IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
OCTOBER SESSION, 1998

ISSAC LYDELL HERRON,	)	
	)	**No. 02C01-9805-CC-00153**
Appellant	)	
	)	**LAKE COUNTY**
vs.	)	
	)	**Hon. R. Lee Moore, Jr., Judge**
FRED RANEY, WARDEN,	)	
	)	**(Writ of Habeas Corpus)**
Appellee	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Issac Lydell Herron, appeals the Lake County Circuit Court's dismissal of his *pro se* petition for writ of habeas corpus. The appellant was originally indicted by the Shelby County Grand Jury for second-degree murder. A jury convicted the appellant as indicted and, on February 13, 1984, he was sentenced to seventy-two years in the Department of Correction.[1] The instant petition was filed on April 6, 1998. In seeking issuance of the writ of habeas corpus, the appellant contends the judgment entered against him is void because the second-degree murder statute is unconstitutionally vague violating due process under the Fifth and Fourteenth Amendments to the United States Constitution. The trial court dismissed the appellant's petition finding that the allegations concerning the statute are not cognizable in habeas corpus proceedings. The appellant appeals the trial court's ruling.

I. Grounds for Habeas Corpus Relief

Tennessee law is well-established that habeas corpus relief is only available when a conviction is void because the convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence has expired and the petitioner is being illegally restrained. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); see also Passarella v. State, 891 S.W.2d 619, 626 (Tenn. Crim. App. 1994). A void judgment is one which shows "upon the face of the judgment or the record of the proceedings upon which the judgment is rendered" that the convicting court was without jurisdiction. Archer, 851 S.W.2d at 161.

In Dykes v. State, No. 02-S-01-9711-CC-00105 (Tenn. at Nashville, Sep. 21, 1998) (for

[1]The appellant's conviction stems from the February 1983 murder of seventy-two year old Russell Tarver. His conviction was affirmed on appeal to this court. See State v. Herron, C.C.A. No. 7 (Tenn. Crim. App. at Jackson, Apr. 10, 1985). The court also denied the appellant's prior petition for habeas corpus relief. See Herron v. State, No. 02C01-9502-CC-00033 (Tenn. Crim. App. at Jackson, Jul. 19, 1995), perm. to appeal denied, (Tenn. Nov. 27, 1995).

publication), our supreme court held, in a habeas corpus proceeding, the validity of an indictment and its resulting conviction may be challenged if it fails to properly charge an offense or the convicting court was without jurisdiction.[2]

Here, the appellant challenges the constitutionality of the 1982 second-degree murder statute. If the statute were unconstitutional, it would be void from its date of enactment. See Capri Adult Cinema v. State, 537 S.W.2d 896, 900 (Tenn. 1976). Thus, the trial court would have lacked the subject matter jurisdiction to hear the appellant's case rendering his judgment of conviction void. Therefore, we conclude the appellant did present a cognizable claim for a habeas corpus proceeding.

II. Constitutionality of the Statute

The appellant contends Tenn. Code Ann. § 39-2-211(a) (1982), "[a]ll other kinds of murder shall be deemed murder in the second degree," is constitutionally vague based upon the following grounds:

> 1) failure to define specific prohibited conduct whereby men of common intelligence must necessarily guess the meaning of the statute;
> 2) failure to give reasonable opportunity to know what conduct is forbidden resulting in arbitrary and discriminatory enforcement;
> 3) failure to define separate degrees of murder;
> 4) failure to allege the requisite *mens rea*;
> 5) failure to allege the elements constituting the offense distinguishing it from other kinds of murder.

Initially, we note that, when reviewing a statute for a possible constitutional infirmity, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. Petition of Burson, 909 S.W.2d 768, 775 (Tenn. 1995). In order to survive a challenge for vagueness, "[a penal] statute must 'give the person of ordinary intelligence a reasonable opportunity to

