

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs June 6, 2023

**FILED**  
07/11/2023  
Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. UNDRAY LUELLEN**

**Appeal from the Criminal Court for Shelby County**  
**No. 07-08953          Jennifer Fitzgerald, Judge**

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**No. W2022-01489-CCA-R3-CD**

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The petitioner, Undray Luellen, appeals the denial of his Rule 36.1 motion to correct an illegal sentence, asserting that his sentence is illegal because the trial court imposed consecutive sentences without stating its reasons on the record. Upon our review of the record and applicable law, we affirm the judgment of the trial court.

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

J. ROSS DYER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR. and TOM GREENHOLTZ, JJ., joined.

Undray Luellen, Wartburg, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

***Facts and Procedural History***

The petitioner was convicted by a Shelby County Criminal Court jury of two counts of especially aggravated kidnapping, one count of aggravated kidnapping, and one count of aggravated criminal trespass. *State v. Undray Luellen*, No. W2009-02327-CCA-R3-CD, 2011 WL 2557010, at \*1 (Tenn. Crim. App. June 27, 2011), *perm. app. denied* (Tenn. Oct. 18, 2011). Following a sentencing hearing, the trial court imposed consecutive sentences of twenty-two years for each of the especially aggravated kidnapping convictions, a concurrent sentence of ten years for the aggravated kidnapping conviction,

and a concurrent sentence of eleven months and twenty-nine days for the aggravated criminal trespass conviction. *Id.* The petitioner was subsequently unsuccessful in pursuits of relief via direct appeal, *see id.*, and petition for post-conviction relief. *See Undray Luellen v. State*, No. W2014-00508-CCA-R3-PC, 2015 WL 2258369, at \*1, \*3 (Tenn. Crim. App. May 14, 2015), *perm. app. denied* (Tenn. Sept. 16, 2015).

On August 16, 2022, the petitioner filed a motion to correct an illegal sentence pursuant to Rule 36.1 of the Tennessee Rules of Criminal Procedure in which the petitioner asserted that the trial court imposed an illegal sentence because it did not state its reasons for imposing consecutive sentences on the record. The trial court entered an order denying the motion on September 16, 2022, determining that the petitioner's sentence was in the applicable sentencing range under the law and also that this Court had already concluded that the trial court did not err in imposing consecutive sentences. The defendant filed an untimely notice of appeal on October 21, 2022.

### *Analysis*

On appeal, the petitioner asserts that the trial court imposed an illegal sentence because it did not provide its reasons for ordering consecutive sentencing on the record. The State responds that the appeal should be dismissed as untimely or, alternatively, the trial court properly denied relief. Given the notice of appeal was only filed five days late and the petitioner is incarcerated and acting pro se, we waive the timely filing of the notice in the interests of justice. *See* Tenn. R. App. P. 4(a).

Rule 36.1 permits a defendant to seek correction of an unexpired illegal sentence at any time. *See State v. Brown*, 479 S.W.3d 200, 211 (Tenn. 2015). “[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). Our supreme court has interpreted the meaning of “illegal sentence” as defined in Rule 36.1 and concluded that the definition “is coextensive with, 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). That 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 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.*

A trial court’s finding concerning the imposition of consecutive or concurrent sentences is appealable by either party, Tenn. Code Ann. § 40-35-115(c), and is therefore considered an appealable error not a fatal error. *See State v. Eric Bernard Howard*, No. M2019-01900-CCA-R3-CO, 2020 WL 3408794, at \*2 (Tenn. Crim. App. June 22, 2020); *State v. Eddie Readus*, No. M2017-02339-CCA-R3-CD, 2019 WL 3064049, at \*3 (Tenn. Crim. App. July 12, 2019), *perm. app. denied* (Tenn. Dec. 4, 2019); *State v. Kenneth Gaines*, No. W2016-01262-CCA-R3-CD, 2017 WL 715159, at \*2 (Tenn. Crim. App. Feb. 23, 2017), *perm. app. denied* (Tenn. May 22, 2017). Again, our supreme court has determined that appealable errors may not be corrected under Rule 36.1. *Wooden*, 478 S.W.3d at 595. Therefore, the trial court’s denial of the petitioner’s Rule 36.1 motion is affirmed.

Furthermore, this Court previously on direct appeal upheld the sentencing determinations of the trial court, including the imposition of consecutive sentences. *Undray Luellen*, 2011 WL 2557010, at \*17. “Rule 36.1 may not be used to relitigate those issues that have been previously determined.” *State v. Ricky Flamingo Brown*, No. M2015-01754-CCA-R3-CD, 2016 WL 987641, at \*2 (Tenn. Crim. App. Mar. 15, 2016), *perm. app. denied* (Tenn. Aug. 18, 2016). The petitioner is not entitled to relief.

### ***Conclusion***

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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J. ROSS DYER, JUDGE