IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 26, 2023 Session

STATE OF TENNESSEE v. WILLIAM PAUL WATSON

Appeal from the Criminal Court for Knox County
No. 96541 G. Scott Green, Judge

No. E2022-01321-CCA-R3-CD

The Defendant, William Paul Watson, pled guilty to possessing more than one-half gram of cocaine with intent to sell within a drug-free zone and received a fifteen-year sentence to be served at one hundred percent. More than ten years later, he filed a motion to be resentenced pursuant to Tennessee Code Annotated section 39-17-432(h). The trial court held a hearing, granted the Defendant's motion, and resentenced him to fifteen years with eight years to be served at one hundred percent and the remainder to be served at a thirty-five percent release eligibility. On appeal, the Defendant contends that the trial court imposed an illegal sentence. The State argues that we should dismiss the appeal for lack of jurisdiction under Tennessee Rule of Appellate Procedure 3(b) and that, in any event, the Defendant's sentence is not illegal. Based upon the oral arguments, the record, and the parties' briefs, we agree with the Defendant, reverse and vacate the judgment of the trial court, and remand the case for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Vacated, Case Remanded

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

Jonathan Harwell (on appeal) and Jessica Greene (at hearing), Knoxville, Tennessee, for the appellant, William Paul Watson.

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

OPINION

FACTS

In February 2011, the Knox County Grand Jury returned a two-count indictment, charging the Defendant with possession of more than one-half gram of cocaine with intent to sell in count one and the alternative theory of possession of more than one-half gram of cocaine with intent to deliver in count two. The counts alleged that the offenses occurred in May 2010 and within 1,000 feet of a public elementary school.

At the time of the offenses, the Drug-Free Zone Act provided that a violation of Tennessee Code Annotated section 39-17-417 that occurred within 1,000 feet of the real property that comprised a public or private elementary school, middle school, secondary school, preschool, child care agency, public library, recreational center, or park required that a defendant be punished one classification higher than the statute provided for the offense. Tenn. Code Ann. § 39-17-432(b)(1) (2010). The defendant also was required to pay certain fines based on the class of felony and was required to serve at least the minimum sentence for the defendant's appropriate range of sentence. Tenn. Code Ann. § 39-17-432(b)(2), (c) (2010). A defendant convicted of violating Tennessee Code Annotated section 39-17-417 near a preschool, childcare center, public library, recreational center, or park was subject to the additional fines but not "additional incarceration." Tenn. Code Ann. § 39-17-432(b)(3) (2010). Thus, a defendant convicted of violating Tennessee Code Annotated section 39-17-417 near a preschool, childcare center, public library, recreational center, or park was not subject to the one-class enhancement but was subject to the mandatory minimum sentencing requirements. *State v. Linville*, 647 S.W.3d 344, 355 (Tenn. 2022).

On December 9, 2011, the then fifty-one-year-old Defendant pled guilty to possession of more than one-half gram of cocaine with intent to sell in count one. At the guilty plea hearing, the State gave the following factual account of the crime: On May 25th, 2010, Officers Earlywine and Dabbelt of the Knoxville Police Department ("KPD") were on patrol in the area of Reed Street and Baxter Avenue when they saw the Defendant leaning into a vehicle that was blocking the roadway. The officers approached the vehicle, and Officer Dabbelt observed the Defendant exchange a clear baggie of what appeared to be crack cocaine for money. The officer also saw the Defendant drop a rock of crack cocaine and pick it up. The officers searched the Defendant incident to arrest and found a large, clear bag containing a white substance, which appeared to be crack cocaine, in his left front pants pocket. The white substance was individually packaged in separate baggies for resale, and the Defendant admitted that he was selling crack cocaine so he could buy a vehicle to find a job. The officers also found $491, which was consistent with street-level drug sales, on the Defendant's person. The field weight of the crack cocaine was 3.3 grams, and the weight of the cocaine at the Tennessee Bureau of Investigation Crime Laboratory was 2.3 grams. The offense occurred within 1,000 feet of Beaumont Elementary School.

At the conclusion of the hearing, the State advised the trial court that "we have agreed that this is a Range I standard sentence despite the record [as] a way of holding down a minimum." The trial court accepted the Defendant's guilty plea. Although the offense ordinarily was a Class B felony, the offense was a Class A felony under the Drug-Free Zone Act. Pursuant to the plea agreement, the Defendant received a fifteen-year sentence, the minimum punishment in the range, to be served consecutively to six years remaining on a prior sentence for which he was on parole at the time of the offense, and count two was dismissed. *See* Tenn. Code. Ann. § 40-35-112(a)(1). The Defendant was statutorily required to serve the fifteen-year sentence at one hundred percent.

