

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1997

<p>FILED</p> <p>September 30, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

EDDIE B. LEWIS,)
)
 Appellant,)
)
)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
)
 Appellee.)

C.C.A. NO. 01C01-9605-CR-00184
 DAVIDSON COUNTY
 HON. SETH NORMAN
 JUDGE
 (Habeas Corpus Relief)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Eddie B. Lewis appeals the dismissal of his petition for habeas corpus relief. He presents the following issues for review: (1) whether Tennessee's sentencing scheme violates the Separation of Powers Clause of the Tennessee Constitution; and (2) whether Tennessee's sentencing scheme violates the determinate sentencing statute set out at Tennessee Code Annotated Section 40-35-211.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

According to Appellant's petition,¹ he was convicted of second degree murder in July of 1989 and was subsequently sentenced as a Range I standard offender to thirty years. On August 7, 1995, Appellant filed a petition for habeas corpus relief in Davidson County Criminal Court. On November 21, 1995, the trial court dismissed his petition. Appellant appeals from this dismissal.

II. HABEAS CORPUS RELIEF

Appellant alleges that the trial court erred in dismissing his habeas corpus petition. He maintains that Tennessee's sentencing scheme violates both the Separation of Powers Clause of the Tennessee Constitution and the

¹ The record does not contain a judgment.

determinate sentencing statute set out at Tennessee Code Annotated Section 40-35-211. Appellant believes that the entire sentencing scheme should be stricken as unconstitutional.

In Tennessee, it is a well established that the remedy of habeas corpus is limited in its nature and its scope. Archer v. State, 851 S.W.2d 157, 161-62 (Tenn. 1993); Passarella v. State, 891 S.W.2d 619, 626 (Tenn. Crim. App. 1994). Habeas corpus relief is available only when "it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered,' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Archer, 851 S.W.2d at 164 (citation omitted in original). The petitioner has the burden of establishing either a void judgment or an illegal confinement . Passarella, 891 S.W.2d at 627. If established by a preponderance of the evidence, the petitioner is entitled to immediate release. Id.

We first note that Appellant fails to even allege that the convicting court was without jurisdiction or that his sentence has expired. See Archer, 851 S.W.2d at 164. Without such a showing, habeas corpus relief is unavailable. See id. Even if Appellant's petition had made the foregoing prima facie allegation, we believe that his arguments lack merit.

In his first argument, Appellant maintains that by assigning each offender a range and a corresponding release eligibility date, the judicial and legislative branches of government infringe upon the exclusive power of the

executive branch to determine when an offender is first eligible for parole.

Appellant relies upon the following two statutes to support his contention that the determination of parole eligibility is an exclusive function of the executive branch:

[T]he department of correction shall be responsible for calculating the sentence expiration date and the earliest release date of any felony offender sentenced to the department and any felony offender sentenced to confinement in a county jail or workhouse for one (1) or more years.

Tenn. Code Ann. § 40-28-129.

[T]he board of paroles is authorized to grant a prisoner parole as specified in a sentence agreement entered into by the prisoner, the department, and the board. In granting such parole, the board may impose any conditions and limitations that the board deems necessary.

Id. § 40-35-501(m).

The Tennessee Constitution does in fact divide the powers of government into three distinct departments and forbids any one branch from exercising powers belonging to another branch. Tenn. Const. art. II, §§ 1, 2. However, our Supreme Court has recognized that it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government. Bank of Commerce and Trust Co. v. Senter, 149 Tenn. 569, 260 S.W.144 (1924). The three branches necessarily overlap somewhat and are interdependent. This Court has previously held that the setting of punishment is a legislative function and that mandatory sentencing provisions do not constitute an unconstitutional encroachment on the power of the judiciary. See State v. Lowe, 661 S.W.2d 701, 704 (Tenn. Crim. App. 1983). Similarly, we believe that the setting of a release eligibility

date by the legislature does not unduly infringe upon the powers of the executive branch to administer paroles.

In his second argument, Appellant contends that by assigning each offender a range and a corresponding release eligibility date, trial courts effectively impose a minimum and a maximum sentence in direct contravention of the determinate sentencing statute set out at Section 40-35-211. Such an argument misapprehends the nature and effect of both the release eligibility date and parole. The release eligibility date establishes the minimum percentage of the sentence that an offender must serve in custody before being considered for parole. See Tenn. Code Ann. § 40-35-501(a)(1). Once an offender has served that minimum length of time, the parole board may in its discretion grant parole. The granting of parole however does not end the sentence but simply alters the manner by which it is served. Howell v. State, 569 S.W.2d 428, 433 (Tenn. 1978). The actual length of an offender's sentence is unaffected by the granting of parole and remains fixed in accordance with Section 40-35-211.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOE G. RILEY, JUDGE