

IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 5, 2004

TERRY LEE CLIFTON v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Lake County
No. 04-CR-8562 R. Lee Moore, Jr., Judge**

No. W2004-01385-CCA-R3-HC - Filed June 9, 2005

Terry Lee Clifton pleaded guilty to one count of forgery in June 1977, five counts of forgery in September 1977, and three counts of forgery in 1981. Additionally, he was convicted of grand larceny in 1983. Based on the petitioner's criminal history, he was sentenced as a habitual offender after his 1983 conviction and therefore is currently serving a life sentence. Since his incarceration, the petitioner has challenged his convictions and sentences multiple times. *See Terry Lee Clifton v. State*, No. 02C01-9110-CC-00234 (Tenn. Crim. App., Nashville, Apr. 13, 1994) (*Clifton IV*); *State v. Terry Lee Clifton*, C.C.A. No. 26 (Tenn. Crim. App., Jackson, Nov. 7, 1990) (*Clifton III*); *State v. Terry Lee Clifton*, C.C.A. No. 8 (Tenn. Crim. App., Jackson, Feb. 19, 1986) (*Clifton II*); *State v. Terry Lee Clifton*, C.C.A. No. 22 (Tenn. Crim. App., Jackson, May 31, 1984) (*Clifton I*). In his current *pro se* appeal, the petitioner challenges the lower court's dismissal of his *habeas corpus* petition, which alleges that his life sentence is void. After a thorough review of the record and applicable law, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON and DAVID G. HAYES, JJ., joined.

Terry Lee Clifton, *Pro Se*, Appellant.

Paul G. Summers, Attorney General & Reporter; and David H. Findley, Assistant Attorney General, for the Appellee, State of Tennessee.

OPINION

The petitioner, Terry Lee Clifton, is presently serving a life sentence. The petitioner received this life sentence in 1983 when the sentencing court convicted him of being a

habitual offender based upon several of his prior felony convictions, namely five September 1977 forgery convictions and three 1981 forgery convictions. *See Clifton I*. In the instant appeal, the petitioner alleges that his 1983 life sentence is void. He claims that he was improperly classified as a habitual offender because he lacks the requisite number of necessary felony convictions, that his underlying convictions include illegally-imposed concurrent sentences, and that the *habeas corpus* court improperly refused to appoint counsel in his case or hold an evidentiary hearing on the issues raised in his petition.

I. Standard of Review and Scope of *Habeas Corpus*

The legal issues raised in *habeas corpus* hearings are questions of law, and our review of questions of law is *de novo*. *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000) (“[W]hether to grant the petition [for *habeas corpus* relief] is a question of law that we review *de novo*.”); *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997) (question of law reviewed on appeal *de novo*).

Habeas corpus relief is available only when the aggrieved party’s conviction is void or the sentence has expired. *See Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). The petitioner in the present case makes no allegation that his sentences have expired; he only claims that his sentences, and hence his conviction judgments, are void.

A void conviction is one which strikes at the jurisdictional integrity of the trial court. *Id.*; *see State ex rel. Anglin v. Mitchell*, 575 S.W.2d 284, 287 (Tenn. 1979); *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). Because in this case the trial court apparently had jurisdiction over the *actus reus*, the subject matter, and the person of the petitioner, the petitioner’s jurisdictional issue is limited to the claim that the court was without authority to enter the judgment. *See Anglin*, 575 S.W.2d at 287 (“‘Jurisdiction’ in the sense here used, is not limited to jurisdiction of the person or of the subject matter but also includes lawful authority of the court to render the particular order or judgment whereby the petitioner has been imprisoned.”); *see also Archer*, 851 S.W.2d at 164; *Passarella*, 891 S.W.2d at 627.