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[2] Subject matter jurisdiction is the power of the court to hear and decide a particular type of action. State v. Nixon, No. 02C01-9612-CC-00484 (Tenn. Crim. App. at Jackson, Dec. 3, 1997), perm. to appeal denied, (Tenn. June 6, 1998). In reference to objections alleging failure to state an offense, the rationale is that if the indictment fails to include an essential element of the offense, no crime is charged and therefore, no offense is before the court. See State v. Perkinson, 867 S.W.2d 1, 5-6 (Tenn. Crim. App. 1992). The defendant has no power to waive the trial court's lack of subject matter jurisdiction. State v. Seagraves, 837 S.W.2d 615, 628 (Tenn. Crim. App. 1992).

know what is prohibited, so that he may act accordingly.'" State v. Lakatos, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995) (citing Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972)). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the statute commands or forbids." Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939). Moreover, the statute should not encourage arbitrary or discriminatory enforcement. Lakatos, 900 S.W.2d at 701; see also Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993). Finally, the standard of certainty required in criminal statutes is generally more exacting than in non-criminal statutes. Leech v. American Booksellers Ass'n. Inc., 582 S.W.2d 738, 746 (Tenn. 1979).

In interpreting Tenn. Code Ann. § 39-2-211, our primary role is to ascertain and give effect to the legislative intent without unduly restricting or expanding the statute's coverage beyond its intended scope. See Roseman v. Roseman, 890 S.W.2d 27, 29 (Tenn. 1994) (citations omitted). If the legislative intent is unclear from the face of the questioned statute, those statutes relating to the same subject matter, or *in pari materia*, must be construed together, the language of some provisions aiding the interpretation of the other, and viewing the statutes as a whole consistent with their legislative purpose. State v. Blouvett, 904 S.W.2d 111, 113 (Tenn. 1995); Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994); Laney v. State, 826 S.W.2d 117, 118 (Tenn. 1992).

The State contends the second-degree murder statute must be read in conjunction with the general murder statute. See Tenn. Code Ann. § 39-2-201 (1982) ("If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with *malice aforethought*, either express or implied, such person shall be guilty of murder.") (emphasis added). We agree with the State's contention.

The offense of murder is a crime which has its origins in the common law. See Fields v. State,

9 Tenn. (1 Yer.) 156 (1829).[3] All forms of murder, or felonious homicide, were included in this definition unless adequate provocation existed to mitigate the offense to manslaughter. Mitchell v. State, 16 Tenn. (8 Yer.) 514 (1835). Using the language of the early 1800's, Section 201 and the common law definition of murder are distinctly similar. The statutes divided murder into two classes- murder in the first degree and second degree[4] of which the express purpose for the division is the graduation of punishment.

Under the pre-1989 Criminal Code and at the time of the instant offense, the homicide portion of the code consisted of only two types of murder, first and second degree. See Tenn. Code Ann. § 39-2-202 and -211. The former code did not consider manslaughter, voluntary or involuntary, "murder;" the distinctive difference between the two being that malice was required for murder but not manslaughter[5]. See Tenn. Code Ann. § 39-2-221 to -223 (1982). Tennessee law has long recognized that once a homicide has been established, the presumption of murder in the second degree arises. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992); Shanklin v. State, 491 S.W.2d 97, 98 (Tenn. Crim. App. 1972).

As defined by statute, first-degree murder is

> "[e]very murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging or a destructive device or bomb, is murder in the first degree."

Tenn. Code Ann. § 39-2-202 (1982).

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[3]The common law offense of murder is "where a person of sound mind and discretion, unlawfully killeth, any reasonable creature, under the king's peace, with malice aforethought, either express or implied." Fields, 9 Tenn. (1 Yer.) at 159 (citation omitted). Homicide, at common law, was separated from manslaughter by malice aforethought; murder was a homicide committed with stated malice. See 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.12 n.1 (1986).

[4]See Riddle v. State, 50 Tenn. (3 Heisk.) 401, 404-05 (1871); Boyd v. State, 47 Tenn. (7 Cold.) 69 (1869); Warren v. State, 44 Tenn. (4 Cold.) 130 (1867).

[5]See State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992); Wilson v. State, 574 S.W.2d 52 (Tenn. Crim. App. 1978) (killing not committed with malice is manslaughter); Smithson v. State, 124 Tenn. 218, 137 S.W. 487 (1910) (describing distinction between murder, either in first or second degree, and manslaughter is attributable to necessary element of malice).

