IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

FILED

July 26, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLANT,	)	
	)	No. 02-C-01-9510-CC-00306
	)	
	)	Madison County
v.	)	
	)	Whit Lafon, Judge
	)	
	)	(Sentencing)
KARON L. WASHINGTON,	)	
	)	
APPELLEE.	)	

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The sole issue presented by this appeal is whether the trial court had jurisdiction to alter the sentences of the appellee, Karon L. Washington, after the judgments accepting her pleas of guilty and setting her punishment had become final. After a thorough review of the record, the briefs presented by the parties, and the authorities that govern the issue presented for review, it is the opinion of this Court that although the judgments of conviction were final, the trial court had jurisdiction to alter, amend or change the judgments because Washington was confined in the Madison County Penal Farm while waiting transportation to the Department of Correction. Thus, the judgment of the trial court is affirmed.

On January 4, 1993, the Madison County Grand Jury returned two indictments against the appellee, Karon L. Washington. Indictment number 93-120 charged the offenses of (a) theft over $1,000 and (b) fraudulent use of a credit card in excess of $1,000. Indictment number 93-121 charged the offenses of (a) theft under $500, two counts, (b) fraudulent use of a credit card under the value of $500, two counts, (c) resisting arrest, one count, (d) disorderly conduct, one count, and (e) forgery, four counts. On May 25, 1993,[1] the appellee entered pleas of guilty to the offenses of fraud by credit card, a Class D felony, and two counts of forgery, a Class E felony. The trial court sentenced the appellee to confinement for two (2) years in the Department of Correction in each count pursuant to a plea bargain agreement. The effective sentence was two (2) years. However, the sentence for fraud by credit card was to be served consecutively to a prior Texas sentence.

The trial court granted Washington's request that she be given a short period of time to take care of her personal affairs before execution of the sentences. Washington did not appear at the next court date. Instead, she was taken into custody in Shelby County, her county of residence, and thereafter extradited to Missouri for crimes committed in that

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[1]The "Plea of Guilty and Waiver of Jury Trial and of Appeal" form is dated May 25, 1991. This was apparently an old form that was still being used. The "1991" was part of the printed form. The clerk of the trial court filed this form and the judgments on May 25, 1993. All other records illustrate that the proceedings occurred in 1993, not 1991. This Court is of the opinion that the judgments forming the basis of this appeal were entered May 25, 1993.

State. The State of Tennessee provided the Missouri authorities with a detainer. As a result, Washington was returned to Madison County in May of 1995.

On June 5, 1995, Washington filed a "Motion to Amend Judgment." The motion asked the trial court to "amend her Judgment of May 25, 1993 pursuant to the attached letter."[2] A hearing was conducted on June 13, 1995. Washington had been confined to the Madison County Penal Farm for thirty-two (32) days on the date of the hearing.

Washington asked the trial court to enter an order that permitted the Tennessee sentences to be served concurrently with the Missouri sentences. The state argued that the trial court did not have jurisdiction to entertain the motion since the 1993 judgments were final. Furthermore, Missouri, not Tennessee, was required to determine whether the sentences were to be served concurrently or consecutively because Washington was convicted in Missouri after the imposition of the Tennessee sentences. The trial court advised counsel to enter a stipulation of facts and he would then deny the motion since the judgment had become final and "it's out of my control," and "I just don't have any authority to do it."

A second hearing was held on June 16, 1995. There is no transcript or statement of the evidence of this hearing. Nor is there a transcript or statement of the evidence as to what occurred on June 26, 1995, when the trial court entered the following order:

> On the 25th day of May, 1993, Defendant was ordered to serve 2 years which she has served in the Missouri State Prison for Women.
>
> IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant be released immediately and she should be placed on probation for the remaining balance of her sentence.

On July 7, 1995, the trial court entered the following "Amended Order Release from Custody:"

> On the 25th day of May, 1993, Defendant was ordered to serve 2 years which she has served in the Missouri State

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[2]The motion was contained in the "technical record" forwarded to this Court. However, the letter was not attached to the motion. Washington moved and was subsequently permitted to supplement the record with a copy of the letter. The letter was written by Washington to the trial court. It asked that the trial court consider probation so that she could return to her children.

> Prison for Women. The original order, which lists only docket number 93-121, is hereby amended by adding docket number 93-120, because 93-120 was to run concurrently with 93-121, but was inadvertently omitted for the original order.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant be released immediately and she should be placed on probation for the remaining balance of her sentence.

The trial court also entered a probation order. This order states that the Texas sentences expired on October 14, 1993. It further states that the expiration date of the probated sentence was October 14, 1995.

I.

As a general rule, the judgment of a trial court becomes final thirty (30) days following the entry of judgment.[3] There are exceptions to this rule. The timely filing of (a) a motion for judgment of acquittal, (b) motion for a new trial, (c) motion for arrest of judgment, or (d) petition for suspension of sentence tolls the finality of the judgment until one or more of these motions have been resolved by the trial court.[4] Washington did not file one of these motions following her 1992 convictions. Consequently, the judgments of the trial court were not tolled in this manner.

An accused may seek the correction or reduction of a sentence imposed by the trial court "within 120 days after the date the sentence is imposed or probation is revoked."[5] The statute specifically provides that "[n]o extensions shall be allowed on the time limitation."[6] Washington did not file a Rule 35 motion within 120 days of the entry of the judgments in this case. The time for the filing of such a motion had expired before Washington filed the initial motion seeking to amend the judgment.

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[3]State v. Moore, 814 S.W.2d 381, 382-83 (Tenn. Crim. App. 1991); State v. Reed, 665 S.W.2d 405, 407 (Tenn. Crim. App.), per. app. denied (Tenn. 1983); State v. Hamlin, 655 S.W.2d 200, 202 (Tenn. Crim. App. 1983); see David L. Washington v. State, Sullivan County No. 03-C-01-9411-CR-00407 (Tenn. Crim. App., Knoxville, April 18, 1995), per. app. denied (Tenn. 1995).

[4]Tenn. R. App. P. 4(c).

[5]Tenn. R. Crim. P. 35(b).

[6]Tenn. R. Crim. P. 35(b).

When a trial court makes a clerical mistake, the mistake "may be corrected by the court at any time and after such notice, if any, as the court orders."[7] In this case, neither the relief sought nor the relief given was predicated upon a mistake made by the trial court when sentencing Washington.

It is obvious that the statutes and rules hereinabove mentioned will not support the action taken by the trial court. This Court must now consider whether the provisions contained in Tenn. Code Ann. § 40-35-212(d) will support the action taken by trial court.

II.

The provisions contained in Tenn. Code Ann. § 40-35-212 govern the manner in which a sentence shall be served. As to an accused who has been sentenced to confinement in the Department of Correction, the statute states:

> (d) Notwithstanding the provisions of subsection (c), the court shall retain full jurisdiction over a defendant sentenced to the department during the time he is being housed in a local jail or workhouse awaiting transfer to the department. Such jurisdiction shall continue until such time as the defendant is actually transferred to the physical custody of the department.

This statutory provision is recognized in the statute governing probation. Tenn. Code Ann. § 40-35-303(e) provides that "[p]robation shall be granted, if at all, at the time of the sentencing hearing except for sentences served in a local jail or workhouse or except during the time a defendant sentenced to the department of correction is being housed in a local jail or workhouse awaiting transfer to the department as provided in § 40-35-212(d)." (emphasis added).

In this case, Madison County received custody of Washington after a Missouri court found that she should be extradited pursuant to the State of Tennessee's detainer and request for custody. Since the detainer was for judgments that originated in Madison County, Washington was returned to Madison County and placed in the Madison County Penal Farm. The assistant district attorney general who represented the state in these

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[7]Tenn. R. Crim. P. 36; see State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App.), per. app. denied (Tenn. 1991).

proceedings did not know why Washington had been returned to Madison County or why she was being housed in the County's workhouse. The assistant district attorney general said at the initial hearing: "I'm not really sure why she [Washington] was in the workhouse, but this a DOC [Department of Correction] sentence." However, it is obvious why Washington was in Madison County. The judgments were held in abeyance and were never executed. It was necessary for Washington to return to Madison County so that the judgments could be executed.

Before a trial court may grant probation to an accused who has been sentenced to the Department of Correction and is awaiting transfer, (a) the trial court must have jurisdiction to enter the judgment,[8] (b) the accused must be confined to the county jail or workhouse,[9] (c) the nature of the offense and the length of the sentence do not bar probation,[10] and (d) it is in the best interest of society and the accused to grant the accused probation. If these prerequisites are present, the trial court may grant the accused probation.[11]

In this case, all of the essential prerequisites were met. Although Washington had been sentenced to Department of Correction sentences, she was confined in the local workhouse when the trial court granted the relief. She had not been in the custody of the Department of Correction prior to the action taken by the trial court. The length of the sentences was two years. The offenses were fraudulent use of a credit card and forgery. Thus, neither the length of the sentences nor the nature of the offenses barred the suspension of the sentences and placing Washington on probation. Given these circumstances, the trial court clearly had jurisdiction to grant the relief it gave to Washington.

The only question that remains to be answered is whether Washington was a fit person for probation, and probation was in the best interest of society and Washington.

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[8]State v. Russell Thurman, Rhea County No. 03-C-01-9302-CR-00040, slip op. at 4, (Tenn. Crim. App., Knoxville, October 22, 1993), per. app. denied (Tenn. 1994); see State v. Smith, 909 S.W.2d 471, 474 (Tenn. Crim. App. 1995).

[9]Tenn. Code Ann. § 40-35-212(d).

[10]State v. Russell Thurman, supra, at 4-5.

[11]See State v. Bruce Kittrell, Roane County No. 175, slip op. at 4, (Tenn. Crim. App., Knoxville, June 7, 1989).

III.

The state argues that if this Court finds that the trial court had the requisite jurisdiction to grant the relief sought, this Court should reverse the suspension of Washington's sentences and grant of probation because she was not suitable for probation. The flaw in this argument is that the record does not contain a transcript or statement of the evidence of the proceedings that occurred on June 26, 1995, or July 7, 1995, when the orders in question were entered.

When a party seeks appellate review of an issue in this Court, it is the duty of that party to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the particular issue in the trial court.[12] Neither the statements made during oral argument in this Court nor the allegations contained in a party's brief constitutes evidence within the meaning of Rule 24, Tenn. R. App. P.[13] If the state was not able to have a transcript or statement of the evidence of the relevant proceedings included in the record, the state had the burden of establishing its "inability [to have such a transcript or statement of the evidence prepared], the reason for the inability, and that the inability was brought about by matters outside [its] control."[14]

Where, as here, the record is incomplete, and does not contain a transcript of the proceedings relevant to the action taken by the trial court in suspending Washington's sentences and placing her on probation, this Court is precluded from considering this issue.[15] Instead, this Court must conclusively presume that the judgment of the trial court

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[12]State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Locust, 914 S.W.2d 554, 557 (Tenn. Crim. App.), per. app. denied (Tenn. 1995); State v. Zirkle, 910 S.W.2d 874, 883 (Tenn. Crim. App.), per. app. denied (Tenn. 1995); State v. Richardson, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Miller, 737 S.W.2d 556, 558 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987).

[13]Roberts, 755 S.W.2d at 836.

[14]Lallemand v. Smith, 667 S.W.2d 85, 87 (Tenn. App. 1983), per. app. denied (Tenn. 1984), cited with approval in State v. Rhoden, 739 S.W.2d 6, 14 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

[15]Ballard, 855 S.W.2d at 560-61; Locust, 914 S.W.2d at 557; Zirkle, 910 S.W.2d at 883; Richardson, 875 S.W.2d at 674; Roberts, 755 S.W.2d at 836.

suspending Washington's sentences and placing her on probation was correct.[16] This rule has previously been applied to sentencing issues.[17]

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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WILLIAM M. BARKER, JUDGE

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[16]Locust, 914 S.W.2d at 557; Richardson, 875 S.W.2d at 674; State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App.), per. app. denied (Tenn. 1991); Roberts, 755 S.W.2d at 836.

[17]See State v. Coolidge, 915 S.W.2d 820, 826-27 (Tenn. Crim. App.), per. app. denied (Tenn. 1995); State v. Beech, 744 S.W.2d 585, 588 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).