IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 17, 2000

STATE OF TENNESSEE v. NELSON KEITH FOSTER

Direct Appeal from the Criminal Court for Sullivan County
No. S41054, S41055, S41056 Phyllis H. Miller, Judge, and R. Jerry Beck, Judge

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No. E1999-02778-CCA-R3-PC
January 2, 2001

The defendant pled guilty to three counts of violating the Motor Vehicle Habitual Offender Act, and was sentenced to three consecutive three-year sentences. Tenn. Code Ann. § 55-10-601. The defendant raises the following issues in this appeal: 1) whether the trial court erred by not allowing him to withdraw his guilty pleas after the trial court imposed his sentence, but before the judgment became final; and 2) whether the trial court erred by denying the defendant alternative sentencing and imposing consecutive sentences. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES, J., and WILLIAM B. ACREE, SP. J., joined.

Mark H. Toohey, Kingsport, Tennessee, for the appellant, Nelson Keith Foster.

Paul G. Summers, Attorney General and Reporter; Clinton J. Morgan, Counsel for the State; H. Greeley Wells, Jr., District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

In a hearing conducted on September 9, 1994, the defendant, Nelson Keith Foster, was adjudged to be a habitual traffic offender in accordance with the Motor Vehicle Habitual Offender Act. See Tenn. Code Ann. § 55-10-601. On May 26, 1997; May 31, 1997; and June 5, 1997, while still being considered a Habitual Traffic Offender, the defendant was stopped by police while driving a vehicle. The defendant was later indicted on three counts of violating the Motor Vehicle Habitual Offender Act, each a Class E felony. On July 14, 1998, the defendant pled guilty to the three counts, and was sentenced to three consecutive three-year sentences. After being sentenced, the defendant entered a motion to have his guilty pleas set aside. On July 12, 1999, the trial court held a hearing to consider the defendant's motion, which was denied.

On April 10, 2000, the trial court granted the defendant a delayed appeal. This appeal followed.

FACTS

On September 9, 1994, the defendant was adjudged to be a habitual traffic offender in accordance with the Motor Vehicle Habitual Offender Act. See Tenn. Code Ann. § 55-10-601. On May 26, 1997; May 31, 1997; and June 5, 1997, while still being considered a Habitual Traffic Offender, the defendant was stopped by police while driving a vehicle. The defendant was later indicted on three counts of violating the Motor Vehicle Habitual Offender Act, each a Class E felony. On July 14, 1998, the defendant pled guilty to the three counts.

At a sentencing hearing on October 15, 1998, the defendant was sentenced to three consecutive three-year sentences. On October 26, 1998, the defendant entered a pro se motion to have his guilty pleas set aside. The judgment of the court in this case was entered on December 16, 1998. On December 16, 1998, newly appointed counsel for the defendant filed a formal motion to have the guilty pleas of the defendant set aside. The trial court heard the defendant's motion on July 12, 1999, and then denied the motion.

On April 10, 2000, the Sullivan County Criminal Court granted the defendant an order for a delayed appeal. The order was filed with the Appellate Court Clerk in Knoxville on April 13, 2000. Notice of appeal was filed with the Circuit Court Clerk of Sullivan County on April 27, 2000. This appeal followed.[1]

NATURE OF APPEAL

Prior to engaging in our analysis, we pause to clarify that this appeal is not an appeal from a post-conviction proceeding. See Tenn. Code Ann. § 40-30-216. It is clear to this Court that the trial court's grant of a delayed appeal under Tennessee Code Annotated section 40-30-213, and the defendant's collateral attack on his adjudication as an habitual traffic offender have partially cloaked the true nature of this appeal in a haze that has caused it to be considered an appeal based upon post-conviction relief. Nothing in the record, however, indicates that a post conviction hearing has already been conducted. As such, an appeal seeking post-conviction relief at this time would be premature.

