

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT  
KNOXVILLE  
JANUARY 1997 SESSION

**FILED**  
March 25, 1997  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

vs. )

ROBIN N. CLARK, )

Appellant. )

C.C.A. No. 03C01-9603-CC-00118

Blount County

Honorable D. Kelly Thomas, Judge

(Jail Credit, Speedy Trial)

FOR THE APPELLANT:

MACK GARNER (On Appeal)  
District Public Defender

NATALEE HURLEY (At Trial)  
Assistant Public Defender  
419 High St.  
Maryville, TN 37804

FOR THE APPELLEE:

CHARLES W. BURSON  
Attorney General & Reporter

M. ALLISON THOMPSON  
Counsel for the State  
450 James Robertson Parkway  
Nashville, TN 37243-0493

PHILLIP MORTON  
Assistant District Attorney General  
363 Court St.  
Maryville, TN 37804-5906

OPINION FILED: \_\_\_\_\_

**AFFIRMED**

CURWOOD WITT,  
JUDGE

## OPINION

The appellant, Robin N. Clark, appeals as of right from the Blount County Circuit Court's order revoking her probation. In 1993, Clark pled guilty to four counts of uttering a forged instrument. The trial judge sentenced her to two years on each count with the sentences to be served concurrently. She was placed on intensive probation after completing a drug rehabilitation program.

The appellant concedes that she violated the rules of probation and does not contest the order to serve the balance of her sentence in the Department of Corrections. In this appeal, she contends that, (1) the trial court's refusal to grant her jail credit for time served in four Knox County convictions constitutes an improper modification of her sentence, and (2) the state's failure to bring her before the Blount County Court on the probation revocation warrant during the time she was incarcerated in Knox County on a concurrent sentence violated her right to a speedy trial.

For the reasons discussed below, we find that appellant's sentences imposed in the Knox County cases were, as a matter of law, cumulative with those imposed by the Blount County Court, and, therefore, she was not entitled to any jail credit for the time served in Knox County. Moreover, we find that the four-month delay between her incarceration in Knox County and the probation revocation hearing in Blount County did not violate appellant's right to a speedy trial. We affirm the judgment of the trial court.

Clark committed the offenses relevant to this appeal on July 24, 1992 in Blount County, Tennessee. In December, 1992 and April, 1993, she committed four forgeries in Knox County. She pled guilty to the Blount County offenses. On June 15, 1993, the trial court conducted a sentencing hearing and placed Clark on intensive probation. A warrant of violation of probation issued on August 1, 1994. She was sentenced on four Knox County charges in October, 1994 and received a one-year sentence on each conviction to be served concurrently in the Community Alternatives to Prison Program (CAPP). The Knox County judgment orders make no mention of the Blount County sentences or the pending warrant.

On June 15, 1995, appellant turned herself in to Knox County for failure to report to the CAPP program. She began serving her sentence in the Knox County cases on June 25.<sup>1</sup> After serving approximately four months, she was returned to Blount County for a probation revocation hearing. At the hearing, the Blount County trial court found that she had violated her probation and required her to serve the balance of her two-year sentence in the Tennessee Department of Corrections. The trial court refused to grant appellant credit for the jail time she had accrued in the Knox County Jail.

Clark contends that in denying her this jail credit the Blount County Court improperly modified the sentence originally pronounced in the Knox County cases. Since the Knox County judgment orders do not require her to serve her sentences consecutive to the existing Blount County sentences, appellant argues that the sentences must be served concurrently and that jail

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<sup>1</sup> The trial court ordered her to serve a minimum of 30% of a one year sentence in the Knox County facility.

time served in Knox County should apply equally against her Blount County sentences. We respectfully disagree.

The unstated premise underlying the appellant's argument is that unless the trial court's order affirmatively reflects that sentences are to run consecutively, they shall be deemed to be concurrent. This is a correct statement of the law, but only in those instances where a defendant is convicted in a single trial of more than one offense. Tenn. R. Crim. P. 32(c)(1).<sup>2</sup> The rule does not apply in this case where the sentences resulted from separate proceedings in different counties. The fact that the judgment orders in the Knox County convictions do not order that the sentences be served consecutively to those in Blount County does not require that the sentences be deemed concurrent.

Moreover, if the trial court had ordered that the appellant serve the Knox County sentences concurrently with those in Blount County, the sentence would have been contrary to law and void. Tennessee Code Annotated Section 40-20-111(b) provides that if a defendant commits a felony while out on bail and is convicted of both offenses, "the trial judge shall not have discretion as to

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<sup>2</sup> The rule is as follows:  
c) Concurrent or Consecutive Sentences.  
(1) Multiple Sentences From One Trial. If the defendant is convicted upon one trial of more than one offense, the trial judge shall determine whether the sentences shall be served concurrently or consecutively. Unless it is made to affirmatively appear that the sentences are consecutive, they shall be deemed to be concurrent. If the court order that the sentence be served consecutively or concurrently, the order shall specifically recite the reasons for such ruling and such judgment is reviewable on appeal.

