

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST SESSION, 1998

FILED
October 6, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

JOHN B. LOWERY,

Appellant.

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C.C.A. NO. 03C01-9710-CR-00475

KNOX COUNTY

HON. RAY L. JENKINS, JUDGE

(PROBATION REVOCATION)

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

In this case, the Defendant, John B. Lowery, was convicted of possession of cocaine with intent to sell on September 16, 1993. He was sentenced to serve eight (8) years in the Tennessee Department of Correction, but the sentence was suspended and he was placed on probation for the length of the sentence. Subsequently, a petition to revoke probation was filed, and after a hearing, the trial court entered an order revoking probation on December 17, 1996. Defendant was ordered to serve the entire sentence of eight (8) years by incarceration in the Department of Correction. He was given credit for two (2) days spent in jail. The Defendant did not appeal from the order revoking probation. However, on April 11, 1997, he timely filed a motion to modify the sentence pursuant to Rule 35(b) of the Tennessee Rules of Criminal Procedure. This motion was denied by the trial court on May 15, 1997, and Defendant filed a timely appeal on June 13, 1997, from the order denying modification of the sentence. We affirm the judgment of the trial court.

In this appeal, the Defendant does not challenge the revocation of his probation by the trial court. Indeed, even though his notice of appeal purports to appeal from the trial court's order revoking probation "on May 15, 1997," the notice of appeal was filed more than thirty (30) days after the order was entered revoking probation. The subsequent filing of a Rule 35(b) motion does not toll the time limitation for filing a notice of appeal from the original judgment revoking probation. See State v. Bilbrey, 816 S.W.2d 71, 74-75 (Tenn. Crim. App. 1991).

Defendant's contention in this appeal is that the trial court erred by not granting him jail credit for the time he spent on probation prior to it being revoked. The standard of review of this court for appeals from the trial court's denial of a Rule 35(b) motion is whether the trial court abused its discretion in denying the motion. State v. Irick, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993), perm. to appeal denied (Tenn. 1993). Thus, a reversal on appeal is warranted only if the record contains no substantive evidence to support the ruling of the trial court. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

This court has previously held that a defendant is not entitled to receive credit on his sentence for time spent on probation prior to the probation being revoked. Young v. State, 539 S.W.2d 850, 854-55 (Tenn. Crim. App. 1976); State v. Gill Austin, C.C.A. No. 01C01-9512-CC-00431, slip op. at 4, Robertson County (Tenn. Crim. App., Nashville, Oct. 17, 1996).

The Defendant, while making some rather novel arguments in his appeal, is not entitled to the relief he seeks. Accordingly, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

JOE G. RILEY, Judge