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[1] A careful reading and sorting of the record has yielded the facts set forth herein. Initially, the record appears to be a confusing mixture of legal documents. However, close analysis of the record has shown there to be pieces of a separate case in the record that does not pertain to the instant appeal. Both the record and the defendant's brief support our understanding that the issues raised in this case pertain to cases S41,054; S41,055 and S41,056, all violations of the Motor Vehicle Habitual Offender Act. The water becomes clouded on occasion as legal documents from case number S41,057 appear in the record supplied to this Court. According to the technical record, case number S41,057 is a charge for disorderly conduct, which was separated from the other three counts on October 15, 1998, at the sentencing and probation hearing, and was set for announcement on January 13, 1999. The documents pertaining to case number S41,057 are irrelevant to this appeal.

The true nature of this appeal is found in the issues set forth in the defendant's brief, which are not of a post-conviction relief nature. As set forth above, those issues are: 1) whether the trial court erred by not allowing the defendant to withdraw his guilty pleas after the trial court imposed an effective nine-year sentence, but before the judgment became final; and 2) whether the trial court erred by denying the defendant alternative sentencing and imposing consecutive sentences.

UNTIMELY FILLING OF NOTICE OF APPEAL

It has long been established in this state that "as a general rule a trial court's judgment becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed," neither of which occurred in this case. State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996). After a judgment becomes final, the trial court may not allow a guilty plea to be withdrawn. Tenn. R. Crim. P. 32(f). The mere fact that the defendant filed a motion to withdraw his guilty pleas did not stop the judgment from becoming final on December 16, 1998. This Court has specifically held that:

> [T]he filing of a motion to withdraw a plea of guilty does not suspend the time within which a judgment of conviction based upon the guilty plea becomes final. If the trial court has not ruled upon the motion to withdraw the guilty plea prior to the time the judgment becomes final, the motion becomes moot because the trial court no longer has authority to grant the motion.

State v. Peele, No. 1999-00907-CCA-R3-CD, *2 (Tenn. Crim. App. filed June 20, 2000, at Knoxville) (citing State v. Kawaski Devel Taylor, No. W1998-006560-CCA-R3-CD, *2 (Tenn. Crim. App. filed March 10, 2000, at Jackson). In the instant case, the judgment of the trial court became final on December 16, 1998, and the trial court had no jurisdiction to rule on the motion after that date. See Id.; see also Pendergrass, 937 S.W.2d at 837.

Having established that on December 16, 1998, the trial court lost jurisdiction to rule on the defendant's motion to withdraw his guilty plea, the trial court did not have the authority to grant the defendant a delayed appeal. Further, a trial court may grant a delayed appeal only after an evidentiary hearing on a petition for post-conviction relief has been conducted. State v. Wilson, 530 S.W.2d (Tenn. 1975); Whisnant v. State, 532 S.W.2d 572, 574 (Tenn. Crim. App. 1975);. If an evidentiary hearing on a petition for post-conviction relief has been conducted, and the conditions set forth under Tennessee Code Annotated section 40-30-213 are met, then a trial court may grant a delayed appeal. In this instance the trial court overstepped its authority.

Having set forth the parameters within which a trial court may grant a delayed appeal, we turn our attention to the rules surrounding appeals as of right. Under Tennessee Rule of Appellate Procedure 4, a notice of appeal is required to "be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." Tenn. R. App. P. 4(a). (emphasis added) In the instant case, the notice of appeal was required to be filed by January 15, 1999. The notice of appeal, however, was not filed until April 27, 2000, more than one year and three months after the filing deadline had passed. Needless to say, a timely

notice of appeal was not filed in this case. The failure to file a notice of appeal document within thirty days after the entry of the judgment *may only be waived by the appropriate appellate court* if such is found to be in the best interest of justice.

