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Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 2, 2023

STATE OF TENNESSEE v. RUSSELL DAVIS

Appeal from the Criminal Court for Shelby County
Nos. 86-00612, 86-01202, 86-01203, 86-01204 Chris Craft, Judge

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No. W2022-01404-CCA-R3-CD

The Defendant, Russell Davis, appeals from the Shelby County Criminal Court's summary dismissal of his motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. Specifically, the Defendant argues that his sentence is illegal because the State failed to file timely and proper notices of enhanced punishment and because he was improperly classified as a Range II offender. After review, we affirm the judgment of the trial court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Russell Davis, Tiptonville, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Mary Elizabeth King, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

In 1986, a jury convicted the Defendant, in case numbers 86-01202, 86-01203, and 86-01204, of a November 1985 aggravated kidnapping, rape, and robbery ("rape case"). *State v. Davis*, 741 S.W.2d 120, 121 (Tenn. Crim. App. 1987). The trial court sentenced the Defendant as a Range II offender, based upon his commission of especially aggravated offenses, to life imprisonment for his aggravated kidnapping conviction, twenty years for his rape conviction, and fifteen years for his robbery conviction. *Id*. The trial court ordered the rape and robbery convictions to run concurrently with each other and consecutively to

the aggravated kidnapping conviction. *Id*. The Defendant appealed, arguing that his convictions violated the prohibition against double jeopardy. *Id*. at 124. He also challenged the admissibility of evidence related to his prior convictions and the victim's identification of the Defendant. *Id*. at 122-24. This court affirmed. *Id*. at 125.

In October 1986, a jury convicted the Defendant, in case number 86-00612, of voluntary manslaughter arising from an incident occurring in November of 1985 ("manslaughter case"). *State v. Davis*, 751 S.W.2d 167, 168 (Tenn. Crim. App. 1988). The trial court again sentenced the Defendant as a Range II offender, based upon his commission of an especially aggravated offense, to ten years for his manslaughter conviction, which was ordered to run consecutively to four previous sentences, including the Defendant's sentences in the rape case. *Id*. The Defendant appealed, challenging the sufficiency of the evidence, the validity of a search of his truck and residence, the admissibility of the victim's medical records, and the jury instructions. *Id*. This court affirmed. *Id*.

The Defendant then filed separate post-conviction petitions in both his rape and manslaughter cases. *Russell L. Davis v. State*, No. 02-C-01-9307-CR00132, 1994 WL 90490, at *1 (Tenn. Crim. App. Mar. 23, 1994), *perm. app. granted* (July 25, 1994). A consolidated evidentiary hearing was held for both post-conviction petitions, and the post-conviction court denied the Defendant relief. *Id*. This court affirmed that denial of relief on appeal. *Id*. The Tennessee Supreme Court granted the Defendant permission to appeal and affirmed this court's judgment that the Defendant was not entitled to relief on his post-conviction petitions. *Davis v. State*, 912 S.W.2d 689, 701 (Tenn. 1995).

On July 25, 2022, the Defendant filed the instant Rule 36.1 motion, listing all four case numbers: 86-00612, 86-01202, 86-01203, 86-01204. He alleged that he received illegal sentences in the rape case based on the State's failure "to file an adequate notice of enhanced punishment as an especially aggravated offender—which amounted to a defective notice or no notice at all" in contravention of Tennessee Code Annotated sections 40-35-107, -202, and -210. Specifically, the Defendant argued that his Range II sentences in these three cases were illegal because the State's "Notice of Sentencing Status" failed to provide "the nature of the release status from a described prior felony conviction relied upon, and the nature of any injury or threat of injury relied upon to establish that the defendant has committed an especially aggravated primary offense[,]" as required by Tennessee Code Annotated section 40-35-202(a). He further argued that his sentences were imposed in direct contravention of Code sections 40-35-202 and -210 "when the [S]tate failed to file three notices of enhanced punishment for each of the three separate case numbers." The Defendant asserted that he was prejudiced by the alleged notice

deficiencies, because he could have negotiated a plea agreement if he had known of the State's intent to have him sentenced as an especially aggravated offender.

In addition, the Defendant contended that his sentences in the rape case were illegal because no certified copies of his prior convictions were submitted during sentencing as required by Code sections 40-35-202 and 40-35-210. Finally, he submitted that his Range II sentence for aggravated kidnapping was illegally imposed in direct contravention of Code section 40-35-107 because the indictment for that offense "allege[d] the other indicted crimes of rape and robbery as elements of the offense and therefore could not [have been] utilized as aggravating factors themselves." The Defendant did not lodge any specific challenge to the manslaughter case and only attached to his motion the judgment forms and indictments for the three offenses in the rape case.

