

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1995 SESSION

FILED

October 8, 1996

**Cecil W. Crowson
Appellate Court Clerk**

BILLY NOBLE FORREST)
AKA BILLY SALEEM EL-AMIN,)
)
APPELLANT,)
)
VS.)
)
JOHN REES, WARDEN and)
STATE OF TENNESSEE,)
)
APPELLEES.)

NO. 01C01-9411-CC-00387
WAYNE COUNTY
HON. WILLIAM B. CAIN
CIRCUIT JUDGE
(Habeas Corpus)

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AFFIRMED

OPINION FILED: _____

JERRY SCOTT, SPECIAL JUDGE

OPINION

The Appellant filed a pro se petition for the writ of habeas corpus in the Circuit Court of Wayne County. Subsequently, counsel was appointed to represent him, and an amended petition was filed.

Appellant is currently serving a forty-five year sentence for robbery with a deadly weapon. In his petition, Appellant contends that his forty-five year sentence expired in 1986 and that he is currently being held illegally. He also alleges that the State was improperly granted the hearing at which his petition for habeas corpus was denied. The trial judge dismissed his petition finding that Appellant must serve the portion of his sentence from his escape in 1980 to his extradition from New York in 1992.

We affirm the dismissal of Appellant's petition for the writ of habeas corpus and find that Appellant must complete the remainder of his forty-five year sentence.

FACTS

In January 1964, Appellant was sentenced to serve forty-five years in prison for robbery with a deadly weapon. Under the terms of that sentence, the Appellant would have been eligible for parole as early as 1984, and his sentence would have expired in 1986. Upon the recommendation of the Board of Pardons and Parole, Governor Winfield Dunn commuted his sentence to twenty years on December 15, 1971.

Appellant was released on parole on December 20, 1972. The conditions of his parole included that he would, "lead the life of a good citizen; obey all the laws of

the nations, states and municipalities; and shall not be guilty of other conduct, in the opinion of the Governor improper and illegal.” Violation of any of the conditions would result in the revocation of the commuted sentence. The Governor would be the sole determiner of whether any of the conditions had been violated. Under the terms of his parole, Appellant resided at the Opportunity House in Davidson County and worked at the Nashville Painting Corporation.

On August 5, 1973, Appellant was arrested and charged with armed robbery, carrying a weapon, and possession of marijuana. A parole violation warrant was issued two days later. On August 29, a preliminary hearing was held to determine if there was probable cause to believe that Appellant had been involved in the incident. Ultimately, Appellant was not charged with a parole violation because it was unclear if he had been involved with one or six armed robberies and because the parole warrant had been issued to prevent Appellant from making bond.

Appellant attempted to contact his parole counselor on August 31, 1973, but was told to telephone again because his counselor was not available. Appellant did not contact his parole officer again. The Board of Probation and Paroles declared him delinquent on January 25, 1974. He was arrested for his absconding status on February 3, 1974.

In his preliminary hearing on March 6, Appellant first claimed that he thought his commuted sentence expired in August 1973. He later admitted that he was aware his sentence did not expire until January 20, 1975. The hearing officer concluded that probable cause existed to believe that Appellant violated his parole by absconding to avoid parole supervision.

Appellant’s parole revocation hearing was held May 22, 1974. At the conclusion of the hearing the Board told the Appellant it would recommend to

Governor Dunn that his parole be revoked. Revocation would result in a parole date in 1985 and a sentence expiration date in 1986. Governor Winfield Dunn revoked the Appellant's commutation on October 28, 1974.

Almost one year later, on September 9, 1975, Appellant was convicted of robbery with a deadly weapon, the crime being committed while on parole. On October 28, 1975 he received a five to seven year sentence for that crime. The court stated that the sentence "shall run at the expiration of present sentence now being served" by the Appellant.

On July 4, 1980, Appellant escaped from the Tennessee State Penitentiary, and a warrant for his arrest was issued. He remained on escape status until he was extradited from New York and returned to custody on April 8, 1992. The Department of Correction calculated that he lost 4,296 days during his escape. He will be eligible for probationary parole on January 23, 1999 and regular parole on January 23, 2000. His sentence will expire on July 24, 2000.

DISCUSSION

A. Dismissal of Petition for Writ of Habeas Corpus

Appellant raises three issues concerning the dismissal of his petition of habeas corpus -- whether the petition was proper and sufficient under the circumstances; whether the trial court erred by dismissing the writ without a benefit of a full evidentiary hearing; and whether the Appellant is being incarcerated for an "alleged escape."

