

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1994 SESSION

FILED
August 22, 1996
Cecil W. Crowson
Appellate Court Clerk

MILTON HOLT,)
)
Appellant,)
)
vs.)
)
STATE OF TENNESSEE and)
MIKE DUTTON, Warden,)
)
Appellee.)

C.C.A. No. 01C01-9402-CR-00056
Davidson County
Hon. Thomas Shriver, Judge
(Habeas Corpus)

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OPINION FILED: _____

AFFIRMED

PER CURIAM

OPINION

The petitioner, Milton Holt, appeals as of right from the dismissal of his petition for habeas corpus relief in which he claimed that his aggravated rape convictions and sentences were void. After a brief evidentiary hearing, the trial judge denied the requested relief. For the reasons discussed below we affirm the judgment of the trial court.

A review of the circumstances surrounding this case will place the trial court's ruling in context. In 1985, petitioner entered a nolo contendere plea to one count of aggravated rape of his daughter, Karen, and a similar plea to one count of aggravated rape of his son, Willie, and is now serving an effective twenty-year sentence at the Riverbend Maximum Security Institution in Davidson County. The pleas were entered in the Circuit Court for Williamson County. Petitioner filed a petition for post-conviction relief in Williamson County in which petitioner alleged ineffective assistance of counsel. The trial court denied relief after an evidentiary hearing. Milton Holt v. State, No. 86-67-III, Williamson Co. (Tenn. Crim. App., March 3, 1987), app. denied, (Tenn. June 8, 1987). A second petition, initiated as a habeas corpus proceeding in Davidson County, was transferred to Williamson County as a post-conviction petition. The case was dismissed as inappropriate for habeas corpus relief and untimely under the post-conviction statute. Milton Holt v. State, No. 01C01-9110-CC-00321, Williamson Co. (Tenn. Crim. App. June 12, 1992), app. denied, (Tenn. 1992).¹

In 1993, petitioner filed a pro se petition for habeas corpus relief in the Criminal Court of Davidson County. Appointed counsel filed two amended petitions, the last on September 27, 1993. The petitions alleged that the facts read into the record to form the legal basis for Holt's convictions were false and that the pleas are void. On

¹ Petitioner also sought habeas corpus relief in the United States District court for the Middle District of Tennessee. See Milton Lee Holt v. Larry Lack, Warden, Civil Action No. 3:88-0674 (M.D. Tenn., January 5, 1989, Nashville), alleging ineffective assistance of counsel. The district court denied relief without an evidentiary hearing. Holt, No. 01C01-9110-CC-00321, slip op. at 3.

September 30, the district attorney general filed a motion to dismiss. At a hearing on October 1, the trial judge, while agreeing that the state's position was technically correct, decided to hear the testimony of the defense witnesses who were present before making a ruling. Petitioner's children testified that the accusations against him were false. They stated that they had accused their father only because they were harassed and threatened by the police officer who was investigating the case. Three letters the children had written to their father were admitted into evidence. Petitioner testified that he had never sexually abused either child.

The trial judge ruled from the bench and made a single factual finding. He found that the victims' recantation was "basically incredible and unbelievable" and that "it is not true that they were not molested." The trial judge then denied the petition for writ of habeas corpus.

In this appeal, petitioner argues that his children's recantation of their accusations are "later-arising grounds" for post-conviction relief under Burford v. State, 845 S.W.2d 204 (Tenn. 1992) and that his failure to raise the issue earlier was the result of circumstances amounting to justifiable excuse or neglect. He no longer contends that habeas corpus relief is appropriate in these circumstances. The state argues that the trial court erred in granting a hearing before dismissing the petition, that the recantation of a witness, without more, does not create grounds for challenging a conviction, and that the facts in this case do not fall within the narrow exceptions to the application of the three-year time limit prescribed by T.C.A. § 40-30-102.

Most of these issues are moot. The petition was filed in Davidson County, the court nearest to petitioner's place of incarceration, as required by T.C.A. § 29-21-205.² A post-conviction petition must be filed in the court where the convictions were

² **Place of application for writ.** - The application should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given for not applying to such

entered. T.C.A. § 40-30-103(a) (Supp. 1994) (repealed 1995). Williamson County Circuit Court must hear any post-conviction petition in this case. In this instance, the trial court in Davidson County lacked statutory authority to consider a post-conviction petition. A habeas corpus petition was filed and a habeas corpus petition was denied.

Habeas corpus relief in Tennessee is very limited. It is available only when it appears upon the face of the judgment or the record of the proceedings that a convicting court is without jurisdiction or authority to sentence a defendant or that a defendant's sentence has expired. T.C.A. § 29-21-101 (1980 Repl.); Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). Unlike post-conviction relief, a proper petition for a writ of habeas corpus may be brought at any time while the petitioner is incarcerated. Id. The petition in this case alleges only that, upon the introduction of further proof and appropriate findings by the trial court, petitioner's convictions may be voided. Petitioner's 1985 convictions are not void on their face. They are merely voidable and may not be challenged except by a petition for post-conviction relief. Id.

In any event, a trial court may only treat a suit for habeas corpus as a suit for post-conviction relief if the remedy is adequate and appropriate under the circumstances of the case. T.C.A. § 40-30-108 (1990 Repl.) (repealed 1995). In this case, the trial judge made no findings concerning the availability of post-conviction relief.³ The record, however, is clear. Petitioner pled guilty on March 11, 1985. No direct appeal was filed. The statutory period for filing post-conviction petitions in such cases expired on July 1, 1989. See Abston v. State, 749 S.W.2d 487, 488 (Tenn. Crim. App. 1988). The 1993 petition was filed nearly four years after the statute had run. In addition, the record shows that petitioner had notice of the alleged grounds for relief

court or judge. T.C.A. § 29-21-105 (1980 Repl.)

³ In the trial court, the petitioner did not ask that the petition be treated as one for post-conviction relief. He did not ask that the suit be transferred to the Williamson County Circuit Court. He never argued that the grounds for relief were such that the statute of limitations would not bar his petition.

before July 1, 1989. Petitioner testified that he had a telephone conversation with his daughter in 1987 in which she apologized to him for making false statements to the police. The record also contains his daughter's letter dated April 4, 1987. In that letter, she states that she is "sorry for lying on you." The letter from his son is dated June 28, 1989. Petitioner had notice of these grounds for relief and could have raised them prior to the expiration of the statutory period. There were no "later-arising grounds" for the trial court to consider. Post-conviction procedures would not provide any effective relief, and transferring the petition to Williamson County would have been an empty gesture. The trial court properly dismissed the petition without considering it as one for post-conviction relief.

A trial judge may properly dismiss a petition for writ of habeas corpus without an evidentiary hearing if the facts alleged in the petition, even if true, would not serve as a basis for relief. Carroll v. Raney, 868 S.W.2d 721, 723 (Tenn. Crim. App. 1983). Although the dismissal of this petition without an evidentiary hearing would have been proper, the trial judge held a brief hearing. The record in this case discloses that the trial judge was considering whether petitioner's counsel should be granted a continuance so that he could make an adequate response to the state's motion to dismiss the petition without a hearing.⁴ Because the witnesses were present, the trial judge decided to hear the testimony. The record indicates that if the trial judge found the testimony sufficiently credible to justify further briefing and argument, he would have given defense counsel the opportunity to respond more fully. However, after listening to the two victims, the trial judge found their testimony completely incredible. No amount of legal research and argument would change the factual result, and further action would be superfluous. The record supports both the trial judge's factual finding and his decision to dismiss the petition forthwith.

⁴ The state filed the motion the day before the hearing, and defense counsel had just received a copy.

The petition did not allege facts that would afford habeas corpus relief, and under the circumstances, post-conviction relief was neither adequate nor appropriate. The trial court's dismissal of the petition for writ of habeas corpus is affirmed.

PER CURIAM

(Tipton, Welles, JJ.)
(Special Judge Bevil not participating)