IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 7, 2023 Session

CITY OF COVINGTON v. TERRELL TOOTEN

Appeal from the Circuit Court for Tipton County
No. 7866 Joe H. Walker, III, Judge

No. W2021-00946-COA-R3-CV

Appellant was found guilty of violating Tennessee Code Annotated section 55-8-199 for alleged use of a handheld wireless telecommunication device while driving. The trial court later dismissed the judgment against Appellant. Appellee City of Covington reached a settlement with Appellant, Appellant's driver's license was reinstated, and the violation was removed from his record. Accordingly, the legal controversy at the center of this case has been extinguished, and this Court can offer no meaningful relief to the Appellant. As such, the appeal is dismissed as moot.

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

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

Terrell Lee Tooten, Cordova, Tennessee, and Varonica Cooper, Memphis, Tennessee, for the appellant, Terrell Lee Tooten.

Rachel K. Witherington, Covington, Tennessee, for the appellee, City of Covington.

MEMORANDUM OPINION[1]

[1] Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

The relevant facts are not in dispute. On April 20, 2021, Appellant Terrell Tooten was driving on Highway 51 in Covington, when he was stopped by Officer Lee Smith of the City of Covington ("City," or "Appellee") Police Department. Officer Smith testified that he observed Mr. Tooten holding an orange device up to his head and talking. Officer Smith believed that the device was a cell phone and initiated a stop. Although Mr. Tooten did not deny that he was talking on the device, he stated that it was a wireless speaker not a cell phone. Mr. Tooten was charged with violation of Tennessee Code Annotated section 55-8-199, which provides, in relevant part, as follows:

> (b)(1) A person, while operating a motor vehicle on any road or highway in this state, shall not:
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> (A) Physically hold or support, with any part of the person's body, a:
>
> (i) Wireless telecommunications device.
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> (ii) Stand-alone electronic device;

The City of Covington Municipal Court found Mr. Tooten in violation of Tennessee Code Annotated section 55-8-199, and he was fined $30 plus court costs. Mr. Tooten appealed that decision to the Circuit Court of Tipton County (the "trial court"). Following a *de novo* hearing, the trial court entered an order on July 16, 2021. Based on the trial court's finding that Mr. Tooten violated Tennessee Code Annotated section 55-8-109, he was charged a $50 fine plus costs, or, in the alternative, he could complete a driver education course.

After Mr. Tooten filed his appeal to this Court, we entered an order remanding the case to the trial court for consideration of Mr. Tooten's pending Tennessee Rule of Civil Procedure 60.02 motion to dismiss the July 16, 2021 judgment. On November 1, 2022, the trial court entered an order, setting aside the July 16, 2021 order with prejudice and charging costs to the City. On November 22, 2022, the City filed a motion to dismiss the appeal as moot. Mr. Tooten opposed the motion. By order of December 1, 2022, this Court deferred the City's motion to dismiss to the assigned panel.

On December 16, 2022, the City filed a motion to consider post-judgment facts, including an August 1, 2022 settlement agreement and release, a payment of $5,000 to Mr. Tooten, and proof that the traffic violation had been removed from Mr. Tooten's record. The City also cited the trial court's order setting aside the judgment against Mr. Tooten. On January 17, 2022, Mr. Tooten filed a response to the City's motion to consider post-judgment facts, wherein he stated that he "ha[d] no opposition to any of the post-judgment facts, submitted by either of the parties, being reviewed or considered by this Court." By

order of January 19, 2023, we reserved ruling on the motion to consider post-judgment facts. Based on the fact that Mr. Tooten does not oppose the City's motion, and in view of the fact that the post-judgment facts bear on the question of whether the instant appeal is moot, we grant the City's motion and consider the post-judgment filings as part of our appellate record. We now take up the question of whether these post-judgment facts render Mr. Tooten's appeal moot.

In ***City of Memphis v. Hargett***, 414 S.W.3d 88, 96 (Tenn. 2013), the Tennessee Supreme Court explained:

> The role of our courts is limited to deciding issues that qualify as justiciable, meaning issues that place some real interest in dispute, ***Colonial Pipeline Co. v. Morgan***, 263 S.W.3d 827, 838 (Tenn. 2008), and are not merely "theoretical or abstract," ***Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.***, 301 S.W.3d 196, 203 (Tenn. 2009). A justiciable issue is one that gives rise to "a genuine, existing controversy requiring the adjudication of presently existing rights." [***UT Med. Grp., Inc. v.***] ***Vogt***, 235 S.W.3d [110,] at 119 [(Tenn. 2007)]. . . .
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> To be justiciable, an issue must be cognizable not only at the inception of the litigation but also throughout its pendency. ***Norma Faye Pyles Lynch Family Purpose LLC***, 301 S.W.3d at 203-04. An issue becomes moot if an event occurring after the commencement of the case extinguishes the legal controversy attached to the issue, ***Lufkin v. Bd. of Prof'l Responsibility***, 336 S.W.3d 223, 226 (Tenn. 2011), or otherwise prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment, *see* ***Knott v. Stewart Cnty.***, 185 Tenn. 623, 207 S.W.2d 337, 338 (1948); ***Cnty. of Shelby v. McWherter***, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996).