II. Propriety of the Petitioner’s Habitual Offender Classification

In his *habeas corpus* petition and appellate brief, the petitioner challenges his life sentence on the basis that the court which sentenced him for his 1983 grand larceny conviction improperly convicted him of being a habitual offender. Specifically, the petitioner contends that his five September 1977 convictions should have been consolidated for sentencing purposes as one conviction and that his three 1981 convictions should have been similarly consolidated. The petitioner posits that consolidation is warranted because these convictions represent two criminal episodes rather than eight distinct crimes. Presumably, the petitioner is arguing that he was improperly sentenced because the Tennessee Habitual Criminal Act required that those classified as a habitual offender be convicted of three prior felonies and that each felony conviction represent a “separate offense, committed at different times and on separate occasions.” Tenn. Code Ann. § 40-2801 (1975). The state counters that this court has previously addressed and

dismissed this issue in one of the petitioner's earlier appeals, and therefore the law of the case bars our reconsideration of the issue. We agree.

In *Clifton I*, the petitioner challenged his habitual offender status as unconstitutional on the basis that his qualifying offenses were all forgeries and thus sentencing him as a habitual offender ran afoul of *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983), which forbids courts from applying the habitual offender classification to certain offenders. This court found that the petitioner's claim was meritless because his classification was valid pursuant to *State v. Freeman*, 669 S.W.2d 688 (Tenn. Crim. App. 1983), which explained that the holding of *Solem* was inapplicable to the Tennessee Habitual Criminal Act. *See Clifton I*; *see also Freeman*, 669 S.W.2d at 693 (explaining that the Tennessee habitual offender statute does not possess the same characteristics that caused the United States Supreme Court to find the Texas habitual offender statute unconstitutional).

Also, in *Clifton IV*, an appeal of a post-conviction proceeding, the petitioner presented the claim that the trial judge had erroneously calculated his habitual criminal prior convictions as more than two. In response, this court said that this issue had no merit. *Clifton IV*, slip op. at 7.

The law of the case doctrine bars reconsideration of issues previously determined in an earlier appellate court decision. *See Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). However, certain limited circumstances may constitute an exception to this rule, namely

(1) evidence offered at a trial or hearing after remand [that] was substantially different from evidence in the initial proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in controlling law that has occurred between the first and second appeal.

Id.

Because this petitioner raised and this court addressed the propriety of his habitual offender status, the law of the case doctrine prohibits our reconsideration of this issue absent one of the circumstances outlined above. The petitioner does not allege nor do we find that any of those circumstances are present in the instant appeal. Thus, this issue does not warrant relief.

III. Legality of Underlying Convictions Supporting Petitioner's Habitual Offender Classification

Next, the petitioner asserts that two of the underlying convictions supporting his habitual offender status are illegal and thus invalidate his classification as a habitual offender. The petitioner raised this issue in his supplement to his *habeas corpus* petition. Pursuant to *McLaney v. Bell*, 59 S.W.3d 90, 94 (Tenn. 2001), the petitioner argues that the sentencing courts who imposed concurrent sentences for his September 1977 and 1981 convictions illegally sentenced him because he committed these crimes while on bond or parole. He relies upon Tennessee Code Annotated section 40-20-111(b) (2003) and Tennessee Rule of Criminal

Procedure 32(c)(3) to claim that he should have received consecutive sentences for these convictions and that concurrent sentencing was foreclosed. *See* Tenn. Code Ann. § 40-20-111(b) (2003) (“In any case in which a defendant commits a felony while such defendant was released on bail in accordance with the provisions of chapter 11, part 1 of this title, and the defendant is convicted of both such offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that such sentences be served cumulatively.”); Tenn. R. Crim. P. 32(c)(3) (“Where a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply: . . . (C) to a sentence for a felony where the defendant was released on bail and the defendant is convicted of both offenses.”). Accordingly, the petitioner asserts that these illegally-imposed sentences are void and thus render his habitual offender status illegal, as well.

The state responds to these assertions by arguing that the petitioner is attempting an impermissible collateral attack on the validity of his September 1977 and 1981 convictions through his *habeas corpus* petition, which attacks the validity of the 1983 sentencing court’s decision to classify him as a habitual offender and thereby impose a life sentence. The state posits that such a collateral attack is proscribed by *State v. Prince*, 781 S.W.2d 846 (Tenn. 1989). We disagree.

