

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1996 SESSION

FILED
December 5, 1996
Cecil W. Crowson
Appellate Court Clerk

DAVID N. KUNTZ,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 01C01-9512-CR-00439

DAVIDSON COUNTY

HON. SETH NORMAN,
JUDGE

(Habeas corpus)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The defendant was convicted in 1972 of two armed robberies and sentenced to consecutive terms of twelve and fifteen years. In 1973, he escaped from prison. In 1982, he was arrested in Nebraska, and in 1983 he pled guilty in Tennessee to escape and was sentenced to a one year term. He was subsequently returned to Nebraska for service of that state's sentence. In 1990, he was paroled from his Nebraska sentence and returned to Tennessee. In April 1990, he filed a pro se "Petition For Post-Conviction or Writ of Habeas Corpus" which was denied. This denial was affirmed by this Court on direct appeal. In 1994, the petitioner filed the instant petition for writ of habeas corpus, which was also denied. The petitioner has again appealed, setting forth his issue as "Whether the appellant is entitled to relief under a Writ of Habeus [sic] Corpus or [the] Post-Conviction Relief statute by withdrawing his guilty plea and asking for a trial when the contract for which the plea was entered has been denied or broken by the State, because the defendant agreed to one sentence, a concurrent one which is illegal, but another sentence, a consecutive one, was imposed." After reviewing the record, we affirm the judgment below.

The petitioner raises in this appeal an issue which he did not raise below. In his amended petition for writ of habeas corpus, he alleged that "he is being illegally restrained because the sentences for armed robbery and escape in Tennessee which were ordered on September 18, 1983, to run concurrently with each other and concurrently with the sentence for armed robbery in Nebraska have expired." Ignoring the merits (or lack thereof) of this allegation for the moment, his amended petition contains not a word about a plea bargain or rejection thereof. Nor is there any proof in the record before us of any plea bargain and/or the alleged terms thereof. The court

below was given no opportunity to consider, first, whether the petitioner had had a plea bargain and, if so, its terms; second, whether the sentencing court had refused to accept that plea bargain; and third, whether he had then been given an opportunity to withdraw his guilty plea.¹ Accordingly, this issue has been waived. See State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994) (“as a general rule, a party will not be permitted to assert an issue for the first time in the appellate court.”)

Returning to the merits of the petitioner’s allegation in his amended petition, we find no error by the court below. In accepting the petitioner’s guilty plea to the escape charge, the trial court sentenced the petitioner to a term of one year. The document reflecting the plea and sentence contained in the record before us does not include any reference as to whether this sentence was to be served concurrently or consecutively to the armed robbery sentences. However, the court below found that the minute entry for the escape offense reflected that the sentence was to run consecutively. Moreover, this sentence was statutorily required to run consecutively to the robbery sentences. T.C.A. § 39-3802 (1973 Supp).

The petitioner based his allegation that his sentences had expired on the statement contained in the document reflecting his plea and sentence that “the date of his imprisonment [for the escape conviction] commence[s] from the 19th day of September, 1983.” He argued below that this statement meant not only that his escape sentence was to be served concurrently with his armed robbery sentences, but also that he began serving all of these sentences at that point. The court below found no merit to this argument. Nor do we.

¹Consideration of this issue would, of course, have required the court below to have construed the petitioner’s petition as one for post-conviction relief.

This Court has previously held that the petitioner is not entitled to credit on his Tennessee sentences for the time he served in Nebraska. See State v. David N. Kuntz, No. 01-C-01-9101-CR-00019, Davidson County (Tenn. Crim. App. filed June 14, 1991, at Nashville). And although the record below does not contain sufficient information to allow us to calculate the exact amount of time which the petitioner has served in Tennessee, it does contain enough information to conclude that his sentences have not expired. Accordingly, his petition for writ of habeas corpus is without merit.²

For the reasons set forth above, the judgment below is affirmed.

JOHN H. PEAY, Judge

CONCUR:

DAVID H. WELLES, Judge

JERRY L. SMITH, Judge

²Habeas corpus relief is available only upon a judgment being found void, or the prisoner's sentence(s) having expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993).