

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2023

FILED

05/31/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. QUINCY D. MOUTRY

**Appeal from the Criminal Court for Knox County
No. 93066 Steven Wayne Sword, Judge**

No. E2022-01076-CCA-R3-CD

The Defendant, Quincy D. Moutry, appeals the dismissal of his Tennessee Rule of Criminal Procedure 36.1 motion to correct an illegal sentence for his possession of a firearm with the intent to go armed during the commission of a dangerous felony conviction. Specifically, the Defendant argues that the trial court's entry of corrected judgment forms increasing the mandatory minimum service term on his sentence constituted an ex parte sentencing in violation of Tennessee Rule of Criminal Procedure 43(a)(3). After review, we reverse the judgment of the trial court and remand the case for entry of a corrected judgment form.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and JILL BARTEE AYERS, J., joined.

Quincy D. Moutry, Wartburg, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; and Charme P. Allen, District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

In 2011, a Knox County jury convicted the Defendant of a March 2008 carjacking, possession of a firearm with the intent to go armed during the commission of a dangerous felony, and aggravated robbery. *State v. Quincy D. Moutry*, No. E2011-02531-CCA-R3-CD, 2013 WL 3105616, at *1 (Tenn. Crim. App. June 17, 2013), *perm. app. denied* (Tenn.

Nov. 13, 2013). Relative to the possession of a firearm conviction, which this appeal concerns, the record shows that the indictment did not allege that the Defendant had a qualifying prior felony conviction nor was a bifurcated trial held to allow the jury to determine whether the Defendant had a qualifying prior felony conviction.¹ At the sentencing hearing, the State asked that the Defendant be sentenced to eight years with a mandatory minimum service term of three years. The trial court sentenced the Defendant as a Range II offender to seven years for this conviction but made no mention at the sentencing hearing of the mandatory sentence term the Defendant would be required to serve.

On June 22, 2011, the trial court entered judgment for the Defendant's possession of a firearm with the intent to go armed during the commission of a dangerous felony conviction. The judgment form indicated that the Defendant was sentenced to seven years with a mandatory minimum sentence term of three years pursuant to Tennessee Code Annotated section 39-17-1324. On July 12, 2011, the trial court entered a corrected judgment form indicating that the Defendant's mandatory minimum sentence term was four years. On July 29, 2011, the trial court entered a final corrected judgment form, which bore a signature date of July 12, 2011, indicating that the Defendant must serve a mandatory minimum sentence term of five years.

The Defendant did not raise an issue concerning the corrected judgment forms on his direct appeal. *Id.* at *4-8. This court affirmed the Defendant's convictions. *Id.* at *8. The Defendant then filed a post-conviction petition contending that he received the ineffective assistance of counsel. *Quincy Moutry v. State*, No. E2017-00353-CCA-R3-PC, 2018 WL 2465147, at *2 (Tenn. Crim. App. June 1, 2018), *perm. app. denied* (Tenn. Sept. 14, 2018). The post-conviction court denied the petition, and this court affirmed that denial of relief on appeal. *Id.* at *4, *7.

In July 2018, the Defendant filed a Rule 36.1 motion alleging his sentence was illegal because the State failed to prove that the Defendant possessed or employed a firearm as required by Tennessee Code Annotated section 39-17-1324(f). The trial court summarily dismissed the motion finding that it raised no colorable claim under Rule 36.1. In February 2022, the Defendant filed a second Rule 36.1 motion arguing that the corrected judgment forms were in violation of a plea agreement with the State. The trial court again

¹ Although the complete transcripts of the trial and sentencing hearing were not part of the record before us, they were part of the record in the Defendant's direct appeal in this case. We have taken judicial notice of the underlying record. *See Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987) ("The courts may take judicial notice of the court records in an earlier proceeding of the same case and the actions of the courts thereon.").

summarily dismissed the motion finding no colorable claim was raised while also noting that the Defendant was convicted following a jury trial and not through a plea agreement.

In July 2022, the Defendant filed the instant Rule 36.1 motion arguing that the corrected judgment forms were the product of an ex parte sentencing hearing in violation of Tennessee Rule of Criminal Procedure 43(a)(3). The trial court found that the Defendant was not subjected to a second sentencing hearing, that the original judgment form was corrected to reflect the original sentencing order of the court, and that the judgment form was valid on its face. The trial court summarily dismissed the motion, finding that Defendant had failed to present a colorable claim for relief under Rule 36.1. This timely appeal followed.

II. ANALYSIS

In this appeal, the Defendant challenges the dismissal of his Rule 36.1 motion, reiterating his contention that the trial court's entry of corrected judgment forms for his possession of a firearm conviction violated Tennessee Rule of Criminal Procedure 43(a)(3). The State contends that the trial court properly dismissed the Defendant's motion for failing to raise a colorable claim under Rule 36.1.

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). 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.” *Id.*

Fatal errors are “so profound as to render the sentence illegal and void.” *Id.* Only fatal errors render a sentence illegal and are entitled to relief under Rule 36.1. *Id.* Unlike fatal errors, when “a trial court fails, by reason of clerical mistake, oversight, or omission, to record a defendant’s sentence accurately on a judgment,” the trial court maintains authority to correct the clerical error at any time. Tenn. R. Crim. P. 36; *Brown*, 479 S.W.3d at 213.

Here, the Defendant argues that the entry of corrected judgment forms for his possession of a firearm conviction constituted an illegal sentence because it was an ex parte sentencing hearing in violation of Tennessee Rule of Criminal Procedure 43(a)(3). Rule 43(a)(3) provides that a defendant’s presence is required at the imposition of sentence unless excused by the court upon the defendant’s motion. Although we disagree that the entry of corrected judgment forms generally constitutes a new sentencing hearing that requires a defendant’s presence, we nonetheless agree with the Defendant’s contention that the final corrected judgment form in this case imposed an illegal sentence.

Alleged violations of Tennessee Code Annotated section 39-17-1324 shall be “tried before the same jury and at the same time as the dangerous felony.” Tenn. Code Ann. § 39-17-1324(d). “The jury shall determine the innocence or guilt of the defendant unless the defendant and the state waive the jury.” *Id.* A violation of Code section 39-17-1324(a) is punishable by a mandatory minimum three-year service term unless, at the time of the offense, a defendant has a qualifying prior felony conviction, in which case the violation is punishable by a mandatory minimum five-year service term. *Id.* § 39-17-1324(g)(1), (2). When the State seeks to have a defendant sentenced under subdivision (g)(2), it must present proof of a qualifying prior felony conviction to the trier of fact. *Id.* § 39-17-1324(f). This court has previously concluded that subdivision (f) requires the trial court to hold a bifurcated trial for the determination of this issue. *State v. Larry Allen Stumbo*, No. E2017-01405-CCA-R3-CD, 2018 WL 3530844, at *11 (Tenn. Crim. App. July 23, 2018); *Josh L. Bowman v. State*, No. E2016-01028-CCA-R3-PC, 2017 WL 1449232, at *7 (Tenn. Crim. App. Apr. 24, 2017). Further, the prior felony conviction must qualify as one of the statutorily enumerated dangerous felonies in order to subject a defendant to an enhanced minimum service term. *See* Tenn. Code Ann. § 39-17-1324(g)(2), (i)(1), (2); *see, e.g., Bowman*, 2017 WL 1449232, at *4-8; *see also State v. Brandon D. Middlebrook*, No. E2019-01503-CCA-R3-CD, 2021 WL 28582, at *19 (Tenn. Crim. App. Jan. 5, 2021). A defendant erroneously sentenced to a mandatory minimum service term pursuant to section -1324 has received an illegal sentence. *State v. Johnvya T. Smith*, No. E2020-00409-CCA-R3-CD, 2021 WL 1352275, at *2 (Tenn. Crim. App. Apr. 12, 2021) (holding that the defendant’s mandatory minimum service of ten years under section 39-17-1324(h)(2) was illegal because he had no qualifying prior felony convictions); *see State v. Tedrick Woods*, No. W2016-01360-CCA-R3-CD, 2017 WL 362626, at *2 (Tenn. Crim. App. Jan. 25, 2017) (concluding that a judgment was illegal on its face because the trial court sentenced the

petitioner to three years to serve rather than the mandatory six years under section 39-17-1324(h)(2)).

The State in its brief argues that the trial court was statutorily mandated to impose a five-year mandatory minimum service term based on the Defendant's prior felony convictions pursuant to Tennessee Code Annotated section 39-17-1324(g)(2). The State reasons that, at the sentencing hearing, proof was presented to the trial court that the Defendant had prior felony convictions for second degree murder and attempted aggravated robbery and that the corrected judgment forms merely reflected compliance with the statute. We disagree.

The record shows that the jury was not presented proof of the Defendant's qualifying prior felony convictions as required by Code section 39-17-1324(f). At the sentencing hearing, the State asked for a three-year mandatory minimum service term, as opposed to pursuing the five-year mandatory minimum enhancement under Code section 39-17-1324(g)(2). Additionally, at the sentencing hearing, the trial court orally sentenced the Defendant to seven years for his possession of a firearm conviction but made no mention of the minimum number of years the Defendant would be required to serve pursuant to section -1324(g). Therefore, the trial court erred by dismissing the Defendant's Rule 36.1 motion on the ground that the corrected judgment forms reflected the original sentencing order of the court.

Because proof of the Defendant's prior felony convictions was not presented to the trier of fact as required by section 39-17-1324(f), his current minimum service term of five years was "not authorized by the applicable statute" and is illegal. *See* Tenn. R. Crim. P. 36.1(a)(2). We acknowledge that a prior panel of this court remanded a case on direct appeal and ordered a jury determination of whether a defendant had a prior felony conviction where the lower court had failed to present that question to the jury at the original trial. *See State v. Roy Demond Duncan*, No. W2012-00834-CCA-R3-CD, 2013 WL 2490551, at *7 (Tenn. Crim. App. June 7, 2013). Remand for a trial would be futile in this instance, however, because neither of the Defendant's prior felony convictions—second degree murder and attempted aggravated robbery—legally qualify as dangerous felonies pursuant to the statute. *See* Tenn. Code Ann. § 39-17-1324(i)(1); *see also Bowman*, 2017 WL 1449232, at *4-8; *Middlebrook*, 2021 WL 28582, at *19. We therefore reverse the judgment of the trial court and remand the case for entry of a corrected judgment form for count two for the Defendant's possession of a firearm conviction to reflect a mandatory minimum sentence of three years pursuant to Tennessee Code Annotated section 39-17-1324(g)(1).

III. CONCLUSION

In consideration of the foregoing and the record as a whole, we reverse the judgment of the trial court and remand the case for entry of a corrected judgment form consistent with this opinion.

KYLE A. HIXSON, JUDGE