

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED
February 2, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)
)
 APPELLEE)
)
 VS.)
)
 JAMES R. LOVINGOOD)
)
 APPELLANT)

C.C.A. NO. 03C01-9902-CC-00056
BLOUNT CIRCUIT NO. C-9356
HON. KELLY THOMAS, JR., JUDGE

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED
JOE H. WALKER, III, Sp. JUDGE

OPINION

This is an appeal of right from an order in the trial court denying a petition to modify a judgment with regard to restitution payments.

Factual Background

In May, 1996, appellant entered pleas of guilty to thirteen counts of theft of various amounts. In count four the appellant was sentenced to ten years as a multiple offender for theft over ten thousand dollars. All other sentences ran concurrent, for an effective sentence of ten years.

Only four counts required payment of restitution. Each of these counts was a conviction of theft. Restitution was ordered as follows: in count three, \$800.00; in count five, \$8,000.00; in count seven, \$905.00; and in count twelve, \$2,100.00. The total restitution required was \$11,805.00.

The defendant appealed his sentences to the Court of Criminal Appeals which affirmed. State v. Lovingood, C.C.A. No. 03C01-9612-CC-00446. The opinion was filed February 9, 1998. A mandate was issued May 7, 1998, for the defendant to be incarcerated pursuant to the judgment of the trial court. He is currently with the Department of Corrections.

A petition to modify restitution was filed in the trial court November 17, 1998. Appellant petitioned to modify the judgment alleging that restitution could not be ordered in addition to sentences of incarceration.

The state moved to dismiss, alleging that this issue could have been raised on direct appeal, and was waived; and that the defendant was incarcerated in the Department of Corrections, so the trial court did not have jurisdiction. The trial court granted the motion of the state after a hearing in January, 1999.

Waiver

At the time of the sentencing hearing, defendant stated that he would be willing to make restitution payments.

He received an effective ten year sentence as a multiple offender, was ordered to pay restitution, and was denied alternate sentencing. He appealed to the Court of Criminal Appeals, but did not raise the issue of restitution. The issue was not raised at the trial court at the time of sentencing, and was not challenged on appeal. An issue not raised when it can be raised is deemed waived. Teague v. State, 772 S.W.2d 915 (1988).

The appellant did not apply to modify his sentence within 120 days after the date the sentence was affirmed, and appellant was with the Department of Corrections. The trial court loses jurisdiction after 120 days, and no extensions are allowed on the time limitation. Tenn.R.Crim.P. 35.

The trial court therefore was correct in its ruling that the issue had been waived, and the trial court did not have jurisdiction over the matter and could not modify the judgment.

Post Conviction

If the petition to modify had been treated as a post conviction petition, appellant would be in no better position. An issue is considered waived when appellant failed to present it for determination on direct appeal. T.C.A. 40-30-206(g). (There are exceptions, but payment of restitution would not be one of them.)

Illegal Sentence

Appellant contends that when he entered pleas of guilty in May, 1996, the sentencing statute allowing the imposition of restitution only applied if the defendant received probation. The statute was amended effective July 1, 1996. However, appellant contends the sentence for crimes committed prior to July 1, 1996, may include restitution to the victims only if it is a sentence of probation. Appellant contends that the sentence of incarceration and restitution imposes a greater offense than the law allowed when the offense was committed, and is a violation of *ex post facto* provisions of our constitution.

The appellant relies upon State v. Davis, 940 S.W.2d 558 (Tenn. 1997), wherein the Tennessee Supreme Court concluded that the trial court did not have the statutory authority to order the payment of restitution as part of the defendant's sentence of confinement for the offense of vandalism. The Supreme Court discussed T.C.A. 40-35-104, 40-35-304, and 40-35-303, to arrive at its determination that restitution was limited to defendants placed on probation. The court determined that a defendant convicted of vandalism could not be ordered to pay restitution, unless placed on probation. The court noted that the trial court did not have the authority "to impose restitution **in this case.**" (emphasis added). Davis at 562. The court pointed out in footnote seven that T.C.A. 40-20-116 does not apply to vandalism; but it does apply to theft.

T.C.A. 40-20-116, Order of Restitution states:

(a) Whenever a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another thereof, the jury shall ascertain the value of such property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases.

(b) If the property has been feloniously destroyed, the jury shall ascertain the damages sustained, upon which judgment shall be rendered in favor of the party aggrieved against the defendant, an execution shall issue as before provided.

Appellant's convictions are for theft, and the trial court had statutory authority to order restitution against the prisoner.

The court finds that appellant waived this issue, the trial court had lost jurisdiction, and the order of restitution for a theft conviction together with incarceration was not illegal. The judgment of the trial court is affirmed.

JOE H. WALKER, III, Sp. JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

ALAN E. GLENN, JUDGE

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)	BLOUNT CIRCUIT NO. C-9356
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)	
APPELLANT)	

JUDGMENT

Came the appellant, James R. Lovingood, by counsel, and the state, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court of Blount County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is

AFFIRMED, and the case is remanded to the Criminal Court of Blount County for execution of the judgment of that court and for collection of costs accrued below.

It appears that appellant is indigent. Costs of appeal will be paid by the State of Tennessee.

PER CURIAM

DAVID G. HAYES, JUDGE
ALAN E. GLENN, JUDGE
JOE H. WALKER, III, Sp. JUDGE