

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1997 SESSION

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| <p>FILED</p> <p>December 9, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p> |
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STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 JEREMY GROOMS,)
)
 Appellant.)

No. 03C01-9608-CC-00285
 Cocke County
 Honorable Ben W. Hooper, II, Judge
 (Rule 35 Motion to Reduce Sentence)

For the Appellant:

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For the Appellee:

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OPINION FILED:_____

REVERSED AND REMANDED

Joseph M. Tipton
 Judge

OPINION

The defendant, Jeremy Grooms, appeals as of right from the trial court's dismissal of his motion for reduction of sentence pursuant to Rule 35, Tenn. R. Crim. P. The trial court ruled that it did not have jurisdiction to grant the motion once the defendant was in the custody of the Department of Correction.

The defendant contends that he complied with the only requirement in Rule 35, by filing the motion to reduce within one hundred twenty days of his sentencing. The state agrees with the defendant, relying upon previous opinions by this court. See, e.g., State v. Leonard Ambrose, No. 89-103-III, Williamson County (Tenn. Crim. App. Dec. 21, 1989) (sentence may be modified under Rule 35 even though defendant is in the penitentiary); State v. Bilbrey, 816 S.W.2d 71 (Tenn. Crim. App. 1991) (hearing on Rule 35 motion occurred more than one hundred twenty days after sentencing when motion was timely filed). The state also agrees with the defendant that the case should be remanded for the trial court to exercise its discretion on the merits of the motion.

Preliminarily, we note that the record on appeal does not include any relevant document other than the motion for reduction of sentence filed August 18, 1994, the trial court minutes and order reflecting that the court held that it had no jurisdiction, and a ten-page transcript of the hearing on the motion, at which the trial court and counsel for the parties discussed the motion and the issues regarding jurisdiction. At the hearing, the prosecutor stated that the defendant was sentenced in May 1994 to twelve years in the penitentiary relative to aggravated robbery. Also, the trial court stated that the motion was filed within one hundred and twenty days of the defendant's sentencing. However, there is no judgment of conviction or other court document or exhibit in the record showing these facts.

Ordinarily, argument by counsel does not constitute evidence. See, e.g., Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979). Thus, if the record in the present case were so viewed, we would have no actual evidence that the motion was timely filed. However, in the context of the representations made by counsel at the hearing, it is apparent that the parties were presenting them as uncontested facts to the trial court. In this sense, the statements constitute more than just argument. Moreover, the trial court's statement that the motion was timely filed represents a determination that we can take as true absent the record showing to the contrary.

Under these circumstances, including the fact that the parties agree that the case should be remanded to the trial court, we hold that the judgment of the trial court is reversed and the case is remanded for consideration of the merits of the Rule 35 motion by the trial court.

Joseph M. Tipton, Judge

CONCUR:

Joe B. Jones, Presiding Judge

Curwood Witt, Judge