

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 26, 2004 Session

**ROY C. SMITH v. JAMES A. BOWLEN, WARDEN and
STATE OF TENNESSEE**

**Appeal from the Circuit Court for Bledsoe County
No. 1-2003 J. Curtis Smith, Judge**

No. E2004-00833-CCA-R3-HC - Filed April 18, 2005

The petitioner, Roy C. Smith, filed a petition for writ of habeas corpus challenging his 1996 guilty plea for rape of a child. After a hearing, the trial court granted the petition, determining that the judgment was not void, but that the petitioner's sentence was illegal. The State appeals. For the following reasons, we affirm the judgment of the trial court granting the writ of habeas corpus.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and J. C. MCLIN, JJ., joined.

Paul G. Summers, Attorney General & Reporter; John H. Bledsoe, Assistant Attorney General; J. Michael Taylor, District Attorney General, and James W. Pope, III, Assistant District Attorney General, for the appellant, State of Tennessee.

B. Jeffery Harmon, Assistant Public Defender, Jasper, Tennessee, for the appellee, Roy C. Smith.

OPINION

Factual Background

On June 17, 1996, the petitioner pled guilty to one count of rape of a child in violation of Tennessee Code Annotated section 39-13-522 (1997) and received a fifteen-year sentence. The petitioner's judgment of conviction reflects that the offense occurred "2-3-88 through 2-3-92." The judgment also reflects that the petitioner was designated as both a "Standard 30% Range I" offender and as a "Child Rapist."

Subsequently, on February 13, 2001, the petitioner filed a document entitled “Petitions for Issuance of a Writ of Habeas Corpus and/or In the Alternative Issuance of a Writ of Error Coram Nobis.” In the petition, he argued that the “alleged crime and indictment clearly provides only for crimes that took place between (2-3-1988-to-2-3-1992)” and that rape of a child did not become law until several months after the crime occurred. The trial court dismissed the petition for relief without appointment of counsel because, among other things, the petitioner failed to comply with the procedural requirements of a petition for writ of habeas corpus. The petitioner appealed, contending that the trial court improperly dismissed the petition. On appeal, this Court concluded that the trial court properly dismissed the petition due to “fatal [procedural] flaws” without addressing the merits of the petition, even though it appeared to this Court at that time that the petitioner had a “valid complaint.” Roy C. Smith v. State, No. W2001-01457-CCA-R3-CD, 2002 WL 31259447, at *2 (Tenn. Crim. App., at Jackson, Sept. 10, 2002).

The petitioner then filed a second petition for writ of habeas corpus on January 7, 2003, in the Circuit Court for Bledsoe County, alleging that both his conviction and sentence were void because the petitioner was convicted of rape of a child, which did not become law until July 1, 1992, and because he was sentenced to serve one hundred percent (100%) of his sentence as a result of being convicted of rape of a child in accordance with the mandatory sentencing provisions of Tennessee Code Annotated section 39-13-523. In other words, the petitioner alleged that his conviction and sentence were void because he was convicted of an offense that was not in effect at the time of the commission of the alleged crime and because he was sentenced under a statutory provision which did not take effect until after the commission of the alleged offense.

After a hearing, the trial court determined in a memorandum opinion entered June 24, 2003, that the writ of habeas corpus should be issued because the trial court did not have jurisdiction to “impose a sentence pursuant to sentencing provisions that did not exist at the time of the offense even though the sentencing judge informed the petitioner in the plainest and clearest language possible of the ramifications of his plea.” The trial court entered an order on August 15, 2003, denying habeas corpus relief on the basis that the underlying conviction was void, but granting the writ of habeas corpus on the basis that the petitioner’s conviction was void because the petitioner was sentenced under a statutory provision not in effect until after the commission of the offense for which he was convicted.

On September 12, 2003, the State filed a “Petition to Reconsider,” seeking to persuade the trial court to overturn its decision to grant the writ. On November 12, 2003, the State filed a response to the petitioner’s motion to dismiss the “Petition to Reconsider.”¹ On November 18, 2003, the trial court entered an order denying the petition to reconsider and denying the motion to dismiss. The State filed a notice of appeal on December 5, 2003.

