

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 10, 2023

FILED
10/16/2023
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. ALAIN BENITEZ

**Appeal from the Criminal Court for Smith County
No. 2019-CR-134 Brody N. Kane, Judge**

No. M2023-00074-CCA-R3-CD

The Defendant, Alain Benitez, appeals the Smith County Criminal Court’s imposition of consecutive sentencing for his two convictions of first degree felony murder. Upon review, we conclude that we must dismiss the appeal for lack of jurisdiction.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Jeffrey N. Kuykendall, Nashville, Tennessee, for the appellant, Alain Benitez.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Senior Assistant Attorney General; Jason L. Lawson, District Attorney General; and Jack Bare, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On April 25, 2018, a police officer discovered the bodies of two men, Shannon Smith and Devon Clark, outside an abandoned house in Pleasant Shade.¹ An investigation led law enforcement to David Bibian and the eighteen-year-old Defendant. In May 2019, the Smith County Grand Jury indicted the Defendant for two counts of first degree felony murder and two counts of robbery, a Class C felony.

¹ The State has requested that we take judicial notice of the record from *State v. Alain Benitez*, No. M2021-00073-CCA-R3-CD, 2022 WL 1231075 (Tenn. Crim. App. Apr. 27, 2022), *perm. app. denied* (Tenn. Sept. 29, 2022). We choose to take judicial notice of the record. *See State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009)

The Defendant went to trial in September 2020, and the jury convicted him as charged in the indictment. After a sentencing hearing, the Defendant received automatic life sentences for the murder convictions, and the trial court imposed five-year sentences for the robbery convictions. The trial court found that the Defendant was a dangerous offender and ordered that he serve the life sentences consecutively.

The Defendant appealed his convictions and consecutive sentencing to this court. *See State v. Alain Benitez*, No. M2021-00073-CCA-R3-CD, 2022 WL 1231075, at *22 (Tenn. Crim. App. Apr. 27, 2022), *perm. app. denied* (Tenn. Sept. 29, 2022). This court affirmed the convictions but reversed the imposition of consecutive sentencing because the trial court failed to address the two factors required for consecutive sentencing under *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). At resentencing, the trial court specifically addressed the *Wilkerson* factors and again ordered that the Defendant serve the sentences consecutively.

The Defendant has appealed the imposition of consecutive sentencing to this court. In every case on appeal, this court must determine if it has jurisdiction. *See* Tenn. R. App. P. 13(b). This court's jurisdiction only extends to the review of the final judgments of trial courts. Tenn. Code Ann. § 16-5-108(a); *State v. McCary*, 815 S.W.2d 220, 221 (Tenn. Crim. App. 1991). Relevant to this case, Tennessee Rule of Appellate Procedure 3(b) provides, "In criminal actions an appeal as of right by a defendant lies from *any judgment of conviction* entered by a trial court from which an appeal lies to the Supreme Court or the Court of Criminal Appeals . . . on a plea of not guilty[.]" (Emphasis added.) Moreover, Tennessee Rule of Appellate Procedure 4(a) provides that in order to initiate an appeal as of right, the defendant shall file a notice of appeal "within 30 days after the date of *entry of the judgment* appealed from." (Emphasis added.)

The record on appeal includes the transcript for the resentencing hearing, which contains the findings and ruling of the trial court. However, the trial court apparently did not enter new judgments of conviction. The technical record contains only this court's original judgment, affirming the Defendant's convictions but remanding the case for resentencing; our supreme court's order, denying the Defendant's Rule 11 application for permission to appeal; and an order entered by the trial court, appointing counsel to represent the Defendant at resentencing. Therefore, without any judgments of conviction in the appellate record, we must conclude that we lack jurisdiction in this case and dismiss the appeal. We note that upon the trial court's entry of new judgments of conviction, the Defendant will have thirty days to file a notice of appeal pursuant to Tennessee Rule of Appellate Procedure 4(a).

CONCLUSION

Based upon our review, the appeal is dismissed.

JOHN W. CAMPBELL, SR., JUDGE