

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

FILED
November 15, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 v.)
)
 JAMES LEWIS FRITZ,)
)
 Appellant)

NO. 02C01-9503-CC-00094

MADISON CIRCUIT

Hon. Franklin Murchison, Judge

(flagrant nonsupport)

For the Appellant:

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District Public Defender
and
Pamela J. Drewery
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For the Appellee:

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and
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OPINION FILED _____

MODIFIED

John K. Byers
Senior Judge

OPINION

The defendant entered a plea of guilty to flagrant non-support in violation of TENN. CODE ANN. § 39-15-101, a class E felony.

The trial judge denied probation, found the defendant to be a standard Range I offender and sentenced him to serve two years. The release eligibility for this offense is 30%. In addition to this, the trial judge ordered that when released on parole, a condition thereof would be that he make restitution in the amount of \$38,000.00.¹

The defendant raised four issues on appeal. Three of these dealt with the sentence as to length or alternative sentencing. These are now moot, as conceded by the defendant, because the sentence has been served.

The only issue for us to determine is whether the trial court could place a condition upon the parole of the defendant.

We find he cannot and find that portion of the judgment is void.

Chapter 28 Title 40 of the Tennessee Code (§§ 40-28-101 *et seq.*) creates and defines the duties of the Board of Paroles. TENN. CODE ANN. § 40-28-103 (a) provides "There is hereby created a full-time, autonomous board of paroles . . . which shall be autonomous in structure"

In *State ex rel. Wade v. Norvell*, 443 S.W.2d 839, 841 (Tenn. Crim. App. 1969) (concurring opinion), this Court said:

The courts have no jurisdiction to exercise authority or control or command or dominion over the Board of Probation and Paroles in the exercise of its statutory duties with reference to the parole of prisoners and allowance or forfeiture of time credits upon their sentences.

¹ Release from a two-year felony sentence is to probation and not to parole. TENN. CODE ANN. § 40-35-501(a)(2)-(6). However, as with parole, this statute reflects that the terms and conditions of probation supervision after such release are to be established by the Department of Corrections, not the trial court.

The State contends that TENN. CODE ANN. § 40-38-101 *et seq.*, the Victims' Bill of Rights, requires or allows the trial court to make restitution a part of parole. TENN. CODE ANN. § 40-38-106(2) provides that victims of crimes involving offenses against property have a right to restitution ordered as a condition of probation or a suspended sentence or parole. The State says this gave authority for the trial court to order the defendant to make restitution as a condition of parole. We do not accept this view.

TENN. CODE ANN. § 40-38-106 does not attempt to enlarge the authority of the courts to encompass the control of the conditions of parole, which is vested in the autonomous Board of Paroles. In the absence of some indication from the legislature that the provision of restitution on parole release is to be determined by the courts, we conclude that so much of TENN. CODE ANN. § 40-38-106 that deals with restitution upon parole does not confer jurisdiction on the courts to enter such orders. What duties it imposes upon the Board of Paroles is not an issue before us to decide.

We conclude so much of the judgment of the trial court as attempted to impose restitution as a condition of parole is null and void and of no effect and is stricken from the judgment.

John K. Byers, Senior Judge

CONCUR:

Joseph B. Jones, Judge

Joseph M. Tipton, Judge