

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 19, 2017

FILED

08/15/2017

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. ATLANTA PEARL HARDY

**Appeal from the Davidson County Criminal Court
No. 2002-D-1927 J. Randall Wyatt, Judge**

No. M2017-00537-CCA-R3-CD

Defendant, Atlanta Pearl Hardy, was convicted of second degree murder in 2004 and now appeals the trial court's denial of her motion to correct an illegal sentence under Tennessee Rule of Criminal Procedure 36.1. Upon review of the record, this Court affirms the trial court's denial of relief under Rule 36.1.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS JJ., joined.

Atlanta Pearl Hardy, Nashville, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Breanne N. Hataway, Assistant Attorney General; Glenn R. Funk, District Attorney General; and Amy M. Hunter, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Over thirteen years after Defendant was convicted of second degree murder, she appeals the trial court's denial of relief under Tennessee Rule of Criminal Procedure Rule 36.1. On May 4, 2004, Defendant was sentenced as a career offender to sixty years at 100 percent for her role in the 2002 murder of Brian Hunter. This Court affirmed the judgment on direct appeal. *State v. Carlos Hardy and Atlanta Hardy*, No. M2004-02249-CCA-R3-CD, 2006 WL 359677, at *1 (Tenn. Crim. App. Feb. 10, 2006), *perm. app. denied* (Tenn. July 3, 2006). Defendant filed a timely petition for post-conviction relief

that was denied by the trial court. *Atlanta Hardy v. State*, No. M2007-01498-CCA-R3-CD, 2008 WL 2924530, at *1 (Tenn. Crim. App. July 20, 2008), *perm. app. denied* (Tenn. Dec. 8, 2008). This Court affirmed the post-conviction court's ruling. *Id.* at *14. Defendant attempted to reopen her petition for post-conviction relief but failed to properly perfect an appeal in this Court after her petition was denied in the trial court. *Atlanta P. Hardy v. State*, No. M2013-01809-CCA-R3-PC (Tenn. Crim. App. Sept. 4, 2013) (Order Dismissing Appeal), *perm. app. denied* (Tenn. Jan. 16, 2014).

On April 20, 2015, Defendant filed a pro se motion to correct an illegal sentence under Tennessee Rule of Criminal Procedure 36.1. Defendant argued that her sentence was illegal due to the State's failure to file a notice of intent to seek career offender status before trial and that her sentence was illegally enhanced in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). On January 31, 2017, the trial court summarily dismissed the motion for failure to state a colorable claim. Defendant subsequently filed an untimely notice of appeal to this Court.

Analysis

A. Timeliness

As a preliminary matter, the State argues that this appeal should be dismissed due to Defendant's failure to file a timely notice of appeal. Generally, the notice of appeal must be filed within thirty days from the date the final order was entered. Tenn. R. App. P. 4(a). The notice of appeal was received eleven days late on March 13, 2017. On the notice of appeal, however, Defendant claimed that it was "delivered to prison authorities for mailing on March 2, 2017." Tennessee Rule of Appellate Procedure 20(g) provides that a filing is deemed timely for incarcerated pro se litigants who "delivered their papers to the appropriate individual at the correctional facility within the time fixed for filing." Even though Defendant's notice of appeal was unsigned, it appears from the face of the notice that it was delivered to the appropriate prison personnel in a timely fashion. Therefore, we will consider Defendant's notice of appeal to be timely filed.

B. Correction of Illegal Sentence

On appeal, Defendant argues that her sentence is illegal because the State failed to file a timely notice of enhancement. Defendant further asserts that her sentence violates the *Blakely* standard regarding her offender status and enhancements. The trial court determined that both of these claims were without merit because they would only render the sentence voidable and were therefore not colorable claims under Rule 36.1. The State argues the same. We agree and affirm the trial court.

Rule 36.1 permits a defendant to seek correction of an illegal sentence. “[A]n illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1(a) (2016). Rule 36.1 “does not authorize the correction of expired illegal sentences.” *State v. Brown*, 479 S.W.3d 200, 201 (Tenn. 2015).

