

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
OCTOBER SESSION, 1997

**FILED**

November 4, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

ROBERT DUANE BITNER, )

Appellant )

vs. )

BILLY COMPTON, Warden, )  
and STATE OF TENNESSEE, )

Appellee )

No. 02C01-9610-CC-00336

LAKE COUNTY

Hon. JOE G. RILEY, JR., Judge

(Writ of Habeas Corpus)

For the Appellant:

**Robert Duane Bitner**, *Pro Se*  
Register Number 216742  
Route 1, Box 330  
Tiptonville TN 38079-9775

For the Appellee:

**Charles W. Burson**  
Attorney General and Reporter

**Elizabeth T. Ryan**  
Assistant Attorney General  
Criminal Justice Division  
450 James Robertson Parkway  
Nashville, TN 37243-0493

**C. Phillip Bivens**  
District Attorney General  
P. O. Drawer E  
Dyersburg, TN 38024

OPINION FILED: \_\_\_\_\_

AFFIRMED

**David G. Hayes**  
Judge

## OPINION

The appellant, Robert Duane Bitner, appeals the dismissal of his *pro se* petition for writ of habeas corpus. The appellant's petition alleges that he was indicted in May 1992 on two counts of aggravated sexual battery and he was convicted of these offenses after a jury trial. The Carroll County Circuit Court then sentenced him to serve an effective sentence of twelve years in the Department of Correction.<sup>1</sup> The appellant filed the instant petition on August 19, 1996. Relying in part upon State v. Roger Dale Hill, No. 01C01-9508-CC-00267 (Tenn. Crim. App. at Nashville, June 20, 1996) and State v. Nathaniel White, No. 03C01-9408-CR-00277 (Tenn. Crim. App. at Knoxville, June 7, 1995), he contends that the judgment entered against him is void because the indictment for aggravated sexual battery failed to allege the *mens rea* of the offense charged. The trial court, finding that "the judgment of conviction is not void on its face, nor has petitioner's sentence expired," and noting that, "[a]llegations concerning the sufficiency of the indictment are not the proper subject of habeas corpus relief," dismissed the appellant's petition.

It is well established that challenges to the sufficiency of an indictment cannot be tested in a habeas corpus proceeding. See Haggard v. State, 475 S.W.2d 186, 187 (Tenn. Crim. App. 1971); Brown v. State, 445 S.W.2d 669, 674 (Tenn. Crim. App. 1969). A panel of this Court has held the same in a capital case. Barber v. State, No. 01C01-9408-CR-00281 (Tenn. Crim. App., Feb. 23, 1995).

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<sup>1</sup>We note that this Court's opinion concerning the appellant's direct appeal reflects that he was indicted in two separate indictments on four counts of aggravated sexual battery of female minors less than thirteen years of age and one count of sexual battery of those females. According to that opinion, he was convicted of three counts of aggravated sexual battery and the Carroll County Circuit Court sentenced him to an effective confinement of twenty-four years in the Department of Correction. See State v. Bitner, No. 02C01-9307-CC-00148 (Tenn. Crim. App. at Jackson, May 25, 1994), perm. to appeal denied (Tenn. 1994). However, the record and the briefs presented to us in the instant matter reflect challenges to only two convictions of aggravated sexual battery and an effective sentence of twelve years for those offenses.

Writs of habeas corpus will issue only in the case of a void judgment or to free a prisoner held in custody after his term of imprisonment has expired. TENN. CONST. Art. 1 § 15; Tenn. Code Ann. § 29-21-101 *et seq.* (1990); see Potts v. State, 833 S.W.2d 60 (Tenn. 1992); See also Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). The appellant has not asserted either argument. Instead, he bases his assertions on a number of federal, rather than state, cases. The strictness of Tennessee law is a marked contrast to federal habeas corpus proceedings which offer a broad basis for review. See Voss v. Raney, No. 02C01-9501-CC-00022 (Tenn. Crim. App. at Jackson, Aug. 2, 1995), perm. to appeal denied, (Tenn. Nov. 20, 1995). “We are not obligated to incorporate federal habeas corpus limits and laws into our state habeas corpus procedure.” Turks v. State, No. 02C01-9502-CR-00035 (Tenn. Crim. App. at Jackson, Jan. 3, 1997). This issue is without merit.

Nonetheless, we have considered the substance of the appellant’s claim and determine it to be without merit. Aggravated sexual battery is defined in pertinent part as the “unlawful sexual contact with a victim by the defendant or the defendant by a victim. . . . [when]. . . . the victim is less than thirteen (13) years of age.” See Tenn. Code Ann. § 39-13-504 (1991) and Tenn. Code Ann. § 39-13-502(a)(4) (1991). Count one of the indictment at issue before us charged in pertinent part:

. . . That Robert Duane Bitner. . . did unlawfully and feloniously commit an aggravated sexual battery by having unlawful sexual contact of the intimate parts of [FB], a female minor less than thirteen (13) years of age. . . .<sup>2</sup>

We find that the indictment at issue here sufficiently apprised the appellant of the offense charged, and is therefore valid.

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<sup>2</sup>Count two of the indictment contained the identical language used in count one; however the offense was committed against a different child, [LF].

As a matter of policy, this Court uses only the initials of minor victims.

A valid indictment in this state must contain the elements constituting the offense and must sufficiently apprise the accused of the offense he is called upon to defend. State v. Tate, 912 S.W.2d 785, 789 (Tenn. Crim. App. 1995); see also Tenn. Code Ann. § 40-13-202 (1990); State v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992). When the legislature neglects, however, to include the requisite mental state in the definition of an offense, permitting the application of any one of the three mental states set forth in Tenn. Code Ann. § 39-11-301(c), an allegation of criminal conduct will provide the accused constitutionally adequate notice of the facts constituting the offense. State v. Dison, No. 03C01-9602-CC-00051 (Tenn. Crim. App., Jan. 31, 1997). Moreover, since under these circumstances the accused's culpable mental state is not a material element of the offense, the appellant's challenge is not jurisdictional in nature, *i.e.*, a defect that renders the indictment invalid. Id. Other panels of this court have upheld the validity of indictments under similar challenges. See e.g., Slagle v. State, No. 03C01-9704-CR-00145 (Tenn. Crim. App. at Knoxville, June 10, 1997); State v. Robert Read, Jr., No. 01C01-9603-CR-00106 (Tenn. Crim. App. at Nashville, April 3, 1997); State v. James, No. 01C01-9601-CR-00016 (Tenn. Crim. App. at Nashville, Mar. 27, 1997); State v. Burrell, No. 03C01-9404-CR-00157 (Tenn. Crim. App. at Knoxville, Feb. 11, 1997). Contrary to the appellant's assertions, the allegations in the indictment sufficiently apprise the accused of the offense of aggravated sexual battery. Consequently, we find the indictment valid.

For the reasons stated above, we affirm the trial court's dismissal of the appellant's petition for writ of habeas corpus.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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PAUL G. SUMMERS, Judge