IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2023

STATE OF TENNESSEE v. CHARLES RANDOLPH JOHNSON

Appeal from the Circuit Court for Anderson County
No. B3C0129A M. Nichole Cantrell, Chancellor

No. E2021-01106-CCA-R3-CD

Defendant, Charles Randolph Johnson, was convicted by an Anderson County Jury of one count of possession with intent to sell or deliver heroin within 1,000 feet of a drug free school zone; possession of more than 14.175 grams of marijuana with intent to sell or deliver; and possession of drug paraphernalia. The trial court imposed an effective thirty-year sentence to be served in confinement. On appeal, Defendant appears to argue that (1) the length of time between his trial and the hearing on his motion for new trial violated his right to due process; (2) the search warrant was invalid; (3) the untimely "constructive amendment" of the indictment rendered it invalid; (4) the evidence was insufficient to support his convictions, and the State committed prosecutorial misconduct; and (5) he received ineffective assistance of counsel. After a thorough review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JILL BARTEE AYERS, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and KYLE A. HIXSON, J., joined.

Charles Randolph Johnson (On Appeal), Hartsville, Tennessee, Pro Se; Mart Cizek (At Trial), Clinton, Tennessee; Andrew Pate (Motion for New Trial), Knoxville, Tennessee.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Dave Clark, District Attorney General; and Ryan Spitzer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

At trial, Tonya Ryans testified that she assisted Deputy Ryan Williams of the Anderson County Sheriff's Office, who was assigned to the Drug Enforcement Agency ("DEA") as a task force officer, with a drug investigation in January 2013 by working as a confidential informant ("CI") and making a series of three controlled buys of heroin. Ms. Ryans was given a small recorder that fit into a hole in her jacket pocket to record two of the transactions. She testified that "Uncle Black," "Grimm," and an unidentified female were present at the residence when she made each of the buys on January 28, 29, and 30, 2013. Ms. Ryans identified Defendant as Uncle Black. Ms. Ryans agreed that she had conversations with Defendant and Grimm about buying additional quantities of heroin. The recordings of two of the drug buys were played for the jury; Ms. Ryans identified Defendant's voice on the recordings. She testified that she "handed the money to [Defendant] and Grimm handed [her] the dope."

During the early morning hours of January 31, 2013, a "no knock" search warrant was executed at the residence where the buys took place. The SWAT team "launched a distractionary device" into the mobile home and entered the residence. Defendant was found asleep in the first bedroom on the left and taken into custody. He told Sergeant Jeremy Huddleston of the Oak Ridge Police Department that he was just visiting the residence. Defendant was not wearing his shirt at the time, and Sergeant Huddleston retrieved it from a pile of clothes in the bedroom. Officers searched the bedroom where Defendant was sleeping and found "approximately fifteen small baggies containing heroin" on a plate with a larger piece of heroin and razor blade. Defendant also had $1,959.00 on his person. Deputy Williams testified that a razor blade is commonly used to cut heroin into smaller pieces. A jar containing both cash and marijuana packaged for resale, and a candle with a large piece of heroin inside were also found in the bedroom. Deputy Williams testified that the piece of heroin in the candle "would be something that someone would have to sell." A syringe and a small container with a "piece of a point of the heroin" inside a plastic baggie were found in a second bedroom in the back. A portion of the suspected heroin found in the residence was field-tested and tested positive for heroin. Digital scales, other drug paraphernalia, and a cell phone were also seized from the residence. Deputy Williams testified that he also found in the mobile home plastic "baggies" with a red apple logo on them commonly used in the drug trade.

Defendant initially gave Deputy Williams a false name and date of birth, and he claimed not to know his Social Security number. Grimm, who was identified by Deputy Williams as Co-defendant Joe Fentress Butler, and a female were also in the mobile home. Deputy Williams testified that the back property of Claxton Elementary School could be seen from the residence at certain times of the year, depending on the foliage of the tree line. He estimated that the school was located approximately 500 feet from the residence.

Sergeant Robert Mansfield of the Anderson County Sheriff's Office estimated that the residence was "not more than a hundred yards" from the school.

Erica Stoner, a special agent and forensic scientist with the Tennessee Bureau of Investigation, analyzed the drugs recovered in this case. She determined that the total amount of marijuana contained in twenty-three small plastic bags was 15.39 grams. Special Agent Stoner also determined that one bag of heroin with larger pieces of the drug contained 17.27 grams. She testified that there were an additional twenty-nine small plastic "zip lock[]" bags containing very small rocks identical to the larger pieces of heroin that she did not analyze. Special Agent Stoner noted in her report: "The gross weight of this additional rock-like substance is 2.55 grams. The total weight for all the rock-like substance would not exceed 150.00 grams."