On appeal, the State seeks to reverse the trial court’s decision to grant the writ.

¹ Apparently, the petitioner filed a motion to dismiss the petition to reconsider. This pleading does not appear in the technical record.

Timeliness of Notice of Appeal

Before we may address the merits of the State's claims, we must first determine whether the State has correctly and timely appealed to this Court. Rule 3(c) of the Tennessee Rules of Appellate Procedure provides that the State may appeal as of right to this Court following "a final judgment in a habeas corpus . . . proceeding." Rule 4(a) of the Tennessee Rules of Appellate Procedure instructs that "the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from" The Advisory Commission Comments to Rule 4 maintain that "[t]hirty days is sufficient time particularly in light of the fact that a party is required to do nothing to initiate the appellate process except file and serve notice of appeal."

In connection with this issue, this Court has noted that:

[I]f a timely motion (1) for judgment of acquittal, (2) for a new trial, (3) for arrest of judgment, or (4) for a suspended sentence is filed, the 30 days [for filing a notice of appeal] run from the entry of the order determining such motion or motions. [Tenn. R. App. P.] 4(c). No other motion, including one for rehearing, is allowed to suspend the running of the appeal time from the entry of the judgment.

State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992); see also Larry Coulter v. State, No. M2002-02688-CCA-R3-PC, 2003 WL 22398393, at *1 (Tenn. Crim. App., at Nashville, Oct. 21, 2003), perm. app. denied (Tenn. 2004). We also note that the Rules of Criminal Procedure do not authorize a "petition to reconsider." See State v. Ryan, 756 S.W.2d 284, 285, n.2 (Tenn. Crim. App. 1988) (stating, "there is no provision in the Tennessee Rules of Criminal Procedure for a 'petition to reconsider' or a 'petition to rehear'").

Thus, the State's filing of a motion to reconsider did not toll the thirty-day time period for filing the notice of appeal. We must still determine whether the State's notice of appeal of the August 15, 2003 order was timely filed. Tennessee Rule of Appellate Procedure 4(a) provides that a notice of appeal shall be filed with and received by the clerk of the trial court within thirty (30) days after the date of entry of the judgment appealed from. Thus, the State's filing of the notice of appeal on December 12, 2003, was well outside the thirty-day time period. Notwithstanding, the rules also provide that "in all criminal cases 'the notice of appeal' document is not jurisdictional, and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a).

In the case herein, the trial court granted the petition for habeas corpus relief on August 15, 2003. This was the final judgment from which the State should have appealed. Accordingly, the State should have timely filed a notice of appeal within thirty (30) days of that date. Instead, on September 12, 2003, the State filed a petition to reconsider in the trial court. On November 18, 2003, the trial court denied the petition to reconsider. It is from this November 18, 2003, order that the State specifically appealed, filing the notice of appeal on December 12, 2003. We note that Rule 3(b) of the Tennessee Rules of Appellate Procedure does not provide for an appeal as of right after

a trial court's denial of a petition to reconsider. Therefore, we are precluded from reviewing the trial court's denial of the State's petition to reconsider. Additionally, the State failed to timely file a notice of appeal of the trial court's August 15, 2003 order granting the writ of habeas corpus. However, from our review of the record, we conclude that "the interest of justice" demands a waiver of the timely filing of the notice of appeal in the case herein.

Habeas Corpus Relief

On appeal, the State argues that the petition for habeas corpus relief does not support the grant of the writ because the petitioner failed to prove that the judgment was void or that his sentence is illegal. The petitioner argues that the trial court properly granted the writ.

The grounds upon which a writ of habeas corpus may be issued are very narrow. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992).

