

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 9, 2023

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JERRY W. PHILLIPS v. MARTIN FRINK, WARDEN

**Appeal from the Criminal Court for Trousdale County
No. 2022-CV-5003 Michael Wayne Collins, Judge**

No. M2022-01268-CCA-R3-HC

Jerry W. Phillips, Petitioner, appeals from the summary dismissal of his habeas corpus petition in which he claimed his convictions were void because there was a fatal variance between the proof at trial and the indictment and that the proof at trial, which differed from the proof at the preliminary hearing, constructively amended the indictment. After a thorough review of the record and the applicable law, we affirm the judgment of the habeas court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and MATTHEW J. WILSON, JJ., joined.

Jerry W. Phillips, Hartsville, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and for the appellee, State of Tennessee.

OPINION

On July 6, 2009, the Campbell County Grand Jury indicted Petitioner on six counts of aggravated sexual battery in Case No. 14171. At the November 2009 trial, the court dismissed Counts One and Six at the close of proof, and the jury found Petitioner guilty of aggravated sexual battery in Counts Two, Three, Four, and Five. The trial court imposed an effective sentence of fifty-four-years' incarceration at 100% service.

In his direct appeal, Petitioner claimed that the ten-year-old victim's "testimony [at trial] was inconsistent with her testimony at the preliminary hearing, and because her testimony was the only evidence of the offenses, the evidence [wa]s insufficient to support [his] convictions." *State v. Phillips*, No. E2011-00674-CCA-R3-CD, 2012 WL 1143831, at *4 (Tenn. Crim. App. Apr. 5, 2012), *perm. app. denied* (Tenn. Aug. 15, 2012). In its opinion, this court summarized the victim's trial testimony as follows:

J.W. testified at trial about four separate instances in which [Petitioner] inappropriately touched her. First, J.W. stated that she was in the attic with [Petitioner] and that [Petitioner] rubbed her breasts. Then, [Petitioner] pulled down her pants and panties and placed his mouth "where [she] pee[s]." On the second occasion, J.W. was in a downstairs bedroom and [Petitioner] again pulled down her pants and panties and rubbed "where [she] pee[s]" with his hand for "a couple of minutes." He also touched her breasts over her clothes. J.W. testified that, on the third occasion, [Petitioner] asked J.W. while the two were sitting on the couch to put her mouth "where he goes to pee." J.W. complied with his request "for a second" and then left to go play or watch television. Lastly, one day when [Petitioner] and J.W. were in the backyard, [Petitioner] set up a tent. He asked J.W. to go inside the tent with him, and he again proceeded to pull down her pants and panties. He put his mouth "where [she] go[es] pee," and his tongue was "going around."

Id.

This court noted that, even though there were differences between J.W.'s testimony at the preliminary hearing and at trial, J.W. confirmed that her trial testimony was accurate and explained that it was hard for her to talk about the events. *Id.* The court recognized that it "is the sole province of the jury to determine witness credibility" and noted that "the jury obviously accredited J.W.'s testimony at trial." *Id.* In affirming the convictions, this court determined that "the jury had ample evidence to find in four instances the existence of 'sexual contact' sufficient to support [Petitioner's] aggravated sexual battery convictions." *Id.*

Petitioner next filed a petition for post-conviction relief, alleging ineffective assistance of trial and appellate counsel based on the failure to object to the trial court's jury selection procedures. *Phillips v. State*, No. E2016-01083-CCA-R3-PC, 2017 WL 3475529, at *1 (Tenn. Crim. App. Aug. 14, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018). The post-conviction court denied relief, and this court affirmed that court's judgment. *Id.* at *8.

On August 8, 2022, Petitioner filed a Petition for Writ of Habeas Corpus (“the Petition”), claiming that he was “being illegally restrained of his liberty by virtue of void ‘Judgments of Convictions’ in case No. 14171” in violation of “the Fifth and Fourteenth Amendments to the United States Constitutions and Tennessee[.]” The Petition stated that the “cause and pretense of this illegal restraint” was that the essential elements of aggravated sexual battery in Counts Four and Five as charged in the indictment and bill of particulars were not proven by the State thus depriving the trial court of jurisdiction to impose sentences; Count Three was not a standalone violation of Tennessee Code Annotated section 39-13-504; and the constructive amendment of indictment by the State without the consent of Petitioner created a variance between the indictment and the evidence used by the State to obtain the convictions.

