

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 30, 2007

TERRANCE LOWDERMILK v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Hamilton County
No. 261914 Rebecca J. Stern, Judge**

No. E2007-00872-CCA-R3-HC - Filed January 10, 2008

The Petitioner, Terrance Lowdermilk, appeals the Hamilton County Criminal Court's summary dismissal of his petition for habeas corpus relief attacking his three convictions for selling more than .5 grams of cocaine. The Petitioner contends, among other things, that his 2002 judgments of conviction are void because ineffective assistance of trial counsel led him to enter a guilty plea which was not voluntary, knowing, and intelligent. The Petitioner also argues that his sentence is illegal based upon a violation of the Interstate Agreement on Detainers Act and because the sentence was imposed in conjunction with the revocation of his illegally imposed probation in an unrelated case. The habeas corpus court dismissed the petition, finding that the Petitioner had failed to state a cognizable claim for habeas corpus relief and, insofar as the pleading was to be considered as a petition for post-conviction relief, it was time-barred. We agree and affirm the order summarily dismissing the petition.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Terrance Lowdermilk, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter and Elizabeth B. Marney, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Petitioner pled guilty on November 19, 2002, to three counts of selling more than .5 grams of cocaine, Class B felonies. Tenn. Code Ann. § 39-17-417(a)(3), (c)(1). He was sentenced to concurrent eight-year terms as a Range I, standard offender. This effective eight-year sentence was also to be served concurrently with a prior six-year state sentence for

aggravated assault¹ and a prior one-hundred-and-fifty-one-month federal sentence for a controlled substance offense.

On December 6, 2006, the Petitioner, who is currently incarcerated in a federal correctional facility, sought habeas corpus relief in Hamilton County Criminal Court. The record on appeal before this Court contains only the petition and the habeas corpus court's order of dismissal.

The petition is lengthy and rambling. Although much of the petition is unintelligible, we discern four basic allegations by the Petitioner:

(1) Trial counsel failed to conduct adequate pretrial investigation, failed to move to dismiss the charges, coerced him into pleading guilty, and failed to file an appeal after the Petitioner requested him to do so. To support his claim of ineffective assistance of counsel in this case, the Petitioner relies upon a federal decision regarding his federal convictions, wherein a federal court determined that Petitioner's trial counsel was ineffective for failing to appeal the Petitioner's convictions and permitting a delayed appeal, see Terrance Lowdermilk v. United States, No. 1:03-CV-395, 1:01-CR-145, 2005 WL 3560640 (E.D. Tenn. Dec. 28, 2005);

(2) His plea bargain agreement was breached when the State failed to reduce the charges after he provided assistance in other drug-related transactions, thereby upholding his portion of the agreement;

(3) His guilty plea was not knowing or voluntary because he was not advised by counsel or the trial court of the elements of the offense and was misinformed regarding his sentence exposure; and

(4) His sentence is illegal due to a violation of the anti-shuttling provisions of the Interstate Agreement on Detainers Act and because his eight-year sentence was imposed in conjunction with the revocation of his illegally imposed probation in the aggravated assault case.

The Petitioner attached to his petition transcripts of the guilty plea hearings in this case and in the aggravated assault case. He also provided an order of the federal court finding ineffective assistance of trial counsel for failure to file a direct appeal of his federal convictions and granting him a delayed appeal. Finally, he submitted a partial copy of the "rule docket" showing actions taken by the trial court regarding his cocaine convictions.

¹ On December 20, 2000, the Petitioner pled guilty to aggravated assault, and the trial court imposed a suspended six-year sentence on supervised probation. See Terrance Lowdermilk v. State, No. E2004-00282-CCA-R3-HC, 2004 WL 1655757 (Tenn. Crim. App., Knoxville, July 22, 2004), perm. to appeal denied, (Tenn. Dec. 6, 2004). Due to his new cocaine convictions in November of 2002, his probation was revoked in the aggravated assault case, and the sentence was ordered into execution.

The State relies on this previous opinion in its brief and asserts that this Court has previously ruled on the legality of the Petitioner's restraint in a prior proceeding. However, this previous opinion relates to the aggravated assault conviction and, in this case, the Petitioner is challenging his three convictions for the sale of cocaine.

By order dated January 17, 2007, the habeas corpus court summarily dismissed the petition. It is from this determination that the Petitioner now appeals.

ANALYSIS

The determination of whether to grant habeas corpus relief is a question of law and our review is de novo. See State v. Summers, 212 S.W.3d 251, 262 (Tenn. 2007). The Tennessee Constitution guarantees a convicted criminal defendant the right to seek habeas corpus relief. See Tenn. Const. art. I, § 15. However, the grounds upon which habeas corpus relief will be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A petition for habeas corpus relief may only be granted when the judgment is shown to be void, rather than merely voidable. Id. A judgment is void only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that the convicting court was without jurisdiction or authority to sentence a defendant or that a defendant's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). On the other hand, a voidable judgment or sentence is one which is facially valid and which requires evidence beyond the face of the judgment or the record of the proceedings to establish its invalidity. Taylor, 995 S.W.2d at 83. A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. Hogan v. Mills, 168 S.W.3d 753, 755 (Tenn. 2005). Moreover, it is permissible for a court to summarily dismiss a habeas corpus petition, without the appointment of counsel and without an evidentiary hearing, if there is nothing on the face of the record or judgment to indicate that the convictions or sentences addressed therein are void. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

