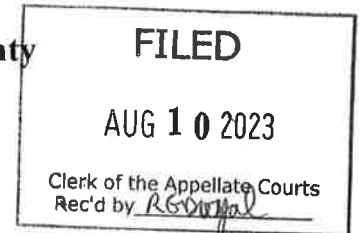


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2023

STATE OF TENNESSEE v. JARRETT MICHAEL TOLLEY¹

Appeal from the Criminal Court for Washington County
Nos. 34866, 34868, 35129 Lisa D. Rice, Judge

No. E2022-01805-CCA-R3-CD



The Defendant, Jarrett Michael Tolley, pleaded guilty to multiple theft- and fraud-related charges in the Washington County Criminal Court, for which she received a sentence of seven years' incarceration suspended to fifteen years on community corrections. The sentence was ordered to be served consecutively to a sentence of two years' incarceration imposed in an unrelated case in Carter County, which resulted in a sentence of six years on community corrections, for an effective sentence of twenty-one years to be served on community corrections. The Defendant filed a motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1, which the trial court denied. On appeal, the Defendant contends that the trial court erred in denying relief. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Jarrett Michael Tolley, Bristol, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Katherine K. Decker, Senior Assistant Attorney General; Steven R. Finney, District Attorney General; for the appellee, State of Tennessee.

¹ This court has previously noted that at the time of the convictions, the Defendant's name was Jarrett Michael Tolley but that the pro se filings in this case reflect the Defendant's name as "Jarrett Michael Tolley (a/k/a Alyssa Tolley)." This court has, likewise, noted that previous pleadings reflect the Defendant has undergone gender confirmation surgery since her convictions, and Tennessee Department of Correction records reflect that the Defendant is female. *See State v. Jarrett Michael Tolley*, No. E2022-01805-CCA-R3-CD (Tenn. Crim. App. Jan. 23, 2023) (order). The record does not reflect that the Defendant's name has been legally changed to "Alyssa," by which she is also known. Consistent with this court's previous order, we use female-gendered pronouns.

OPINION

The Defendant's convictions relate to offenses which occurred in 2007 and 2008. On February 3, 2009, the Defendant pleaded guilty in case number 34866 to felony theft and received a three-year sentence suspended to community corrections for fifteen years. In case number 34868, the Defendant pleaded guilty to felony theft and received a three-year sentence suspended to community corrections for fifteen years. These sentences were ordered to be served concurrently with each other but consecutively to the sentence imposed in an unrelated case in Carter County. The Carter County judgment forms reflect that the Defendant pleaded guilty to four counts of forgery and to four counts of misdemeanor theft and received an effective two-year sentence suspended to six years on community corrections, which was ordered to be served consecutively to any unexpired sentence.

On December 8, 2009, the Defendant pleaded guilty in case number 35129 to four counts of identity theft and to four counts of forgery. The Defendant received an effective seven-year sentence suspended to community corrections for fifteen years. The guilty plea transcript reflects that the Defendant agreed to an out-of-range sentence of seven years pursuant to *Hicks v. State*, 945 S.W.2d 706, 709 (Tenn. 1997). This sentence was ordered to be served concurrently with the sentences imposed in case numbers 34868 and 34866 but consecutively to the sentence imposed in Carter County. The sentence was likewise ordered to be served consecutively to any unexpired sentence, which included a sentence imposed for a Sullivan County conviction. At the time of the guilty plea hearing, the Defendant was serving the Sullivan County sentence. The plea agreement is not included in the record, and the Defendant did not seek appellate review after the hearing.

On December 11, 2009, the trial court entered an alternative sentencing order in connection with case numbers 34866, 37868, and 35129 reflecting that the Defendant received an effective seven-year sentence to be served on community corrections for twenty-one years, beginning on December 8, 2009, and expiring on December 8, 2030. The order noted that the sentences were to be served consecutively to the Carter County sentence, for an effective sentence of nine years to be served on community corrections for twenty-one years. However, on August 15, 2015, the court entered an amended alternative sentencing order, reflecting that the Defendant's community corrections sentence would begin on July 7, 2014, and expire on July 7, 2035. The order stated that the amendment was necessary to reflect the correct start time for community corrections due to the sentences in the present case being consecutive to the prior conviction in Sullivan County, which expired on July 6, 2014. The order, likewise, stated that the sentences in the present case were to be served consecutively to the Carter County sentences, for an effective nine-year sentence to be served on community corrections for twenty-one years.