Lieutenant Larry Miller of the Clinton Police Department testified as an expert in the field of Geographic Information Systems ("GIS"). He prepared a map designating a 1000 foot "buffer or a barrier" around the residence where the three controlled buys took place. Lieutenant Miller determined that Claxton Elementary School property was located within the buffer area. The map was received as an exhibit.

Defendant testified that he was a resident of Michigan at the time of the offenses and had traveled to Tennessee to see a female friend Co-defendant Butler had introduced to him. He said that he had been staying at her residence, which was located in the same mobile home park as the residence where the buys took place, for approximately five days at the time of his arrest in this case.

Defendant testified that he was asleep when the search warrant was executed at the residence where the buys took place because he had attended a party there and was intoxicated. He said that he knew Co-defendant Butler, who was also from Michigan, through Co-Defendant Butler's aunt. Defendant testified that Ms. Ryans incorrectly identified his voice on the recordings of the drug buys, and he denied selling any heroin to her. He also denied that anything in the mobile home belonged to him. However, he admitted that his jacket was there and said that his shirt was hanging on a door knob. Defendant testified that Co-defendant Butler had lived in Tennessee for a couple of years at the time of the offenses in this case.

Based on this evidence, the jury convicted Defendant of one count of possession with intent to sell or deliver heroin within 1,000 feet of a drug free school zone; possession of more than 14.175 grams of marijuana with intent to sell or deliver; and possession of drug paraphernalia. The trial court imposed an effective thirty-year sentence to be served in confinement.

Due to issues raised by Defendant, we feel it necessary to provide further background on his case. Defendant filed a motion for new trial on January 21, 2016. Trial

counsel then filed a motion to withdraw on September 14, 2016, and new counsel was appointed on December 2, 2016. Before the hearing on the motion for new trial, newly appointed counsel died, and third counsel was appointed on February 27, 2017 to represent Defendant. While represented by third counsel, Defendant filed a *pro se* motion requesting removal of counsel[1] and a *pro se* amended motion for new trial on April 7, 2017. On November 3, 2017, the trial court entered an order *nunc pro tunc* for a hearing held on October 13, 2017, ordering that transcripts be prepared of the preliminary hearing, and "any evidentiary or pretrial motion hearing(s)." Third counsel filed an amended motion for new trial on February 25, 2019.

An order was entered on July 30, 2019, noting: "That [the prosecutor] and [defense counsel], appeared and were prepared to go forward with the hearing, but Defendant had not been transported by no fault of counsel." The motion for new trial hearing was reset for August 20, 2019. On that date, an order was entered resetting the hearing for October 1, 2019, "for good cause, and at Defendant's request." On October 1, 2019, an order was again entered resetting the hearing for November 15, 2019, "at the request of the Defendant[.]" An order was entered on February 10, 2020, resetting a hearing scheduled for that day to April 27, 2020, noting that Defendant had again not been transported for the hearing.

While still represented by third counsel, Defendant filed a pro se "MOTION FOR SUPPLEMENTARY AMENDMENT" on August 19, 2020, that contained the following language:

> Petitioner respectfully also raises the issue that according to the Tennessee Rules & Codes Criminal Procedure once a conviction has been handed down by the Court and sentencing and final judgment has been entered, a Motion for New Trial must be filed within 30 days after the final judgment has been entered which is the statute and time guidelines provided by the Court and within 30 days after the filing of a Motion for New Trial, normally the hearing is held within a 30 to 90 day period, and this petitioner now contends he was sentenced on November 30, 2015 and final judgment was entered on December 22, 2015, and Motion for New Trial was filed on petitioner's behalf on January 21, 2016.
>
> Petitioner respectfully submits as of right, now it is _____2020 and Petitioner's Motion for New Trial as well as additional amended Motions and issues have yet to be heard by this Honorable Court almost five (5) years later, this undoubtedly constitutes a violation of due Process as well as (inordinate delay)

[1] The motion for removal appears to be in reference to new counsel who had passed away.

> because there is absolutely no excuse for a delay of this hearing for almost five years with no ruling concerning this matter.

Third counsel filed a motion to withdraw on April 27, 2021. Fourth counsel was appointed on April 30, 2021, and a status hearing was set for May 10, 2021. A second amended motion for new trial was filed by fourth counsel on August 23, 2021. The motion for new trial hearing was held on August 24, 2021, and the motion was denied.