Without the additional element of premeditation and deliberation[6], the murder fails to be a first-degree murder, and falls under the second-degree murder statute. Thus, second degree murder is defined by exclusion. See e.g., Brown, 836 S.W.2d at 543; State v. West, 844 S.W.2d 144 (Tenn. 1992); Griffin v. State, 578 S.W.2d 654, 656 (Tenn. Crim. App. 1978); Warren, 44 Tenn. (4 Cold.) at 130. Therefore, prior to the adoption of the 1989 Code, second-degree murder in the state of Tennessee was either 1) the intentional killing of another with malice absent the elements of premeditation and deliberation, *i.e.*, express malice, Gray v. State, 63 Tenn. (4 Baxt.) 331 (1874); or 2) the unintentional killing of another with malice where the death was attributable to "conscious and willful recklessness," *i.e.*, implied malice. Griffin, 578 S.W.2d at 656.

The appellant attacks the statute for vagueness for its failure to allege a *mens rea* or a specific intent requirement citing Colautti v. Franklin, 439 U.S. 379, 396, 99 S.Ct. 675, 683 (1979). The challenged 1982 second-degree murder statute, a codification of the common law, was a general intent crime which required no intent other than that evidenced by the doing of the acts constituting the offense. See e.g., State v. Dison, No. 03C01-9602-CC-00051 (Tenn. Crim. App. at Knoxville, Jan. 31, 1997), perm. to appeal denied (Tenn. Dec. 1, 1997) (citing United States v. Garrett, 984 F.2d 1402, 1415 (5th Cir. 1993) and Tallman v. United States, 465 F.2d 282 (7th Cir. 1972). Accordingly, this issue is without merit.

The appellant contends Section 211 is "void for vagueness" because it fails to allege the elements constituting the offense of second-degree murder. Dating back to the late-1800's, the elements of second-degree murder have always been clearly defined. In order to sustain a conviction, the proof must demonstrate the killing was unlawful and malicious. State v. Pride, 667 S.W.2d 102, 104 (Tenn. Crim. App. 1983); State v. Estes, 655 S.W.2d 179 (Tenn. Crim. App. 1983); Gray, 63 Tenn. (4 Baxt.) at 334. Malice aforethought[7], without adequate provocation and disconnected to any

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[6] We note that the element of deliberation has been repealed. See Tenn. Code Ann. § 39-13-201(b)(2) (*deleted* 1995).

[7] Malice, as defined within the murder statute, is an intent to inflict injury upon another or rather a design formed within the mind of doing mischief to another. State v. Taylor, 668 S.W.2d 681, 683 (Tenn. Crim. App. 1984). It includes any intention of doing an unlawful act which may possibly result in the party's death. Humphrey v. State, 531 S.W.2d 127 (Tenn. Crim. App. 1975), or an "evil design in general, the dictates of a wicked, depraved, and malignant heart."

previously formed design to kill, is an essential element of the offense. Lay v. State, 501 S.W.2d 820 (Tenn. Crim. App. 1973); Smith v. State, 212 Tenn. 510, 370 S.W.2d 543 (1963); Gray, 63 Tenn. (4 Bax.) at 334; Holly v. State, 29 Tenn. (10 Hum.) 141, 142 (1849). This contention is also without merit.

Read *in pari materia* with Tenn. Code Ann. § 39-2-201, second-degree murder is a "killing of any reasonable creature in being . . . with malice aforethought." The murder statutes, Sections 201, 202, and 211, read, as a whole and in conjunction, clearly establish that second-degree murder is any murder by exclusion which is not first-degree murder. Therefore, we conclude the second-degree murder statute is not "void for vagueness" for any of the challenged reasons.

Based upon the above reasons, the judgment of the trial court denying the appellant's petition for writ of habeas corpus is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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L. T. LAFFERTY, Special Judge

Bailey v. State, 479 S.W.2d 829 (Tenn. Crim. App. 1972); Warren, 44 Tenn. (4 Cold.) at 135-37. Express malice is that malice toward the party killed in which the defendant "contemplates the injury or wrong he inflicts." Fox v. State, 441 S.W.2d 491, 495 (1968). Implied malice is simply malice in general, not against any particular party, but the result of "a wicked, depraved and malignant spirit." Id. at 496.