The remedy of state habeas corpus is limited in scope to cases where the judgment is void or the term of imprisonment or other restraint has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). Under Article I, Section 15 of the Tennessee Constitution, a habeas corpus petition is proper at any time while the

prisoner is incarcerated to contest a void judgment or an illegal confinement. Id. The petitioner has the burden of proof to show that the term of imprisonment has expired. State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 381 S.W.2d 290, 291-292 (Tenn. 1964). If the petitioner can establish by a preponderance of the evidence that his sentence has expired, he is entitled to immediate release. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

Appellant has failed to establish that his term of imprisonment has expired. According to the Tennessee Sentences Dates Inquiry, Appellant's term was to expire on June 10, 1986. This Court has repeatedly held that, by statute, credit is only available for prison time served that "arises out of the" offense for which the credit is claimed. E.g., Smith v. McWherter, 1987 WL 6069 (Tenn. Crim. App. 1987). When Appellant escaped from custody on July 4, 1980, he stopped receiving credit toward his sentence. That Appellant was never charged with or convicted for his escape has no bearing on whether his sentence has expired. Cf. State v. Abbott, 617 S.W.2d 172, 173-74 (Tenn. Crim. App. 1981)(finding that an escaped felon who was not charged with the escape was required to serve the remainder of his incomplete sentence.)

Appellant also argues that he was denied a full evidentiary hearing. The trial court is not required as a matter of law to grant the writ and conduct an inquiry into the allegations. Rather a petition that fails to state a cognizable claim may be summarily dismissed by the trial court. Passarella, 891 S.W.2d at 627. A hearing is not warranted when the facts alleged in the petition, even if true, would not serve as the basis for relief. de la Beckwith v. Evatt, 819 S.W.2d 453, 458 (Tenn. Crim. App. 1991) citing Russell v. Willis, 222 Tenn. 486, 437 S.W.2d 529, 531 (1969) and State ex rel. Kuntz v. Bomar, *supra*. The only facts in dispute are the dates of Appellant's release. However, the evidence Appellant presents in his appeal clearly shows that he failed to serve the last six years of his 1964 conviction and that he is not entitled

to be released. Assuming that all the documentation Appellant placed in his brief had merit, Appellant would not be entitled to relief and, consequently, an evidentiary hearing is not warranted. However, attachments to briefs are not evidence and will not be considered by the appellate courts. Appellant is to remain incarcerated until he serves the remainder of his sentence for his 1964 conviction.

According to the 1975 conviction for armed robbery, Appellant is to serve five to seven years “at the expiration of present sentence now being served.” This is consistent with Tenn. R. Crim. P. 32(c)(3)(A), which provides that a felon convicted of committing a felony while on parole must serve the sentence for that offense consecutively. Appellant argues that the record is confusing as to whether the sentence is concurrent or consecutive because the Tennessee Department of Correction set release dates on the 1975 conviction concurrent to that of the 1964 conviction. Although the Department determines the length of a prisoner’s sentence by statute, it may not alter sentences imposed by the Court. Appellant is to serve the term of his 1975 conviction at the expiration of his current sentence on July 24, 2000.¹

B. Motion to Reconsider under Tenn. R. Civ. P. 60.02

Appellant argues that the Court improperly granted the State’s motion to reconsider under Tenn. R. Civ. P. 60.02 on the grounds that the motion was “inadequate and improper.” An adequate motion under 60.02 must state the facts justifying the invocation of the “extraordinary relief” provided by that motion. Turner v. Turner, 776 S.W.2d 88, 92 (Tenn. App. 1988). The State’s motion reads, in its entirety,

“Comes now the State of Tennessee, by and through Mike Bottoms, District Attorney General for the Twenty Second Judicial District in the above styled cause and would

¹We only consider the expiration dates of his current sentence because, having been convicted of committing a felony while on parole, Appellant must serve the rest of his term without parole eligibility. Tenn. Code Ann. § 40-28-123(b)(1)(1990).

respectfully move this Honorable Court to correct the judgment under rule 60.02 of the rules of civil procedure.”

Although the motion is arguably deficient, Appellant failed to raise that issue on May 19 and June 23, 1994, when the trial court entertained oral arguments on the motion. Appellate courts are not required to grant relief where the party requesting relief failed to take actions that were reasonably available to nullify or prevent the harmful effect of an error. Tenn. R. App. P. 36(a). Because Appellant had the opportunity to raise this issue during oral arguments on May 19 and June 23, 1994, his failure to make a contemporaneous objection served as a waiver of the issue of the motion’s adequacy. State v. Thomas, 818 S.W.2d 350, 364 (Tenn. Crim. App. 1991).

The judgment of the trial court is affirmed.

JERRY SCOTT, SPECIAL JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

DAVID G. HAYES, JUDGE