

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 24, 2006

**JAMES E. SWIGGETT v. HOWARD CARLTON, WARDEN**

**Appeal from the Criminal Court for Johnson County  
No. 4759 Lynn W. Brown, Judge**

**No. E2006-00049-CCA-R3-HC - Filed November 17, 2006**

The petitioner, James E. Swiggett, appeals from the Johnson County Criminal Court's denial of his petition for the writ of habeas corpus. He claims that his first degree murder conviction, for which he is serving a life sentence, is void because the prosecutor denied him due process at trial by knowingly sponsoring perjured testimony. He claims on appeal that the trial court erred by dismissing his petition on the basis it failed to state a colorable claim and without the appointment of counsel. We affirm the judgment of the trial court.

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

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

James E. Swiggett, Mountain City, Tennessee, Pro Se.

Michael E. Moore, Acting Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; and Joe C. Crumley, Jr., District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner claims on appeal that the records of his conviction proceedings are necessary for a determination of the merits of his claim for habeas corpus relief and that the lower court erred in dismissing his petition without providing him with an attorney and an opportunity to present the records which demonstrate the voidness of his conviction. The state responds that the trial court was not in error.

In this state, “[a]ny person imprisoned or restrained of his liberty, under any pretense whatsoever, except [those held under federal authority], may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment and restraint.” T.C.A. § 29-21-101; Church v. State, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998). The purpose of a habeas corpus petition is to

contest void and not merely voidable judgments. Archer v. State, 851 S.W.2d 157, 163 (Tenn. 1993)

(citing State ex rel. Newsom v. Henderson, 221 Tenn. 24, 424 S.W.2d 186, 189 (1968)). Habeas corpus relief is available only when it appears on the face of the judgment or the record that the trial court was without jurisdiction to convict or sentence the defendant or that his sentence has expired. Archer, 851 S.W.2d at 164. The burden is on the petitioner to establish that the judgment is void or that the sentence has expired. State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). The trial court may appoint counsel for an indigent habeas corpus petitioner “if necessary.” T.C.A. § 40-14-204.

Initially, the state argues that we should dismiss the petitioner’s appeal because the petitioner filed an untimely notice of appeal. The trial court signed its order dismissing the petition on December 5, 2005, and the order was filed on December 9, 2005. The petitioner mailed his notice of appeal from prison on January 5, 2006, and the notice was filed with the trial court clerk on January 11, 2006. We do not believe the record necessarily shows that the notice of appeal was filed late. In an event, under the circumstances, the interest of justice dictates that we waive the filing of the notice of appeal relative to any claimed lateness. See Tenn. R. App. P. 4(a) (providing for waiver of a notice of appeal in criminal cases if dictated by the interest of justice).

The state also argues that the petition was technically deficient because it failed to state that the claim had not been presented in an earlier petition for habeas corpus relief as required by Tennessee Code Annotated section 29-21-107(3). This was not a basis upon which the state moved for dismissal in the trial court nor the basis upon which the trial court dismissed the petition. We will not address it for the first time on appeal.

The state argues, as well, that the petitioner has not stated a colorable claim of a void judgment. We agree. The petitioner’s claims, if proven, would render the challenged judgment voidable rather than void. A voidable, as opposed to void, conviction is not a basis for habeas corpus relief. McLaney v. Bell, 59 S.W.3d 90, 93 (Tenn. 2001). The “authorized avenue for attacking a voidable judgment is a petition for post-conviction relief.” State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). However, in this case, the petitioner’s time for filing a petition for post-conviction relief has expired. James E. Swiggett v. State, No. E2002-00174-CCA-R3-PC, Greene County (Tenn. Crim. App. October 15, 2002) (holding that petitioner’s statute of limitations to seek post-conviction relief expired on May 10, 1996), app. denied (Tenn. Feb. 3, 2003); see T.C.A. § 40-30-102 (defining one year statute of limitations for post-conviction actions, citing prior version of Code found at § 40-35-202). The trial court properly dismissed the petition for writ of habeas corpus without reviewing the records of the petitioner’s conviction proceedings.

Further, the trial court did not err in failing to appoint counsel. Given that the petitioner’s claim was not one which, even if proven to his satisfaction, would entitle him to habeas corpus relief,

appointment of counsel was not necessary for disposition of the petition. See T.C.A. § 40-14-204; State ex rel. Edmondson v. Henderson, 220 Tenn. 605, 609, 421 S.W.2d 635, 636 (1967).

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE