

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

**STATE OF TENNESSEE Ex Rel VICTOR E. MCCONNELL v. HOWARD
CARLTON, WARDEN, and the STATE OF TENNESSEE**

**Appeal from the Circuit Court for Johnson County
No. 4775 Robert E. Cupp, Judge**

No. E2006-00967-CCA-R3-HC - Filed October 5, 2007

The pro se petitioner, Victor E. McConnell, appeals from the denial of his petition for writ of habeas corpus. The state has filed a motion requesting that this court affirm the trial court's denial of relief pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The petition fails to establish a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Victor E. McConnell, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

In March 1983, the petitioner was convicted pursuant to his guilty pleas of aggravated rape (case # 151362), first-degree burglary (case # 152488), first-degree murder (case # 152501), and assault with intent to commit first-degree murder (case # 152502). Upon these convictions, the petitioner was sentenced pursuant to his plea agreement¹ to twenty years, fifteen years, life, and life, respectively, for an effective term of life in prison. The judgments provide that the sentence for the first-degree burglary conviction is to be served consecutively to the sentence for the aggravated rape conviction. The remaining judgments do not expressly indicate whether the sentences imposed for the murder and assault convictions were to be served concurrently or consecutively to the aggravated rape conviction. No direct appeal of these judgments was taken.

¹ The plea agreement does not appear in the record before us.

As relevant to the instant appeal, the record reflects that the aggravated rape occurred in April 1982. The defendant was released on bond following this offense on April 30, 1982. The remaining offenses were committed on September 25, 1982, while the defendant was released on the previously set bond.

On November 14, 2005, the petitioner filed a petition for writ of habeas corpus in the Criminal Court for Johnson County. Therein, the petitioner asserted that the sentences imposed in the above-referenced cases were imposed in direct contravention of statutory law, thereby rendering the judgments void. Citing Tennessee Code Annotated Sections 40-35-107 (1982, repealed) and 40-35-210 (1982, repealed), the petitioner asserted without further elaboration that "the sentence structure agreed to by the state, the relator and accepted by the court is illegal/void and amendable [sic] to be corrected at any time as it was imposed contrary to an express statutory mandate." In replying to the state's motion to dismiss filed in the trial court, the petitioner for the first time set forth his precise argument that the trial court was statutorily required in his case to impose consecutive sentences for the offenses he committed in September 1982 while he was released on bond. The petitioner stated:

Any sentence imposed for the crimes occurring in September of 1982, by statute and rule, while the relator was on bond for the crime occurring in April of 1982, must be consecutive. This illegality has been addressed by the Tennessee Supreme Court many times and the end result is that this type/sort of sentencing is illegal and amenable to correction by writ of habeas corpus.

On March 6, 2006, the trial court denied the petition. Relying on Hogan v. Mills, 168 S.W.3d 753 (Tenn. 2005) and Tennessee Rule of Criminal Procedure 32(c)(3)(C), the trial court found while the judgments for the September 1982 offenses in the petitioner's case were silent as to whether the sentences were to be served concurrently or consecutively to the sentences for the April 1982 offense, mandatory consecutive sentences resulted by operation of law. The court thus rejected the petitioner's erroneous argument that the sentences must be deemed to be concurrent and the judgments did not establish his claim of an illegal sentence.

In Tennessee, "[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." Church v. State, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998); Tenn. Code Ann. § 29-21-101. 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)). A writ of habeas corpus may be granted only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). 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). A petition seeking issuance of a writ of habeas corpus may be summarily dismissed by a trial court if it fails to indicate that the petitioner's conviction is void. Tenn. Code Ann. § 29-21-109.

In the present case, the challenged judgments provide that the sentence for the first-degree burglary conviction is to be served consecutively to the sentence for the aggravated rape conviction. As noted, the remaining judgments do not expressly indicate whether the sentences imposed for the murder and assault convictions run concurrently or consecutively to the aggravated rape conviction. Tennessee Rule of Criminal Procedure 32(c)(3)(C) requires that a defendant convicted of both a felony committed while released on bail and the offense from which the defendant was on bail when he committed the felony serve his sentences consecutively. The trial court correctly found that pursuant to Rule 32, consecutive sentences were mandated in the petitioner's case for those offenses committed while he was released on bail. The trial court also correctly rejected the petitioner's argument that the lack of an express provision for concurrent or consecutive sentencing on the challenged judgments must be deemed to indicate the imposition of concurrent sentences. As our supreme court observed in Hogan, when consecutive sentencing is mandated, "the new sentences run consecutively to the prior sentence even if the judgment is silent in this regard." Hogan, 168 S.W.3d at 756. In summary, the trial court properly rejected the petitioner's claim of void sentencing judgments in denying his petition for writ of habeas corpus.

Upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the petitioner has not established a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

JAMES CURWOOD WITT, JR., JUDGE