In *Prince*, our supreme court addressed a scenario in which two petitioners had unsuccessfully pursued prior direct appeals of their convictions and sentences as well as prior post-conviction petitions challenging their convictions. *Id.* at 848. The petitioners then filed a second set of post-conviction petitions challenging the voluntariness of their guilty pleas for crimes that were used as a basis for a later habitual offender classification. *Id.* The court found that the petitioners’ attempted collateral attack on these prior convictions was impermissible. *Id.* at 851. Specifically, the court instructed,

A defendant cannot maintain a collateral attack *by post-conviction* on his status of habitual criminality by attacking the validity of his predicate convictions. Prior to making such an attack on an habitual criminal conviction, he must by appropriate petition in the court where his earlier conviction took place seek a hearing to determine the constitutional validity of any such prior conviction. If he is successful in those proceedings he then exposes the enhanced sentence on the subsequent conviction to collateral attack as well.

Id. (emphasis added and citation omitted). We find *Prince* distinguishable from the case at bar. As noted above, *Prince* involves an appeal from a denial of a post-conviction petition. *Id.* We conclude that the *Prince* court’s foreclosure of the petitioners’ attempt to attack their underlying convictions turns on the means by which the petitioners were attempting their attack. The Post-Conviction Procedure Act does not allow a petitioner to attack multiple proceedings or trials, and it requires a petitioner to bring the post-conviction petition in the court that imposed the challenged conviction. Tenn. Code Ann. § 40-30-102(c) (2003) (stating that a petitioner may only bring one post-conviction petition); *id.* § 40-30-104(c) (stating that a petitioner may only attack one trial or proceeding per petition); *id.* § 40-30-104(a) (stating that a petitioner must file

his or her petition in the court from which the challenged conviction originated). The petitioners in *Prince* were attempting to challenge their convictions that resulted in habitual offender classification, as well as the predicate convictions upon which the court relied when determining them to be habitual offenders. The Post-Conviction Procedure Act does not allow for such collateral attacks. *See id.* § 40-30-104(a), (c). Conversely, a *habeas corpus* petition does not possess such limitations. Accordingly, we conclude that *Prince* does not bar the petitioner’s challenge to his allegedly illegally-imposed concurrent sentences.

Determining that *Prince* poses no bar to the challenges mounted in the present *habeas corpus* action does not equate, however, with determining that the collateral attacks upon the habitual criminal predicate convictions are otherwise authorized. Indeed, we hold that this action in *habeas corpus* may not be used to challenge the predicate convictions when the petitioner is no longer imprisoned or restrained of his liberty as a direct result of these convictions.

To be eligible for *habeas corpus* relief in Tennessee, a petitioner must be “imprisoned or restrained of liberty.” Tenn. Code Ann. § 29-21-101 (2000). In *Hickman v. State*, 153 S.W.3d 16 (Tenn. 2004), our supreme court held that no action in *habeas corpus* lies when “the restraint on a person’s liberty is merely a collateral consequence of the challenged judgment.” *Id.* at 23. A person is not restrained of his liberty for *habeas corpus* purposes “unless the challenged judgment *itself* imposes a restraint upon the petitioner’s freedom of action or movement.” *Id.* at 23 (emphasis added). Specifically, “[u]se of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a *habeas corpus* challenge to the original conviction long after the sentence on the original sentence has expired.” *Id.*

Applying *Hickman* to the present case, we conclude that the petitioner may not use the writ of *habeas corpus* to attack his pre-1983 convictions because the sentences on those earlier, predicate convictions have been served and have expired. We are aware that the petitioner claims that some of the predicate convictions are void because the conviction court illegally imposed concurrent sentencing when consecutive sentencing was mandatory. *See, e.g., McLaney v. Bell*, 59 S.W.3d 90, 91 (Tenn. 2001) (holding that “if the face of the judgment or the record of the underlying proceedings shows that the concurrent sentence[] is illegal, such sentence creates a void judgment for which *habeas corpus* relief is available”).¹ *McLaney* notwithstanding, however, the petitioner may not now attack these convictions because he is no longer imprisoned or restrained of his liberty in consequence of them.