Id. In other words,

> [a] moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. ***McCanless v. Klein***, 188 S.W.2d 745, 747 (Tenn. 1945); ***County of Shelby v. McWherter***, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. ***Knott v. Stewart County***, 207 S.W.2d 337, 338-39 (Tenn. 1948***); Ford Consumer Fin. Co. v. Clay***, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998). In other words, "[m]ootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." ***Carras v. Williams***, 807 F.2d 1286, 1289 (6th Cir. 1986).

> Determining whether a case is moot is a question of law. ***Alliance for Native American Indian Rights in Tennessee, Inc.***, 182 S.W.3d 333, 339 (Tenn. Ct. App. 2005). An appellate court "will dismiss appeals as moot when 'by a court decision, acts of parties, or other causes occurring after the commencement of the action the case has lost its controversial character.'" ***West v. Vought Aircraft Industries, Inc.***, 256 S.W.3d 618, 625 (Tenn. 2008) (quoting ***McCanless***, 188 S.W.2d at 747 (Tenn. 1945)).

Tennessee Democratic Party v. Hamilton County Election Commission, No. E2018-01721-COA-R3-CV, 2020 WL 865282, *2 (Tenn. Ct. App. Feb. 21, 2020).

However, the Tennessee Supreme Court has recognized

> a limited number of exceptional circumstances that make it appropriate to address the merits of an issue notwithstanding its ostensible mootness: (1) when the issue is of great public importance or affects the administration of justice; (2) when the challenged conduct is capable of repetition and evades judicial review; (3) when the primary dispute is moot but collateral consequences persist; and (4) when a litigant has voluntarily ceased the challenged conduct. ***Lufkin***, 336 S.W.3d at 226 n. 5 (citing ***Norma Faye Pyles Lynch Family Purpose LLC***, 301 S.W.3d at 204).

City of Memphis v. Hargett, 414 S.W.3d at 96

The following documents are relevant to the question of whether this case is moot: (1) the trial court's November 1, 2022 order setting aside the July 16, 2021 judgment against Mr. Tooten and dismissing the City's case against him; (2) a settlement agreement between Mr. Tooten and the City, under which Mr. Tooten agreed to hold the City harmless, and the City agreed not to dispute the trial court's November 1, 2022 order dismissing its case against Mr. Tooten and setting aside the judgment against him; (3) a copy of the $5,000 check Mr. Tooten received from the City in settlement; (4) proof that Mr. Tooten's driver's license was reinstated and the violation of Tennessee Code Annotated section 55-8-199 removed from his driving record.

At oral argument before this Court, Mr. Tooten confirmed that the trial court dismissed the judgment against him. This fact, coupled with the reinstatement of Mr. Tooten's driver's license and the removal of the violation from his record eliminates the controversy at the heart of this lawsuit. ***City of Memphis***, 414 S.W.3d at 96 (citing ***Lufkin***, 336 S.W.3d at 226) ("An issue becomes moot if an event occurring after the commencement of the case extinguishes the legal controversy attached to the issue."). In other words, in the absence of any judgment against him, "meaningful relief in the event of a favorable judgment," is precluded. ***Id.*** (citations omitted). Nonetheless, Mr. Tooten asserts that exceptions to the mootness doctrine apply, which exceptions would allow this

Court to proceed with its review. Specifically, Mr. Tooten asserts that the case involves issues of "great public importance" and "is capable of repetition and evades judicial review." ***City of Memphis v. Hargett***, 414 S.W.3d at 96 (citation omitted). We disagree. Mr. Tooten's arguments do not persuade us that exceptional circumstances warrant application of any of the exceptions to the mootness doctrine.

Notwithstanding the dismissal of the judgment against him and the reinstatement of his driver's license, at oral argument, Mr. Tooten asked this Court to consider the question of whether Tennessee Code Annotated section 55-8-199 is unconstitutionally vague. The panel questioned Mr. Tooten concerning whether the vagueness issue was raised and argued in the trial court. Mr. Tooten conceded that the only testimony adduced at the hearing was from Officer Smith, and no evidence was presented concerning the constitutionality of the relevant statute. It is well settled that issues raised for the first time on appeal are waived. *See* ***Black v. Blount***, 938 S.W.2d 394, 403 (Tenn. 1996) (holding that "issues raised for the first time on appeal are waived"); ***In re M.L.P.***, 281 S.W.3d 387, 394 (Tenn. 2009) (same); ***Dye v. Witco Corp.***, 216 S.W.3d 317, 321 (Tenn. 2007) (same). Having failed to raise it at the trial level, we deem Mr. Tooten's vagueness argument waived and will not address it.

For the foregoing reasons, the appeal is dismissed as moot. Costs of the appeal are assessed to the Appellant, Terrell Lee Tooten, for all of which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE