IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1996 SESSION

FILED

May 7, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01C01-9603-CR-00123
	)	
Appellee	)	
	)	WILSON COUNTY
V.	)	
	)	HON. J. O. BOND,
JAMES O. GAMBRELL, SR.,	)	JUDGE
	)	
Appellant.	)	(Certified Question of Law)
	)	
	)	

For the Appellant:

Gary Vandever
108 North Greenwood Street
P.O. Box 642
Lebanon, TN 37088

For the Appellee:

John Knox Walkup
Attorney General and Reporter

Daryl J. Brand
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Tom P. Thompson, Jr.
District Attorney General

Robert N. Hibbett
Assistant District Attorney
111 Cherry Street
Lebanon, TN 37087

OPINION FILED: _____

APPEAL DISMISSED

William M. Barker, Judge

OPINION

This is an appeal of a certified question of law pursuant to Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure. In accordance with a plea agreement, appellant pled guilty to two counts of incest and one count of rape. He received four (4) year sentences each on the incest charges and a ten (10) year sentence on the rape offense. All sentences were ordered to run concurrently for an effective sentence of ten (10) years in the Department of Correction.

According to the order entered by the trial court, the certified question of law is as follows:

> Was the interrogation of the Defendant, James O. Gambrell, Sr., during the accusatory stage of the criminal process[,] a custodial interrogation such as to warrant the suppression of the pre-trial statement that he gave since officers did not advise him of his "Miranda" rights.

Upon review of the record, we have determined that this question of law would not have been dispositive of appellant's case. It is, therefore, not a proper question for our review. The appeal is dismissed.

On March 31, 1993, J.G.,[1] reported allegations of sexual abuse to the Department of Human Services (DHS). She alleged that appellant, her father, had been having sexual relations with her throughout her teenage years. The record also reveals that she had run away from home two days earlier. DHS notified the Wilson County Sheriff's Department of these allegations. At the prompting of DHS and law enforcement officials, J.G. made a phone call to her father which was tape-recorded.[2]

Officials from DHS then decided to speak with the victim's parents and discuss placement of the victim as she did not wish to return home. As a result, a deputy from the Wilson County Sheriff's Office contacted appellant and his wife at their home at

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[1]It is the policy of this Court to refer to minor victims of sexual abuse by their initials only. State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

[2]There is nothing in the record which indicates the substance of this conversation. However, it is likely that the conversation provided some confirmation of the victim's accusations because a detective testified at the suppression hearing that appellant became a suspect at this point.

about 7:30 p.m. The deputy requested that they come to the Sheriff's Department so that DHS officials could speak to them about their daughter. The Gambrells arrived at the Sheriff's Department about 8:00 p.m. Mrs. Gambrell met with DHS officials and appellant agreed to speak with two detectives in the Sheriff's Department. At approximately 10:15 p.m., appellant signed a written statement confessing to the sexual abuse of his daughter over a period of years. Appellant and his wife returned home after he gave his statement. On April 13, 1993, appellant was indicted on ten (10) counts of incest and ten (10) counts of rape. He was arrested two days later.

Appellant filed a motion to suppress his March 31 statement and a hearing was held in the trial court on December 3, 1993. The trial court ruled that appellant's statement was admissible, but admitted that it was a "very close question." Based upon the State's concession that the statement was the "cornerstone" of its case, the trial court granted appellant's request for an interlocutory appeal to this Court. This Court declined to hear the appeal and the parties prepared for trial. A plea agreement was negotiated between appellant and the State and accepted by the trial court on the day scheduled for trial. The plea agreement specifically reserved the above certified question of law.

Tennessee Rule of Criminal Procedure 37(b)(2)(i) permits a defendant to reserve for appeal a certified question of law when entering into a plea agreement. The rule requires that the question be dispositive of the case and that the State and trial court consent to appellate review of the question. Tenn. R. Crim. P. 37(b)(2)(i). However, the Rule does not set forth the necessary steps to be taken in the trial court to preserve the question. Our supreme court has supplied the explicit requirements that must be met before appellate consideration of a certified question of law is proper. State v. Preston, 759 S.W.2d 647 (Tenn. 1988). The prerequisites for appellate review are:

> 1. The final order or judgment from the trial court must contain a statement of the dispositive certified question of law reserved by defendant;

2. The order of the trial court must include a statement that the question was expressly reserved pursuant to a plea agreement;

3. The order must assert that the State and the trial judge consented to the reservation of the question, and that the State and the trial judge believe the question is dispositive of the case;

4. The question of law must be clearly stated to identify the scope and limits of the legal issue reserved; and

5. The reasons relied upon by the defendant at the suppression hearing must be identified and appellate review is limited to those grounds passed upon by the trial court.