Petitioner attached to the Petition a motion for appointment of counsel, a memorandum of law, copies of the indictment, his motion for a bill of particulars and the State’s answer thereto, several pages of the trial transcript containing J.W.’s testimony, and a transcript of the testimony from the preliminary hearing. The State filed a motion to dismiss on August 12, 2022. On August 21, 2022, the habeas court found that the Petition failed to state a cognizable basis for habeas corpus relief and granted the State’s motion to dismiss.¹ Petitioner timely appealed.

Analysis

On appeal, Petitioner claims that the habeas court violated Tennessee Code Annotated sections 29-1-104 and 29-21-108 by summarily dismissing the Petition.² He argues that his convictions are void and the trial court lacked jurisdiction to sentence him because: (1) there was a fatal variance between the proof presented at trial and the indictment and the bill of particulars; (2) the proof at trial was different from the preliminary hearing proof that formed the basis of the indictment; and (3) the proof at trial amounted to a constructive amendment to the indictment to which he did not consent. The State argues that Petitioner’s claims are not cognizable in a habeas corpus proceeding and that the habeas court properly dismissed the Petition. We agree with the State.

¹ Petitioner filed a response to the State’s motion to dismiss which was dated after the order of dismissal was entered.

² Tennessee Code Annotated section 29-21-104 requires a court to issue a writ of habeas corpus if there is evidence that any person within the jurisdiction of the court is illegally imprisoned or restrained of liberty. Tennessee Code Annotated section 29-21-108 requires a court to act upon an application for a writ habeas corpus “instanter” and provides that any judge who “wrongful[ly] and willful[ly] refuses to grant” a properly applied-for writ commits “a misdemeanor in office” and is subject “to damages at the suit of the party aggrieved.”

Habeas Corpus Relief

Habeas corpus relief may only be granted in limited circumstances. *Edwards v. State*, 269 S.W.3d 915, 920 (Tenn. 2008). Unlike petitions for post-conviction relief, “the purpose of the habeas corpus petition is to contest void and not merely voidable judgments.” *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992) (citing *State ex rel. Newsome v. Henderson*, 424 S.W.2d 186, 189 (Tenn. 1968)).

Habeas corpus relief is available in Tennessee only when “it appears upon the face of 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 a defendant, or that a defendant’s sentence of imprisonment or other restraint has expired.

Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993) (quoting *State v. Galloway*, 45 Tenn. (5 Cold.) 326, 336-37 (1868)).

A petitioner bears the burden of establishing by a preponderance of the evidence that a judgment is void or that the confinement is illegal. *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). A habeas corpus petition may be summarily dismissed without a hearing when the petition “fails to demonstrate that the judgment is void.” *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004) (citing Tenn. Code Ann. § 29-21-109). “Whether habeas corpus relief should be granted is a question of law[,]” which we review de novo. *Edwards*, 269 S.W.3d at 919.

Fatal Variance

Only when a variance between the indictment and the proof affects the substantial rights of a defendant is the variance fatal. *State v. Mayes*, 854 S.W.2d 638, 640 (Tenn. 1993) (citing *Berger v. United States*, 295 U.S. 7 (1935)). “[A] variance is not fatal if (1) the defendant is sufficiently informed of the charges levied against him so that he can adequately prepare for trial and, (2) the defendant is protected against a subsequent prosecution for the same offense based on double jeopardy grounds.” *Id.*

Petitioner argues that J.W. testified at the preliminary hearing that Petitioner touched her on top of her clothing and testified at trial that he touched her under her clothing. Petitioner claims that the discrepancy in the victim’s preliminary hearing testimony “voids” the convictions in Counts Two, Four, and Five because he did not commit the offenses charged in the indictment as defined by the bill of particulars. He claims that Count Three is void because it occurred at the same time as Count Two.

The indictment for the four counts on which Petitioner was convicted stated that Petitioner “did unlawfully, feloniously, intentionally, and knowingly engage in sexual contact with [J.W.], a person less than thirteen years of age[.]” The bill of particulars alleged in Counts Two, Four, and Five that Petitioner “touched the victim’s ‘private area where she pee’s” and in Count Three touched the victim’s “boob.” Neither document specified whether the touching occurred over or under the victim’s clothing.

