

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs March 05, 2014

DERICKO JACKSON v. MICHAEL DONAHUE, WARDEN

**Appeal from the Circuit Court for Hardeman County
No. CC13CR86 Joe H. Walker, III, Judge**

No. W2013-01718-CCA-R3-HC - Filed May 30, 2014

Petitioner, Dericko Jackson, appeals as of right from the trial court's summary dismissal of the petition for writ of habeas corpus relief filed by Petitioner. Petitioner attacks his 1998 convictions in Shelby County for felony murder, especially aggravated robbery, and aggravated assault. The convictions were the result of guilty pleas apparently negotiated with the State as to the conviction offenses, and length and manner of service of the sentences. The sentences of life imprisonment for felony murder and fifteen years for especially aggravated robbery were ordered to be served consecutively. The three-year sentence for aggravated assault was ordered to be served concurrently with the sentence for felony murder. Each of three judgments provides that Petitioner is allowed 480 days of pre-trial jail credit against the sentence imposed in each judgment for the time period of May 9, 1997 to August 31, 1998. Petitioner asserts that all the convictions are void because the provisions for any pre-trial jail credit in the sentence for especially aggravated robbery results in an illegal sentence. Petitioner argues that as a result he is entitled to habeas corpus relief for all three convictions. After a thorough review, we affirm the judgment of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Dericko Jackson, Whiteville, Tennessee, *Pro Se*.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; and D. Michael Dunavant, District Attorney General, for the appellee, the State of Tennessee.

OPINION

In order to be entitled to the relief he seeks, i.e., a declaration that the three convictions are void, Petitioner must first show that the judgment for the conviction of especially aggravated robbery is illegal. Petitioner asserts that (1) he was entitled to no pre-trial jail credits to the sentence imposed for especially aggravated robbery and (2) because he was granted pre-trial jail credits in direct contravention of Tennessee Code Annotated section 40-23-101(c), that judgment is illegal. Petitioner further argues that since the judgment for especially aggravated robbery is illegal, and because the inclusion of illegal pre-trial jail credits for the especially aggravated robbery sentence was a material condition of his negotiated plea agreement, he is entitled to habeas corpus relief allowing him to withdraw his guilty pleas and stand trial on the original charges. In its brief, the State seems to take the position that the sentence for especially aggravated robbery may be an illegal sentence that can be corrected without setting aside the conviction, *or* that the erroneous award of pre-trial jail credit renders the judgment *voidable* instead of *void* and therefore habeas corpus relief is not appropriate.

In *Cantrell v. Easterling*, 346 S.W.3d 445 (Tenn. 2011), a habeas corpus case, our supreme court defined an illegal sentence as follows:

We refer to [a] third category of sentencing errors as “fatal errors” because they are so profound as to render the sentence illegal and void. An illegal sentence is one which is “in direct contravention of the express provisions of [an applicable statute], and consequently [is] a nullity.” *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978). We also include within the rubric “illegal sentences” those sentences which are not authorized under the applicable statutory scheme. [*Davis v. State*, 313 S.W.3d 751, 759 (Tenn. 2010)].

Cantrell, 346 S.W.3d at 452.

Thus, there are two types of illegal sentences: (1) those in direct contravention of an applicable statute and (2) those not authorized by the applicable statutes. *See Davis*, 313 S.W.3d at 759. In *Davis* the Court gave two examples of each type of illegal sentence. As to illegal sentences in direct contravention of an applicable statute, the Court stated,

see, e.g., Smith v. Lewis, 202 S.W.3d 124, 127-28 (Tenn. 2006) (holding sentence illegal because it provided for a RED where the applicable statute expressly prohibited early release eligibility); *State v. Burkhart*, 566 S.W.2d

871, 873 (Tenn. 1978) (holding sentence imposed in direct contravention of express statutory provisions “a nullity”).

Davis, 313 S.W.3d at 759.

In *Burkhart*, the judgment for that defendant’s escape conviction allowed the sentence to be served concurrently with the sentence he was serving when he escaped, in direct contravention of a statute which mandated the escape conviction to be served consecutively to the prior sentence. *Burkhart*, 566 S.W.2d at 872.

As to sentences which are illegal because they are not authorized by the applicable statutes, the Court stated,

see, e.g., May v. Carlton, 245 S.W.3d 340, 348-49 (Tenn. 2008)(granting habeas corpus relief to convicted felon declared infamous for a crime not listed as infamous under the statute); *Stephenson [v. Carlton]*, 23 S.W.3d [910], [912] [(Tenn. 2000)] (holding habeas corpus attack proper where defendant’s sentence of life without parole was not statutorily authorized and was therefore illegal)

Davis, 313 S.W.3d at 759.

