner against subsequent re prosecution for this same offense. Hill, 954 S.W.2d at 727, 729. Therefore, the indictment in this case meets constitutional and statutory requirements of notice and form and is, therefore, valid.

The trial court properly dismissed Petitioner's petition. Accordingly, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, Judge

CONCUR:

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JERRY L. SMITH, Judge

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WILLIAM B. ACREE, JR., Special Judge