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Appellate Courts

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

STATE OF TENNESSEE v. MARQUEZ TRAVELL BILLINGSLEY

Appeal from the Criminal Court for Knox County
Nos. 109473, 121608 Steven W. Sword, Judge

No. E2022-01419-CCA-R3-CD

The Defendant, Marquez Travell Billingsley, pleaded guilty to conspiracy with intent to sell over fifteen grams of heroin in a drug-free zone, a park. In exchange, the State dismissed other charges pending against him. Pursuant to the plea agreement, the trial court sentenced the Defendant to twelve years, to be served at 100%. Several years later, the Defendant filed a motion to be resentenced pursuant to Tennessee Code Annotated section 39-17-432(h). After a hearing, the trial court denied relief. On appeal, we conclude that an appeal as of right does not lie from a trial court's decision regarding a motion for discretionary resentencing pursuant to the Drug-Free School Zone Act. Accordingly, the Defendant's appeal is dismissed.

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

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

Susan E. Shipley, Knoxville, Tennessee, for the appellant, Marquez Travell Billingsley.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Charme P. Allen, District Attorney General; and Cameron Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

This case arises from a conspiracy among multiple participants to sell heroin. After the Knox County grand jury charged him with several offenses, the Defendant pleaded guilty to one count of conspiracy to possess with the intent to sell over fifteen grams of heroin in a drug-free zone, specified as a park. The transcript of the guilty plea is not

included in the record. In a judgment filed October 17, 2017, the trial court sentenced the Defendant to twelve years, to be served at 100%.

On June 1, 2022, the Defendant filed a pro se motion for appointment of counsel because the Drug-Free Zone law had changed retroactively, and he needed counsel to assist him in filing a motion pursuant to the change. On June 6, 2022, the trial court appointed counsel for the Defendant.

On June 7, 2022, following the appointment of counsel, the Defendant filed a motion for him to be resentenced pursuant to the change in the "Drug[-]Free School Zone" law. The motion stated as follows:

> 1. On October 16, 1017, the [D]efendant was convicted of a "Drug[-]Free Park Zone" conspiracy count involving more than 15 grams of heroin, and was given a sentence of 12 years at Range II (100 percent).
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> 2. The [D]efendant is still serving his sentence with the Tennessee Department of Corrections, and his sentence end date is December 1, 2028. He is currently classified as a minimum restricted supervision inmate.
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> 3. On April 29, 2022, Governor Lee signed into law Public Chapter 927 (2022), which allows defendants who were convicted under the "Drug[-]Free School Zone" law prior to its amendment in 2020 to be resentenced under the current version.
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> 4. Specifically, Public Chapter 927 adds a new subsection at Tennessee Code Annotated Section 39-17-432(h) to allow the Defendant to move for resentencing by showing "that the defendant would be sentenced to a shorter period of confinement under this section of the defendant's offense had occurred on or after September 1, 2020" based on the facts if the case and other factors concerning the "interests of justice."
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> 5. Under the post-2020 version of the law, a defendant may only be subject to enhanced "school or park zone" sentence if (1) the offense occurred on or within 500 feet of a school or other restricted area and (2) the "court finds that the defendant's conduct exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity. [T.C.A. § 37-17-432 (2020)].
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> 6. Under the current "school zone" law as amended in 2020, Defendant would not be subject to enhanced sentencing under [Tennessee Code Annotated section 39-17-432]. Rather, Defendant would have received a sentence of 12 years at 30 percent for the heroin conspiracy count.
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> 7. The facts of the case, and the interests of justice, compel a determination that Defendant Billingsley be resentenced to a term that he would have been subject to absent the "school or park zone" enhancement, namely a sentence of 12 years at 30 percent.

The Defendant submitted a memorandum of law to support the resentencing. That memorandum provided a useful summary of some of the facts of the underlying conviction, which we will briefly summarize here. The conspiracy in this case occurred between January 1, 2015, and July 20, 2016, and was spearheaded by Abraham Owens, a man much older than the Defendant. At the time of the conspiracy's inception, the Defendant was seventeen years old.

The Defendant's memorandum recounted that the State had given discovery to the Defendant, and it included a videotape of two drug sales made by Mr. Owens, both of which occurred in a daycare zone. Other suspects interviewed by the police said that the Defendant was one of several people who obtained heroin and crack cocaine from Mr. Owens. Law enforcement confiscated and analyzed Mr. Owen's cell phone, upon which there were a number of photos of the Defendant, one of which showed him holding money, others of which showed him in an apparent drug-induced stupor, and a video in which he and Mr. Owens were brandishing guns while listening to music. Another witness identified the Defendant as being the "treasurer" of the "Mafia Insane Vice Lords" group in Knoxville and also a conspirator in the group's drug sales.

The memorandum concluded that the Defendant was entitled to resentencing because he was a minor during most of the pendency of this drug conspiracy, making him a member of the class of individuals to whom the drug-free school zone was intended to protect. The memorandum stated the Defendant was a teenager who came under the influence of a much older, charismatic drug dealer, who lavished him with attention. He was a "youthful sidekick" rather than the driving force of this conspiracy. The memorandum further contended that there was no evidence that this was a drug operation that had a particularized impact upon school or restricted area zones, since most of the actual drug deals occurred at businesses or private residences.

At the hearing, the trial court first noted that neither party opposed the new sentencing hearing. The trial court held the hearing, during which the parties presented the following evidence: The State introduced the presentence investigative report. It posited that, pursuant to the change in law, the Defendant's sentence would be lengthier, at twenty-five years for a Class A felony, than the twelve-year sentence he received as part of his plea agreement. The presentence report showed that the Defendant had several other convictions, including assault, reckless driving, and possession of a weapon with intent to go armed. The report indicated that the Defendant was a member of the Vice Lords Gang, and prison records indicated he was an active member of the gang.

Philip Jinks, an officer with the Knoxville Police Department, testified that he worked as an investigator in the organized crime unit. He began a drug investigation into the Mafia Insane Vice Lords after a series of violent crimes involving that gang and the Crips. Additionally, law enforcement officers executed a search warrant on a home belonging to a Mafia Insane Vice Lords member and seized a large amount of controlled

substance. Investigator Jinks, along with others, surmised that the Vice Lords were a drug trafficking organization and resolved to investigate them further.

Investigator Jinks said that his investigation, conducted in 2015 and 2016, involved a great deal of surveillance, controlled buys, some arrests, court-authorized tracking devices, and execution of search warrants on residences and cell phones. There were other independent forensic investigations by the Knox County Sheriff's Department, which were also taken into consideration. Ultimately, Investigator Jinks and his co-workers determined that the Vice Lords were communicating with one another in furtherance of the distribution of heroin.

Investigator Jinks said that indictments were issued for Abraham Owens, now deceased, the Defendant, and brothers Dalton and Deshawn Matthews, along with others. Evidence implicating the Defendant included text messages relative to the distribution of controlled substances. Investigator Jinks discovered text messages referring drug customers to "Little Buddy," which was the Defendant's "gang name." He found videos on a cell phone that he confiscated that depicted Mr. Owens and the Defendant with firearms, large amounts of money, and what appeared to be bags of heroin.

The investigator noted that the Defendant admitted to being a member of the Vice Lords. Investigator Jinks said that drugs are the "number one money maker" for most criminal street gangs and that the gangs use the money to further other gang activities, including recruiting new gang members with the allure of all the money. He noted that, during the search of Deshawn Matthews's home, he found literature that stated that the Mafia Insane Vice Lords were an underground criminal organization that participated in organized crime.

Investigator Jinks said that there were multiple instances of the gang members overt criminal acts in a restricted zone. In one instance, law enforcement officers stopped Dalton Matthews, who had an outstanding warrant, within 100 feet of two daycare centers. He fled from that location on foot and was captured and found to be in possession of over forty grams of heroin, which is an amount consistent with resale.

Investigator Jinks recalled that the Defendant pleaded guilty. He did not plead to an A felony, and he did not receive a sentence that was enhanced by the gang statute.

During cross-examination, Investigator Jinks agreed that the Defendant was seventeen when the investigator began his investigation and turned eighteen before the investigation was concluded. The investigator said that he found evidence of the Defendant's involvement on Mr. Owen's cell phone, but he was unsure when that phone was seized. Investigator Jinks agreed that the Defendant did not participate in any of the surveilled controlled drug buys, but said that there were informants who said that they had

purchased narcotics from the Defendant. The investigator agreed that the Defendant was not present at the home searched or when Dalton Matthews ran from the police.

The Defendant testified that he was serving his sentence at the Trousdale Turner Correctional Facility ("Trousdale") and that he was a minimum security, "negative five," inmate who participated in "[i]ndustrial cleaning" as his assignment at the facility. The Defendant described life at the facility saying that it was understaffed, meaning that he had been unable to receive any education. He said that violence at the Trousdale facility was rampant, there were: regular stabbings among the inmates; between fifteen and twenty overdoses each week, and frequently inmates who threw each other off the top rails and stabbed each other in the face. Narcotics were readily available at the Trousdale facility. As part of his assignment, he was randomly drug screened.

The Defendant said that, when he was first incarcerated in 2017, he was "in shock" at having received a twelve-year sentence, which led to him refusing to participate in a required class and failing to report as scheduled. He agreed that he made choices then that he should not have made. In 2018, he was written up for being defiant and for failing to report and failing to participate. He was also written up for "threat group act," which he said was based on the officers finding a photograph of him and some other inmates. The Defendant explained that, in November 2018, he was written up for refusing a random drug screen, but he said officers woke him up at 3am to take the screen, and he refused. In January 2019, officers wrote him up for possessing a deadly weapon, but he said that the weapon, a sharp object fashioned out of plastic, belonged to his cellmate and not him. In April 2019, he was charged with assault of correctional staff. He explained that three officers came into his cell "being very negative" and said some "racist remarks." The officers making racist remarks got into a group area that he was in and pushing between the officers and the inmates began. One of the officers swung at the Defendant and missed him, so the Defendant swung and hit him. A "big brawl" ensued between four inmates and six officers. The Defendant was convicted of assault in connection with this incident. Shortly thereafter, the Defendant was written up for possession of a cell phone. The Defendant said that, in January 2020, officers wrote him up because they found half a "blunt" on the floor of his cell.

All of the aforementioned write-ups and behavior happened before the Defendant was transferred to Trousdale. In the two years at Trousdale, the Defendant had only received one write-up and that was for being out of place. He explained that, in his opinion, the officer who wrote him up must have been "trying to get a police-of-the-year award" because she unnecessarily wrote him up. He said his change in behavior was based on his realization that his behavior was hurting his people. He said that he stopped being around other gang members and hoped that his chance at a reduced sentence would be approved. If it was, he would help his sister with her children and obtain his GED. He wanted to work and help his family.

During cross-examination, the Defendant said that the class that he refused to participate in was a behavioral class. He had no good reason for his original refusal, and offered that he ultimately took and completed the class in February 2021. He also said he was unsure what behavior led to his three defiance write-ups in 2018. The Defendant explained the 2018 "security threat group act," saying that multiple men from Knoxville all managed to be at the same prison at the same time and one of them had a cell phone. The men took a picture and posted it to Facebook, actions that led to the write up. The Defendant said he did not know who had the cell phone that took the picture, and he denied that the men were all members of the same gang, saying instead that they all just happened to be from Knoxville. The Defendant said he did not know who owned the Facebook page where the photo was posted. The Defendant said that, for his assault charge, he was subjected to two years in super max confinement meaning that he was in his cell for twenty-three hours per day and released for one hour per day.

The Defendant described his gang membership, saying that he became affiliated with the gang when he was thirteen years old. He said that he was unaware of the purpose of the gang and, when he joined, was not aware that they sold heroin. The Defendant said he later learned that Mr. Owens sold heroin but claimed that he never assisted him. He said that he was present during some of the sales and acknowledged that he had previously sold heroin. The Defendant said he only sold heroin twice, but he did not recall to whom he sold it.

The Defendant acknowledged that he had seen the photograph that depicted Mr. Owens and himself in a vehicle with a large sum of money and a large quantity of heroin. He said that he did not own or possess the heroin and that the vehicle and the money belonged to Mr. Owens.

The Defendant said he was "plugged out" of the gang, or dismissed, in 2020. He said that plugging out involved being beaten by several men, which was required when one renounced their gang affiliation.

The Defendant said that he understood that the original charges against him included selling 150 grams or more of heroin in a protected zone. He also understood at the time that there was an enhancement in the indictment for being affiliated with a gang. The Defendant said he understood at the time that he faced fifteen to twenty-five years and said that he was serving twelve years.

Based upon this evidence and the arguments of counsel, the trial court denied the Defendant's motion. In support of its decision, the trial court first noted that the Drug-Free School Zone law had changed the sentencing structure and that the change allowed for defendants sentenced under the old law to seek resentencing. The new law did not require a defendant to serve his sentence at 100%, unless the court found that the defendant's conduct exposed a vulnerable person to the distractions and dangers that are incident to the

occurrence of illegal activity. The court stated that, pursuant to the facts of the Defendant's case, there was not ample evidence that the Defendant's conduct exposed a vulnerable person to the dangers incident to the selling of drugs. The trial court surmised that, under the new law, the Defendant would not have been sentenced at 100%. The court stated, however, that before pleading guilty, the Defendant faced four Class A felony charges, which would have merged but which carried a sentencing range of fifteen to twenty-five years, a Class B felony charge, and a gang enhancer. He additionally faced other charges and enhancements, which would have increased the sentence to twenty-five years, but the trial court opined that he would have run the respective sentences for each charge concurrently. The trial court determined that, under the new law, the Defendant may have had a longer sentence, but a lower service of sentence percentage, making the overall sentence potentially shorter. The court noted, however, that the Defendant was sentenced pursuant to a plea agreement, making much of this speculative.

The court went on to examine the factors enumerated by the Legislature as factors for consideration in Tennessee Code Annotated section 39-17-432(h). One of those considerations was the Defendant's criminal record, including subsequent criminal convictions. The court noted that the Defendant was very young and a juvenile during some of the conspiracy. He also noted that the Defendant had had some problems while incarcerated. The largest impact on the court's decision, it said, was that this sentence was entered pursuant to a plea agreement.

The trial court speculated that the Defendant would have received a sentence of twenty-five years, to be served at 35%, for a total of seven and a half years of incarceration. This was potentially less than the twelve years to which he was sentenced to serve "day for day". He noted, however, that the language of the statute which stated "the sentence would be greater" was not intended to mean the percentage the Defendant may serve if released early but rather the amount of time total that he would have been sentenced to pursuant to the new statute. That said, the trial court went on, "the fact that this was a plea deal and the fact that he was looking at a much longer sentence, to me, weighs against finding that the interest of justice dictate a new sentence."

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it denied his request for a new sentence for a drug-free park zone conviction pursuant to the changed law as articulated in Tennessee Code Annotated section 39-17-432(h). The State contends first that the Defendant has no right to appeal the trial court's denial of his request. The State further asserts that, even if the Defendant does have a right to appeal, we should affirm the trial court's findings on appeal.

On June 12, 2023, before this case's docket date of June 27, 2023, this court decided the issue of whether the Defendant has a right to appeal. We adopt that holding and copy the reasoning below:

> In 2022, our legislature amended the Act creating a procedure allowing defendants to request resentencing in accordance with the 2020 revision of the Act. Tenn. Code Ann. § 39-17-432(h) (2022). More specifically, a defendant who was sentenced under the Act for an offense committed "prior to September 1, 2020, may, upon motion of the defendant or the district attorney general or the court's own motion" seek to be resentenced. *Id.* Upon the filing of such motion, the trial court shall hold a hearing to determine if the defendant would have received "a shorter period of confinement under this section if the defendant's offense had occurred on or after September 1, 2020." *Id.* "The court shall not resentence the defendant . . . if the court finds that resentencing the defendant would not be in the interests of justice." *Id.* In determining whether a new sentence would be in the interests of justice, the trial court may consider the defendant's criminal record, his behavior since being incarcerated, the circumstances surrounding the defendant's offense, and other factors that it deems relevant. *Id*. However, we note that despite granting the defendant an opportunity to seek resentencing in accordance with the amended statute, the legislature did not provide the defendant or the State with an avenue to appeal the trial court's decision under the statute.
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> A defendant in a criminal case does not have an appeal as of right in every instance. *State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017) ("A defendant in a criminal case does not have an appeal as of right in every instance.") Tennessee Rule of Appellate Procedure 3(b) provides when a defendant in a criminal case has an appeal as of right:
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> > 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 Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(A) or (D) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from

> the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation; an order denying a motion for reduction of sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure, from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding, from a final order on a request for expunction, and from the denial of a motion to withdraw a guilty plea under Rule 32(f), Tennessee Rules of Criminal Procedure.

Tenn. R. App. P. 3(b).

Rule 3(b) does not specifically provide for an appeal as of right from an order denying resentencing pursuant to Tenn. Code Ann. § 39-17-432(h) (2022). A defendant in a criminal case has no appeal as of right unless it is enumerated in Rule 3(b). *Rowland*, 520 S.W.3d at 545; *see also State v. Lane*, 254 S.W.3d 349, 353 (Tenn. 2008) (holding there is no appeal as of right from an order denying a defendant's motion to modify a condition of probation); *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005) (holding the defendant (in a case decided prior to the amendment of Rule 3(b) to allow for an appeal as of right for orders under Tennessee Rule of Criminal Procedure Rule 36) did not have an appeal as of right from the dismissal of a Rule 36 motion to correct an illegal sentence); *State v. Hegel*, No. E2015-00953-CCA-R3-CO, 2016 WL 3078657, at *1-2 (Tenn. Crim. App. May 23, 2016) (ruling the defendant had no right to appeal the denial of his motion to suspend court costs); *State v. Moses*, No. W2011-01448-CCA-R3-CD, 2011 WL 6916487, at *1-2 (Tenn. Crim. App. Dec. 28, 2011) (holding the defendant did not have a Rule 3 appeal as of right from an order denying his motion to reinstate probation); *State v. Bean*, No. M2009-02059-CCA-R3-CD, 2011 WL 917038, at *2 (Tenn. Crim. App. Mar. 16, 2011) (holding a defendant has no right of appeal from an order denying his motion for a furlough); *State v. Childress*, 298 S.W.3d 184, 186 (Tenn. Crim. App. 2009) (holding a defendant cannot appeal from an order allowing the State to nolle prosequi the charges against him); *State v. Coggins*, No. M2008-00104-CCA-R3-CD, 2009 WL 482491, at *3-4 (Tenn. Crim. App. Feb. 25, 2009) (ruling a defendant has no appeal as of right from an order denying a new probation revocation hearing); *Simon v. State*, No. M2003-03008-CCA-R3-PC, 2005 WL 366893, at *2 (Tenn. Crim. App. Feb. 16, 2005) (holding the defendant had no appeal as of right from an order denying sentencing credits); *Sexton v. State*, No. E2003-00910-CCA-R3-PC, 2004 WL 50788, at

> *3 (Tenn. Crim. App. Jan. 12, 2004) (holding a defendant did not have the right to appeal the denial of a motion for "credit for time at liberty").
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> Neither Rule 3 nor the most recent amendment to Tenn. Code Ann. § 39-17-432(h) (2022) provides for an appeal as of right for the defendant. Therefore, we conclude that the defendant does not have an appeal as of right in this matter and that the instant appeal is not properly before us and should be dismissed.

State v. Bobo, No. W2022-01567-CCA-R3-CD, 2023 WL 3947500, at *2-4 (Tenn. Crim. App., at Jackson, June 12, 2023).

In accordance with our reasoning in *Bobo*, we similarly conclude that the Defendant in this case does not have a right to an appeal on this issue. As such, because this appeal is not properly before us, we dismiss the appeal.

III. Conclusion

Based on the foregoing reasoning and authorities, we conclude that the Defendant does not have an appeal as of right from the denial of his motion for resentencing pursuant to Tennessee Code Annotated section 39-17-432(h), and, therefore, we dismiss the appeal.

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ROBERT W. WEDEMEYER, JUDGE