In *Cantrell* our supreme court set forth the well settled law regarding habeas corpus relief as follows:

Although the Tennessee Constitution guarantees the *right* to seek habeas corpus relief, see Tenn. Const. art. I, § 15, the *procedure* for seeking state habeas corpus relief is regulated by statute. See Tenn. Code Ann. §§ 29-21-101 through -130 (2000 and Supp. 2010). “Any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in § 29-21-102 [dealing with federal prisoners], may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint.” *Id.* § 29-21-101 (2000). Although this statutory language is broad, this Court has long recognized “the limited nature of the relief available pursuant to the writ of habeas corpus.” *Archer v. State*, 851 S.W.2d 157, 161 (Tenn.1993) (citing *State ex rel. Karr v. Taxing Dist. of Shelby Cnty.*, 84 Tenn. (16 Lea) 240, 249-50 (1886)). To wit, “[w]hen the restraint, from which relief is sought by a writ of *habeas corpus*, proceeds from a judgment erroneous but not void, the writ will not lie.” *Archer*, 851 S.W.2d at 161 (quoting *Karr*, 84 Tenn. at 249). Thus, the key issue

becomes whether the challenged judgment is “void.” And, as we explained many years ago,

[a] void judgment is one which shows upon the face of the record a want of jurisdiction in the court assuming to render the judgment, which want of jurisdiction may be either of the person, or of the subject-matter generally, or of the particular question attempted to be decided or the relief assumed to be given.

Lynch v. State ex. rel. Killebrew, 166 S.W.2d at 397 (1942). Stated slightly differently,

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, 851 S.W.2d at 164. “[F]or purposes of habeas corpus proceedings, the term ‘jurisdiction’ is synonymous with the term ‘authority.’” *Edwards v. State*, 269 S.W.3d 915, 920-21 (Tenn. 2008) (citing *Lynch*, 166 S.W.2d at 398-99).

Cantrell, 346 S.W.3d at 453.

The issue of an illegal sentence is a cognizable claim in a habeas corpus proceeding. *Id.* As pertinent to Petitioner’s case, the Court in *Cantrell* held,

Moreover, if the conviction is valid but the sentence is illegal, and therefore void, then the remedy depends upon whether the sentence was imposed pursuant to a plea-bargain. If the illegal sentence was a material condition of a plea agreement, then the defendant must be given the opportunity (a) to withdraw his plea and stand trial on the original charges or (b) to enter into a legal plea agreement. *See Smith*, 202 S.W.3d at 129; *Burkhart*, 566 S.W.2d at 873. If the illegal sentence follows a valid jury verdict, however, the only remedy is the entry of an amended judgment order reflecting a

legal sentence. *See May*, 245 S.W.3d at 348-49. The underlying conviction remains intact and the defendant's custodial status is determined by reference to the corrected, legal sentence.

Cantrell, 346 S.W.3d at 456.

We note that effective June 11, 2009, Tennessee Code Annotated section 29-21-101(b) states that regarding the availability of the writ of habeas corpus,

(b) Persons restrained of their liberty pursuant to a guilty plea and negotiated sentence are not entitled to the benefits of this writ on any claim that:

(1) The petitioner received concurrent sentencing where there was a statutory requirement for consecutive sentencing;

(2) The petitioner's sentence included a release eligibility percentage where the Petitioner was not entitled to any early release; or

(3) The petitioner's sentence included a lower release eligibility percentage than the petitioner was entitled to under statutory requirements.

None of these statutory provisions apply in Petitioner's case. His situation turns upon the ramifications of erroneously granting too many pre-trial jail credits.

As noted above, Petitioner's claim for relief is based upon his assertion that the pre-trial jail credit for the especially aggravated robbery conviction is illegal, because, according to Petitioner, it is in direct contravention of Tennessee Code Annotated section 40-23-101(c). That statute states,

(c) The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the Defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail or juvenile court detention prior to waiver of juvenile court jurisdiction, or county or jail workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary

subsequent to any conviction arising out of the original offense for which the defendant was tried.

Tenn. Code Ann. § 40-23-101(c).

Before reviewing in detail Petitioner's specific argument, we note what Tennessee Code Annotated section 40-23-101(c) does *not* do. First, it does not prohibit the granting of the identical days of pre-trial jail credit for two or more sentences which are ordered to be served consecutively. Second, it does not limit the grant of pre-trial jail credits to only *one* of two or more sentences ordered to be served consecutively. Neither the Petitioner nor the State points us to any other statute or any rule which so prohibits or limits the granting of pre-trial jail credits. Neither have we found any such rule or statute in our own research.

