

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 24, 2007

DAVID WAYNE DUNN v. HOWARD CARLTON, WARDEN

**Appeal from the Criminal Court for Johnson County
No. 4822 Robert E. Cupp, Judge**

No. E2007-00355-CCA-R3-HC - Filed August 30, 2007

The pro se petitioner, David Wayne Dunn, appeals from the Johnson County Criminal Court's summary dismissal of his petition for a writ of habeas corpus attacking his 1985 first degree murder conviction. He alleges that he is entitled to relief because the indictment is duplicitous and the judgment represents an illegal general verdict. Following our review, we affirm the judgment of the trial court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

David Wayne Dunn, Mountain City, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price and David E. Coenen, Assistant Attorneys General, attorneys for appellee, State of Tennessee.

OPINION

In 1985, a Davidson County jury convicted the petitioner of first degree murder, grand larceny, and concealing stolen property. On direct appeal, this court affirmed his convictions for first degree murder and grand larceny, but reversed and dismissed the conviction for concealing stolen property. State v. David Wayne Dunn, No. 85-356-III, 1986 WL 6322 (Tenn. Crim. App. at Nashville, June 6, 1986). The petitioner sought post-conviction relief alleging that he had been denied his right to effective assistance of counsel. After an evidentiary hearing, the post-conviction court denied relief; this court affirmed the denial on appeal. State v. David Wayne Dunn, No. 01C019002CR00028, 1990 WL 172626 (Tenn. Crim. App. at Nashville, Feb.25, 1991).

The pro se petition for a writ of habeas corpus alleges that the petitioner's conviction for first degree murder is illegal because the indictment combined both premeditated murder and

felony murder as alternatives in a single count and the verdict was a general verdict that failed to specify which theory of first degree murder the petitioner was found guilty. The state argues that both claims are not cognizable in a habeas corpus proceeding.

ANALYSIS

Tennessee law provides that “[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment.” Tenn. Code Ann. § 29-21-101. Habeas corpus relief is limited and available only when it appears on the face of the judgment or the record of proceedings that a trial court was without jurisdiction to convict the petitioner or that the petitioner’s sentence has expired. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007); Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004) (citing Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)). To prevail on a petition for writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. Hickman, 153 S.W.3d at 20; see also State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109.

We note that the determination of whether to grant habeas corpus relief is a matter of law; therefore, we will review the trial court’s finding de novo without a presumption of correctness. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001). In denying relief without an evidentiary hearing, the trial court found that the indictment containing alternative means to commit first degree murder sufficiently conferred jurisdiction upon the trial court and, thus, did not warrant habeas corpus relief. The trial court also found that any issue regarding the general verdict could not be challenged in a habeas corpus proceeding.

Typically, a challenge to the sufficiency of an indictment is not cognizable in a habeas corpus proceeding. See Haggard v. State, 4 Tenn. Crim. App. 620, 475 S.W.2d 186, 187-88 (Tenn. Crim. App. 1971). However, “the validity of an indictment and the efficacy of the resulting conviction may be addressed in a petition for habeas corpus when the indictment is so defective as to deprive the court of jurisdiction.” Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). Turning to the validity of the indictment challenged by the petitioner, we note that our supreme court has held that an indictment that alleges multiple theories for the commission of a crime is sufficient to confer jurisdiction. State v. Hammonds, 30 S.W.3d 294, 301 (Tenn. 2000). Therefore, we conclude that the trial court correctly determined that the petitioner was not entitled to habeas corpus relief regarding this challenge.

Regarding the petitioner’s challenge to the general verdict in his case, we conclude that the trial court correctly ruled that such a challenge is not cognizable in a habeas corpus proceeding. Such a challenge that may implicate jury unanimity or election renders a judgment merely voidable and not void. Robert Howell v. Tony Parker, W2005-00521-CCA-R3-HC, 2005 WL 1541825 (Tenn. Crim. App. June 27, 2005). Additionally, we note that there exists “no constitutional or statutory provision prohibit[ing] a jury from rendering a general verdict of guilty of first degree murder where both premeditated and felony murder are charged and submitted to the jury.” State v. Cribbs, 967 S.W.2d 773, 787 (Tenn. 1998).

CONCLUSION

Based upon the foregoing and after a full consideration of the record, arguments of counsel and applicable law, this court concludes that the petitioner has failed to establish that he is entitled to habeas corpus relief. Therefore, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE