

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1996

FILED

March 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee)
)
vs.)
)
WILLIE LEWIS BROWN,)
)
Appellant)

No. 03C01-9510-CR-00335

HAMILTON COUNTY

Hon. Joseph F. DiRisio, Judge

(Delayed Appeal)

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OPINION FILED: _____

DELAYED APPEAL DISMISSED

David G. Hayes
Judge

OPINION

On January 28, 1993, the appellant, Willie Lewis Brown, entered guilty pleas, pursuant to a plea agreement, in the Hamilton County Criminal Court, to one count of especially aggravated robbery, one count of especially aggravated burglary, two counts of attempted first degree murder, and four counts of aggravated robbery. Pursuant to the plea agreement, the trial court imposed the minimum sentence within range I for each of the eight offenses and ordered concurrent sentences for an effective sentence of fifteen years.¹

On September 29, 1994, the appellant filed a petition for post-conviction relief alleging, *inter alia*, that his guilty plea was not knowingly and voluntarily entered and that he received the ineffective assistance of counsel. On June 2, 1995, the trial court dismissed the petition "as the defendant has been granted a delayed appeal in the case in which he is attacking his conviction." On June 12, 1995, the trial court entered an "Order for Delayed Appeal," which provided:

"Upon Motion of the petitioner, by attorney Rich Heinsman, Jr. for a Rule 45(b)(2) enlargement of time to file an appeal, and it appearing that a Rule 37(b)(iii) appeal may lie in this case, and that the 30 day appeal period has lapsed, it is hereby ORDERED, that petitioner, pursuant to Rule 45(b)(2) is granted leave to file notice of appeal in this cause."

In this appeal, as of right, the appellant contends that his convictions must be reversed because the trial court accepted his guilty pleas "in violation of Rule 11, Tennessee Rules of Criminal Procedure, State v. Mackey, [553 S.W.2d 337 (Tenn. 1977)], and Boykin v. Alabama, [395 U.S. 238, 89 S.Ct. 1709 (1969)]."

¹ Case # 194740, Especially Aggravated Robbery, class A felony, 15 years.
Case # 194743, Especially Aggravated Burglary, class B felony, 8 years.
Case # 194746, Attempted First Degree Murder, class A felony, 15 years.
Case # 194749, Attempted First Degree Murder, class A felony, 15 years.
Case # 194752, Aggravated Robbery, class B felony, 8 years.
Case # 194755, Aggravated Robbery, class B felony, 8 years.
Case # 194758, Aggravated Robbery, class B felony, 8 years.
Case # 194761, Aggravated Robbery, class B felony, 8 years.

Specifically, the appellant contends that, at the guilty plea hearing, the trial judge failed to advise him “of the minimum and maximum penalties he was facing in any of his cases.” Again, we note the record reflects that the appellant, pursuant to the plea agreement, received the minimum sentence permissible in each of the eight cases in which a guilty plea was entered.

We first address the issue raised by the State of whether the trial court was without the authority to grant a “delayed appeal.” We conclude that it did not, based upon the following:

(1) A judgment in a criminal case becomes final thirty days after its entry. State v. Bouchard, 563 S.W.2d 561, 563 (Tenn. Crim. App. 1977) (citations omitted); State v. Thomas, No. 03C01-9504-CR-00109 (Tenn. Crim. App. at Knoxville, Nov. 15, 1995) (citations omitted). The appellant’s guilty pleas were entered on January 28, 1993. The Notice of Appeal in this case was filed on June 12, 1995, almost two and one-half years later. Accordingly, the trial court was without jurisdiction in this case.

(2) Generally, no appeal lies from a specific sentence imposed pursuant to a plea bargain agreement other than by Tenn. R. Crim. P. 37(b)(2). Failing to preserve an appeal from a plea of guilty usually forecloses any direct attack upon such a plea. See State v. McClintock, 732 S.W.2d 268, 269 (Tenn. 1987). See also Tenn. R. App. P. Rule 3(b).

(3) The trial court had no authority to grant a “delayed appeal.” A delayed appeal can only be granted by a trial court upon a petition filed under the Post-Conviction Act seeking that relief, and then, only after an evidentiary hearing where the court finds that the defendant was unconstitutionally denied an appeal from his “original conviction.” Whisnant v. State, 532 S.W.2d 572, 575 (Tenn. Crim. App. 1975). Tenn. Code Ann. § 40-30-120, (repealed 1995) (replaced by Tenn. Code Ann. §40-30-213 (1995 Supp.)). The record in this case indicates that the trial court dismissed the appellant’s post-conviction petition. Parenthetically, we note that the substantive issue on appeal, i.e. failure to advise as to minimum and maximum sentence range is not constitutionally mandated. Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992).

(4) The trial court’s order cites as authority for the appeal Tenn. R. Crim. P., Rule 37(b)(iii). This rule permits an appeal from a guilty plea in which there was a plea agreement under Rule R. Crim. P., Rule 11(e) only when “The error(s) complained of were not waived as a matter of law by the plea of guilty or nolo contendere, or otherwise waived, and if such errors are apparent from the record of the proceedings already had.” This rule is not applicable to the facts of this case as the trial court had no jurisdiction. See supra number 1.

(5) The trial court's order also cites as authority for the appeal Tenn. Rules Crim. P. Rule 45. Rules of Criminal Procedure do not apply to appellate proceedings. Rules of Appellate Procedure govern proceedings before the Supreme Court, Court of Appeals, and Court of Criminal Appeals. The only method for taking an appeal as of right to this Court is prescribed by the Rules of Appellate Procedure, specifically Rules 3 and 4. Accordingly we conclude that the trial court was without authority to grant a "delayed appeal." See Porter v. Daniels, No. 88-276-II (Tenn. App. at Nashville, Feb. 22, 1989), petition to rehear, (Tenn. App. at Nashville, Mar. 15, 1989).

We acknowledge the appellant's concern over clerical errors in case No. 194743. Case number 194743 charged the appellant with especially aggravated burglary, a class B felony. The appellant's plea agreement reflects that he pled guilty in case number 194743 to especially aggravated robbery, a class A felony, with an agreed sentence of fifteen years. An "Order of Conviction," likewise, indicates that the appellant pled guilty, in case number 194743, to especially aggravated robbery. The judgment of conviction correctly lists the offense as especially aggravated burglary, but, incorrectly lists the offense as a class A felony with a sentence of fifteen years. The correct sentence should be eight years. See supra footnote 1. The appeal is dismissed. The case is remanded to the trial court for correction of the error noted in the judgment of conviction in Case No. 194743. Tenn. R. Crim. P. 36.

DAVID G. HAYES, Judge

CONCUR:

DAVID H. WELLES, Judge

THOMAS T. WOODALL, Judge