In determining whether to waive the timely filing requirement, we turn our attention to the events that led up to the defendant's delay in filing a notice of appeal. We first note the defendant's request for two changes of counsel during the course of the proceedings in this case. Certainly this played a role in the delay. Second, we note that the record indicates that counsel on both sides submitted several motions for postponements, wherein the proceedings were rescheduled. Third, we note that the trial judge expressed concern about the dynamics of his courtroom inadvertently causing the defendant to run afoul of the time requirements set forth under Tennessee Rule of Appellate Procedure 4. Fourth, we note the trial judge's mistaken belief that he could remedy any violations of the time requirements set forth for filing a timely appeal by granting a delayed appeal. Each of these factors weigh heavily in this Court's decision of whether or not to waive the timely filing requirement in this case. Given that three out of four of these factors were clearly beyond the control of the defendant, it is the opinion of this Court that justice would be best served by waiving the thirty (30) day filing requirement, and addressing the issues raised by the defendant.

ANALYSIS

Guilty Pleas

The defendant first contends that the trial court erred by not allowing him to withdraw his guilty pleas after the trial court imposed an effective nine-year sentence, but before the judgment became final. We disagree.

As set forth above, after the judgment of the trial court became final, the trial court no longer had the authority to grant the defendant's motion. This Court recently addressed similar issues in Peele and Taylor. In both of these cases this Court held that the trial court's order denying a defendant's motion to withdraw his guilty plea after the judgment became final was a nullity. Peele, No. 1999-00907-CCA-R3-CD at *2; Taylor, No. W1998-006560-CCA-R3-CD at *3. We concluded our analysis in Peele by holding that because the order of the trial court was void, the defendant had nothing to appeal. Peele, No. 1999-00907-CCA-R3-CD at 2. While Taylor was more subtle than Peele, the outcome was essentially the same. Specifically, this Court dismissed Taylor's attempted appeal from the trial court's order denying his motion to withdraw his guilty plea. Taylor, No. W1998-006560-CCA-R3-CD at *3. As in both Peele and Taylor, the defendant in the instant case has nothing to appeal regarding his guilty pleas. This issue is without merit.

Alternative Sentencing and Consecutive Sentences

The defendant next contends that the trial court erred by denying him alternative sentencing and imposing consecutive sentences. We disagree.

Alternative Sentencing: Standard of Review

This Court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is de novo. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210, to consider the following factors in sentencing:

(1) [t]he evidence, if any, received at the trial and the sentencing hearing;
(2) [t]he presentence report;
(3) [t]he principles of sentencing and arguments as to sentencing alternatives;
(4) [t]he nature and characteristics of the criminal conduct involved;
(5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in sections 40-35-113 and 40-35-114; and
(6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6).

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1); see also Ashby, 823 S.W.2d at 169.

A court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 as they are relevant to the section 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); Boston, 938 S.W.2d at 438.

There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. § 40-35-103(2); State v. Boggs, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996). Indeed,

individualized punishment is the essence of alternative sentencing. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). In summary, sentencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

Alternative Sentencing: Analysis

We first turn our attention to the burden carried by the defendant. As set forth above, the defendant carries the burden of proving that the sentence imposed by the trial court is improper. In attempting to overcome this burden, the defendant argued:

(1) that he did not have an extensive criminal history;
(2) that his violations of the Motor Vehicle Habitual Offender Act were the result of his need to drive to work so he could provide necessities for his family;
(3) that his conduct neither caused nor threatened serious bodily injury; and
(4) that he has never been convicted of driving under the influence of alcohol or drugs.

Our review of the record does not support the defendant's contention that he does not have an extensive criminal history. In fact, the record shows that the defendant has an extensive criminal history, which includes four prior felony convictions and countless misdemeanor convictions. Further, this Court is not moved by the defendant's argument that consideration should be given to the fact that he has never been convicted of driving under the influence of alcohol or drugs. Obviously the trial court was not moved by this argument either.

This Court has no desire to deny the defendant the consideration that is due regarding the factors that weigh in his favor in carrying the burden. As such, we note that the trial court considered, as a mitigating factor, that the defendant was driving out of a need to provide necessities for his family. Continuing, this Court understands the need for one to work and understands that on occasion transportation is necessary to go to and from work. However, this Court is not moved by the defendant's claims of violating the law out of a need to supply necessities. The defendant could have made other arrangements for such transportation. Further, our review of the defendant's criminal record has left us with the opinion that the defendant has had, and continues to have, little if any respect for the laws that govern the citizens of this state. These new felony convictions are but a continuation of a long history of criminal recidivism. The trial court also considered, as a mitigating factor, that the defendant's criminal conduct neither caused nor threatened serious bodily injury to others. The trial court, however, gave little weight to these factors in its sentencing determination, and gave far greater weight to the defendant's lengthy criminal history. This was the trial court's prerogative.

We next note that under the Criminal Sentencing Reform Act of 1989, trial courts are encouraged to use alternatives to incarceration. In support of this point of encouragement, the defendant argues that his sentence does not encourage effective rehabilitation. In response to this argument we again note the lengthy criminal history of the defendant and the defendant's prior unsuccessful attempts at rehabilitation by way of less severe methods. This Court agrees

with the trial court that there is a need in the instant case to protect society by restraining the defendant, and that less restrictive methods have been unsuccessfully attempted by the defendant.

While the trial court did not state whether it considered the defendant's potential or lack of potential for rehabilitation, we believe that the trial court could have correctly found that the defendant has little potential for rehabilitation through alternative sentencing. The presentence report clearly shows that the defendant was given alternative sentencing on several prior occasions. The same report also clearly shows that the defendant violated the terms of his release into the community on at least four occasions, and was returned to prison three separate times. Further, in a report by the defendant's parole officer, the officer described the defendant's compliance with the terms of his parole as "marginal." Such facts do not support a case for rehabilitation through alternative sentencing.

The defendant also argues that "state prison capacities and the funds to build and maintain them are limited, [and that] alternative sentencing in the defendant's case would promote the purpose of assuring that convicted felons committing the most severe offenses shall be given first priority regarding incarceration." This Court is moved by the defendant's seemingly deep concern for the state's economy and the burden placed upon the tax-paying citizens who fund such building projects. This Court also agrees with the defendant that the expense incurred by the state for its prisons is great, and that there is a shortage of space in our prisons to house criminals. However, the funding and overcrowding of our states's prisons is not an issue that takes refuge in the domain of this Court. These are issues to be addressed by our legislature, which works according to the will of the citizens of the State of Tennessee.

Our findings support the trial court's denial of the defendant's request for alternative sentencing and we, therefore, affirm the trial court's denial of the defendant's request.

Consecutive Sentencing: Standard of Review

A court may order sentences to run consecutively if the court finds by a preponderance of the evidence that "[t]he defendant is an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2); see also State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Further, the general principles of sentencing require that the length of a sentence be "justly deserved in relation to the seriousness of the offense" and "be no greater than that deserved for the offense committed." State v. Lane, 3 S.W.3d 456, 460 (Tenn. 1999) (citing Tenn. Code Ann. §§ 40-35-102(1) and -103(2)).

Consecutive Sentencing: Analysis

Our review of the record shows that the trial court sentenced the defendant to consecutive sentences based upon his extensive criminal activity. The defendant's criminal record reveals more than thirty prior violations, four of which are felony convictions as we have already pointed out. Based upon the defendant's criminal history, the trial court was correct in concluding that the defendant is an offender whose record of criminal activity is extensive. The

trial court did not err by imposing consecutive sentences on the defendant. The aggregate sentence was justly deserved in relation to the extensive list of offenses that color the defendant's criminal record, and was not greater than that deserved. This issue is also without merit.

CONCLUSION

The judgments of the trial court are affirmed.

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JOHN EVERETT WILLIAMS, JUDGE