IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1999 SESSION

FILED

June 3, 1999

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**C.C.A. No. O1C01-9805-CR-00218**
	)	
vs.	)	**Davidson County**
	)	
THERON L. BOYD,	)	**Honorable Seth Norman, Judge**
	)	
Appellant.	)	**(Possession of Cocaine for**
	)	**Resale--Certified Question)**
	)	
	)	

FOR THE APPELLANT:

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OPINION FILED: _____

APPEAL DISMISSED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Theron L. Boyd, pleaded guilty in the Davidson County Criminal Court to possession of cocaine for resale, a Class B felony, and unlawful possession of a weapon, a Class A misdemeanor. He received an effective eight year sentence. The defendant has attempted to appeal, pursuant to Tennessee Rule of Criminal Procedure 37(b)(2), certified questions of law challenging warrantless searches conducted by the police. Because we conclude that the defendant did not meet the requirements for preserving post-guilty plea appellate review of his certified questions, we dismiss the appeal.

On March 5, 1997, Metro Nashville-Davidson County police officers were alerted that drugs were being used in room 102 of the Wilson Inn in Davidson County. The officers entered the interior hallway of the Inn which provided access to room 102. When they arrived at the door to room 102, they smelled marijuana smoke and knocked on the door. When the defendant opened the door, marijuana smoke escaped from the room and entered the hallway. Seeing the officers, the defendant closed the door but opened it again in response to the officers' second knock. This time, one of the officers stepped into the room through the open door and observed a smoldering marijuana cigarette in the bathroom and a pistol sticking out of a vest which hung on a chair. The officers arrested the defendant and his female companion, Tammy Thompson, in whose name the room had been rented. She told the officers that she and the defendant had arrived in a van which contained drugs. The officers located the van in the motel parking lot and utilized a drug dog which "hit" on the vehicle. The officers then searched the van and found marijuana and cocaine.

The defendant moved the trial court to suppress the evidence found in the motel room and in the van. The trial court ruled that the search of the motel room was valid and that the defendant lacked standing to attack the search of the van. Accordingly, the motion to suppress was denied.

Approximately three weeks later, the defendant tendered a guilty-plea petition which set forth an agreed sentence of eight years as a Range II offender on the charge of cocaine possession, to run concurrently to an eleven-month, 29-day sentence for possession of a weapon. The petition, signed by the defendant and certified by both defense counsel and the attorney for the state, said, "Defendant reserves right to appeal search issue. (See attached)." Apparently, the words, "See attached" referred to a handwritten document labeled "Certified Question on Appeal."[1] It bore the caption of the case, the docket number, and the signatures of both defense counsel and the assistant district attorney general. It contained allegations that both the search of the hotel room and the van violated relevant constitutional provisions and that the search "issues are dispositive." On the same day this petition was submitted, the trial court conducted a plea submission hearing. The transcript of that hearing reflects that the trial judge examined the defendant pursuant to Tennessee Rule of Criminal Procedure 11 and asked the defendant if he understood that if the plea were accepted he would be waiving his right to trial and to appeal. The trial court then added, "Except for the certified question . . . I believe there is a certified question in this particular case." Defense counsel responded, "Right." That acknowledgment notwithstanding, neither the court's order accepting the guilty plea nor the judgment mentions the issue of a certified question of law or of a rule 37(b) appeal.[2]

On appeal, the state argues that the defendant has not properly preserved his certified question for appellate review, based upon the rulings of our supreme court in State v. Preston, 759 S.W.2d 647 (Tenn. 1988), and State v. Pendergrass, 937 S.W.2d 834 (Tenn. 1996).

In Pendergrass, the court reiterated its admonitions from Preston:

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[1]The document appears in the technical record but not immediately after the petition. The document is not dated and bears no filing stamp.

[2]The order accepting the guilty plea did appoint the public defender, who represented the defendant in the trial court proceedings, to represent the defendant on appeal.

> Regardless of what has appeared in prior petitions, orders, colloquy in open court and otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal *must contain a statement of the dispositive certified question of law reserved* by the defendant for appellate review and the question of law must be *stated so as to clearly identify the scope and the limits of the legal issue reserved*. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by the defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question of law, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. Most of the reported and unreported cases seeking the limited appellate review pursuant to Tenn. R. Crim. P. 37 have been dismissed because the certified question was not dispositive. Also, the order must state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. No issue beyond the scope of the certified question will be considered.

Pendergrass, 937 S.W.2d at 836-37 (quoting Preston, 759 S.W.2d at 650) (emphasis added in Pendergrass). The Pendergrass court also observed that the Preston prerequisites would be met if the final judgment referred to or incorporated "any other independent documents which would satisfy the Preston requirements." Pendergrass, 937 S.W.2d at 837.

