

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER SESSION, 1995

**FILED**  
January 31, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

CLIFFORD WAYNE ROGERS, )  
Appellant, )

C.C.A. NO. 02C01-9411-CR-00257  
Cecil Crowson, Jr.  
Appellate Court Clerk

VS. )

SHELBY COUNTY

STATE OF TENNESSEE, )  
Appellee. )

HON. JOHN P. COLTON, JR.  
JUDGE  
(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF SHELBY COUNTY

FOR THE APPELLANT:

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

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's dismissal of the Petitioner's petition for post-conviction relief because it was time-barred. We affirm the dismissal of the petition.

The Petitioner pleaded guilty to first degree murder in April of 1986. A petition for post-conviction relief was filed in June of 1987. This petition was denied after a hearing by the trial court. The trial court's decision was not appealed. The Petitioner filed a petition for post-conviction relief in September of 1993. This petition was filed pro se, and an attorney was appointed to represent the Petitioner in his post-conviction relief matter. His attorney filed a Supplemental Petition for a Writ of Habeas Corpus. In this petition, he inferred that although the post-conviction relief petition was barred by the statute of limitations, there is no time limit on writ of habeas corpus petitions. The Petitioner's attorney then filed an Amended Supplemental Petition for a Writ of Habeas Corpus.

The State filed a motion to dismiss the petition based on the fact that the petition for a writ of habeas corpus should be treated as a petition for post-conviction relief. The State argued that the Petitioner did not claim a question of constitutional dimension, and the petition was time-barred. The trial court agreed with the State and granted the State's motion.

The Petitioner's petition for a writ of habeas corpus can be treated as a petition for post-conviction relief. Tenn. Code Ann. § 40-30-108 (1990).<sup>1</sup> "A petition for habeas

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<sup>1</sup>This statute was repealed in 1995, however, it was in effect when the trial court dismissed the Petitioner's petition.

corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate . . . ." Id.

Habeas corpus relief is available in Tennessee 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 v. State, 851 S.W.2d 157, 164 (Tenn. 1993).

The Petitioner argued four issues in his petition for writ of habeas corpus. The first issue was that he was denied his Sixth Amendment right to counsel due to the ineffective assistance of counsel. The second issue was that he did not voluntarily make his guilty plea. The third issue was that he was sentenced under an invalid indictment because the indictment did not include the proper language to define murder. The fourth issue was that there was insufficient evidence to support a conviction of premeditated murder in the first degree.

The issues the Petitioner argues are not proper for relief under a petition for writ of habeas corpus. The Petitioner's first issue, that he received ineffective assistance of counsel, is clearly not a proper issue for a writ of habeas corpus. We have held that ineffective assistance of counsel is not a proper ground for habeas corpus relief because ineffective assistance of counsel makes the judgment voidable and not void. Issac Lydell Herron v. Fred Raney, No. 02C01-9502-CC-00033, Lauderdale County, slip. op. at 3 (Tenn. Crim. App., Jackson, filed Jul. 19, 1995), cert. denied, (Tenn. 1995); Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994).

The Petitioner's second issue, that he did not voluntarily make his guilty plea, is also not a proper ground for relief under a petition for a writ of habeas corpus. The Petitioner alleges that at the time he entered his guilty pleas, he was suffering from a mental affliction, his attorneys coerced him into pleading guilty, the prosecutor did not fully explain the exact nature of the charges against him and what would have to be proven, and the trial court did not advise him of his rights as required before a plea can be accepted. In Archer v. State, 851 S.W.2d 157 (Tenn. 1993), the Tennessee Supreme Court was faced with the question as to whether the voluntariness of guilty pleas may be the proper basis for a writ of habeas corpus. Our supreme court held that because the petition in that case "allege[d] only that, upon introduction of further proof and after appropriate findings of fact by the trial judge, the facially valid judgments may be voided. The appellant's convictions based upon his 1981 guilty pleas are, therefore, not void, but merely voidable." Id. at 164. The supreme court refused to grant the appellant his requested relief because his challenge to the voluntariness of the pleas did not establish that the convictions were void, but instead only showed that they were voidable. Id. at 165. The same can be said for the petition for writ of habeas corpus in the Petitioner's case. His challenges to the voluntariness of his guilty plea require investigation outside the record. Therefore, he can only show that they are voidable and not void.

The Petitioner's third issue is that he was convicted and sentenced under an insufficient indictment. The Petitioner's indictment read that the Petitioner did "unlawfully, feloniously, willfully, deliberately, maliciously and premeditatedly Kill and Murder" the victim. He argues that the indictment must charge that the killing was done "unlawfully and with malice aforethought," or the indictment will be insufficient. He relies on Witt v. State, 46 Tenn. 5 (1868), for this proposition. Our supreme court has stated, "[t]hat much of Witt which may be read as requiring that the indictment charge and [sic] technical term 'with malice aforethought' and that 'maliciously' is not of

equivalent import is hereby overruled." Campbell v. State, 491 S.W.2d 359, 362 (Tenn. 1973). Therefore, this issue is without merit.

The Petitioner's fourth issue is that there was insufficient evidence to convict him of first degree murder. This issue is also without merit because the Petitioner pleaded guilty to murder in the first degree. He was not tried, and therefore, no evidence was required to support his conviction.

It is clear that none of these issues meets the requirements for the issuance of a writ of habeas corpus that were reiterated in Archer. Therefore, the Petitioner's petition for a Writ of Habeas Corpus should be treated as a petition for post-conviction relief.

The Petitioner pleaded guilty to first degree murder in 1986. After 1989, the three-year statute of limitations had run against the grounds alleged in the petition. Therefore, this petition is barred by the three-year statute of limitations.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOHN H. PEAY, JUDGE