The proof at trial showed that Petitioner engaged in sexual contact by touching the private area of a person less than thirteen years of age. There was no fatal variance in the proof at Petitioner’s trial and the indictment or the bill of particulars. *See State v. Shropshire*, 45 S.W.3d 64, 70-71 (Tenn. Crim. App. 2000) (determining that any variances were neither material nor prejudicial where the proof at trial varied from the bill of particulars “because (1) the bill of particulars alleged that the defendant caused the victim to touch his penis with her mouth, but the victim testified at trial that the defendant caused the victim to touch his penis with her hand”).

Even if there had been, this court has consistently held that a fatal variance is not a cognizable ground for habeas corpus relief. *See Malone v. State*, No. M2016-01464-CCA-R3-HC, 2017 WL 1404344, at *2 (Tenn. Crim. App. Apr. 17, 2017), *perm. app. denied* (Tenn. July 20, 2017); *see also Rubio v. State*, No. M2008-00048-CCA-R3-HC, 2008 WL 2780592, at *2 (Tenn. Crim. App. July 18, 2008), *perm. app. dismissed* (Tenn. Apr. 13, 2009); *Wallace v. Dotson*, No. W2006-00908-CCA-R3-HC, 2007 WL 852173, at *2 (Tenn. Crim. App. Mar. 22, 2007), *perm. app. denied* (Tenn. Aug. 13, 2007); *Beasley v. State*, No. E2005-00367-CCA-MR3-HC, 2005 WL 3533265, at *4 (Tenn. Crim. App. Dec. 27, 2005), *perm. app. denied* (Tenn. May 30, 2006); *Yelton v. Waller*, No. M2004-02529-CCA-R3-HC, 2006 WL 119628, at *1 (Tenn. Crim. App., Jan. 17, 2006), *no perm. app. filed*; and *Edwards v. State*, No. E2004-00918-CCA-R3-HC, 2004 WL 2951975, at *2 (Tenn. Crim. App. Dec. 20, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005).

Sufficiency of the Evidence

Challenges to the sufficiency of the evidence are not cognizable in a habeas proceeding. *Gant v. State*, 507 S.W.2d 133, 136 (Tenn. Crim. App. 1973). Additionally, habeas corpus “proceedings may not be employed to raise and relitigate or review questions decided and disposed of in a direct appeal from a conviction.” *Id.* at 137. This court previously determined in the direct appeal that the evidence was sufficient to support the convictions. *Phillips*, 2012 WL 1143831, at *3. This claim is meritless.

Constructive Amendment of the Indictment

“[W]hen the proof does not correspond to the offense charged in the indictment, a constructive amendment of the indictment has occurred, and the defendant is entitled to relief.” *State v. Adkins*, No. M2019-02284-CCA-R3-CD, 2021 WL 2100447, at *7 (Tenn. Crim. App. May 25, 2021), *perm. app. denied* (Tenn. Sept. 22, 2021). As applicable here, aggravated sexual battery is unlawful sexual contact with a victim by Petitioner or Petitioner by a victim when the victim is less than thirteen years of age. Tenn. Code Ann. § 39-13-504 (2007). Here, the evidence showed that Petitioner engaged in sexual contact with a person less than thirteen years of age. Every element of aggravated sexual battery was proven, and no essential element of aggravated sexual battery was changed or modified by the proof. There was no constructive amendment of the indictment, and even if there had been, an allegation that the proof at trial constructively amended the indictment is not a proper basis for habeas relief. *Lewis v. State*, No. M2007-01616-CCA-R3-HC, 2007 WL 4116489, at *3 (Tenn. Crim. App. Nov. 14, 2007).

Jurisdiction

A copy of the indictment and the judgments were attached to the Petition. The indictment provided adequate notice of the offenses for which Petitioner was convicted. The indictment and the judgments were facially valid. Therefore, the trial court had jurisdiction to impose judgment and sentence Petitioner. *See Yelton*, 2006 WL 119628, at *1.

Conclusion

The habeas court did not err in summarily dismissing the Petition.

ROBERT L. HOLLOWAY, JR., JUDGE