Rarely do courts use such foreboding language as our supreme court used in Preston, and yet, if anything, the court only galvanized the language in Pendergrass and State v. Irwin, 962 S.W.2d 477, 479 (Tenn. 1998) (referring to the "explicit and unambiguous requirements" of Preston and holding that, in violation of those requirements, Irwin's final judgment contained neither a reference to the reservation of a dispositive certified question nor an incorporation by reference of such a reservation). This court has amplified the supreme court's admonitions about appealing certified questions of law. State v. Stuart Allen Jenkins, No. 01C01-9712-CR-00590, slip op. at 3, 4 (Tenn. Crim. App., Nashville, Dec. 21, 1998)

("[S]trict adherence to the Preston requirements is expected . . . . Counsel should take Preston to heart."); State v. Jamie Walker, No 02C01-9707-CC-00283, slip op. at 3 (Tenn. Crim. App., Jackson, Sept. 24, 1998) (commenting that the supreme court had "reiterated its [Preston] admonitions" in Pendergrass); State v. Carlos L. Acevedo, No. 01C01-9602-CR-00061, slip op. at 6 (Tenn. Crim. App., Nashville, Nov. 22, 1996) (referring to the "clear, mandatory language of Preston and Pendergrass), perm. app. denied (Tenn. 1997). In Carlos L. Acevedo, the defendant's written plea petition set forth the certified question provisions, and the trial court's order accepting the guilty plea "incorporated the provisions of the [plea] petition." Carlos L. Acevedo, slip op. at 4. However, the final judgment contained no reference to the certified question of law, and this court found the absence of the required language in the final judgment to be fatal to a review of the certified question, despite the apparent agreement in the lower court between the defendant and the state.

In State v. Benny Sluder, No. 03C01-9509-CC-00272 (Tenn. Crim. App., Knoxville, Feb. 12, 1997), perm. app. granted and remanded for consideration of propriety of consecutive sentencing (Tenn. Ct. Crim. App. opn. filed on Dec. 23, 1997) (Tenn. 1997), the Rule 37(b)(2) appeal was dismissed for the lack of a final judgment which contained a timely reference to the reservation of a certified question. See also State v. Darrell Ewing, No. 02C02-9305-CC-00089 (Tenn. Crim. App., Jackson, Mar. 25, 1994) (appeal dismissed for failure to comply with Preston requirements); State v. George Allen Fletcher, No. 86-270-III, slip op. at 2-3 (Tenn. Crim. App., Nashville, Mar. 17, 1987) (in pre-Preston ruling, court dismissed appeal, inter alia, because the final judgment contained no articulation of the certified question and no statement of the dispositive nature of the issue). This court and the supreme court have rigidly enforced the Preston rules about declaring the reservation of a certified question in the final judgment and about the judgment setting forth the trial judge's approval of the rule 37(b)(2) appeal and his finding that the certified question is dispositive of the case. The one circumstance in which

some variance has been allowed is when the final order incorporates by reference some other document or documents which contain the elements required by Preston. See Pendergrass, 937 S.W.2d at 837; Jamie Walker, slip op. at 4; State v. Ricky Gene Wilkerson, No. 01C01-9708-CR-00362, slip op. at 2 (Tenn. Crim. App., Nashville, May 22, 1998) (order).[3]

In the present case, the final judgment contains no reference at all to reservation of a certified question for appeal. Neither is there any attempt to incorporate the reservation by reference. See Irwin, 962 S.W.2d at 479. The record is devoid of any document signed by the trial judge which reflects his agreement to the appeal of certified questions or his acknowledgment that the proposed questions would be dispositive of the case. Without question, the transcript of the plea submission hearing reflects the trial court's awareness of the proposed appeal of certified questions, and we acknowledge precedent of this court which holds that, in the event of a conflict between a trial court's written judgment and the transcript of the court's ruling, the transcript controls. See, e.g., State v. Davis, 706 S.W.2d 96, 97 (Tenn. Crim. App. 1985). However, this general precedent cannot prevail against the preemptive language of Preston which requires the critical elements to be included in the final judgment," regardless of what has appeared in prior petitions, orders, colloquy in open court and otherwise." Preston, 759 S.W.2d at 650 (emphasis added).

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[3]We are aware that in Stuart Allen Jenkins this court elected to consider the certified question presented by Jenkins even though he had failed to comply with Preston. In making this decision, this court noted that the record showed that the parties and the trial court agreed that the certified question was dispositive and that "the issue is finite in scope, adequately stated, and is dispositive of the case." Stuart Allen Jenkins, slip op. at 4-5 (emphasis added). The trial court had entered a pre-judgment agreed order which addressed the appeal of a certified question. The present case is distinguishable in that the trial court entered no order which addressed the certified question appeal. Moreover, the present case involves multiple certified questions. There were two warrantless searches which the defendant challenges. Apparently, neither of the questions would be singularly dispositive of the entire case unless the defendant prevailed on both questions. Therefore, we do not believe the present case is appropriate for excusing noncompliance with the Preston requirements.

Finally, we are not unsympathetic to the defendant's claim that it is unfair for the state to agree to a certified question appeal in the trial court and then to seek dismissal of the appeal based upon noncompliance with applicable appeal requirements. Also, we are aware that, as a matter of practice in many trial courts, defense counsel may not participate in the preparation of the final judgment in a criminal case. Nevertheless, we are constrained to find that these two concerns are irrelevant in the face of Preston's clear mandate. A rule 37(b)(2) appeal is in the nature of a dispensation or a privilege, and our courts have held that a party seeking the benefits of such an appeal is obliged to satisfy all applicable requirements. "[T]he burden is on defendant to see that [the] prerequisites are in the final order . . . ." Preston, 759 S.W.2d at 650; see also Irwin, 962 S.W.2d at 479; Pendergrass, 937 S.W.2d at 837. Implicitly, the burden rests with neither the district attorney general nor the trial court.

In view of the foregoing, the appeal is dismissed.

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JAMES CURWOOD WITT, JR., Judge

CONCUR:

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JOHN H. PEAY, Judge

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DAVID H. WELLES, Judge