

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

<p>FILED</p> <p>March 13, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

MICHAEL L. KINDALL,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 01C01-9605-CR-00178

DAVIDSON COUNTY

HON. J. RANDALL WYATT, JR.,
JUDGE

(Habeas corpus)

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The petitioner filed two petitions for writ of habeas corpus, each dealing with a separate conviction and both alleging that his sentences are unconstitutional. The court below denied both petitions after a single hearing, and the petitioner appeals. We affirm the judgment below.

Habeas corpus relief is available in Tennessee only when the face of the judgment or the record of the proceedings upon which the judgment is rendered reveals that the convicting court was without jurisdiction or authority over the petitioner, or that the petitioner's sentence of imprisonment has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). The petitioner does not claim that his sentences have expired. Thus, he is not entitled to habeas corpus relief on that ground. With respect to the validity of the trial courts' judgments, it appears from the record on this appeal that neither petition included a copy of its underlying judgment or the record of the proceedings on which the judgment was based. A petition for writ of habeas corpus must contain a copy of the "legal process" upon which the petitioner's restraint is based, or a satisfactory reason for its absence. T.C.A. § 29-21-107(b)(2). The petitions in this case contain neither. Dismissal was therefore appropriate. State ex rel. Wood v. Johnson, 393 S.W.2d 135, 136 (Tenn. 1965). Moreover, it is the petitioner's burden to show the invalidity of the judgment(s) against him and "in the absence of a production of the judgment, or a copy thereof, we must presume it was and is valid in all respects." State ex rel. George v. Bomar, 390 S.W.2d 232, 234 (Tenn. 1965). See also State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993) (it is the appellant's responsibility to create an adequate record on appeal); T.R.A.P. 24(b). Accordingly, the court below did not err when it denied habeas corpus relief.

Although not noted by the court below, the petitions do attempt to state grounds for relief cognizable under the post-conviction act, T.C.A. § 40-30-201 et seq. (1996 Supp). However, the first petition was not timely filed for this purpose. The first petition states that the date of conviction was July 7, 1992. Our review of this Court's records reveal no appeal from that conviction. The petition was filed on July 26, 1995. Thus, under either the three-year limitations period applicable under the prior post-conviction act, T.C.A. § 40-30-101 et seq. (1990), or under the one year limitations period under the new act, the petition was not timely filed.¹ Accordingly, summary dismissal of this petition under the post-conviction act would have been proper.

The second petition was filed on September 22, 1995, and references a conviction date of September 7, 1994. However, the records of this Court reveal that a direct appeal was taken from this conviction which was disposed of by an opinion affirming the conviction on January 26, 1996. Thus, the petition was filed prematurely. Premature post-conviction petitions are properly dismissed summarily. See e.g., Gary Rocco Denami, No. 01C01-9507-CR-00224, Davidson County (Tenn. Crim. App. filed July 5, 1996, at Nashville).²

Moreover, the petitioner's allegations in his second petition that his sentence is unconstitutional could have been raised on his direct appeal, but were not. Accordingly, this ground for relief has been waived. T.C.A. § 40-30-206(g) (1996 Supp). Finally, summary dismissal of both petitions would also have been proper because neither of them alleges any facts in support of the claims of unconstitutionality. "A bare

¹Where a convicted defendant takes no action to perfect his appeal, the statute of limitations begins to run from the date of final conviction. Warren v. State, 833 S.W.2d 101, 102 (Tenn. Crim. App. 1992).

²While this case construes the prior post-conviction act, T.C.A. § 40-30-101 et seq., the language of the limitations period contained in the new act, T.C.A. § 40-30-202(a), does not suggest a different holding.

allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings [under the post-conviction act.] Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition.” T.C.A.

§ 40-30-206(d) (1996 Supp).

The court below did not err in refusing to grant habeas corpus relief. Nor did it err in failing to consider the petitions as ones for post-conviction relief, as summary dismissal under the post-conviction act would have been proper following such consideration. Accordingly, the judgment below is affirmed.

JOHN H. PEAY, Judge

CONCUR:

DAVID H. WELLES, Judge

JERRY L. SMITH, Judge