Tenn. R. Crim. P. 32(c)(1).

whether the sentences shall run concurrently or cumulatively but shall order that such sentences be served cumulatively." An order of a trial court that is in direct contravention of an express statutory provision is a nullity. State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978); State v. Archer, 594 S.W.2d 751, 752 (Tenn. Crim. App. 1979) perm. to appeal denied (Tenn. 1980); State v. Johnny Fred Bayles, No. 02C01-9511-CC-00332 slip op. at 3 (Tenn. Crim. App., Jackson, June 28, 1996) perm. to appeal granted (Tenn.1997).

In addition, the Tennessee Rules of Criminal Procedure state:

(3) Mandatory Consecutive Sentences.

Where a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not.

The rule shall apply: . . .

(C) to a sentence for a felony where the defendant was released on bail and the defendant is convicted of both offenses.

Tenn. R. Crim. P. 32 (3)(C)(emphasis added). The rules of criminal procedure, like the other rules of procedure are "laws" of this state. Tennessee Dept. of Human Services v. Vaughn, 595 S.W.2d 62, 63 (Tenn. 1980). The Knox County judgment orders do not, by their silence, require appellant to serve those sentences concurrently with sentences resulting from other proceedings. The Rules of Criminal Procedure deem that such sentences are to be served consecutively even if the judgment order does not explicitly order that result.<sup>3</sup>

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<sup>3</sup> The fact that the Knox County judgments were final is simply irrelevant. If the original order needed modification, our law provides that a trial court has the authority to correct an illegal sentence at any time. State v. Burkhart, 566 S.W.2d at 873; Taylor v. Morgan, 909 S.W.2d 17, 20(Tenn. Crim.

The trial court in Blount County did not illegally modify the judgment order entered in Knox County. Modification of the Knox County judgments was unnecessary because consecutive sentencing was mandated whether the trial court entered an explicit order or not. The trial court did not err in denying appellant credit for the four months she served on the Knox County convictions.<sup>4</sup>

Clark also contends that the state violated her right to a speedy trial by failing to provide her with a probation revocation hearing during her four-month incarceration in Knox County. She bases this argument on the assumption that the Knox County sentences were concurrent to those in Blount County. Given our disposition of the first issue, we conclude that Clark's constitutional rights were not violated by the brief delay.

The United States and Tennessee Constitutions guarantee the criminally accused the right to a speedy trial. U.S.Const. amends. XI & XIV; Tenn. Const. art. I, § 9. A probation revocation proceeding is a continuation of the criminal prosecution and the defendant has a constitutional right to a speedy

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App. 1995). The trial court in Knox County could have corrected the judgment order any time it received notice of the Blount County sentences.

<sup>4</sup> We recognize that in State v. Burkhart, a case involving a guilty plea and an illegal sentence, the Tennessee Supreme Court remanded the case for a hearing to determine whether the guilty plea was predicated on concurrent sentencing. 566 S.W.2d at 873. See also Henderson v. State, 220 Tenn. 520, 419 S.W.2d 176, (Tenn. 1967); State v. Clyde Smith, No. 01C01-9204-CC-00144 (Tenn. Crim. App., Nashville, Nov. 18, 1992); Ronald Lee Lyons v. State, No. 01C01-9104-CC-00119 (Tenn. Crim. App., Nashville, Oct. 10, 1991). No remand is necessary in this case. Nothing in the records indicate that appellant's guilty pleas were entered contingent upon concurrent sentencing. In fact, the record indicates that the Knox County Court was unaware of the Blount County convictions when it entered judgment. Moreover, the Knox County convictions are not at issue in this appeal. Appellant disputes only the validity of the order of the Blount County Court.

trial on the offense of probation violation. Allen v. State, 505 S.W.2d 715 (Tenn. 1974); State v. Futina M. Carlton, No. 01C01-9512-CR-00417 slip op. at 1 (Tenn. Crim. App., Nashville, April 26, 1996)

The United States Supreme Court has identified the following four factors to be considered in determining whether a defendant had been denied a speedy trial: (1) length of delay, (2) reason for delay, (3) defendant's assertion of his or her right to a speedy trial, and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193, (1972); State v. Bishop, 493 S.W.2d 81, 83-84 (Tenn. 1973). The length of the delay is a "triggering mechanism" to inquire into the other three factors. State v. Woods, 924 S.W.2d 342, 346 (Tenn. 1996). The facts and nature of each case determine whether the delay is presumptively prejudicial in that instance. State v. Ronnie Crowe, No. 02C01-9112-CC-00274 slip op. at 8 (Tenn. Crim. App., Jackson, Jan. 20, 1993).

We have found nothing in the record to indicate that in this case a four-month delay should be considered presumptively prejudicial. Moreover, it is readily apparent that appellant suffered no actual prejudice. Tennessee law requires that the sentences for the Blount County offenses and the sentences for the Knox County offenses be served consecutively. Clark could not have obtained credit toward her Blount County sentences for the time served in Knox County had she been transported to Blount County on the day she surrendered to Knox County authorities.

A careful review of the law and the facts discloses no error requiring reversal or modification of the trial court's probation revocation order. The judgment of the trial court is affirmed.

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Curwood Witt, Judge

CONCUR:

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Gary R. Wade, Judge

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Joseph M. Tipton, Judge