However, both Petitioner and the State recognize that *case law* in our state provides that a defendant is not entitled to "double-dip" on receiving pre-trial jail credits under certain circumstances when sentences are ordered to be served consecutively. In *Timothy L. Dulworth v. Henry Steward, Warden*, No. W2012-00314-CCA-R3-HC, 2012 WL 2742210 (Tenn. Crim. App. July 9, 2012) a panel of this court held,

We next address the application of pre-trial jail credit to the Petitioner's consecutive twenty-five year sentence for the assault with intent to commit first degree murder conviction. "A defendant incarcerated prior to trial who receives consecutive sentences is only allowed pre-trial jail credits to be applied toward the first sentence." *Marvin Rainer v. David G. Mills*, No. W2004-02676-CCA-R3-HC, 2006 WL 156990, at *5 (Tenn. Crim. App., at Jackson, Jan. 20, 2006), *no Tenn. R. App. P. 11 application filed*; *see also State v. Darrell Phillips*, No. W2005-00154-CCA-R3-CD, 2005 WL 3447706, at *1 n. 1 (Tenn. Crim. App., at Jackson, Dec. 16, 2005), *perm. app. denied* (Tenn. May 1, 2006); *State v. Hobert Dean Davis*, No. E2000--02879-CCA-R3-CD, 2002 WL 340597, at *3 (Tenn. Crim. App., at Knoxville, Mar.4, 2002), *no Tenn. R. App. P. 11 application filed*. The effect of consecutive awards of the full amount of pretrial jail credit would be to double the credit. *State v. Joyce Elizabeth Cleveland*, No. M2005-02783-CCA-R3-CD, 2006 WL 2682821, at *2 (Tenn. Crim. App., at Nashville, Sept. 14, 2006), *no Tenn. R. App. P. 11 application filed*. "An inmate may not 'double-dip' for credits from a period of continuous confinement." *Rainer*, 2006 WL 156990, at *5. Thus, the Petitioner is not entitled to pre-trial jail credit on his consecutive sentence for the assault with the intent to commit first degree murder conviction.

Timothy L. Dulworth, 2012 WL 2742210 at *2. See also *Michael W. Belcher v. David Sexton, Warden*, No. E2013-01325-CCA-R3-HC, 2014 WL 890947, at *3 (Tenn. Crim. App. March 6, 2014).

Petitioner's theory is based upon the following facts gleaned from the record. In each of the three judgments of conviction (for felony murder, especially aggravated robbery, and aggravated assault) he was specifically granted 480 days of pre-trial jail credit. Also, in each judgment it is specifically stated that the precise dates of pre-trial custody for each offense was from May 9, 1997 to August 31, 1998. This is strong circumstantial evidence that Petitioner was taken into custody at the same time for at least the two pertinent cases in this appeal, felony murder and especially aggravated robbery. Therefore, Petitioner argues, he was not lawfully entitled to receive pre-trial jail credit of *any* amount on the second sentence, in this case the sentence for especially aggravated robbery. Petitioner argues that this error is in direct contravention of Tennessee Code Annotated section 40-23-101(c), and thus renders the sentence in the judgment for especially aggravated robbery illegal. Finally, Petitioner asserts, the illegal sentence was a material condition of his plea agreement, and he is thus entitled to habeas corpus relief as set forth in *Cantrell*.

As stated at the outset in this opinion, Petitioner is entitled to relief only if the especially aggravated robbery sentence is an "illegal" sentence. For the reasons set forth we conclude that none of the sentences imposed upon Petitioner is an "illegal" sentence as that term has been defined by our supreme court. Though we cannot find that the precise issue here has been previously addressed, we determine herein that in order to be an "illegal sentence" the sentence must be imposed in direct contravention of a statute or be a sentence not authorized by the applicable statutes. *Davis*, 313 S.W.3d at 759.

The sentencing court in the case *sub judice* followed the mandatory dictates of Tennessee Code Annotated section 40-23-101 by granting pre-trial jail credit, and did not violate the provisions of any statute or rule in doing so and did nothing which was specifically unauthorized by a statute or rule. Accordingly, no "illegal sentence," as that term has been defined by our supreme court, was imposed upon Petitioner. Since no illegal sentence was imposed, Petitioner is not entitled to habeas corpus relief. On the other hand, the judgments were allowed to become final without any appeal by the State or Petitioner. If a judgment is final and is not illegal, and does not contain a "clerical error," it must be followed as it is written. See *Cantrell*, 346 S.W.3d at 449, 451 (If the judgment reflects the actual sentence imposed in open court, there is not a "clerical error" and other errors which are not "clerical" or "illegal" cannot be addressed except on direct appeal.).

We have thoroughly reviewed Petitioner's brief and reply brief. Although he has phrased his issues under different theories, the only way he would be entitled to relief under

any of his arguments pursuant to his petition for habeas corpus relief would be if one or more of his sentences was illegal because it granted pre-trial jail credit. Hence, his additional issues offer no relief. Petitioner is not entitled to relief in this appeal. The judgment of the trial court dismissing the habeas corpus petition is affirmed.

THOMAS T. WOODALL, JUDGE