The record reflects that on March 11, 2016, the Defendant filed a motion to correct an illegal sentence, alleging that suspending the seven-year sentence and imposing a twenty-one-year sentence on community corrections was illegal. The Defendant argued that before imposing the twenty-one-year sentence on community corrections, the trial court did not advise her that the court was not bound by the plea agreement, did not inform the parties that the court was rejecting the agreement or provide her with the opportunity to withdraw the guilty pleas, and did not advise her that if the plea were not withdrawn, the court “may dispose of the case less favorably than provided by the plea agreement.” The Defendant asserted that the court’s suspending the agreed-upon sentence and imposing a twenty-one-year sentence violated “multiple provisions of The Tennessee Sentencing Reform Act of 1989” and Tennessee Criminal Procedure Rule 11. The Defendant requested the entry of amended judgments reflecting the original terms of the plea agreement.

On November 16, 2017, the trial court denied the motion to correct an illegal sentence on the basis that the Defendant failed to raise a colorable claim for relief because the allegations, even if true, did not establish fatal errors which would have rendered the sentence void. On November 9, 2022, the Defendant filed an untimely notice of appeal, and this court declined the Defendant’s request to waive the timely filing. *See State v. Jarrett Michael Tolley*, No. E2022-01580-CCA-MR3-CD (Tenn. Crim. App. Nov. 15, 2022) (order); *see also* T.R.A.P. 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.”).

On September 27, 2022, the Defendant filed a second motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1, which is the subject of the present appeal. She raised the same allegation as raised in the previous Rule 36.1 motion, arguing that the trial court erred by imposing a twenty-one-year sentence to be served on community corrections, rather than the seven-year agreed upon sentence pursuant to the plea agreement, and that the imposed sentence violated principles of sentencing and Tennessee Criminal Procedure Rule 11.

On December 1, 2022, the trial court denied relief for the “same reasons stated in the Court’s first Order denying the motion” and dismissed the motion. The court found that at the time of the guilty plea hearing, the Defendant was serving a three-year sentence in Sullivan County and “had disposed of the charges pending in Carter County.” The court found that pursuant to the plea agreement, the seven-year sentence in the present case was to be served concurrently with the Carter County cases but served consecutively to the Sullivan County case.² Relative to Criminal Procedure Rule 11, the court determined that

² Although the trial court’s denial order states that the effective sentence in the present Washington County case was to be served concurrently with the sentence imposed in Carter County, the record reflects that the trial court ordered consecutive service at the guilty plea hearing.

it had substantially complied with the rule governing the acceptance of guilty pleas. After reviewing the judgment forms and the guilty plea transcript, the court determined that the Defendant was properly advised of the consequences and of the rights she waived upon pleading guilty and that the guilty pleas were voluntarily and knowingly entered. The court concluded that the Defendant's allegation, even if true, would be an appealable error, not one which concerned an illegal sentence, and that the Defendant failed to state a colorable claim for relief. This appeal followed.

The Defendant contends that the trial court erred by denying relief on her motion to correct an illegal sentence. She argues that the court erred by imposing an effective sentence of twenty-one years to be served on community corrections, rather than the agreed-upon seven-year sentence. The State responds that the trial court did not err by denying the motion because the Defendant failed to state a colorable claim for relief and because the Defendant's issue was previously determined by the trial court.

Tennessee Rule of Criminal Procedure 36.1 provides:

(a)(1) Either the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. Except for a motion filed by the state pursuant to subdivision (d) of this rule, a motion to correct an illegal sentence must be filed before the sentence set forth in the judgment order expires. The movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents. The motion shall state that it is the first motion for the correction of the illegal sentence or, if a previous motion has been made, the movant shall attach to the motion a copy of each previous motion and the court's disposition thereof or shall state satisfactory reasons for the failure to do so.

(2) For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

••••

(2) The court shall review the motion, any response, and, if necessary, the underlying record that resulted in the challenged judgment order. If the court determines that the motion fails to state a colorable claim, it shall enter an order summarily denying the motion.

••••

(c) An order granting or denying a motion filed under this rule shall set forth the court's findings of fact and conclusions of law as to the matters alleged in the motion.