ANALYSIS

I. Post-Trial Delay

Defendant argues that the length of time between his trial and the hearing on his motion for new trial "interfered with his utilization of 'State remedies' resulting in the failure to exhaust which is [] state motivated and inexcusable, showing a violation of both the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." The State responds that any delay was largely due to Defendant's own actions, that he suffered no prejudice, and he cannot establish that his due process rights were violated.

In the context of a delay between a defendant's arrest and indictment, a due process violation will be found when (1) there has been a delay; (2) it caused the accused to suffer actual prejudice; and (3) the state caused the delay to gain tactical advantage or to harass the defendant. *State v. Dykes*, 803 S.W.2d 250, 255-56 (Tenn. Crim. App. 1990), *overruled on other grounds by State v Hooper*, 29 S.W.3d 1 (Tenn. 2000). In *State v. Courtney B. Matthews*, No. M2005-00843-CCA-R3-CD, 2008 WL 2662450 (Tenn. Crim. App. July 8, 2008), a panel of this court applied these factors to a nearly nine-year delay between the filing of a motion for new trial and the trial court's ruling on the motion. *Id*. at *9-10.

In this case, while we do not condone the more than five-year delay between the filing of the motion for new trial and the hearing on the motion, Defendant has not shown or even alleged how he suffered prejudice by the delay. *Id.* Additionally, it appears that Defendant and/or his counsel contributed to this delay by requesting that the hearing be reset on at least two occasions. Further, at least two of Defendant's appointed attorneys moved to withdraw due to complaints Defendant made about counsel's representation and breakdowns in communication. *Id.* We also find that there is nothing in the record to show that the State caused the delay in this case to gain tactical advantage or to harass Defendant. At the hearing on Defendant's motion for new trial, the trial court in considering Defendant's speedy trial claim, concluded:

> As has [been] acknowledged and this Court has said on many occasions, [Defendant] is himself the architect of his own delay in many instances. Such as having problems with attorneys and

> wanting to fire them and get back with them. And then we come into court to have a hearing and he wants to review such and such before we have the hearing. The Court is well aware of that and will take judicial notice of that. Even as I ruled back in August, there is no lost evidence that either party has asserted. There [are] no faded memories. There is some . . . well, the Court has heard . . .nobody said they don't actually recall because it's been so long. It's just as anyone else would say; I believe this is what it is and I'm not absolutely sure. The Court would find there was not bureaucratic indifference. And I probably found it then. If not, I'm finding now for the reasons that I've stated. The problems that we've had with [Defendant]. The very fact that we are here six years later from his trial. We have tried and tried to get this tried. And just like last time we had to continue it again. And I'm sitting here today hearing these same things.

Because Defendant has not shown prejudice by any delay between the filing of his motion for new trial and the hearing on the motion and because he contributed to the delay, he cannot establish that his due process rights were violated. Defendant is not entitled to relief on this issue.

II. Search Warrant

Defendant contends that the search warrant in this case was invalid because it "relied on fraudulently procured affidavits of complaint," it had a "signator [sic] who is not capable of making probable cause determination[s]," and it violated his Fourth Amendment Rights. The State asserts that Defendant has waived this issue and that relief is not warranted.

Initially, as pointed out by the State, Defendant has waived this issue by failing to file a pre-trial motion to suppress. Rule 12(b)(2)(C) of the Tennessee Rules of Criminal Procedure provides that motions to suppress evidence must be filed prior to the trial. *See State v. McCray,* 614 S.W.2d 90, 94 (Tenn. Crim. App. 1981). "The rule is applicable when a claim of a constitutional right is involved whose violation would lead to suppression of evidence." *State v. Goss,* 995 S.W.2d 617, 628 (Tenn. Crim. App. 1998). Failure to timely present a motion to suppress to the trial court constitutes a waiver of the issue for appellate review, "in the absence of 'cause shown' for the failure." *McCray,* 614 S.W.2d at 94. Defendant in this case has not shown cause for his failure to file a suppression motion. Additionally, Defendant did not include this issue in his motion for new trial and has raised it for the first time on appeal. *See* Tenn. R. App. P. 3(e), 36(a). "When an issue is raised for the first time on appeal, it is typically waived." *State v. Maddin,* 192 S.W.3d 558, 561 (Tenn. Crim. App. 2005); *see State v. Allen*, 593 S.W.3d 145, 154 (Tenn. 2020). Defendant is not entitled to relief on this issue.

III. Amendment of the Indictment

Defendant asserts that the indictment in this case was defective and that the "State committed an untimely constructive amendment of the indictment shortly before trial started without prior notice given-surprising [Defendant] at trial[.]" He contends that failure to give him prior notice of the constructive amendment, "was coupled with presenting a material variance between the offense charged and the proof elicited at trial, showing an extreme differentiation materially from the facts alleged in the indictment, making a fair trial impossible."[2] Defendant further asserts that he was "charged with one crime and convicted of another." The State responds that the trial court properly exercised its discretion in allowing an amendment to the indictment of "correctional changes" and that Defendant consented to the amendment and has not shown any prejudice.

Tennessee Rules of Criminal Procedure 7(b) provides:

> (b) Amending Indictments, Presentments and Informations.
>
> (1) With Defendant's Consent. With the defendant's consent, the court may amend an indictment, presentment, or information.
>
> (2) Without Defendant's Consent. Without the defendant's consent and before jeopardy attaches, the court may permit such an amendment if no additional or different offense is charged and no substantial right of the defendant is prejudiced.

The Tennessee Supreme Court has emphasized the relaxation of common law pleading requirements, as well as its reluctance to promote form over substance in examining the sufficiency of an indictment. *See State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000). Indictments satisfying the requirements for adequate notice to the defendant also satisfy constitutional and statutory requirements. *Id.* The correction of an "unintentional drafting error" does not charge an additional or different offense nor prejudice a substantial right of the defendant if the indictment clearly charges the essential elements of the offense. *State v. Beal*, 614 S.W.2d 77, 80 (Tenn. Crim. App. 1981).

During a pretrial hearing in this case, the State announced that it had discovered "a discrepancy and problems in the [i]ndictment." The prosecutor went on to state that Count 1 listed the wrong section of Tennessee Code Annotated. However, the prosecutor noted that Defendant "has been properly advised; it clearly says the drug 'heroin' and the Schedule 1. The proper statute n[umber] is really 417 which makes it a felony and for 432

[2] We note that Defendant did not raise this issue in his motion for new trial and has raised it for the first time on appeal. However, the waiver provision does not apply when the issue would result in dismissal of the prosecution of the accused. *State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994).

which is the school zone enhancement and that the clerical error in the statute is insignificant." The State also requested to dismiss two alternate theories charging Defendant with delivery and sale of heroin. Finally, the prosecutor said:

> And then lastly Schedule 6 should have alleged the school zone enhancements. The Indictment classifies it as Schedule Class D. In this case, the state failed to include this language. Rather than try to increase the charge which obviously the state would be entitled to do over the objection by the defendant, at this late hour, we would rather just acknowledge that it should be that way. All three of those changes are relatively minor and don't fundamentally change the defendant's position going into trial, and it should be made, Your Honor.

Trial counsel expressed concern about the timeliness of the amendments to the indictment and noted that "[i]t stripped away one of our potential defenses." Defendant ultimately consented to the amendment reducing the marijuana related charge from a Class D to a Class E felony, but opposed the amendment "[i]n terms of the 'A' felony" on the "grounds of the timeliness" of the motion.

In granting the State's motion to amend the indictment, the trial court found that Defendant was not prejudiced as a result of the amendments to the indictment. As to the error in Count 1 identifying the wrong section of the statute, the trial court stated:

> All it was, was a scribing error by one number instead of a 7 instead of 406. So the Court would find that there is no prejudice to the defendant. He would have been in jail [anyway] on the same charge, basically the same charge, and he was adequately advised as to what the charge was. So the Court will allow the amendment of the Indictment and that amendment would be to eliminate the charge of sell and delivery and leave it only possession with intent to delivery [sic] or sell and changing the actual Code from TCA 39-17-407 to 406. And then Count 2 would be the same, and they are not asking to add an enhancement portion.

We agree with the trial court's findings. As stated above, Defendant consented to the amendment reducing his marijuana related charge from a Class D to a Class E felony. Additionally, he has not shown prejudice resulting from any other amendments to the indictment. In *State v. Reid*, our supreme court determined that the trial court properly allowed the State to amend an indictment to change the predicate felony underlying two counts of felony murder from "especially aggravated robbery" to "robbery." 164 S.W.3d 286 at 312. The *Reid* Court explained that "no new or different offenses were alleged; to the contrary, the amended indictment, like the original indictment, charged two counts of

felony murder." *Id.* Similarly, in this case, no new or different offenses were alleged by the amendments to the indictment. The language of the indictment provided Defendant with ample notice of the offenses charged. *See Beal*, 614 S.W.2d at 80. Therefore, we conclude that the amendment of the indictment was proper under Tennessee Rule of Criminal Procedure 7(b)(2). Defendant was not "charged with one crime and convicted of another," and there were no material variances between the indictment and the proof as he alleges in his brief. Defendant is not entitled to relief on this issue.