¹ We note that Tennessee Rule of Criminal Procedure 32 did not come into effect until July 13, 1978. *See* Tenn. R. Crim. P. 59, advisory commission cmts. (stating that the rules became effective July 13, 1978). Also, the provision for mandatory consecutive sentencing contained in Tennessee Code Annotated section 40-20-111(b) was not effective until 1979. *See* Tenn. Code Ann. § 30-30-111 (1982) (legislative history). Thus, although neither provision for mandatory consecutive sentencing was effective when the defendant was convicted in 1977, both were in force when he was convicted in 1981. Apparently, the 1981 convictions were based upon offenses that occurred in 1980 and 1981, after the effective dates of Rule 32 and Code section 40-20-111(b). It appears, then, that the petitioner has no claim of illegal concurrent sentences relative to the convictions imposed in September 1977, based on a bail or parole status at that time. There were no operative mandatory provisions at that time for consecutive sentences of an on-bail or on-parole offender.

One significant upshot of this determination is that the *habeas corpus* court has no authority to scrutinize the face of the record of the predicate convictions to determine whether the judgments therein imposed were void. *See Hickman*, 153 S.W.3d at 27 (reaffirming the “well-settled principle that a judgment is void only if the face of the judgment or the record of the proceedings clearly reflects that the court lacked jurisdiction to render the judgment or that the sentence is expired”).

That said, we conclude that neither *Hickman* nor any other tenet of *habeas corpus* law of which we are aware bars the petitioner from attacking the 1983 habitual criminal conviction. In adjudicating a *habeas corpus* attack upon this 1983 judgment, the court must determine whether the face of the judgment or record of that proceeding reflects that the trial court lacked jurisdiction to impose the judgment. *See id.* In 1983, a habitual criminal designation was articulated as a conviction of being a habitual criminal, *see* Tenn. Code Ann. §§ 39-1-803, -805 (1982) (repealed 1989), which was defined as person who had been previously convicted of a specified number of felonies, *see id.* § 39-1-801 (1982) (repealed 1989). Thus, the 1983 conviction court’s jurisdiction to enter the habitual criminal judgment is predicated upon the petitioner having the requisite prior convictions, and in the present *habeas corpus* action, the court should examine the face of the judgment and record in that 1983 proceeding to determine whether jurisdiction to impose the judgment existed. In other words, the *habeas corpus* court should determine whether the predicate convictions are established in the record of the habitual criminal proceeding. *See id.* § 39-1-804 (1982) (repealed 1989) (to establish a factual basis for a habitual criminal conviction, the state may introduce into evidence “a judgment of conviction”) (emphasis added). Because this determination necessarily entails an adjudication that the predicate convictions exist, the *habeas corpus* court determines whether the face of the habitual criminal judgment or record evinces the existence of the predicate convictions as jurisdictional bases, and because the predicate convictions – or any other convictions – may not emanate from void judgments, the *habeas corpus* court is called upon, when the predicate conviction judgments appear on the face of the habitual criminal proceeding record, to assure that nothing appears on the face of the record that indicates voidness of the preceding judgments.

The issue of whether concurrent sentencing in the predicate convictions resulted in void judgments was raised in the supplemental petition and was not addressed by the *habeas corpus* court. Thus, although the examination described above was not performed by the *habeas corpus* court, we have reviewed the record of the habitual criminal proceeding contained in the archive of this court since the conclusion of the appeal in that proceeding (*Clifton I*). *See* Tenn. R. App. P. 13(c); *Dewayne Cathey v. State*, No. W2003-00411-CCA-R3-CD (Tenn. Crim. App., Jackson, July 28, 2004). This review reveals that, in the habitual criminal proceeding, the state established the prior predicate convictions through the testimony of the Madison County Circuit Court Clerk, who exhibited to his testimony copies of the indictments and guilty-plea documents with respect to the 1977 and 1981 predicate convictions. Although the clerk did not introduce copies of the prior conviction judgments, he affirmatively testified that the petitioner was convicted in the circuit court of the offenses specified in the exhibited indictments and plea agreements. Nothing in the clerk’s testimony, the exhibited documents, or elsewhere in the record of the habitual criminal proceeding indicates that the petitioner was on bond or parole when he committed the offenses resulting in the 1977 and 1981 convictions. We conclude that

the face of the habitual criminal record supports a finding that the habitual criminal conviction is not void.

Accordingly, the judgment of the *habeas corpus* court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE