

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2023

FILED

10/17/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. MICHAEL NOTARO

**Appeal from the Criminal Court for Sullivan County
No. S59383 William K. Rogers, Judge**

No. E2022-01642-CCA-R3-CD

Michael Notaro, Defendant, pled guilty to three counts of sexual exploitation of a minor with an agreed-upon sentence of 10 years for each conviction, to be served consecutively for a total effective sentence of 30 years at 100% in exchange for the State agreeing not to seek further prosecution for any other offenses under investigation. Defendant did not seek a direct appeal of his sentence. Instead, Defendant filed a motion pursuant to Rule 36.1 of the Tennessee Rules of Criminal Procedure in which he argued that his sentence was illegal. The trial court dismissed the motion for failure to state a colorable claim. Defendant appeals. We affirm the judgment of the trial court.

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 ROBERT H. MONTGOMERY, JR., and JILL BARTEE AYERS, JJ., joined.

Ilya Berenshteyn, Bristol, Tennessee, for the appellant, Michael Notaro.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Barry Staubus, District Attorney General; and William Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In May 2011, the Sullivan County Grand Jury issued a three-count presentment charging Defendant with three separate counts of sexual exploitation of a minor based on hundreds of images and videos found on a laptop and desktop computer belonging to Defendant.

In November of 2012, Defendant pled guilty to three counts of sexual exploitation of a minor. As part of the plea agreement, the State agreed not to seek further prosecution for any other offense currently under investigation. Counsel for the State explained that after the presentment, the State learned information that could have led to new charges. At the guilty plea hearing, counsel for the State explained that if the case had gone to trial, the State would have proven that:

[A]n investigation began in April of 2005 in which a neighbor made contact with Bristol Tennessee Police Department in reference to having observed illegal material on her neighbor [Defendant's] computer. The computer was subsequently analyzed by the [Internet Crimes Against Children] Unit in Knoxville[,] Tennessee and was maintained for evidence and returned or an evidence report was returned [to] Detective Erin Blevins for a follow-up for possible prosecution. The computer's hard drive contained over 175 images of child pornography that were recovered from Volume C of the hard [drive] and recovered folders that had been previously deleted. Forensic analysis then allocated space of the hard drive yielded over 1200 images of child pornography by utilizing file header analysis to locate deleted images. The apartment [Defendant] was residing in at the time of the observation was made was within the city limits of Bristol, Tennessee, which is located in Sullivan County. In March of 2011, further investigation continued and [Defendant] was contacted by law enforcement along with his mother, Ms. Ruby Notaro, who resided with [Defendant] and stated that there were three computers in the residence. One being a laptop which she had purchased for [Defendant] for college and consent to search waivers were obtained for Ms. Ruby Notaro as well as for [Defendant] in which over 200 images of child pornography involving individuals under the age of 18 were discovered. [Defendant] was subsequently interviewed on May 19th, 2011, and waived his rights . . . he admitted that in 2005 he accidentally found illegal child porn sites when he did a Google search for library books title[d] Lolita. He found links to websites that had illegal images of children on display. [Defendant] also admitted that he had occasionally paid for access to websites that contained illegal images of child pornography. [Defendant] admitted to having a desktop and a laptop computer that he used to search and download the illegal child pornography. He initially stated that he searched for images of 17 year olds but later also searched and downloaded images and videos of children engaging in sex acts ranging [from] 10 to 14 years of age. [Defendant] also stated that he also used his on-line accounts to chat and often trade illegal pictures of children and also traded and also sen[t] naked pictures of himself to users who may have been under age. [Defendant] explained the materials saved on his laptop. That approximately

60% of it was illegal child pornography. [Defendant] also admitted to knowingly communicating with minor females while online and having communicated with subjects that possibl[y] faked they were minors and admitted to soliciting these individuals for sex. [Defendant] further stated that in the month of February 2011 he communicated with individuals who represented themselves to be 12 years old and he further sent an illegal video of a 14 year old engaging in sexual acts.

The trial court accepted the plea to three counts of sexual exploitation of a minor and sentenced Defendant to the agreed-upon sentence of 10 years on each count to be served consecutively, for a total effective sentence of 30 years at 100%. The record reflects that consecutive sentencing was a condition of the plea agreement.

Defendant filed a motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1 in December 2020. In the motion, Defendant asserted that his sentences were illegal because the trial court failed to find that Tennessee Code Annotated section 40-35-115(b)(5), pertaining to discretionary consecutive sentencing of sexual offenders of minor victims, applied and that his sentences were required to be imposed concurrently pursuant to Code section 40-35-115(d) in the absence of such a finding by the trial court. After a brief hearing during which the trial court heard argument from counsel, the trial court dismissed the motion for failure to state a colorable claim. The trial court determined that the judgments were valid and that Defendant knowingly entered into the plea agreement with “express terms” that he serve his sentences consecutively. The trial court also noted Defendant did not dispute the fact that he agreed to the terms of the agreement and that he was represented by counsel at the plea. Defendant filed a timely notice of appeal.

Analysis

Defendant argues on appeal that the trial court abused its discretion by dismissing his motion filed pursuant to Rule 36.1. Specifically, Defendant insists that his sentences are illegal because the trial court did not find that consecutive sentences were appropriate pursuant to the criteria of Tennessee Code Annotated section 40-35-115(b)(5). The State disagrees, arguing instead that the trial court properly dismissed the motion because Defendant failed to state a colorable claim.

Rule 36.1 provides the defendant and the State an avenue to “seek to correct an illegal sentence,” defined as a sentence “that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1; *see also State v. Wooden*, 478 S.W.3d 585, 594-95 (Tenn. 2015) (holding that “the definition of ‘illegal sentence’ in Rule 36.1 is coextensive with, and not broader than, the definition of the term

in the habeas corpus context”). To avoid summary denial of an illegal sentence claim brought under Rule 36.1, a defendant must “state with particularity the factual allegations,” *Wooden*, 478 S.W.3d at 594, establishing “a colorable claim that the unexpired sentence is illegal,” Tenn. R. Crim. P. 36.1(b). “[F]or purposes of Rule 36.1 . . . ‘colorable claim’ means 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.” *Wooden*, 478 S.W.3d at 593. 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.* Commenting on appealable errors, the court stated that those “generally involve attacks on the correctness of the methodology by which a trial court imposed 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.* The determination whether a Rule 36.1 “motion states a colorable claim for correction of an illegal sentence under Rule 36.1 is a question of law, to which de novo review applies.” *Id.* at 589 (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007)).

Defendant’s argument that the consecutive sentences imposed as part of his plea agreement are illegal is an appealable error. *See, e.g., State v. Luellen*, No. W2022-01489-CCA-R3-CD, 2023 WL 4450479, at *1-2 (Tenn. Crim. App. July 11, 2023) (citing Tennessee Code Annotated section 40-35-115(c)), *perm. app. filed* (Tenn. Aug. 4, 2023); *State v. Howard*, No. M2019-01900-CCA-R3-CO, 2020 WL 3408794, at *2 (Tenn. Crim. App. June 22, 2020). Here, Defendant agreed by the terms of the plea agreement to consecutive sentences, which were allowed by statute, and he waived his right to an appeal of the sentences by accepting the plea agreement. He then filed a Rule 36.1 motion several years later. Defendant failed to state a colorable claim. The trial court did not abuse its discretion. The judgment of the trial court is affirmed.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

TIMOTHY L. EASTER, JUDGE