

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 21, 2024 Session

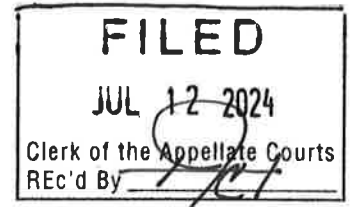
**STATE OF TENNESSEE v. JACOB A. SMITH**

**Appeal from the Criminal Court for Knox County**  
**No. 122058                      G. Scott Green, Judge**

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**No. E2023-01065-CCA-R3-CD**

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The defendant, Jacob A. Smith, appeals his Knox County jury conviction of unlawful possession of a weapon by a convicted felon, challenging the trial court's denial of his motion to continue his trial to attain the assistance of an expert witness. Because the defendant's motion for new trial was untimely filed and because we decline to waive the untimeliness of the defendant's notice of appeal, we dismiss the appeal.

**Tenn. R. App. P. 3; Appeal Dismissed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Daniel Bell, Knoxville, Tennessee, for the appellant, Jacob A. Smith.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and TaKisha Fitzgerald and Robert Debusk, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

At the defendant's January 18, 2023 trial, Officer Anthony Bradley of the Knoxville Police Department testified that he was in the process of conducting a "drug interdiction" in the Merchants Drive area of Knoxville on July 21, 2021, when he was notified of a stolen vehicle being driven nearby. Officer Bradley and his partner drove along Merchants Drive and Clinton Highway until they located the stolen vehicle, which Officer Bradley identified as a black Volvo SUV, parked at a Super 8 motel. Officer Bradley conducted a traffic stop of the vehicle and took the defendant, who occupied the driver's seat, and an unidentified female passenger into custody. When Officer Bradley

performed a pat down of the defendant, the defendant informed him that he had a needle in his right front pocket and a firearm in his left boot, which Officer Bradley removed from the defendant's person. The defendant also told Officer Bradley that he was a convicted felon. A video of this interaction recorded from Officer Bradley's body camera was played for the jury.

The video recording depicted Officer Bradley approaching the defendant's vehicle with his firearm drawn. On cross-examination, Officer Bradley stated that he drew his weapon in case the stop escalated into a pursuit or conflict. He recalled that the firearm he removed from the defendant had an "odd modification," which he described as a drill bit that had been inserted into the firearm where the cylinder pin should have been. After the defendant's arrest, Officer Bradley secured the defendant's firearm at the Knoxville Police Department. He stated that he only learned of the firearm's modification when it was later disassembled. Officer Bradley also testified that he was unaware that the defendant was a convicted felon when he decided to stop him. Thereafter, the State introduced a certified copy of the defendant's 2016 Union County conviction of aggravated burglary into evidence.

Sergeant Brian Dalton of the Knoxville Police Department testified as an expert in firearms and toolmark identification. He recalled that he examined the firearm recovered from the defendant upon his arrest and identified it as a North American Arms .22 magnum revolver. He also examined three loose .22 long-rifle cartridges, a drill bit, and a five-cartridge casing which were also recovered from the defendant. To ensure the firearm functioned properly when equipped with the drill bit, as it had been upon the defendant's arrest, Sergeant Dalton test-fired the firearm several times. A video recording of Sergeant Dalton test-firing the firearm was played for the jury.

On cross-examination, Sergeant Dalton testified that he was initially hesitant to test-fire the defendant's firearm because of its modification. He stated that he was concerned that the drill bit's difference in diameter from a manufacturer's cylinder pin would cause friction between the firearm's cylinder and barrel and render the firearm unsafe. However, after testing the firearm, he concluded that it performed safely and without malfunction.

The State rested. After a *Momon* colloquy, the defendant elected not to testify and did not present additional proof.

Upon this evidence, the jury convicted the defendant as charged. Following a hearing, the trial court sentenced the defendant to a term of 15 years. The judgment against the defendant was entered on March 8, 2023, and the defendant thereafter filed an untimely motion for new trial on April 25, 2023. Notwithstanding the motion's untimeliness, the trial court heard and denied the defendant's motion for new trial on June 26, 2023. The defendant then filed a notice of appeal on July 26, 2023.

A motion for new trial must be made in writing “within thirty days of the date the order of sentence is entered” to preserve issues for review by this court. Tenn. R. Crim. P. 33(b). This 30-day time limit is mandatory, unforgiving, and may not be extended by the trial court. Tenn. R. Crim. P. 45(b)(3); *State v. Davis*, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987). The trial court is without jurisdiction to consider and rule upon the merits of an untimely motion for new trial. Tenn. R. App. P. 3(e). A trial court’s consideration of and ruling upon an untimely motion for new trial will not validate the motion. *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). “[T]he failure to timely file a motion for new trial results in the waiver of those issues which may result in the granting of a new trial.” *Id.*; see also *State v. Bough*, 152 S.W.3d 453, 460 (Tenn. 2004) (“If a motion for new trial is not timely filed, all issues are deemed waived except for sufficiency of evidence and sentencing.”).

The single issue presented for our review in this case is whether the trial court erred in denying the defendant’s motion for a continuance. With this continuance, the defendant argues that he would have been able to “hire an independent expert witness to examine forensic evidence central to the case.” However, this issue has not been properly preserved for our review because the defendant’s motion for new trial, filed approximately 45 days after the entry of his judgment, was untimely. The defendant acknowledges that an untimely motion for new trial does not toll the 30-day timeframe in which a notice of appeal must be filed, but he nevertheless requests that this court waive the untimeliness of his notice of appeal in the interest of justice pursuant to Tennessee Rule of Appellate Procedure 4(a). (“[T]he notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the entry of the judgment appealed from; however, in all criminal cases the ‘notice of appeal’ document is not jurisdictional and the timely filing of such document may be waived in the interest of justice.”)

When considering whether to waive the untimeliness of a notice of appeal in the interest of justice, this court considers “the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case.” *State v. Rockwell*, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007). Here, the defendant’s notice of appeal was filed approximately 140 days after the entry of the judgment against the defendant, well outside the 30-day timeframe provided by Rule 4. In support of his request to waive the untimeliness of his notice of appeal, the defendant states that the delay was due “[f]irst and foremost” to trial counsel’s “misunderstanding of the applicable law” and to an extended bout of illness. However, a misunderstanding of the law weighs against a finding of waiver. *Id.* Regarding the nature of the issue presented for review, we note that the record indicates that, were we to grant waiver, our review of the defendant’s claim would be extremely limited. The trial court apparently held a hearing on the defendant’s motion for a continuance and entered an order denying it, but our review of the issue is foreclosed by the defendant’s failure to raise it in

a timely-filed motion for new trial. Therefore, we decline to waive the untimeliness of the defendant's notice of appeal.

Accordingly, the appeal is dismissed.

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JAMES CURWOOD WITT, JR., JUDGE