IV. Sufficiency of the Evidence and Prosecutorial Misconduct

Defendant mentions that he is "absolutely innocent" of his convictions, and later on in his brief, mentions the "presumption of innocence." He further asserts that the State committed prosecutorial misconduct during both opening and closing arguments and during trial. The State contends that the evidence overwhelmingly established guilt and that Defendant waived any issue concerning prosecutorial misconduct.

We conclude that Defendant has waived both issues by failing to adequately address them in his brief. Tennessee Rule of Appellate Procedure 27(a)(7) requires that the appellant set forth an argument for each issue, along with "the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on[.]" Tenn. R. App. P. 27(a)(7). Similarly, Rule 10(b) of the Rules of this Court states plainly that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b).

Where there is failure to prepare a sufficient brief in compliance with the Rules of Appellate Procedure, the issue is waived. *State v. Lucy Killebrew*, 760 S.W.2d 228, 236 (Tenn. Crim. App. 1988) (waived issue where Defendant had failed to adequately brief issues by making appropriate references to the record, cite authority in support of issues, and/or make appropriate arguments); *see also State v. Jason Steven Molthan*, No. M2021-01108-CCA-R3-CD, 2022 WL 17245128, at *2 (Tenn. Crim. App. Nov. 28, 2022) *no perm. app. filed* (waived issues where Defendant had failed to provide an adequate appellate record and had not prepared a sufficient brief); *State v. Sheila Marie Lott*, No. M2008-02127-CCA-R3-CD, 2010 WL 565664, at *4 (Tenn. Crim. App. Feb 18, 2010) ("Appellant also makes a cursory statement that her sentences should have been run concurrently rather than consecutively. Appellant includes no argument or citations to authority to support the statement. [] Because Appellant has failed to cite any authority for this claim, it is waived."). We recognize that pro se litigants are afforded more leniency than lawyers but they "are not entitled to shift the burden of litigating their case to the courts." *Chiozza v. Chiozza*, 315 S.W.3d 482, 487 (Tenn. Ct. App. 2009) (quoting *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000)); *State v. Marquette Benson aka Marquette Mukes*, No. W2017-01276-CCA-R3-CD, 2018 WL

4562928, at *3 (Tenn. Crim. App. Sept. 21, 2018). This Court must "be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary." *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003); *State v. James John Lewis*, No. M2011-00302-CCA-R3-CD, 2011 WL 5573244, at *2 (Tenn. Crim. App. Nov. 15, 2011).

As to sufficiency of the evidence, Defendant makes only cursory statements as to his "actual innocence." He makes no argument concerning the sufficiency of the convicting evidence, and he makes no references to the record pointing out any alleged insufficiencies or relevant legal authority cited. However, we have examined the evidence presented at trial and conclude that it is sufficient beyond a reasonable doubt to support the convictions. Similarly, as to the issue of prosecutorial misconduct, Defendant briefly mentions the issue and does not support his claim with argument, citation to relevant legal authority, or references to the record. Moreover, as pointed out by the State, Defendant failed to include this issue in his motion for new trial. Tenn. R. App. P. 3(e). Therefore, it is waived. Defendant is not entitled to relief.

V. Ineffective Assistance of Counsel

Although not addressed by the State, Defendant also raises claims of ineffective assistance of counsel in his brief. While this issue was raised in Defendant's amended motion for new trial, an order was entered on August 24, 2021, "*nunc pro tunc* to August 13, 2021[,]" prior to the motion for new trial hearing, that contains the following:

> [F]ollowing an announcement by [fourth counsel] that he has consulted with the Defendant and that they are in agreement **NOT** to pursue any claim of ineffective assistance of counsel at this Motion for New Trial stage in order to preserve and retain that issue for possible litigation later, and the Court finding it appropriate to allow any and all allegations of ineffective assistance in the pending Motion for New Trial and any amendments thereto to be withdrawn without prejudice to the Defendant's right to raise that issue at a later time (probably after the conclusion of his direct appeal)[.]

(Emphasis in original). As a result of the agreement between fourth counsel and Defendant to withdraw Defendant's claim of ineffective assistance of counsel, there was no evidence presented at the hearing on the motion for new trial supporting Defendant's claim, and the trial court had no opportunity to make findings of fact. Therefore, this issue is waived. Tenn. R. App. P. 3(e); *State v. Meade*, 942 S.W.2d 561, 566 (Tenn. Crim. App. 1996). Defendant is not, however, precluded from raising this issue again in an appropriate post-conviction proceeding.

Conclusion

Based on the foregoing reasons, the judgments of the trial court are affirmed.

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JILL BARTEE AYERS, JUDGE