

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1996 SESSION

FILED
Jan, 17, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

DICKIE L. HOPKINS,)
)
 APPELLANT,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 APPELLEE.)

No. 02-C-01-9509-CC-00271
Fayette County
Jon Kerry Blackwood, Judge
(Post-Conviction Relief)

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OPINION FILED: _____

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED FOR A NEW SENTENCING HEARING

Joe B. Jones, Presiding Judge

OPINION

The appellant, Dickie L. Hopkins, appeals as of right from a judgment of the trial court denying his suit for post-conviction relief following an evidentiary hearing. In this Court, the appellant contends (1) his pleas of guilty were coerced, and (2) he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution because counsel (a) failed to notice the state's notice of enhanced punishment was untimely filed, (b) failed to argue the trial court should consider the punishment for the offenses under the 1982 and 1989 versions of the Tennessee Sentencing Reform Acts, (c) failed to bring to the attention of the court the convictions used to enhance punishment occurred after he committed the offenses in the present cases, and (d) failed to argue two prior convictions should have been considered as one offense for sentencing purposes. After a thorough review of the record, the briefs of the parties, and the authorities which govern the issues presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed in part, reversed in part, and remanded to the trial court for a new sentencing hearing.

The evidence contained in the record does not preponderate against the trial court's finding the pleas of guilty entered by the appellant were neither coerced nor involuntarily entered. Therefore, this Court affirms the judgment of the trial court as to this issue pursuant to Rule 20, Tenn. R. Crim. App. However, the appellant is entitled to post-conviction relief regarding effective assistance of counsel and the sentencing issues. The State of Tennessee confesses error in its brief, and it agrees this Court should grant relief and remand this case to the trial court for a new sentencing hearing. The record supports the conclusion reached by the state.

On the 27th day of March, 1989, the appellant was indicted by the Fayette County Grand Jury for seven counts of burglary second degree.¹ The appellant entered pleas of guilty to all seven counts on May 14, 1990, without the benefit of a plea bargain agreement.² On May 24, 1990, the trial court found the appellant to be a career offender

¹This offense is now known as aggravated burglary. Tenn. Code Ann. § 39-14-403.

²The State of Tennessee made the appellant a reasonable offer to settle these cases. He rejected the offer and made a counter offer to the state. The state rejected his offer.

and imposed a Range III sentence consisting of confinement for fifteen (15) years in the Department of Correction. The trial court ordered that counts one, two, and three be served consecutively. Counts four, five, six, and seven are to be served concurrently to all counts. In addition, the sentences imposed by the trial court are to be served consecutively to the sentences imposed by the Mississippi courts. The effective sentence imposed in this case was confinement for forty-five (45) years in the Department of Correction.

The record reflects the offenses alleged in the indictments occurred between August 2, 1988 and November 1, 1988. The Mississippi offenses occurred between July 26, 1988 and January 12, 1989. However, these fourteen offenses were not reduced to judgments of conviction until March 3, 1989, March 21, 1989, June 20, 1989, and September 14, 1989. In summary, the Mississippi cases were not reduced to judgments until after the appellant committed the offenses in Fayette County.

This Court is of the opinion the appellant was denied the effective assistance of counsel during the sentencing hearing because counsel failed to (a) bring to the attention of the trial court the constitutional ramifications of sentencing the appellant pursuant to the Tennessee Sentencing Reform Act of 1989 for offenses occurring before the effective date of the Act without considering the punishment set forth in the Tennessee Sentencing Reform Act of 1982, and (b) challenge the use of convictions which were reduced to judgment after the commission of the offenses in question. While the body of law in both areas was created after the sentencing hearing, these issues were being raised by other attorneys in this state when the sentencing hearing was conducted.

The Supreme Court held in State v. Blouvet, 904 S.W.2d 111, 113 (Tenn. 1995), the phrase “prior conviction” contained in Tenn. Code Ann. § 40-35-106(b)(1) means “a conviction that has been adjudicated prior to the commission of the more recent offense for which sentence is to be imposed.” Thus, the Mississippi offenses, which occurred before the commission of the Fayette County offenses, but not reduced to judgment until after the commission of the Fayette County offenses, should not have been used to determine the offender status of the appellant.

In State v. Pearson, 858 S.W.2d 879 (Tenn. 1993), the Supreme Court held the ex

post facto provisions contained in both the United States Constitution and the Tennessee Constitution require an analysis of the sentences which can be imposed under both the 1982 Act and the 1989 Act when the offenses occurred prior to the effective date of the 1989 Act, and the sentence was imposed after the Act's effective date. Most, if not all, of the offenses occurred prior November 1, 1989, the effective date of the 1989 Act.

The trial court did not make the requisite analysis when sentencing the appellant. On remand, the trial court will make the requisite analysis mandated by Pearson.

The failure of counsel to pursue these two issues of law during the sentencing hearing fell below the standard of representation expected of counsel in Fayette County and the State of Tennessee.

The claim regarding the notice of enhancement of any sentence imposed is moot given the disposition made in this case. Most of the offenses listed in the notice cannot be used to enhance the appellant's sentence.

Whether the two Shelby County cases should be considered as only one offense for sentencing is moot given the nature of the relief granted. The appellant may establish the requisite facts to demonstrate these two offenses are to be considered but one conviction as provided by the applicable statute. This determination will require the introduction of evidence.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JERRY L. SMITH, JUDGE