While Defendant’s sentence is not expired, Rule 36.1 permits only the correction of illegal sentences. Our supreme court has interpreted the meaning of “illegal sentence” as defined in Rule 36.1 and concluded that the definition “is coextensive, and not broader than, the definition of the term in the habeas corpus context.” *State v. Wooden*, 478 S.W.3d 585, 594-95 (Tenn. 2015). The court then reviewed the three categories of sentencing errors: clerical errors (those arising from a clerical mistake in the judgment sheet), appealable errors (those for which the Sentencing Act specifically provides a right of direct appeal), and fatal errors (those so profound as to render a sentence illegal and void). *Id.* at 595. Commenting on appealable errors, the court stated that those “generally involve attacks on the correctness of the methodology by which a trial court imposed [the] sentence.” *Id.* In contrast, fatal errors include “sentences imposed pursuant to an inapplicable statutory scheme, sentences designating release eligibility dates where early release is statutorily prohibited, sentences that are ordered to be served concurrently where statutorily required to be served consecutively, and sentences not authorized by any statute for the offenses.” *Id.* The court held that only fatal errors render sentences illegal. *Id.*

In this case, the trial court found that the alleged error regarding the notice of enhancement would render the sentence merely voidable. Defendant did not raise this issue on direct appeal or post-conviction. Alleging an error regarding the notice of enhancement involves the “underlying sentencing procedure, not the legality of [Defendant’s] sentence, and, as such, should have been raised on direct appeal.” *State v. Christopher Hubbard*, No.W2016-01263-CCA-R3-CD, 2017 WL 244116 (Tenn. Crim. App. Jan. 20, 2017), *perm. app. denied* (Tenn. Apr. 13, 2017). Regarding Tennessee Code Annotated section 40-35-202(a), which governs notice of enhancement, our supreme court has stated “an accused has a duty to inquire about an ambiguous or incomplete notice and must show prejudice to obtain relief.” *State v. Adams*, 788 S.W.2d 557 (Tenn. 1990). Defendant failed to inquire and has not shown prejudice in any of her appeals. “Correction of an alleged error in offender classification must be sought on direct appeal.” *Cantrell v. Easterling*, 346 S.W.3d 445, 458 (Tenn. 2011). “The only time an error in the classification of an offender would ever rise to the level of an illegal sentence would be if a trial court, somehow, classified a defendant in a category not available under the Sentencing Act.” *State v. Robert B. Ledford*, No. E2014-01010-CCA-R3-CD, 2015 WL 757807, *2 (Tenn. Crim. App. Feb. 23, 2015), *perm. app. denied* (Tenn. June 12, 2015). As such, Defendant’s claims are appealable errors that do not rise

to the level of a colorable claim and would merely render the sentence voidable. Defendant's claim is not within the scope of Rule 36.1.

Finally, Defendant's *Blakely* argument is waived. *Blakely* is raised in Defendant's statement of facts alone and lacks further "support[] by argument, citation to authorities, or appropriate references to the record." Tenn. R. Crim. Ct. App. 10(b). Even though this argument is waived, this Court finds that the *Blakely* claim is without merit. This Court has held that "a *Blakely* violation does not meet the Rule 36.1 definition of an illegal sentence and does not establish a void or otherwise illegal judgment." *State v. Rafael Antonio Bush*, No. M2014-01193-CCA-R3-CD, 2014 WL 7204637, at *4 (Tenn. Crim. App. Dec. 18, 2014), *perm. app. denied* (Tenn. Mar. 12, 2015). Furthermore, "*Blakely* is not to be applied retroactively to cases already determined final on direct appeal." *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at *3 (Tenn. Crim. App. May 1, 2007), *no perm. app. filed*. Defendant fails to make a colorable claim regarding her *Blakely* assertion and therefore the claim is without merit in context of Rule 36.1. We affirm the trial court.

Conclusion

After a thorough review of the record, we affirm the trial court's denial of Defendant's Rule 36.1 motion to correct an illegal sentence.

TIMOTHY L. EASTER, JUDGE