In 2020, our legislature made it more difficult to trigger the Drug-Free Zone Act by reducing the drug-free zone around the real property at issue from 1,000 feet to 500 feet. *See* Tenn. Code Ann. § 39-17-432(b)(1)(B) (2020). Additionally, the previous Drug-Free Zone Act's requirements that a defendant be punished one classification higher, pay additional fines, and serve at least the minimum sentence for the defendant's appropriate range of sentence became discretionary. *See* Tenn. Code Ann. § 39-17-432(b)(1), (b)(2), (c)(1) (2020). Finally, the 2020 amendments to the Drug-Free Zone Act created a rebuttable presumption that a defendant was not required to serve the minimum sentence for the defendant's appropriate range of sentence at one hundred percent but provided that the presumption was overcome if the trial court found that the defendant's conduct "exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity." Tenn. Code Ann. § 39-17-432(c)(2) (2020).

Public Chapter 803, section 12 of the Public Act specified that the 2020 amendments to the Drug-Free Zone Act were to apply to offenses committed on or after September 1, 2020. Tenn. Code Ann. § 39-17-432 (2020), Compiler's Notes. Because the amendments were not retroactive, our legislature enacted Tennessee Code Annotated section 39-17-432(h). The new subsection (h), which became effective April 29, 2022, allows defendants sentenced for offenses committed before September 1, 2020, to file a motion for resentencing under the amended version of the Drug-Free Zone Act. Specifically, 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).

On June 27, 2022, the Defendant, through counsel, filed a motion to reduce his sentence pursuant to Tennessee Code Annotated section 39-17-432(h). The State filed a response, requesting that the trial court deny the motion. The State argued that the Defendant could not show he would have been sentenced to a shorter period of confinement if the offense had occurred on or after September 1, 2020. Relevant to that argument, the State acknowledged that the offense occurred more than five hundred feet from Beaumont Elementary School. However, the State asserted that the offense occurred within five hundred feet of Reed and Baxter Park; therefore, the sentencing enhancement for a drug-free park zone would have applied even if the sentencing enhancement for a drug-free school zone did not apply. The State also asserted that reduction of the sentence was not in the interests of justice because the Defendant was selling crack cocaine in front of a playground, he entered into a negotiated plea agreement in which he was allowed to plead guilty as a Range I offender and serve a sentence "at the bottom of the Range," he had five prior felony drug convictions and was on parole at the time of the offense, and he had three disciplinary infractions while incarcerated in 2007.

The trial court held a hearing on August 26, 2022. At the outset of the hearing, the Defendant introduced into evidence a copy of his criminal history and a certificate showing he graduated from the "Wings program." The State introduced into evidence "three screenshots from videos from the arrest in question"; the State's 2011 Notice of Enhanced Punishment, showing five prior felony drug convictions for the Defendant; the Defendant's disciplinary history for the Knox County Sheriff's Office, showing three jail violations in 2007; aerial maps, showing the area of Reed Street and Baxter Avenue; and Google street-view maps, showing Reed and Baxter Park.

Officer Michael Dabbelt of the KPD testified that on May 25, 2010, he "happened upon Mr. Watson leaning into a vehicle or near a vehicle" and that "[f]urther investigation revealed a large amount of currency and what was later identified as crack cocaine." Officer Dabbelt acknowledged that the incident occurred near Reed and Baxter Park, and he identified a screenshot of the park in 2010. The screenshot showed a swing set in the park. The State asked if Officer Dabbelt frequently saw children in the area of the park, and he responded, "I couldn't say . . . that I've seen children in that particular park, just based on my memory." The State asked if he ever saw children in the neighborhood, and he said yes.

On cross-examination, Officer Dabbelt acknowledged that on May 25, 2010, he was in "field training" and was being supervised by Officer Earlywine. He also acknowledged that the Defendant was standing outside the vehicle in question and that two women were inside the vehicle. Officer Dabbelt searched the Defendant, and the Defendant was cooperative during the search.

At the conclusion of the hearing, defense counsel advised the trial court that the Defendant was a Range II, multiple offender. Defense counsel stated that the Defendant accepted the State's plea offer of fifteen years as a Range I, standard offender to be served at one hundred percent because he was facing "significant time" of twenty-five to forty years for the offense, which was a Class A felony under the previous version of the drug-free zone statute. Defense counsel noted that although the Defendant would have been facing twelve to twenty years for a Class B felony under the new drug-free zone statute, the trial court could not resentence him if the new sentence would be greater than the sentence originally imposed. The trial court asked, "So 20 at 35 percent versus 15 [at] a hundred percent, is that a harsher punishment?" Defense counsel answered that any increase in the number of years, even at thirty-five percent release eligibility, would be a harsher punishment because the Defendant may not make parole. The trial court asked if it could sentence the Defendant "to 15 with the first 8 at a hundred" for committing the offense within a drug-free park zone but corrected itself, stating, "It'd actually be the first 12 at a hundred." Defense counsel said the trial court could not sentence the Defendant for committing the offense in a drug-free park zone because the indictment did not allege a park zone. Defense counsel suggested that the trial court resentence the Defendant to twelve or fifteen years as a Range II, multiple offender, meaning his release eligibility would be thirty-five percent.

The State argued that the trial court could consider that the offense occurred within a drug-free park zone because the new statute provided that the court could consider "any other relevant factor" in its decision to reduce the Defendant's sentence. The State also argued that the trial court should consider that the Defendant had been on parole just sixty-four days for a prior offense of selling cocaine when he committed the offense in this case.

The trial court noted that the Defendant "negotiated an agreement to resolve and work his way out of a very bad situation" and that he was on parole at the time of the offense. Accordingly, the trial court found that his fifteen-year sentence was "appropriate." The trial court also found that "in the interest of justice, the State has shown that this was within a park zone." The trial court stated that it was "going to fashion a sentence here that both of you are going to appeal me on" and ordered that the Defendant serve the first eight years of the fifteen-year sentence at one hundred percent "because he was not ever put on Range II notice for the actual zone violation of a park zone. So I'm going to go down to Range I." The trial court ordered that the Defendant serve the balance of the fifteen-year sentence at thirty-five percent release eligibility. The following colloquy then occurred:

> [Defense counsel]: I'm sorry. I don't mean to be annoying, Judge. I do have a question about your ruling. You said you were going to go down to a Range I, which is 8 -- I mean 8 to 12. Would you not then put the remainder of his sentence on 30 percent?

> THE COURT: That's true -- no. It's a Range II sentence. I'm doing that because he wasn't placed on notice of Range II status for the zone violation. It's a Range II sentence. But I'm giving him the benefit of the doubt that he wasn't indicted for the park zone. So I'm going to do 8 at 100 percent with the balance of the 15 years to be served with a 35 percent release eligibility.

The trial court entered an amended judgment, which reflected the Defendant's sentence of fifteen years as a Range II, multiple offender convicted of a Class B felony. The following appears in the "Special Conditions" box of the amended judgment:

> COUNT 2 IS DISMISSED PER THE PLEA AGREEMENT. AMENDED JUDGMENT SUBMITTED AFTER RESENTENCING HEARING PURSUANT TO TCA 39-17-432(H). DUE TO THE INTEREST OF JUSTICE, DEFENDANT TO SERVE 8 YEARS AT 100% SERVICE RATE DUE TO PARK ZONE IN VICINITY OF THE SALE BUT THE BALANCE OF THE 15 YEARS TO BE SERVED AS A RANGE II OFFENDER WITH A 35% RELEASE ELIGIBILITY DATE.

The Defendant appeals the ruling of the trial court.

ANALYSIS

The Defendant, anticipating that the State would argue we should dismiss his appeal because this court lacks jurisdiction under Tennessee Rule of Appellate Procedure 3(b), contends that an appeal as of right lies in this case because the trial court entered an amended judgment of conviction that reflects an illegal sentence. Alternatively, he contends that if he does not have an appeal as of right, we should treat his appeal as a petition for the common law writ of certiorari. Under either avenue, the Defendant claims that we must vacate the amended judgment and remand the case for imposition of a lawful sentence. The State argues that neither Tennessee Rule of Appellate Procedure 3(b) nor Tennessee Code Annotated section 39-17-432 provide for an appeal as of right and that, even if the Defendant's sentence is illegal, which it is not, he is not entitled to relief because he can seek to correct his illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1.

I. Appeal as of Right

First, we must determine whether this court has jurisdiction over the Defendant's appeal. "[P]arties in criminal cases do not always have an appeal as of right under the

Rules of Appellate Procedure." *State v. Lane*, 254 S.W.3d 349, 352 (Tenn. 2008). 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 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 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 proceedings; 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.

Recently, this court held in *State v. Daryl Bobo*, -- S.W.3d--, No. W2022-01567-CCA-R3-CD, 2023 WL 3947500, at *4 (Tenn. Crim. App. June 12, 2023), that a defendant did not have an appeal as of right from a trial court's denial of a motion for resentencing because such an appeal was not enumerated in Rule 3(b). As this court explained,

> 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). [*State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017)]; *see also* [*Lane*, 254 S.W.3d at 353] (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. James Frederick 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. Cedric 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. Jay 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. Thomas 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); *Richard 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); *Gary Maurice 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").
>
> 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.

Daryl Bobo, -- S.W.3d --, No. W2022-01567-CCA-R3-CD, 2023 WL 3947500, at *4; *see State v. Billingsley*, No. E2022-01419-CCA-R3-CD, 2023 WL 4417531, at *6 (Tenn. Crim. App. July 10, 2023) (agreeing with this court's reasoning in *Daryl Bobo* and concluding that defendant did not have an appeal as of right from denial of motion for resentencing filed pursuant to Tenn. Code Ann. § 39-17-432(h) (2022)).

The present case, though, is unique and distinguishable from *Darryl Bobo* and the opinions cited therein because the trial court in this case granted the Defendant's motion for resentencing, pronounced a reduced sentence, and entered an amended judgment of conviction. Relevant to this case, Rule 3(b) provides that an appeal as of right

> 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 . . . on a plea of guilty or nolo contendere . . . 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.

Tenn. R. App. P. (emphasis added). Although the Defendant entered a guilty plea and his original judgment of conviction became final years ago, the Tennessee legislature took the unprecedented step of amending Tennessee Code Annotated section 39-17-432 to allow defendants sentenced for conduct occurring within a drug-free zone before September 1, 2020, to move for resentencing. The issue of the trial court's imposing an illegal sentence pursuant to such resentencing was not waived as a matter of law by the Defendant's guilty plea and, as we will explain below, the illegality of the new sentence is apparent from the record. Accordingly, under the circumstances of this case, we conclude that the Defendant has a Rule 3(b) appeal as of right from the resentencing judgment entered by the trial court.

II. Illegal Sentence

The Defendant claims that his new sentence is illegal because fifteen years to be served as eight years at one hundred percent and the remainder at thirty-five percent release eligibility is not authorized for a Range II offender convicted of a Class B felony, even if the trial court could order mandatory minimum sentencing pursuant to the Drug-Free Zone Act. The Defendant also claims that the trial court improperly imposed one hundred percent service of part of the sentence based on the offense occurring within a drug-free park zone because he was not indicted for a park-zone offense and because the rebuttable presumption against mandatory minimum sentencing was not overcome. The State argues that the Defendant's reduced sentence is not illegal because, at most, it includes an out-of-range sentence, which Tennessee courts have held is permissible. Moreover, the State argues that although a drug-free park zone was not alleged in the indictment, the trial court could consider "all relevant factors" in resentencing and that the trial court's ruling demonstrates it found the rebuttable presumption against mandatory minimum sentencing had been overcome. Finally, the State argues that even if the Defendant's sentence is illegal, we should not allow him to use the trial court's error for "a second bite at the sentencing apple" because the error was to his benefit.

Persons who commit felonies or misdemeanors in Tennessee must be sentenced pursuant to the provisions of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-104(a). Furthermore, new subsection (h) of Tennessee Code Annotated section 39-17-432 states that if a trial court resentences a defendant, the court must do so in accordance with subsections (a)-(g) of the statute. Tenn. Code Ann. § 40-35-432(h)(1) (2022).

An illegal sentence is "'one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.'" *State v. Wooden*, 478 S.W.3d 585, 594 (Tenn. 2015). "[F]ew sentencing errors render sentences illegal." *Id*. at 595. One example of a fatal sentencing error that renders a sentence is illegal and void is a sentence imposed pursuant to an inapplicable statutory scheme. *Id*. Whether a sentence is illegal is a question

of law that we review de novo. *State v. June Curtis Loudermilk*, No. W2015-00222-CCA-R3-CD, 2016 WL 81292, at *1 (Tenn. Crim. App. Jan. 6, 2016) (citing *State v. Dusty Ross Binkley*, No. M2014-01173-CCA-R3-CD, 2015 WL 2148950, at *2 (Tenn. Crim. App. May 7, 2015) (stating that review of a sentence pursuant to Tenn. R. Crim. P. 36.1 is de novo with no presumption of correctness) (citing *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007) (reviewing whether a sentence is illegal for purposes of habeas corpus relief de novo))).