The trial court summarily dismissed the motion, finding that the Defendant had failed to raise a colorable claim for relief under Rule 36.1. In so concluding, the trial court observed that the State had filed a notice of sentencing status in both the Defendant's rape and manslaughter cases four days prior to each trial. The trial court determined that "the sentences the [D]efendant received were authorized under the statutory scheme of each offense at the time of that offense, and were in the appropriate range of punishment, and [were] therefore not illegal and need[ed] no correction." This timely appeal followed.

II. ANALYSIS

In this appeal, the Defendant challenges the summary dismissal of his Rule 36.1 motion. The Defendant notes that the trial court found the enhancement notices were filed only four days before trial, which, he submits, is in contravention of the ten-day requirement. He further contends that the trial court was incorrect, averring that no notice was filed at all, and that an evidentiary hearing is required to determine this factual dispute. He then again raises the same issues set forth in his Rule 36.1 motion. The State argues that the trial court properly dismissed the Defendant's motion for failing to raise a colorable claim under Rule 36.1. The State reasons that "[a]lleging an error regarding the notice of enhancement involves the underlying sentencing procedure, not the legality of the [D]efendant's sentence," and that the issue, therefore, should have been raised on direct appeal. We agree with the State.

Tennessee Rule of Criminal Procedure 36.1 provides a mechanism to a defendant or the State to seek correction of an illegal sentence. Tenn. R. Crim. P. 36.1(a); *State v. Brown*, 479 S.W.3d 200, 208-09 (Tenn. 2015). An illegal sentence under this rule is "one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1(a)(2). The term "illegal sentence" "is synonymous with

the *habeas corpus* concept of a 'void' sentence." *Cox v. State*, 53 S.W.3d 287, 292 (Tenn. Crim. App. 2001), *overruled on other grounds, Moody v. State*, 160 S.W.3d 512 (Tenn. 2005).

When a Rule 36.1 motion is filed, the trial court must determine whether the movant has stated a colorable claim that the sentence is illegal. Tenn. R. Crim. P. 36.1(b). A colorable claim under Rule 36.1 is "a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1." *State v. Wooden*, 478 S.W.3d 585, 593 (Tenn. 2015). "[W]hen determining whether a Rule 36.1 motion sufficiently states a colorable claim, a trial court may consult the record of the proceeding from which the allegedly illegal sentence emanated." *Id*. at 594. A trial court may summarily dismiss a Rule 36.1 motion if the movant fails to state a colorable claim for relief. Tenn. R. Crim. P. 36.1(b)(2). Whether a movant's Rule 36.1 motion states a colorable claim is a question of law that we review de novo. *Wooden*, 478 S.W.3d at 589.

Sentencing errors are divided "into three categories—clerical errors, appealable errors, and fatal errors." *Wooden*, 478 S.W.3d at 595. Clerical errors "arise simply from a clerical mistake in filling out the uniform judgment document[.]" *Id*. Appealable errors are those "for which the Sentencing Act specifically provides a right of direct appeal[,]" and generally involve challenges to "sufficiency of the evidence supporting a conviction" or "attacks on the correctness of the methodology by which a trial court imposes a sentence." *Id*. Fatal errors are "so profound as to render the sentence illegal and void." *Id*. Only fatal errors render a sentence illegal and entitle a defendant to relief under Rule 36.1. *Id*.

Here, the record indicates that the Defendant received Range II sentences based upon his commission of especially aggravated offenses. *See* Tenn. Code Ann. § 40-35-107 (Supp. 1985). Under the law at the time, a defendant's offender classification could be enhanced to that of a Range II offender if the defendant was found to have committed an especially aggravated offense beyond a reasonable doubt. *Id.* § 40-35-107(8). At the time of the Defendant's offenses, rape was specifically enumerated as an especially aggravated offense. *See id.* § 40-35-107(5) (referencing Code section 39-2-604, which codified the offense of rape at the time). Additionally, non-enumerated felony offenses could be classified as especially aggravated offenses upon a showing of certain statutory criteria. *See id*. § 40-35-107(1)-(4).

If the State sought to have a defendant's sentence enhanced for an especially aggravated offense, the State was required to "file a statement thereof with the court and defense counsel before trial[,]" which set forth the specific criteria upon which the State intended to rely to support such an enhancement. *See id*. § 40-35-202(a) (Repl. 1982).

When imposing a sentence for an especially aggravated offense, the trial court was required to consider, *inter alia*, "the statement filed by the district attorney general with the court as required by § 40-35-202." *Id*. § 40-35-210(d). The Tennessee Rules of Criminal Procedure in effect at the time of the Defendant's trial required that a notice seeking sentencing for an especially aggravated offense be filed "not less than ten (10) days prior to trial." Tenn. R. Crim. P. 12.3(a) (Tenn. Ct. R. Ann. 1988-89). "If the notice is filed later than this time, the trial judge shall grant the defendant upon his motion a reasonable continuance of the trial." *Id.* Concerning the late-filing of an enhancement notice, the Comment to Rule 12.3 provided, "If the defendant does not request a continuance, the written notice shall be valid." *See also State v. Stephenson*, 752 S.W.2d 80, 81 (Tenn. 1988) (holding that the late-filing of an enhancement notice does not render the notice ineffective where the defendant failed to request a continuance and failed to otherwise show that he was prejudiced).

First, we observe that although the Defendant listed the case number for his manslaughter case in his Rule 36.1 motion, he never lodged any specific issue with the sentence imposed therein, did not attach a copy of that judgment of conviction to his motion, and only attached the judgment of conviction for that case to his appellate brief. *See* Tenn. R. Crim. P. 36.1(a)(1) ("The movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents."); *Threadgill v. Bd. of Prof'l Responsibility*, 299 S.W.3d 792, 812 (Tenn. 2009) (holding that documents "attached to pleadings, briefs, and oral arguments are not evidence and may not be considered by an appellate court unless they are properly made part of the record"), *overruled on other grounds by Lockett v. Bd. of Prof'l Responsibility*, 380 S.W.3d 19 (Tenn. 2012); *see, e.g., Edgar Bailey, Jr. v. Dwight Barbee*, *Warden*, No. W2012-01729-CCA-R3-HC, 2013 WL 865329, at *3 (Tenn. Crim. App. Mar. 5, 2013) (stating that documents attached to appellant's brief are not properly part of the certified record and cannot be considered by appellate courts). As such, any issue regarding the sentence in the manslaughter case is waived. *See* Tenn. R. App. P. 36(a).

Importantly, as the State indicates, alleging an error regarding the notice of enhancement for offender classification pursuant to Tennessee Code Annotated section 40-35-202(a) involves the "underlying sentencing procedure, not the legality of [a defendant's] sentence." *See, e.g., State v. Atlanta Pearl Hardy*, No. M2017-00537-CCA-R3-CD, 2017 WL 3492060, at *2 (Tenn. Crim. App. Aug. 15, 2017) (quoting *State v. Christopher Hubbard*, No. W2016-01263-CCA-R3-CD, 2017 WL 244116, at *2 (Tenn. Crim. App. Jan. 20, 2017)). "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), *superseded by rule on other grounds*, Tenn. R. Crim. P. 36.1; *see* Tenn. Code Ann. § 40-35-107(10) (Supp. 1985) (providing that "[t]he finding that a defendant is or is not an

especially aggravated offender shall be appealable by either party"). As such, alleged errors regarding the notice of enhancement pursuant to section 40-35-202(a) are appealable errors and do not raise a colorable claim under Rule 36.1. *Hardy*, 2017 WL 3492060, at *2.

Similarly, a trial court's error in offender classification will generally not "render the sentence illegal so long as the classification falls with the purview" of the sentencing statutes. *Cantrell*, 346 S.W.3d at 458. 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 statutes. *Id.* at 458-59. Put another way, an offender classification would create an illegal sentence only if the trial court classified the defendant in a category for which it did "not have the authority or the jurisdiction to classify a defendant." *Id.* at 458. Otherwise, "[c]orrection of an alleged error in offender classification must be sought on direct appeal." *Id.* As such, any error in determining the Defendant's Range II classification based upon his commission of especially aggravated offenses did not render the sentence illegal for the purpose of Rule 36.1. *See, e.g., State v. Edward Dewayne Shelton*, *Jr.*, No. M2018-00319-CCA-R3-CD, 2018 WL 5733132, at *3 (Tenn. Crim. App. Oct. 31, 2018) (stating same in addressing the defendant's claim that his sentence was illegal because he was classified as a Range II offender rather than a Range I offender). The trial court correctly determined that the sentences the Defendant received were authorized under the statutory scheme for each offense at the time of that offense and in the appropriate range of punishment and were, therefore, not illegal.

Taking the Defendant's contentions as true, and viewing these contentions in the light most favorable to him, we conclude that the Defendant failed to assert a colorable claim for relief under Rule 36.1. Any errors regarding the notices of enhancement and his offender classification should have been raised on direct appeal. Therefore, the trial court properly dismissed the Defendant's Rule 36.1 motion for failing to state a colorable claim for relief.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

KYLE A. HIXSON, JUDGE