Whether a defendant states a colorable claim is a question of law and is reviewed de novo. *State v. Wooden*, 478 S.W.3d 585, 589 (Tenn. 2015). A colorable claim is defined as “a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1.” *Id.* at 593. A motion filed pursuant to Rule 36.1 “must state with particularity the factual allegations on which the claim for relief from an illegal sentence is based.” *Id.* at 594. A trial court “may consult the record of the proceeding from which the allegedly illegal sentence emanated” when determining whether a motion states a colorable claim for relief. *Id.*

Only fatal errors result in an illegal sentence and “are so profound as to render the sentence illegal and void.” *Id.* at 595; *see State v. Cantrell*, 346 S.W.2d 445, 452 (Tenn. 2011). Fatal errors include sentences imposed pursuant to an inapplicable statutory scheme, sentences that designate release eligibility dates when early release is prohibited, sentences that are ordered to be served concurrently when consecutive service is required, and sentences that are not authorized by statute. *Wooden*, 478 S.W.3d at 595. Errors which are merely appealable, however, do not render a sentence illegal and include “those errors for which the Sentencing Act specifically provides a right of direct appeal.” *Id.*; *see Cantrell*, 346 S.W.2d at 449. Appealable errors are “claims akin to . . . challenge[s] to the sufficiency of the evidence supporting a conviction” and “involve attacks on the correctness of the methodology by which a trial court imposed sentence.” *Wooden*, 478 S.W.3d at 595; *see Cantrell*, 346 S.W.2d at 450-52.

The record reflects that in March 2016, the Defendant filed a motion pursuant to Rule 36.1, alleging that suspending her sentence and imposing an effective twenty-one-year sentence to be served on community corrections was unlawful because the trial court (1) did not advise her that the court was not bound by the terms of the plea agreement, (2) did not inform the parties that the court was rejecting the agreement or provide her with the opportunity to withdraw her guilty pleas, and (3) did not advise her that if the pleas were withdrawn, the court “may dispose of the case less favorably than provided by the plea agreement.” The Defendant asserted that suspending the agreed-upon sentence and imposing an effective twenty-one-year sentence to be served on community corrections violated principles of sentences and Tennessee Criminal Procedure Rule 11. The trial court denied the motion on the basis that the Defendant failed to state a colorable claim for relief because the allegations, even if true, were appealable errors and not fatal errors that would have rendered the effective sentence void. The Defendant filed an untimely notice of appeal, nearly five years late, and this court declined to waive the timely filing and dismissed her appeal.

Following this court's order dismissing her appeal, the Defendant filed the present motion to correct an illegal sentence, raising identical allegations. The trial court, again, denied relief based upon the failure to state a colorable claim and dismissed the motion. "Rule 36.1 may not be used to relitigate those issues that have been previously determined." *State v. Ricky Flamingo Brown*, No. M2015-01754-CCA-R3-CD, 2016 WL 987641, at *2 (Tenn. Crim. App. Mar. 15, 2016), *perm. app. denied* (Tenn. Aug. 18, 2016); *see* T.C.A. § 40-30-106(h) (2018) ("A ground for relief is 'previously determined' if a court of competent has ruled on the merits after a full and fair hearing."). The trial court previously ruled upon the allegations in the Defendant's present motion.

Further, Rule 36.1 is limited to matters related to illegal sentences. The allegation that the trial court failed to comply with principles of sentencing and with Tennessee Criminal Procedure Rule 11 in this case involve a contention that the court utilized an improper method to impose the sentence, not that the court imposed an illegal or unlawful sentence. Such an allegation is an appealable error and is not a colorable claim for relief pursuant to Rule 36.1. *See Wooden*, 478 S.W.3d at 595; *Cantrell*, 346 S.W.2d at 450-52. The sentencing act provided the Defendant with a right to appeal the court's determinations at the time of the guilty plea hearing in 2009, but she did not seek appellate review. *See* T.R.A.P. 3. The Defendant failed to state a cognizable claim for relief pursuant to Rule 36.1.

We note that the February 3, 2009 guilty plea transcript in connection with case numbers 34866 and 34868 is not in the appellate record. However, the December 8, 2009 guilty plea hearing transcript related to case number 35129 reflects that the Defendant received an effective seven-year sentence to be served on community corrections for fifteen years. The court, likewise, in cases numbers 34866 and 34868, suspended the Defendant's previously imposed fifteen-year sentence to be served on community corrections. Although the court ordered concurrent service of the fifteen-year community correction sentences, the court ordered consecutive service to the six-year community corrections sentence in the Carter County case, for an effective twenty-one years to be served on community corrections. The record does not reflect that at the guilty plea hearing, the Defendant or her attorney asked questions, lodged objections, or expressed a lack of understanding regarding the court's determinations in conjunction with the terms of the plea agreement. The record, likewise, does not reflect that the trial court imposed a sentence inconsistent with the terms of the plea agreement. The plea agreement documents are not contained in the record, which prevents any determination that the trial court rejected the terms of the agreement or violated principles of sentencing as the Defendant asserts. The trial court did not err by denying relief and dismissing the motion. The Defendant is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE