

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 21, 2007

KEVIN D. OTEY v. JIM WORTHINGTON, Warden

**Direct Appeal from the Criminal Court for Morgan County
No. 9214 E. Eugene Eblen, Judge**

No. E2006-02419-CCA-R3-HC - Filed September 18, 2007

The Petitioner, Kevin D. Otey, pled guilty in 1996 in Maury County to arson and was sentenced to four years confinement. In 1997, the Petitioner pled guilty to possession of cocaine for resale, felonious evading arrest, and reckless endangerment and received an effective sentence of six years. The Petitioner pled guilty in 1999 to another count of possession of cocaine with intent to sell and was sentenced to eleven years “concurrent with [his] prior sentence.” The Petitioner subsequently filed a pro se petition for writ of habeas corpus and the Morgan County Court granted relief on the basis that the eleven-year sentence should be calculated as beginning at the imposition of his arson sentence, which had been imposed three years earlier. The State filed a timely notice of appeal and raised the following issues: (1) the habeas court erred by consulting the Tennessee Offender Management Information System report; (2) the habeas court erred by defining “concurrent” to award the Petitioner retroactive credit on his eleven-year sentence; and (3) the habeas court erred by granting relief in an unripe case. After a thorough review, we reverse the habeas court’s judgment and dismiss the Petitioner’s claim for habeas corpus relief.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, J.J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon and John H. Bledsoe, Assistant Attorneys General, for the Appellant, State of Tennessee.

Joe H. Walker and Walter B. Johnson, II, Assistant Public Defenders, Harriman, Tennessee, for the Appellee, Kevin D. Otey.

OPINION

I. Facts

The Petitioner, Kevin D. Otey, pled guilty to arson and was sentenced to four years by a Maury County judge on October 16, 1996. On October 20, 1997, the Petitioner pled guilty to possession of cocaine for resale, felonious evading arrest, and reckless endangerment, with concurrent sentences of six years, three years, and one year, for an effective sentence of six years. Then, on May 10, 1999, the Petitioner pled guilty to possession of cocaine for resale and was given an eleven year sentence “concurrent with his prior sentences.” The Petitioner filed a petition for a writ of habeas corpus arguing that his five “concurrent” sentences should have begun to run in 1996, the date of his initial conviction. The habeas court granted relief by ruling that the eleven-year sentence imposed in 1999 was to be treated as if it began on October 20, 1997, when the Petitioner’s earlier sentences for possession of cocaine, felonious evading arrest, and reckless endangerment began. The State subsequently filed a timely notice of appeal.

II. Analysis

The State contends that the habeas court erred when it granted the Petitioner a writ of habeas corpus because: (1) the habeas court erred by considering the Tennessee Offender Management Information System (TOMIS) report when it should have only considered the face of the judgments or the record of the proceedings upon which the judgments were rendered; (2) the habeas court erred by defining “concurrent” to include the granting of retroactive jail credit to the Petitioner based on his earlier incarceration; and (3) the habeas court erred by granting relief in an “unripe” case.

The right to seek habeas corpus relief is guaranteed by article I, section 15 of the Tennessee Constitution and governed by statute. T.C.A. § 29-21-101 (2006) *et seq.* The determination of whether to grant habeas corpus relief is a question of law and is accordingly reviewed *de novo*. *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000). Although no statutory limits prevent a habeas corpus petition, the grounds upon which relief may be granted are very narrow. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). The petitioner bears the burden of demonstrating by a preponderance of the evidence that “the sentence is void or that the confinement is illegal.” *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). In other words, the very narrow grounds for granting habeas corpus relief are (1) the judgment was facially invalid, and therefore, void, because the convicting court was without jurisdiction or authority to sentence the Petitioner, or (2) the petitioner’s sentence has expired. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). In contrast, a voidable judgment is “one which is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity,” and it does not entitle the petitioner to relief. *Taylor*, 995 S.W.2d at 83; *see State v. Richie*, 20 S.W.3d 624, 633 (Tenn. 2000).

