IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2023 Session

STATE OF TENNESSEE v. ROGER SCOTT HERBISON

Appeal from the Circuit Court for Dickson County
No. 22CC-2019-CR-159 David D. Wolfe, Judge

No. M2022-01359-CCA-R3-CD

The Defendant, Roger Scott Herbison, entered a guilty plea to one count of attempted sexual exploitation of a minor and one count of attempted aggravated sexual exploitation of a minor in exchange for an effective four-year sentence, suspended to probation, and the Defendant's placement on the sex offender registry. As a part of his plea, the Defendant sought to reserve a certified question of law, concerning whether probable cause existed for issuance of a search warrant, which was the subject of an unsuccessful suppression motion. Because the Defendant did not properly reserve a certified issue for review, we are without jurisdiction to review the merits of the Defendant's claim, and we dismiss his appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and MATTHEW J. WILSON, JJ., joined.

Leonard G. Belmares II, Dickson, Tennessee, for the Defendant-Appellant, Roger Scott Herbison.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Ray Crouch, District Attorney General; and Sarah W. Wojnarowski, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On February 28, 2019, Lieutenant Scott Lavasseur[1] of the Dickson County Sheriff's Office filed an affidavit for a warrant to search the Defendant's home "for any electronic device capable of storing pictures of child pornography." In this affidavit, Lieutenant

[1] Although Lieutenant Lavasseur's name is spelled "Lavassar" in the suppression hearing transcript, we will rely on the spelling that Lieutenant Lavasseur used in his affidavit supporting the search warrant.

Lavasseur stated that on January 9, 2019, he received "a CyberTip" through the National Center for Missing and Exploited Children (NCMEC) from the service provider Skype, wherein Skype reported that on December 14, 2018, it "observed [a] child pornography image being uploaded from an account" with an IP address later determined to be located at the Defendant's home. Lieutenant Lavasseur described the aforementioned image as "an image of a young girl about 10 to 13 years old standing in front of a full[-]length mirror taking a picture of herself with a cell phone, totally naked except for her shorts/underwear around her knees." After considering this affidavit, the trial court issued the search warrant for the Defendant's home, which resulted in the seizure of several electronic devices containing child pornography.

On April 16, 2019, a Dickson County Grand Jury charged the Defendant by presentment with one count of sexual exploitation of a minor, more than fifty images, in violation of Tennessee Code Annotated section 39-17-1003, and one count of aggravated sexual exploitation of a minor in violation of Code section 39-17-1004.

On August 9, 2019, the Defendant, through counsel, filed a motion to suppress all evidence obtained pursuant to this search warrant. In this motion, the Defendant claimed; that the affidavit failed to establish the identity or the reliability of the informants at Skype and the NCMEC who disclosed the information regarding the image to the affiant; that the affiant's description of the image failed to establish probable cause that a crime had been committed and failed to violate any Tennessee law because it did not show that the minor was involved in "sexual activity" or "simulated sexual activity" as defined in Tennessee Code Annotated section 39-17-1002(8) (Supp. 2019); that the affiant, by withholding the image from the magistrate, deprived the magistrate of the information necessary to determine probable cause for issuance of the search warrant; and that the image, if it had been examined by the magistrate, would not have established probable cause for the issuance of the warrant.

Motion to Suppress Hearing. At the September 17, 2019 suppression hearing, Lieutenant Levasseur testified that he was a computer forensic examiner and that he operated the Internet Crimes Against Children (ICAC) unit. With regard to this case, he stated that the Skype Corporation identified an image of child pornography being uploaded from an account connected with the Defendant and reported this tip to the NCMEC, which relayed the tip to ICAC. He explained that federal law required internet service operators, like Skype, to monitor servers for child pornography and to forward any images of child pornography or suspected child pornography to NCMEC with a report of the account information. The NCMEC report in this case included the photographic image, which Lieutenant Lavasseur reviewed before completing the affidavit for the search warrant of the Defendant's home. The affidavit, search warrant, and return were identified by

Lieutenant Lavasseur and admitted as a collective exhibit. In addition, the photographic image included in the NCMEC report was also identified and admitted as an exhibit.

In the affidavit for this search warrant, Lieutenant Lavasseur described this image as a "young girl about 10 to 13 years old standing in front of a full[-]length mirror taking a picture of herself with a cell phone, totally naked except for her shorts/underwear around her knees." He acknowledged that he did not include this image in his affidavit to the magistrate judge but insisted that in the "hundreds of cases" he had investigated, he had "never shown a child pornography image to the Magistrate." Instead, Lieutenant Lavasseur described the aforementioned image "in detail" and outlined his "extensive knowledge and expertise on child pornography" in the affidavit.

Lieutenant Lavasseur acknowledged that he had never received any medical training as to the determination of ages or stages of human development. He asserted his conclusion regarding the age of the individual in the aforementioned image was based on the "millions of child pornography images" he had reviewed during his fourteen-year career as an investigator. He explained that many of his previous investigations involved "known children" who took "sexual selfies" and sent them to other people, which meant that he knew "the age of children" and knew what he was "looking at in a picture." He said the image in the Defendant's case concerned "sexting," which involves someone taking a nude photograph to send to another person. Lieutenant Lavasseur acknowledged that if the individual in this image had been clothed, then "it wouldn't [have] be[en] sexual in nature." He also acknowledged that there were no "sex toys" in the photograph and that the photograph was not focused specifically on the individual's breasts or genitals.

Lieutenant Lavasseur described the photograph in this case as a "sexting selfie." He explained that "sexting" was "sex[ual] in nature" and that the purpose of this photograph was for "sexual gratification on either end of whoever is getting it, who is making it." He asserted that this particular image was lewd and lascivious "[b]y its very nature" because it was a "selfie made by a 10[-] to 13[-]year[-]old girl who [was] naked in front of a mirror."

On cross-examination, Lieutenant Lavasseur reiterated that federal law requires "all internet service providers to monitor for child pornography on their servers," and if they find child pornography or what they suspect is child pornography, the providers must "forward it to NCMEC with a report as to the account information." Lieutenant Lavasseur asserted that the IP address associated with uploading this particular image was registered to a Comcast account at the Defendant's home. He asserted that the photographic image in this case gave him probable cause to obtain the search warrant for the computers and devices in the Defendant's home.

On redirect examination, Lieutenant Levasseur acknowledged that he did not confirm through a national database the age of the young girl in the image at issue.

At the conclusion of the suppression hearing, the trial court orally denied the motion to suppress. It noted the Tennessee Supreme Court had recently held that a trial court must look to the totality of the circumstances in determining whether an affidavit establishes probable cause for issuance of a search warrant. See State v. Tuttle, 515 S.W.3d 282, 307-08 (Tenn. 2017). The trial court stated that because it issued the search warrant in the Defendant's case, it was "familiar with the totality of the circumstances in this case." The court also asserted that although the Tennessee Supreme Court could have adopted the federal rule in United States v. Perkins, 850 F.3d 1109, 1116-17 (9th Cir. 2017), that an officer's omission of images alleged to be child pornography from his search warrant application constituted at least reckless misleading of the magistrate, the Tennessee Supreme Court had not yet adopted that rule. The trial court added:

> But at this point in time, as I understand the law in the State of Tennessee, it's not required that a Magistrate be shown an image that is alleged to be child pornography. That image is in fact described in the Affidavit of Lieutenant Lavass[eu]r. And having now reviewed the photograph that was submitted as an Exhibit Two . . . to this hearing, that [photograph] is exactly as [Lieutenant Lavasseur] described[,] in this Court's opinion.
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> The argument about the developmental stage of this young lady that's in the photograph is in my opinion something that could be argued at trial . . . although our statutes, as I pointed out, do not require that the State prove the identity or the age of the person involved. It is a fact question for the jury to determine.
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> In this Court's opinion the totality of the circumstances in this case clearly indicate that the description of the [photographic] image presented probable cause that there was child pornography involved. I issued the search warrant. I believe I was correct in issuing the search warrant then, and I believe I am correct in . . . sustaining the search warrant at this point in time.

While acknowledging the Tennessee Supreme Court's conclusion in State v. Whited, 506 S.W.3d 416, 426 (Tenn. 2016), that federal law "can be instructive on the issue of lasciviousness," the trial court observed that the cases dealing with child pornography focused on "whether the evidence [wa]s sufficient to sustain a conviction beyond a reasonable doubt" and "[n]one of them . . . deal[t] with [whether] probable cause [existed]

for the issuance of a search warrant." The trial court asserted that the only thing defense counsel had submitted on the issue of probable cause was the rule in Perkins, which it did not believe the Tennessee Supreme Court had adopted. Consequently, the court held that it was "deny[ing] the Motion to Suppress and uphold[ing] the search warrant" in the Defendant's case.

After the denial of his motion to suppress, the Defendant entered a conditional guilty plea to one count of attempted sexual exploitation of a minor, more than fifty images, and one count of attempted aggravated sexual exploitation of a minor in exchange for an effective sentence of four years suspended to probation.[2] As part of his guilty plea, the Defendant sought to reserve a certified question of law pursuant to Rule 37(b) of the Tennessee Rules of Criminal Procedure. The judgments for these convictions were entered on August 30, 2022.

The "Special Conditions" box for both of the Defendant's judgments provided, "See attached Certified Question." The Defendant's certified question, which was included in a separate order, stated the following:

> Whether the search warrant issued by the magistrate on February 28, 2019, violated the Defendant's rights protected by the Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Tennessee Constitution, and whether any evidence or statements obtained as a result of the execution of said search warrant should be suppressed as the fruits of an unconstitutional search, due to the fact that the warrant was issued based on the statements of the law enforcement affiant; the description, "a young girl 10 to 13 years old standing in front of a full length mirror taking a picture of herself with a cell phone, totally naked except for her shorts/underwear around her knees[,"] failed to provide probable cause because it did not describe a photo that violated Tenn. Code Ann. § 39-17-1003 or any other law; and the photo was not provided to the magistrate to allow an independent determination of the age of the subject or whether the display was sexual activity as defined in Tenn. Code Ann. §39-17-1002(8)(G)?

The last paragraph of this order stated, "The foregoing certified question of law for appellate review was reserved during the plea of the Defendant. The reservation was made with the consent of the State of Tennessee and the Trial Court. All parties agree that the question is dispositive of count one in this case."

[2] The Defendant did not include the guilty plea hearing transcript in the record on appeal.

Following entry of these judgments, the Defendant filed a timely notice of appeal.

ANALYSIS

The Defendant argues that the trial court erred in denying the motion to suppress because the magistrate was not given sufficient information in the affidavit to independently determine probable cause for issuance of the search warrant. Specifically, the Defendant claims that the affidavit failed to include facts establishing the identity or reliability of the informants at Skype and NCMEC who initially disclosed the image and information concerning the image. The Defendant also maintains that Lieutenant Levasseur's description of the photographic image at issue failed to establish probable cause for the issuance of the warrant because it did not describe a photograph that was illegal under Code section 39-17-1003[3] or any other law in effect at that time. See Whited, 506 S.W.3d at 447. In addition, the Defendant asserts that Lieutenant Levasseur's failure to provide the magistrate with the photograph at issue deprived the magistrate of the information necessary to determine probable cause. See Perkins, 850 F.3d at 1116-17. Lastly, the Defendant argues that had this photograph been submitted to the magistrate, the search warrant would not have issued.

In response, the State contends that this appeal should be dismissed because the Defendant did not properly reserve a certified question of law pursuant to Tennessee Rule of Criminal Procedure 37(b). The State claims that the Defendant has not shown that the trial court agreed that the certified question was dispositive of the case. It also asserts the Defendant has not shown that the certified question was dispositive as to both counts because only count one was referenced in the certified question. Alternatively, the State argues that should this court conclude that the certified question satisfies the requirements of Rule 37(b), the trial court properly denied the Defendant's motion to suppress. Although the State clearly raises the Defendant's failure to properly reserve a certified question in its brief, the Defendant did not file a reply brief addressing this issue. See Tenn. R. App. P. 27(c). After review, we conclude that the Defendant failed to comply with two different requirements in Rule 37(b).

[3] The Defendant asserts that the affidavit did not describe a photograph that violated Code section 39-17-1003 (Supp. 2019) because Lieutenant Levasseur's description of this photo did not meet the definition of "sexual activity" in Code section 39-17-1002(8)(G) (Supp. 2019) (amended May 11, 2021 to change the definition of "sexual activity" in subsection (G) from "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person" to "[e]xhibition of the breast, genitals, buttocks, anus, or pubic or rectal area of any minor that can be reasonably construed as being for the purpose of the sexual arousal or gratification of the defendant or another").

A defendant must properly reserve a certified question before this court has jurisdiction to consider the merits of the question. Tennessee Rule of Criminal Procedure 37(b)(2)(A) allows for an appeal from any order or judgment on a conditional plea of guilty or nolo contendere if the defendant reserves, with the consent of the State and the trial court, the right to appeal a certified question of law that is dispositive of the case, so long as the following four requirements are met:

> (i) the judgment of conviction or order reserving the certified question that is filed before the notice of appeal is filed contains a statement of the certified question of law that the defendant reserved for appellate review;
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> (ii) the question of law as stated in the judgment or order reserving the certified question identifies clearly the scope and limits of the legal issue reserved;
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> (iii) the judgment or order reserving the certified question reflects that the certified question was expressly reserved with the consent of the state and the trial court; and
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> (iv) the judgment or order reserving the certified question reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case[.]

Tenn. R. Crim. P. 37(b)(2)(A). As relevant here, if the judgment does not set out the certified question, the judgment may refer to, or incorporate by reference, another document that satisfies these requirements. See State v. Irwin, 962 S.W.2d 477, 479 (Tenn. 1998).

In 1988, the Tennessee Supreme Court in State v. Preston outlined the requirements for reserving a certified question of law pursuant to Tennessee Rule of Criminal Procedure 37:

> Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a [Tennessee Rule of Appellate Procedure] 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate

> courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. Most of the reported and unreported cases seeking the limited appellate review pursuant to [Tennessee Rule of Criminal Procedure] 37 have been dismissed because the certified question was not dispositive. Also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. No issue beyond the scope of the certified question will be considered.

759 S.W.2d 647, 650 (Tenn. 1988) (emphases added). Rule 37(b) was amended in 2002 to include the Preston requirements. State v. Day, 263 S.W.3d 891, 899 (Tenn. 2008).

Strict compliance, rather than substantial compliance, with the requirements of Rule 37(b) is necessary to perfect the reservation of a certified question of law and to confer jurisdiction on an appellate court following entry of a guilty plea. Id. (stating that the Preston requirements, which were incorporated into Rule 37, have been "strictly construed"); State v. Armstrong, 126 S.W.3d 908, 912 (Tenn. 2003) (rejecting "substantial compliance" with the Preston requirements). The Tennessee Supreme Court recognized that "a substantial compliance standard would be very difficult to apply in a consistent and uniform manner, and therefore would conflict with the very purpose of Preston." Armstrong, 126 S.W.3d at 912. "The defendant bears the burden of ensuring that the final order complies with the requirements of Rule 37 and that the appellate record is sufficient for review." State v. Springer, 406 S.W.3d 526, 531 (Tenn. 2013); see State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996). The failure to properly reserve a certified question of law pursuant will result in dismissal of the appeal for lack of jurisdiction. Pendergrass, 937 S.W.2d at 838.

This court has frequently warned attorneys and trial courts of the inherent dangers of a Rule 37 appeal. In the past, we have described the inappropriate utilization of Rule 37 as "the quagmire of criminal jurisprudence in Tennessee." State v. Thompson, 131 S.W.3d 923, 923-24 (Tenn. Crim. App. 2003). We have also referred to the conditions for certified questions as "'a trap' for the unwary." State v. Bolka, No. W2018-00798-CCA-R3-CD, 2019 WL 1958110, at *3 (Tenn. Crim. App. Apr. 30, 2019) (citation omitted). Regrettably,

the Defendant in this case joins the long list of defendants who have failed to follow the exacting requirements for an appeal of a certified question.

We agree with the State that the Defendant's attached order does not show that the trial court was of the opinion that the certified question was dispositive of the case. The order identifies the certified question and then provides, in pertinent part, "The reservation was made with the consent of the State of Tennessee and the Trial Court. All parties agree that the question is dispositive of count one in this case." The order was then signed by the trial court, the attorney for the Defendant, and the prosecutor. Although this order states that the trial court consented to the reservation of the certified question, it does not show that the trial court was of the opinion that this question was dispositive. See Tenn. R. Crim. P. 37(b)(2)(A)(iv) (requiring that "the judgment or order reserving the certified question reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case" (emphasis added)); see also Preston, 759 S.W.2d at 650.

Recently, this court held language stating that "[t]he parties agree that a finding related to the above outlined issues would be dispositive of the case" failed to strictly comply with Rule 37(b). State v. Graves, No. E2021-00647-CCA-R3-CD, 2022 WL 4835190, at *8-9 (Tenn. Crim. App. Oct. 4, 2022). The court observed that "the trial court is not a 'party' with an interest in the outcome of the case and is therefore not included in the language on the judgment form about the dispositive nature of the certified question." Id. at *9 (citing Black's Law Dictionary (11th ed. 2019) (defining "Party" as "One by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment")). The court further concluded that the trial court's oral finding at the plea submission hearing on the dispositive nature of the certified question did "not save this appeal from dismissal because Rule 37(b) requires the trial court's opinion be in 'the judgment or order reserving the certified question' and not in some other part of the record." Id. (citing Preston, 759 S.W.2d at 650). Moreover, the court asserted that the trial judge's signature on the judgments including the certified question was insufficient to show "the judge's consent to reserving the certified question and the judge's opinion that the question is dispositive of the case." Id. (citing See State v. McDonald, No. E2006-02568-CCA-R3-CD, 2007 WL 4460141, at *3 (Tenn. Crim. App. Dec. 20, 2007) (stating that "[w]hile it may be inferred from the placement on the judgment that the State and the court agreed, it is not explicitly stated as required by the rule")). The court ultimately concluded that it was "without jurisdiction to consider this appeal due to the lack of compliance with Rule 37(b)." Id.

In the Defendant's case, the statement that "[a]ll parties agree that the question is dispositive of count one in this case" fails to strictly comply with Preston and Rule 37(b)

[I, 14]. See State v. Wheatley, No. M2019-00071-CCA-R3-CD, 2020 WL 774161, at *3 (Tenn. Crim. App. Feb. 18, 2020) (dismissing appeal where neither the judgment nor the order contained the required statements that "the State and the trial court agreed to the reservation of a certified question or that the Defendant, the State, and the trial court were of the opinion that the certified questions were dispositive of the case"); State v. Davis, No. W2017-02145-CCA-R3-CD, 2018 WL 3409678, at *6 (Tenn. Crim. App. July 12, 2018) (concluding that the defendant "failed to follow the mandatory requirements of Tennessee Rule of Criminal Procedure 37(b)(2) and Preston" because the record did not include an order containing a statement that "the State and the trial court believed the [certified] questions to be dispositive"); State v. Simmons, No. M2003-03064-CCA-R3-CD, 2005 WL 468295, at *3 (Tenn. Crim. App. Feb. 23, 2005) (dismissing appeal where neither the judgment nor the order showed that the certified question was "expressly reserved with the consent of . . . the trial judge" or that "the trial judge [is] of the opinion that the certified question is dispositive of the case"). Because the trial court is not a "party" to the Defendant's case, the order fails to show that the trial court was of the opinion that the certified question was dispositive. Accordingly, the State argues, and we agree, that the Defendant failed to strictly comply with the requirements of Preston and Rule 37(b) by omitting a specific statement that the trial court, the State, and the Defendant are of the opinion that the certified question is dispositive of this case. See Preston, 759 S.W.2d at 650; Tenn. R. Crim. P. 37(b)(2)(A)(iv). Because the Defendant failed to comply with this requirement, this court is without jurisdiction to consider the appeal.