Id at 650. See also State v. Harris, 919 S.W.2d 619, 621 (Tenn. Crim. App. 1995). The usual remedy for non-compliance with Preston is dismissal of the appeal. See State v. Bowlin, 871 S.W.2d 170, 173 (Tenn. Crim. App. 1993) (holding that this Court uniformly dismisses appeals in which no modicum of compliance is present).[3]

Our review of the record indicates that appellant has complied with the procedural requirements of Preston. The trial court's order accepting appellant's guilty pleas clearly sets forth the certified question of law and states that the plea agreement expressly reserves the right to appeal this question of law. Additionally, the order contains a statement that the trial judge and the State consented[4] to the reservation and that the question is dispositive of the case. The judgment form on each conviction also notes the reservation of a certified question of law. Nevertheless, we are unable to address the merits of the certified question.

Satisfaction of the technical requirements does not ensure review by an appellate court. Appellate review of a properly reserved question of law is permitted only when the certified question addresses a dispositive issue. Tenn. R. Crim. P.

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[3]We note that the supreme court has promulgated an amendment to the Advisory Commission Comments for Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure. If approved by the legislature, the Comments will advise attorneys to be certain that the application fully comports with the Preston requirements because failure to follow these dictates could result in dismissal of the appeal.

[4]It is irrelevant that the State did not contest appellate review at the trial level or on appeal. See State v. Bowlin, 871 S.W.2d 170, 172-73 (Tenn. Crim. App. 1993). We are compelled to raise any defect relating to the certified question *sua sponte* because it relates to the very nature of our jurisdiction. Id. See also State v. Charlotte Little, No. 02C01-9504-CR-00113 (Tenn. Crim. App. at Knoxville, January 30, 1996), perm. to appeal denied (Tenn. 1996); State v. Larry David Tharpe, No. 02C01-9302-CC-00018 (Tenn. Crim. App. at Jackson, February 23, 1994).

37(b)(2)(i); State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988). An appellate court is not bound by the trial court's determination that an issue is dispositive. Preston, 759 S.W.2d at 651 (Opinion on Petition to Rehear). In fact, the appellate court is required to make an independent determination of the dispositive nature of the question. Id. If the record before the court does not clearly demonstrate how the question is dispositive, appellate review must be denied. Id.

At both the suppression hearing and the plea agreement hearing, the court expressed its belief that the "custodial interrogation" question was dispositive of the case. While the admissibility of the appellant's confession may have been dispositive at the time of the suppression hearing, it was not dispositive by the time of trial. At this early stage of the proceedings, appellant's signed confession was the "cornerstone" of the State's case according to the assistant district attorney. Apparently, appellant's daughter, the victim, was reluctant to testify at that time. With no other proof available, it is clear that the admissibility of the statement would have been dispositive of the case.

However, two years passed before the case was set for trial and appellant entered his guilty pleas.[5] The character of the State's proof changed substantially during that time. At the plea hearing, the State informed the trial court that it would have presented testimony from the victim had the case gone to trial. This testimony would have reflected that during the victim's teenage years she and her father had sexual intercourse on many occasions, including vaginal intercourse, anal sex and oral sex. According to the victim, between 1990 and 1992, they had intercourse at least ten times per month and in 1993 they had intercourse approximately ten times in January, February and March, until the victim ran away from home. In order to support the elements of rape, the victim would have testified that in the beginning, she

[5]We assume this delay is attributed to the appellant's pursuit of an interlocutory appeal in this Court.

was not willing to participate, that she cried and did not want to have sex with appellant, but that he coerced her into doing so.

Considering the availability of the victim's testimony, we cannot agree with the trial court that the admissibility of the appellant's confession is dispositive of the case. It is apparent from the proposed testimony of the victim that a reasonable trier of fact could have found the appellant guilty of numerous counts of rape and incest without the State ever introducing his confession. Had the confession been admitted at trial and determined to be error on appeal, the remedy would have been to remand the case for a new trial. An issue may not be considered dispositive when remand for a new trial would be required. State v. Wilkes, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). Thus, the issue is not dispositive and the admissibility of appellant's confession is not a proper question for appellate review. The appeal is dismissed.

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William M. Barker, Judge

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Paul G. Summers, Judge

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Joe G. Riley, Judge