Here, the offense was a Class B felony, and the Defendant was a Range II, multiple offender. While the range of punishment for a Class B felony is eight to thirty years, the range of punishment for a Range II offender convicted of a Class B felony is twelve to twenty years. *See* Tenn. Code Ann. §§ 40-35-111(b)(2), -112(b)(2). Therefore, the Defendant's fifteen-year sentence is statutorily authorized. The release eligibility for a Range II, multiple offender, though, "shall occur after service of thirty-five percent (35%) of the actual sentence imposed less sentence credits earned and retained by the defendant." Tenn. Code Ann. § 40-35-501(d). Tennessee Code Annotated section 39-17-432(d) also provides that

> [n]otwithstanding the sentence imposed by the court, title 40, chapter 35, part 5, relative to release eligibility status and parole does not apply to or authorize the release of a defendant sentenced for a violation of subsection (b), and required under subsection (c) to serve at least the minimum sentence for the defendant's appropriate range of sentence, *prior to service of the entire minimum sentence for the defendant's appropriate range of sentence*.

(Emphasis added.) The Defendant's fifteen-year sentence to be served as eight years at one hundred percent, followed by seven years at thirty-five percent, is not authorized by either statute.

Granted, a defendant who pleads guilty can knowingly and voluntarily waive "any irregularity as to offender classification or release eligibility" so as to receive a sentence with the length in one range and a release eligibility for a different range. *Hicks v. State*, 945 S.W.2d 706, 709 (Tenn. 1997). However, the Defendant did not knowingly and voluntarily agree to any sentencing irregularity in this case. Similarly, while this court recently denied relief on a Rule 36.1 motion to correct an illegal sentence when a defendant "clearly benefitted" from the illegal sentence, the illegal sentence was part of a bargained-for plea agreement. *See State v. Juan Lesean Perry*, No. M2022-00220-CCA-R3-CD, 2023 WL 2700093, at *3 (Tenn. Crim. App. Mar. 30, 2023), *perm. app. denied* (Tenn. Aug. 9, 2023); Tenn. R. Crim. P. 36.1(c)(3)(B). Again, the Defendant did not agree to the illegal sentence in this case.

As to the trial court's ordering that the Defendant serve part of the sentence at one hundred percent based on his committing the offense in a drug-free park zone, we note that "the enhanced penalty is triggered if the jury determines beyond a reasonable doubt that any part of the sale or possession occurred in a drug free zone." *State v. Alfred Maron Williams, et al.*, No. E2018-00670-CCA-R3-CD, 2020 WL 2120088, at *17 (Tenn. Crim. App. May 4, 2020) (quoting *State v. Jaimes-Garcia*, No. M2009-00891-CCA-R3-CD, 2010 WL 5343286, at *18 (Tenn. Crim. App. Dec. 22, 2010)). The indictment alleged that the offense occurred within one thousand feet of a drug-free school zone, and the Defendant stipulated at the guilty plea hearing to committing the offense within a school zone, not a park zone. Additionally, while the State presented evidence that the offense occurred within a park zone, the State did not present any evidence that the Defendant's conduct exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity. Therefore, the rebuttable presumption that the Defendant was not required to serve at least the minimum sentence in the range was not overcome. For the reasons stated, to the extent that the trial court relied upon the park-zone finding to require that the eight-year portion of the sentence be served at 100-percent pursuant to section 39-17-432(c)(1), it did so improperly.

However, Tennessee Code Annotated section 39-17-432(h)(1)(D) allows a trial court to consider "[a]ny other factors the court deems relevant" when determining "whether a new sentence would be in the interests of justice." Tenn. Code Ann. § 39-17-432(h)(1). The statute thus allows the trial court to consider the park-zone issue inasmuch as it is relevant to deciding whether the interests of justice call for resentencing.

In light of the foregoing, the illegal sentence imposed by the trial court is reversed and vacated. On remand, the trial court shall follow the procedures set forth in Tennessee Code Annotated section 39-17-432(h)(1). If the trial court deems that resentencing is warranted pursuant to the statute, it shall sentence the Defendant, a Range II offender, to a term of twelve to fifteen years at a thirty-five percent service rate. *See* Tenn. Code Ann. § 39-17-432(h)(1) ("[t]he court shall not resentence the defendant if the new sentence would be greater than the sentence originally imposed"). If, on the other hand, the trial court finds that resentencing the Defendant would not be in the interests of justice based upon the statutory considerations, it shall deny the Defendant's motion and leave the original sentence in place.

CONCLUSION

Based upon the oral arguments, the record, and the parties' briefs, we conclude that the Defendant's sentence is illegal. Therefore, the judgment of the trial court is reversed and vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion.

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JOHN W. CAMPBELL, SR., JUDGE