We also conclude that we are without jurisdiction to consider this appeal because the Defendant's certified question does not clearly identify "the scope and limits" of the issue reserved. See Tenn. R. Crim. P. 37(b)(2)(A)(ii); Preston, 759 S.W.2d at 650 (requiring that the issue be stated in such a way as "to clearly identify the scope and limits of the legal issue reserved."). A defendant's certified issue must identify, among other things: (1) "the reasons relied upon by defendant in the trial court" to advance the motion, and (2) the reasons "passed upon by the trial judge" in denying the motion. Preston, 759 S.W.2d at 650.

Here, the Defendant's certified question not only fails to identify all the reasons he relied upon in filing his motion to suppress but also fails to identify the trial court's reasons for denying his motion to suppress. See, e.g., State v. Potts, No. M2020-01489-CCA-R3-CD, 2021 WL 4714716, at *5 (Tenn. Crim. App. Oct. 11, 2021) (observing that a certified question is overly broad pursuant to Rule 37 and Preston if it requires the appellate court to "'comb the record' to discern" the reasons relied upon by the defendant and the trial court at the suppression hearing); State v. Rickman, No. W2019-00778-CCA-R3-CD, 2020 WL 1894693, at *2 (Tenn. Crim. App. Apr. 16, 2020) (holding that "the reasons relied upon by Defendant in the trial court at the suppression hearing, and the trial court's reasoning for denying the motion to suppress should be discernable from the certified

questions of law without looking at any other portions of the appellate record"); State v. Treat, No. E2010-02330-CCA-R3-CD, 2011 WL 5620804, at *5 (Tenn. Crim. App., Nov. 18, 2011) (dismissing appeal where the certified question of law did not "articulate the reasons previously relied upon by the Defendant in support of his argument [and did] not describe the trial court's holdings on the constitutional issues presented"). Given that a motion to suppress may be denied for many reasons, a certified question that references only the denial of the motion itself will fail this requirement. State v. Seard, No. W2021-01485-CCA-R3-CD, 2022 WL 14207657, at *6 (Tenn. Crim. App. Oct. 25, 2022) (reiterating that "[t]he scope and limits of the legal issue reserved, the reasons relied upon by defendant at the suppression hearing, and the trial court's reasoning for denying the motion to suppress" should be discernible from the certified question "without looking at any other portions of the appellate record"). The Defendant's certified question failed to identify all the reasons he relied upon in filing his motion to suppress and, perhaps even more importantly, failed to identify why the trial court denied the suppression motion. Accordingly, the Defendant has failed to clearly identify the scope and limits of the legal issue reserved. See Tenn. R. Crim. P. 37(b)(2)(A)(ii); Preston, 759 S.W.2d at 650.

Because the Defendant failed to comply with the requirements of Rule 37(b), we may not accept jurisdiction where it would not otherwise exist. We agree with this court's previous sentiment that "[w]e take no satisfaction in the dismissal of this or the many other failed Rule 37(b)(2) appeals" but we "cannot assume jurisdiction where it is denied due to failures in meeting the strict prerequisites" of Rule 37(b). State v. Pride, No. E2010-02214-CCA-R3-CD, 2011 WL 4424354, at *3 (Tenn. Crim. App. Sept. 23, 2011). Therefore, we must dismiss the Defendant's appeal.

CONCLUSION

Because we lack jurisdiction to consider the Defendant's certified question, we dismiss this appeal.

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CAMILLE R. MCMULLEN, PRESIDING JUDGE