A habeas petitioner can only attack a judgment that is void on its face and not one that is merely voidable. State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000). "A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired." Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A petitioner has the burden of establishing by a preponderance of the evidence that the judgment he attacks is void or that his term of imprisonment has expired. State ex rel. Kuntz v. Bomar, 381 S.W.2d 290, 291 (Tenn. 1964). If a petitioner fails to establish by a preponderance of the evidence that his conviction is void or his term of imprisonment has expired, he is not entitled to immediate release. Passarella v. State, 891 S.W.2d 619, 627-28 (Tenn. Crim. App. 1994), superceded by statute as stated in State v. Steven S. Newman, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

In the case herein, the petition for writ of habeas corpus alleged: (1) that the judgment was void because the petitioner pled guilty to rape of a child at a time when such criminal offense did not exist; and (2) that the petitioner's sentence is illegal, and thus his judgment is void, because he received a sentence as a "child rapist" at one hundred percent (100%) when such a sentencing option did not exist.

After a hearing, the trial court determined that the petitioner's conviction was not void because he was not convicted of an offense which was not in effect at the time of the crime, but that the petitioner's conviction was void because he was sentenced under a statutory provision that was not in effect until after the commission of the offense for which he was convicted. In order to determine that the petitioner's underlying conviction was not void, the trial court adopted the

following reasoning in Judge Witt's concurring opinion in Roy C. Smith, 2002 WL 31259447, at *3 (Witt, J., concurring in results only):

Although the petitioner was indicted and apparently convicted pursuant to Tennessee Code Annotated section 39-13-522, proscribing rape of a child, that statutory provision was merely a recodification of the rape-of-a-child prong of aggravated rape previously contained in section 39-13-502(a)(4). The elements of the offense are the same. Thus, in the form of section 39-13-504(a)(4), rape of a child was a proscribed offense at the time the offenses under review were committed.

We agree with the trial court's assessment and the reasoning adopted in Roy C. Smith to achieve that result. On June 17, 1996, the petitioner pled guilty to one count of rape of a child in violation of Tennessee Code Annotated section 39-13-522. The petitioner's judgment of conviction reflects that the offense occurred "2-3-88 through 2-3-92." While rape of a child as defined in Tennessee Code Annotated section 39-13-522 did not become law until July 1, 1992, the indictment in this case listed the elements of the crime of aggravated rape previously contained in Tennessee Code Annotated section 39-13-504(a)(4) as it applied to the alleged conduct taking place from "2-3-88 through 2-3-92." The petitioner's conviction is not void because he was not convicted of an offense which was not in effect at the time of the crime.

The trial court next determined that the petitioner's conviction was void because he was sentenced under a statutory provision that did not take effect until after the commission of the offense for which the petitioner pled guilty. We agree. The petitioner agreed to a sentence under the plea agreement to serve fifteen (15) years as a Range I, standard offender. However, the judgment reflects that the petitioner was designated as both a "Standard 30% Range I" offender and as a "Child Rapist." In accordance with the mandatory sentencing provisions of Tennessee Code Annotated section 39-13-523, the petitioner was required to serve one hundred percent (100%) of his conviction as a result of being convicted of rape of a child. Such a sentence is invalid because this statutory provision, Tennessee Code Annotated section 39-13-523, did not take effect until July 1, 1992. The Tennessee Supreme Court has recognized that a sentence imposed in direct contravention of a sentencing statute, i.e., the length or manner of service, for example, is void and illegal. McConnell v. State, 12 S.W.3d 795, 799 (Tenn. 2000); State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978). The petitioner's conviction is void. The State argues that the petitioner was aware that he would have to serve one hundred percent (100%) of his sentence, citing the colloquy between the petitioner and the trial court at the guilty plea hearing and that the trial court should have merely modified the petitioner's sentence and denied the writ. There is no authority for a court in a habeas corpus proceeding to modify a sentence based on evidence presented at the hearing in an attempt to reform a judgment that is invalid on its face. At the time of the plea hearing, it was impossible for the petitioner to be convicted as a "child rapist" and be required to serve one hundred percent (100%) of his sentence. Accordingly, we affirm the trial court's grant of the writ of habeas corpus.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The case is remanded to the trial court for issuance of the writ.

JERRY L. SMITH, JUDGE