Here, the habeas corpus court denied the Petitioner relief. In doing so, the habeas corpus court, citing to Tennessee Code Annotated section 29-21-102, first noted that the writ of habeas corpus is generally unavailable to a federal prisoner. Next, the court determined that the Petitioner did not state a valid claim for relief by way of a writ of habeas corpus, finding that "none of the [P]etitioner's allegations, whether regarding the prosecutor's breach of a prior agreement in the same case, the suspension of a six-year sentence to the department of correction in a prior case, or constitutional or statutory violations preceding the entry of the plea, amount to illegality." Finally, the court stated that, while the allegations contained in the petition could have been properly presented in a petition for post-conviction relief, the petition was barred by the one-year statute of limitations.

Our supreme court has recently determined that a prisoner serving concurrent state and federal sentences in a federal correctional institution may challenge his state convictions through the use of the state writ of habeas corpus. Faulkner v. State, 226 S.W.3d 358, 365 (Tenn. 2007). However, we agree with the habeas corpus court that the Petitioner failed to state a cognizable claim for habeas corpus relief.

The Petitioner's claims regarding ineffective assistance of counsel, a breached plea agreement, and voluntariness of his plea do not entitle him to habeas corpus relief. These claims, even if true, would render the judgment at most voidable, not void. See Luttrell v. State, 644 S.W.2d 408, 409-10 (Tenn. Crim. App. 1982). Furthermore, proof of deficient representation in

the Petitioner's federal case does not change the conclusion that his claim of ineffectiveness is not cognizable in a habeas corpus proceeding.

The Petitioner also argues that his sentences are illegal based upon a violation of the anti-shuttling provisions of the Interstate Agreement on Detainers Act (IAD) and because his eight-year sentence was imposed in conjunction with the revocation of his illegally imposed probation in the aggravated assault case. A sentence imposed in direct contravention of a statute, i.e., "without jurisdiction or authority" to act, is illegal and, thus, void. See Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000).

Again, the Petitioner has not established that he is entitled to habeas corpus relief. First, any violation of the IAD was waived by the Petitioner's guilty plea. The general rule has long been firmly established and settled that a plea of guilty, understandingly and voluntarily entered on the advice of counsel, constitutes an admission of all facts alleged and a waiver of all non-jurisdictional and procedural defects and constitutional infirmities, if any, in any prior stage of the proceeding. Lawrence v. Mullins, 449 S.W.2d 224, 229 (Tenn. 1969). Next, in the Petitioner's post-conviction appeal of his aggravated assault conviction, he argued that the trial court had no authority to suspend his six-year sentence after imposing a term of imprisonment and, therefore, the judgment placing him on probation was illegal. See Terrance Lowdermilk v. State, No. E2004-00282-CCA-R3-HC, 2004 WL 1655757, at *1 (Tenn. Crim. App., Knoxville, July 24, 2004), perm. to appeal denied, (Tenn. Dec. 6, 2004). This Court determined that "the initial suspension of the Petitioner's [aggravated assault] sentence was not illegal." Id. at *2. Accordingly, his eight-year sentences for his cocaine convictions were not imposed in conjunction with the revocation of his illegally imposed probation.

The Petitioner's lawful sentences have not expired and the sentencing court had jurisdiction and authority to enter the judgments against him. For these reasons, the habeas corpus court's dismissal of the Petitioner's request for relief was proper.

We also agree with the habeas corpus court that, even if we treat the petition as one for post-conviction relief, the Petitioner is still not entitled to a hearing. The one-year statute of limitations for filing a petition for post-conviction relief expired before he filed the instant petition. See Tenn. Code Ann. § 40-30-102(a). The pleading does not allege any grounds which would provide an exception to the statute of limitations. See id. § at (b). Moreover, the facts of this case simply do not require that the limitations period be tolled based upon due process considerations. See Burford v. State, 845 S.W.2d 204, 208-09 (Tenn. 1992). The federal decision granting a delayed appeal from the federal convictions does not constitute "newly discovered evidence" of ineffectiveness as asserted by the Petitioner. As noted by the habeas corpus court, the Petitioner's claims are belied by his responses at the guilty plea hearing, the federal decision is irrelevant to any ineffectiveness as it relates to the Petitioner's trial counsel in this case, and the issue of failure to file a delayed appeal could have been presented previously in a timely filed post-conviction petition. Accordingly, insofar as the Petitioner's pleading may be considered as a petition for post-conviction relief, it was properly dismissed as time-barred.

CONCLUSION

In accordance with the foregoing, we conclude that the Hamilton County Criminal Court did not err by summarily dismissing the habeas corpus petition and that, if the petition is considered as one seeking post-conviction relief, it is barred by the one-year statute of limitations. The judgment is affirmed.

DAVID H. WELLES, JUDGE