The Petitioner filed a petition under the title of habeas corpus relief, however, he sought a re-evaluation of the meaning and application of the trial court’s phrase “concurrent to prior sentences.” Specifically, the Petitioner wanted the habeas corpus court to interpret his 1997 judgment as retroactively beginning the eleven-year sentence on October 16, 1996, when the Petitioner was convicted and sentenced for arson. Pursuant to *Archer*, habeas corpus relief is

limited to void judgments or expired sentences. 851 S.W.2d at 164. In this case, the relief the Petitioner seeks does not fit within the narrow circumstances of proper habeas corpus relief. He neither alleges a void judgment nor an expired sentence, as he has merely requested his release date be set for October 16, 2007. As such, the habeas court erred when it granted the Petitioner relief.

The Petitioner's argument hinges on his claim that when considering the TOMIS reports, his eleven-year sentence imposed in 1999 should be given a starting date of October 16, 1996. Pursuant to *Summers v. State*, habeas corpus review is limited to considering just the judgment and the technical record. 212 S.W.3d 251, 260 (Tenn. 2007) (quoting *State ex rel. Kuntz v. Bomar*, 381 S.W.2d 290, 291-92 (Tenn. 1964) ("such matters [complained of in the habeas corpus petition] are foreclosed by that judgment, in the absence of anything upon the face of the record to impeach the judgment.")). In this case, the habeas court erroneously went beyond the scope of the judgment and record when it consulted the TOMIS report.

Additionally, the Petitioner requests that his concurrent sentences be credited as if they all began running on his initial conviction in 1996. The Petitioner is not entitled to relief on this issue. To begin with, a petitioner's sentence begins running upon receiving his judgment and being held in custody. T.C.A. §40-23-101 (2006). In *Brown v. Tennessee Department of Correction*, the Tennessee Court of Appeals held that, "when two [different] sentences begin at different times, the result can be different," and that "the termination of the first sentence has no effect on the unserved part of the second sentence." 11 S.W.3d 911, 913 (Tenn. Ct. App. 1999). Additionally, the Court adopted the view that "when two sentences run concurrently, it merely means that, for each day in custody while serving both sentences, the inmate received credit towards each sentence. Concurrent sentences do [not] necessarily begin and end at the same time – they simply run together during the time they overlap." *Id.* (quoting *Bullard v. Dep't of Corr.*, 949 P.2d 999, 1002 (Colo. 1997)). Moreover, "'double-dipping' for credits from a period of continuous confinement in this state for two separate and unrelated charges has been rejected." *State v. Frederick Cavitt*, No. E1999-00304-CCA-R3-CD, 2000 WL 964941 p. *3 (Tenn. Crim. App., at Knoxville, July 13, 2000), *no Tenn. R. App. P. 11 application filed*.

In the case at hand, the Petitioner was sentenced to serve eleven years on May 10, 1999 and he was already in custody. As such, his sentence for that judgment began on that day. The habeas court interpreted the trial court's "concurrent with prior sentences" language on the 1999 judgment to mean that the Petitioner would receive credit towards that particular sentence for time already served on other sentences. Although the sentencing language reads that the sentences were concurrent, this merely allows for credit for multiple sentences each day, so long as the sentences overlap. The Petitioner was sentenced for eleven years for possession of cocaine with intent to resell in 1999 and may not "double-dip" for credits from a different sentence assigned for a different offense. The habeas court erred when it credited the Petitioner with time served from his previous sentences towards his 1999 sentence.

III. Conclusion

We find that the habeas court erred in granting the Petitioner habeas corpus relief because the Petitioner did not allege a proper claim for habeas relief. Additionally, the habeas court erred

by considering material outside of the judgment and the record and by retroactively imposing the Petitioner's sentence. Based on the foregoing reasoning and authorities, we reverse the judgment of the habeas court and dismiss the Petitioner's claim.

ROBERT W. WEDEMEYER, JUDGE