

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 27, 2024 Session

FILED

04/17/2024

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. MALIK DEWAYNE HARDIN

Appeal from the Criminal Court for Knox County
No. 101617A Steven Wayne Sword, Judge

No. E2023-00456-CCA-R3-CD

The Defendant, Malik DeWayne Hardin, appeals the denial of his motion for resentencing for his guilty-pleaded conviction of possession with the intent to sell less than .5 grams of cocaine in a drug free school zone, which resulted in a sentence of twelve years at 100% as a Range II offender. The Defendant asserts that the trial court issued a fundamentally illegal ruling and palpably abused its discretion by comparing the sentence the Defendant received pursuant to his negotiated plea agreement to the sentence he faced if convicted of the greater charged offense and concluding that he would not receive a lesser sentence under the 2022 amendment to the Drug-Free School Zone Act. The Defendant therefore requests that this court, in the interest of justice, convert his improperly filed Rule 3 appeal into a common law writ of certiorari and reverse the ruling of the trial court. Because the Defendant has not shown that his case warrants review pursuant to a writ of certiorari, we dismiss the appeal.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and MATTHEW J. WILSON, JJ., joined.

Drew Justice, Murfreesboro, Tennessee (on appeal), and Richard Stooksbury, Knoxville, Tennessee (at hearing), for the appellant, Malik DeWayne Hardin.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Willie Lane, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On May 10, 2010, the Defendant and his codefendant passenger were arrested by Knoxville police officers after they were seen in a vehicle on the grounds of a Knox County public housing complex from which both men had been banned. Based on the results of the search of the vehicle, the Defendant was charged by presentment with a number of offenses, including possession of more than 26 grams of cocaine with the intent to sell/deliver within 1,000 feet of an elementary school, in violation of the Drug-Free School Zone Act. On March 5, 2015, following the denial of his motion to suppress, the Defendant pled guilty to the lesser offense of possession with the intent to sell less than .5 grams of cocaine in a drug-free school zone in exchange for a Range II sentence of twelve years at 100% in the Tennessee Department of Correction (“TDOC”), reserving a certified question of law regarding the legitimacy of the search.¹

According to the prosecutor’s recitation of facts at the guilty plea hearing, two officers with the Knoxville Police Department saw the Defendant driving a vehicle in a public housing complex, recognized both the Defendant and his passenger as individuals on the complex’s no-trespass list, and arrested them after they exited the vehicle. The officers noticed a gun protruding from underneath the driver’s seat of the locked vehicle, called a drug dog to the scene that alerted on the vehicle, and subsequently obtained a search warrant for the vehicle. The search of the vehicle uncovered 43.2 grams of crack cocaine and 13.2 grams of powder cocaine in a plastic container in the console, \$19,800 in United States currency in a computer bag in the trunk, and a loaded handgun underneath the driver’s seat. The Defendant’s fingerprints were on items inside the computer bag and on the plastic container of cocaine. In addition, the State was prepared to present the testimony of the woman who had rented the vehicle on the Defendant’s behalf that she had not placed the contraband in the vehicle, and testimony from the Defendant’s cellmate that the Defendant had “made statements” that the Defendant and his codefendant “got caught in Austin Homes with cocaine, a gun and bunch of money in the trunk.”

When asked if he had additions or corrections to the statement of facts, defense counsel responded that “the K-9 alert occurred before the officers noticed the gun” but “[w]ith that one exception, [the Defendant] would stipulate that had this case gone to trial, the State’s evidence would be sufficient for a reasonable juror to convict [the Defendant].”

¹ As part of his negotiated plea, the Defendant also pled guilty to possession of a firearm during the commission of a dangerous felony, possession of marijuana, and criminal trespass. He received a three-year sentence at 100% for the firearm conviction, to be served consecutively to his twelve-year sentence for the drug-free school zone conviction. Pursuant to his plea agreement, other charges were dismissed.

The Defendant's convictions were affirmed by this court on direct appeal, and our supreme court denied the Defendant's application for permission to appeal. *State v. Hardin*, No. E2014-00873-CCA-R3-CD, 2015 WL 3794588, at *1 (Tenn. Crim. App. June 12, 2015), *perm. app. denied, designated not for citation* (Tenn. Oct. 15, 2015).

On June 15, 2022, the Defendant filed a pro se motion for resentencing pursuant to the 2022 amendment to the Drug-Free School Zone Act, Tennessee Code Annotated section 39-17-432(h), followed by a September 9, 2022 amended motion after the appointment of counsel. At the March 2, 2023 hearing on the motion, the following exhibits were admitted: the Defendant's February 2, 2023 presentence report; a transcript showing the Defendant had earned a total of eighteen credit hours from undergraduate-level college courses completed during his period of incarceration; a certificate in paralegal studies that the Defendant had earned through an online program; and the transcript of the Defendant's guilty plea hearing.

The presentence report reflected that the Defendant had thirteen TDOC disciplinary infractions since 2011, including for participating in gang activities, drug possession, assault on staff, possession of a deadly weapon and assault with a deadly weapon. The Defendant's disciplinary history with the Knox County Sheriff's Office included infractions for fighting, refusing a lawful order, and assault on an inmate. The presentence report further reflected that as of August 20, 2020, TDOC had documented confirmation of the Defendant's membership in the "Gangster Disciples" street gang.

The prosecutor conceded that the offense occurred more than 500 feet from the elementary school and that "[t]here were no vulnerable persons present at the time of this particular act." The prosecutor argued, however, that, given the plea agreement, the Defendant could not establish that he "would have done less time" under the new law. The prosecutor further argued that the interest of justice did not support a reduction in the Defendant's sentence.

In an allocution to the trial court, the forty-two-year-old Defendant stated that, after his release on bond in 2012, he co-founded "Community Step Up[.]" which assisted previously incarcerated individuals with their reentry into the community, and that he was serving as vice-chairman of that group in 2014 at the time his bond was revoked. He stated that he had matured while in prison, accepted responsibility for his actions, and intended to serve his community as a mentor to young people. He spoke of his desire to be present in the lives of his son and daughter and requested that the trial court "consider the new law and . . . craft a fair sentence that would be fair to t[he] Court."

At the conclusion of the hearing, the trial court noted that the stipulated proof was that the Defendant was in possession of over 50 grams of cocaine, which meant that the charged offense would have been a Class B felony had the school zone enhancement not applied, with a minimum Range II sentence of twelve years. The trial court further noted that the Defendant's guilty plea to possession of less than .5 grams of cocaine in a school zone resulted in the same twelve-year sentence that he would have received if sentenced for the original offense under the new law. In reaching this conclusion, the trial court found that "the law's saying that you'd have to show that you'd get a shorter period of time in confinement isn't the percentage, it's the number of years you're looking at." The trial court, therefore, denied the motion:

And so I think, under the drug-free school zone, I can't . . . resentence you under that. So it stays at 12 at 100. So I'm going to deny your petition. It doesn't have anything to do with whether or not I think you deserve it or not. It's my interpretation of law that I think I can't sentence you under that.

Now, this is all new. So I'm going to let you appeal that decision if you'd like. I assume you want to appeal that decision?

The attorney who represented the Defendant at the hearing withdrew from representation at the conclusion of the hearing, and on March 29, 2023, the Defendant filed a pro se notice of appeal. That same day, a new attorney was appointed who filed a second notice of appeal.

ANALYSIS

On appeal, the Defendant acknowledges that he has no appeal as of right from the denial of a motion for resentencing under the 2022 amendment to the Drug-Free School Zone Act. *See State v. Bobo*, 672 S.W.3d 299, 302 (Tenn. Crim. App. 2023); *cf. State v. Watson*, No. E2022-01321-CCA-R3-CD, 2023 WL 5925717, at *7 (Tenn. Crim. App. Sept. 12, 2023) (concluding that a defendant had a Rule 3 appeal as of right from the amended judgment entered after the trial court granted the defendant's motion for resentencing and resentenced the defendant), *no perm. app. filed*. The Defendant, therefore, requests that this court convert his improperly filed Rule 3 appeal into a writ of certiorari because he has no other plain, speedy or adequate remedy and because the trial court acted illegally or arbitrarily. He asserts that the trial court acted illegally or arbitrarily by using "a completely wrong felony class [the offense with which he was charged] to determine" his eligibility for resentencing, and by wrongly stating "that a twelve-year sentence at 35% with reduction credits is equally severe to a 12-year sentence at 100%."

The Defendant argues that his mistake in filing a Rule 3 appeal is mitigated because there was little to no law on the resentencing amendment at the time he wrongly initiated his pro se appeal, and because the trial court expressly told him that he could appeal the trial court's decision. The State responds by arguing, *inter alia*, that the appeal should be dismissed because the Defendant has not established the existence of any of the requirements necessary for a writ of certiorari. We agree with the State.

The 2020 amendments to the Drug-Free School Zone Act reduced the drug-free zone from 1,000 to 500 feet and made discretionary the previous requirements that a defendant be punished one classification higher, pay additional fines, and serve at least the minimum sentence in his range. *See* Tenn. Code Ann. § 39-17-432(b), (c)(1) (2020). In 2022, the act was amended to allow defendants sentenced for offenses committed before September 1, 2020, to file a motion for resentencing under the amended version of the Drug-Free School Zone Act. The new subsection reads as follows:

(1) Notwithstanding subsection (d) or (e) or any other law to the contrary, the court that imposed a sentence for an offense committed under this section that occurred prior to September 1, 2020, may, upon motion of the defendant or the district attorney general or the court's own motion, resentence the defendant pursuant to subsections (a)-(g). The court shall hold an evidentiary hearing on the motion, at which the defendant and district attorney general may present evidence. The defendant shall bear the burden of proof to show that the defendant would be sentenced to a shorter period of confinement under this section if the defendant's offense had occurred on or after September 1, 2020. The court shall not resentence the defendant if the new sentence would be greater than the sentence originally imposed or if the court finds that resentencing the defendant would not be in the interests of justice. In determining whether a new sentence would be in the interests of justice, the court may consider:

(A) The defendant's criminal record, including subsequent criminal convictions;

(B) The defendant's behavior while incarcerated;

(C) The circumstances surrounding the offense, including, but not limited to, whether the conviction was entered into pursuant to a plea deal; and

(D) Any other factors the court deems relevant.

(2) If the court finds that the defendant is indigent, using the criteria set out in § 40-14-202(c), the court shall appoint counsel to represent the defendant on such a motion.

(3) The court shall not entertain a motion made under this subsection (h) to resentence a defendant if:

(A) A previous motion made under this subsection (h) to reduce the sentence was denied after a review of the motion on the merits;

(B) Resentencing the defendant to a shorter period of confinement for this offense would not reduce the defendant's overall sentence or lead to an earlier release; or

(C) The defendant has previously applied to the governor for a grant of executive clemency on or after December 2, 2021, for the same offense and has been denied.

(4) This subsection (h) does not require a court to reduce any sentence pursuant to this section.

Tenn. Code Ann. § 39-17-432(h) (2022).

The common law writ of certiorari has been codified in Tennessee Code Annotated section 27-8-101, which provides as follows:

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Tenn. Code Ann. § 27-8-101.

The common law writ of certiorari is an “extraordinary judicial remedy,” *State v. Lane*, 254 S.W.3d 349, 355 (Tenn. 2008), and “does not normally lie to inquire into the correctness of a judgment issued by a court with jurisdiction.” *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002) (citation omitted), *superseded by statute on other grounds*. The writ of certiorari is available “to correct (1) fundamentally illegal rulings; (2) proceedings

inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal's authority; and (5) plain and palpable abuses of discretion." *Lane*, 254 S.W.3d at 355 (internal quotation and citation omitted). However, because "the common-law writ of certiorari is an extraordinary judicial remedy, reviewing courts should not grant a petition for a common-law writ of certiorari to (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the lower tribunal." *Id.* (internal quotations and citations omitted).

We agree with the State that the trial court acted well within its discretion in denying the motion for resentencing. Despite the trial court's statement that its denial of the motion had nothing to do with whether it thought the Defendant was deserving, the trial court clearly considered in its decision the circumstances surrounding the offense and the benefit to the Defendant of the plea bargain agreement, by which the Defendant received dismissal of some charges and was allowed to plead guilty to a lesser offense involving a smaller amount of cocaine than was found in the vehicle. As the trial court noted, at the time of the Defendant's hearing, motions for resentencing under the 2022 amendment were "all new." This court's opinion in *Bobo*, which made it clear that there is no appeal as of right from the denial of a motion for resentencing, had not yet been released, which explains the trial court's having told the Defendant that he could appeal its decision to this court. The newness of the statute also helps to explain the trial court's somewhat confused ruling and its possible misinterpretation of the statute. Regardless, the record does not reflect that the trial court's ruling was fundamentally illegal, that the proceedings were inconsistent with essential legal requirements, that the Defendant was denied his day in court, that the trial court acted without authority, or that the trial court demonstrated a plain and palpable abuse of discretion. *See Lane*, 254 S.W.3d at 355. We, therefore, decline to convert the Defendant's improperly-filed Rule 3 appeal into the "extraordinary judicial remedy" of a writ of certiorari. *See id.* Accordingly, we dismiss the appeal.

CONCLUSION

Based on our review, we conclude that the Defendant is not entitled to the extraordinary remedy afforded by a writ of certiorari and dismiss the appeal.

JOHN W. CAMPBELL, SR., JUDGE