

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1997 SESSION

FILED
October 31, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

JAMES CLYDE SAYLOR,

Appellant,

VS.

**HOWARD CARLTON and
STATE OF TENNESSEE**

Appellees

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C.C.A. NO. 03C01-9612-CR-00453

JOHNSON COUNTY

**HON. LYNN W. BROWN,
JUDGE**

(Habeas corpus)

FOR THE APPELLANT:

FOR THE APPELLEES

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The petitioner filed his petition for writ of habeas corpus on August 6, 1996, alleging that his 1989 conviction for aggravated rape committed in 1987 must be set aside pursuant to this Court's opinion in State v. Roger Dale Hill, Sr., No. 01C01-9508-CC-00267, Wayne County (Tenn. Crim. App. filed June 20, 1996, at Nashville). Specifically, he claims that the indictment charging him with the crime fails to allege the essential element of his mens rea and his conviction must therefore be set aside. The court below summarily denied the petition on the grounds that it failed to state a basis for relief. The petitioner appeals. We affirm the judgment below.

The charge against the petitioner provides that he "did unlawfully engage in sexual penetration with [the victim], twelve (12) years of age, by making the said [victim] perform fellatio on" him in violation of T.C.A. § 39-2-603. In Hill, a case dealing with a post-1989 criminal offense, the indictment alleged merely that the defendant had "unlawfully sexually penetrate[d] [the victim] a person less than thirteen (13) years of age." This Court found that the use of the word "unlawfully" was not sufficient to allege the defendant's mens rea, an essential element of the offense. Accordingly, the indictment was found fatally defective.

The State contends that Hill is inapposite to this case because the petitioner's crime was committed in 1987 and therefore the statutes relied upon in Hill have no application, citing to this Court's Rule 20 Order in Gregory L. Hatton v. State, No. 02C01-9611-CC-00407, Lake County (Tenn. Crim. App. Order filed Feb. 19, 1997, at Jackson). We agree. Thus, as we stated in that case, "the decision in Hill does not control our review of the issue raised herein."

At the time of the offense in this case, aggravated rape was defined as

“unlawful sexual penetration of another accompanied by any of the following circumstances” including the age of the victim being less than thirteen years. T.C.A. § 39-2-603(a)(4) (1982). The statutory requirements for an indictment alleging this (or any other) crime were found in T.C.A. § 40-13-202 (1982): “The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment.” We think the indictment at issue meets these requirements.

Moreover, even if Hill applied to the instant indictment, we think the allegation that the defendant committed the offense “by making the said [victim] perform fellatio on [him]” is sufficient to allege any necessary mens rea element. The use of the term “making” in this context renders it equivalent to “forcing.” One person forces another to do something intentionally, deliberately and/or knowingly: not accidentally. Accordingly, the language contained in the indictment was sufficient to allege a criminal mens rea. This issue is without merit.

The petitioner also complains that the court below erred when it dismissed his petition summarily. It did not. Habeas corpus relief is available only when the judgment is void upon its face or the petitioner’s sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); Passarella v. State, 891 S.W.2d 619, 626 (Tenn. Crim. App. 1994). No such grounds have been demonstrated here: the “defect” about which the petitioner complains did not divest the trial court of jurisdiction or render the subsequent post-indictment proceedings a nullity. Nor does the petition set forth grounds

for relief under the post-conviction act.¹ The indictment charging the petitioner with aggravated rape was sufficient on which to base a valid conviction, and no evidentiary hearing was therefore necessary. The judgment below is therefore affirmed.

JOHN H. PEAY, Judge

CONCUR:

DAVID G. HAYES, Judge

WILLIAM M. BARKER, Judge

¹Furthermore, the instant petition was not filed in the county in which the conviction occurred. Accordingly, the court below lacked jurisdiction to consider it as a petition for post-conviction relief. See Oliphant v. State, 806 S.W.2d 215, 217 (Tenn. Crim. App. 1991).