

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

**FILED**  
April 12, 1996  
Cecil W. Crowson  
Appellate Court Clerk

GEORGE T. BONDS, )  
 )  
Appellant, )  
 )  
 )  
VS. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellee. )

C.C.A. NO. 01C01-9508-CC-00260  
  
DICKSON COUNTY  
HON. LEONARD W. MARTIN  
JUDGE  
(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF DICKSON COUNTY

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

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

This is an appeal from an order of the trial court dismissing the Defendant's petition for post-conviction relief without an evidentiary hearing. The trial court determined that the petition was barred by the three-year statute of limitations. We affirm the judgment of the trial court.

On March 27, 1995, the Petitioner filed his petition for post-conviction relief in the Circuit Court for Dickson County, Tennessee. He sought post-conviction relief from certain sentences imposed as a result of guilty pleas entered on April 8, 1981. The petition alleged ineffective assistance of counsel in that counsel allowed the Petitioner to enter into a plea agreement which resulted in illegal sentences. The petition alleges that the sentences are illegal because they were ordered to be served concurrently with certain other sentences, yet the law required the sentences to be served consecutively because the crimes were committed while the Petitioner was an escapee from prison.

The petition alleges that the ordering of the sentences to be served concurrently resulted in an illegal sentence because of a violation of Tennessee Code Annotated section 39-5-719 (repealed 1989) and Rule 32(c)(3)(B) of the Tennessee Rules of Criminal Procedure.

The State of Tennessee filed its response to the petition and alleged that the petition should be dismissed because it was barred by the three-year statute of limitations then in effect.<sup>1</sup> The trial court agreed with the State's position and, without conducting an evidentiary hearing, dismissed the petition as being barred by the statute of limitations. It is from this order that the Petitioner appeals.

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<sup>1</sup>Tenn. Code Ann. § 40-30-102 (repealed 1995).

It is clear that the petition was filed outside the three-year period within which the Petitioner had to bring a petition for post-conviction relief. Although the Petitioner argues that the statute of limitations should not be applied to him because he was incarcerated out of state for a portion of his sentence and he had no knowledge that his sentence was illegal until 1994, we are unable to conclude that the three-year statute of limitations should not apply to this petition or that the application of the statute violates the petitioner's due process rights. See Phillips v. State, 890 S.W.2d 37 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994). We, therefore, cannot conclude that the trial court erred by dismissing the petition for post-conviction relief.

We note that the petition appears to allege facts which, if true, would render the sentences illegal and void. See Henderson v. State ex rel. Lance, 220 Tenn. 520, 419 S.W.2d 176 (1967); see also Taylor v. Morgan, 909 S.W.2d 17 (Tenn. Crim. App. 1995). In Archer v. State, 851 S.W.2d 157, 163 (Tenn. 1993), the Supreme Court noted that because the trial court in Lance was without authority to render a concurrent sentence when statutorily required to make the sentence consecutive, the judgment was facially void, and a writ of habeas corpus could issue to release Lance from his guilty plea.

As we have observed, the trial court herein dismissed the petition without an evidentiary hearing. The record on appeal contains only the Defendant's petition, a memorandum in support thereof, the State's response, and the trial court's order. From this record, we cannot be certain that the sentences are illegal. If they are, a court has the authority to correct an illegal sentence at any time, even if it has otherwise become final. State v. Burkhardt, 566 S.W.2d 871, 873 (Tenn. 1978). What is less clear is the procedure which must (or even may) be followed to bring the illegal sentence to the attention of the court, especially when a petition for post-conviction relief is barred by the statute of limitations. See Taylor v. Morgan, 909 S.W.2d 17 (Tenn. Crim. App. 1995); Archer v. State, 851 S.W.2d 157 (Tenn. 1993); Joseph Harvey Cutright v. State, No. 02C01-9108-

CC-00175, Henderson County (Tenn. Crim. App., Jackson, filed Mar. 25, 1992), applic. denied, State v. Cutright, Order, No. 02C01-9108-CC-00175 (Tenn., Jackson, filed Aug. 31, 1992).

Although it is clear that the petition for post-conviction relief was barred by the statute of limitations, the petitioner would generally be able to obtain relief from an illegal sentence by filing a petition for writ of habeas corpus. A trial court is not bound by the title of a pleading, but has the discretion to treat the pleading according to the relief sought. Norton v. Everhart, 895 S.W.2d 317, 319 (Tenn. 1995). However, a petition for habeas corpus relief should be filed with the court or judge most convenient in point of distance to the petitioner, unless a sufficient reason be given in the petition for not applying to said court or judge. Tenn. Code Ann. § 29-21-105. Thus, if the trial court in Dickson County treated the petition in the case sub judice as a petition for writ of habeas corpus, it appears the petition could be properly dismissed because the petition alleges that the petitioner is incarcerated in another county and gives no reason for not filing the petition in the county of the petitioner's incarceration.

Furthermore, it is also unclear as to whether the Petitioner would be entitled to habeas corpus relief. The sole relief available under Tennessee's habeas corpus statute is discharge from custody. Taylor v. Morgan, 909 S.W.2d at 20. Because the Defendant herein may be legally restrained on other valid sentences, he may not be entitled to habeas corpus relief. Tenn. Code Ann. § 29-21-122; see Chester Ray Hall v. State, No. 01C01-9405-CC-00163, Wayne County (Tenn. Crim. App., Nashville, filed July 26, 1995). We also note that absent statutory authority, the circuit court for Dickson County could not transfer this case to the court in the county where the Petitioner is incarcerated. Norton, 895 S.W.2d at 320.

The issue before us is whether the trial judge erred in dismissing a petition for post-conviction relief which was clearly barred by the statute of limitations. We cannot conclude that he did.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE