IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 16, 2019

STATE OF TENNESSEE v. SHANE EVANS VINCENT

Appeal from the Circuit Court for Giles County
No. CR-12648 Russell Parkes, Judge

No. M2018-00034-CCA-R3-CD

The Appellant, Shane Evans Vincent, pled guilty in the Giles County Circuit Court to facilitation of aggravated child abuse, a Class B felony, and the trial court sentenced him to twelve years to be served as six months in jail followed by supervised probation. Subsequently, the trial court revoked his probation and ordered that he serve the remainder of his twelve-year sentence in confinement. The Appellant filed a motion for new trial "on the violation of his probation," the trial court denied the motion, and the Appellant filed a notice of appeal in this court. The State argues that we should dismiss the appeal because the Appellant's motion for new trial and notice of appeal were untimely. The Appellant concedes that a probation revocation proceeding is not a "trial"; therefore, his motion for new trial did not toll the time for filing a notice of appeal. We conclude that the appeal should be dismissed.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

John S. Colley, III (on appeal), Columbia, Tennessee; Matthew D. Dunn (motion for new trial), Brentwood, Tennessee; and A. Colbrook Baddour (at revocation hearing), Pulaski, Tennessee, for the appellant, Shane Evans Vincent.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Senior Assistant Attorney General; Brent A. Cooper, District Attorney General; and Jonathan Davis, Rebecca Parsons, and Victoria Haywood, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In March 2015, the Giles County Grand Jury indicted the Appellant in case number CR-12648 for two counts of aggravated child abuse of a child eight years of age or less, a Class A felony. On September 27, 2016, he entered a best interest guilty plea to one count of facilitation of aggravated child abuse, a Class B felony, and the State nolle prosequied the remaining count.[1] Pursuant to the plea agreement, the Appellant received a twelve-year sentence to be served as six months in jail followed by supervised probation. According to the probation order he signed on December 1, 2016, one of the conditions of his probation was that he "agree to a search, without a warrant, of [his] person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time."

On July 11, 2017, the Appellant's probation officer filed a Probation Violation Report, alleging that the Appellant violated his probation by being arrested on June 26, 2017, for possession of a Schedule II controlled substance and possession of a Schedule IV controlled substance and by failing to notify his probation officer immediately of the arrest. The trial court issued an arrest warrant, and the Appellant was taken into custody.

On September 18, 2017, the Appellant filed a motion to suppress the drug evidence obtained during the warrantless search of his vehicle on June 26, 2017. On September 26, 2017, the trial court held a joint hearing on the motion to suppress and the probation revocation.

At the outset of the hearing, the trial court stated, "Let the record reflect that we are here in the case of State v. Shane Vincent, Case Number 12648. . . . Here on a motion to suppress filed September the 18th, 2017." Defense counsel then advised the trial court, "He's also here on a violation if you want to take it up concurrently[.]" The trial court responded, "I can take them up concurrently if there's no objection from the State." The State answered that it did not object.

Defense counsel called Officer Billy Greco to testify. Officer Greco said that on June 26, 2017, he stopped the Appellant's Ford Taurus because he had received information that the license plate on the Taurus was not registered to the vehicle. During the stop, Officer Greco learned that the plate was properly registered and that the Appellant had a valid driver's license. The Appellant showed Officer Greco the

[1] We note that according to the Appellant's guilty plea form, he pled guilty to attempted aggravated child abuse. However, the judgment of conviction, the probation order, and the probation violation report reflect that he pled guilty to facilitation of aggravated child abuse. The Appellant did not include the guilty plea hearing transcript in the appellate record, and the record does not show conclusively whether he pled guilty to facilitation of aggravated child abuse or attempted aggravated child abuse.

Appellant's "TDOC card" and told the officer that he was on probation for driving on a revoked license, which the officer thought was "odd . . . because they don't usually put people on state probation for driving on revoked." Officer Greco did not suspect the Appellant of a crime but asked for consent to search the vehicle, and the Appellant, thinking he could not deny consent due to the conditions of his probation, consented to the search. Officer Greco handcuffed the Appellant for officer safety and searched the car. During the search, Officer Greco found a pill bottle containing oxycodone and alprazolam, which were not prescribed to the Appellant.

At the conclusion of the suppression hearing, the trial court found that the Appellant's traffic stop was constitutional, that Officer Greco could request consent to search the vehicle, and that the Appellant voluntarily consented to the search. Therefore, the trial court denied the Appellant's motion to suppress.

The State called Ti Rohasek, the Appellant's probation officer, to testify. Rohasek said the Appellant did not notify him of the June 26 arrest until July 9. Rohasek filed a probation violation report because the Appellant was arrested for possession of Schedule II and Schedule IV substances and because the Appellant did not notify him "immediately" about the arrest, which was a condition of the Appellant's probation. On cross-examination, Rohasek acknowledged that the Appellant reported to him as required and said that the Appellant was always respectful.

At the conclusion of the probation revocation hearing, the trial court found that the State proved by a preponderance of the evidence that the Appellant violated his probation by possessing Schedule II and Schedule IV drugs and by not reporting his June 26 arrest immediately to his probation officer. Accordingly, the trial court revoked the Appellant's probation and ordered that he serve the remainder of his twelve-year sentence in confinement.

On November 9, 2017, the Appellant filed a motion for new trial, requesting that the trial court "grant a new trial on the violation of his probation." The trial court denied the motion on December 6, 2017, and the Appellant filed his notice of appeal on January 4, 2018.

II. Analysis

On appeal, the Appellant contends that the consent he gave Officer Greco to search his vehicle was invalid because "[t]here is absolutely no proof in the record" that he knowingly, intelligently, and voluntarily waived his Fourth Amendment rights when he pled guilty to facilitation of aggravated child abuse. He further contends that Officer Greco did not have reasonable suspicion to conduct the search; therefore, the trial court

erred by denying his motion to suppress and using the controlled substances found during the illegal search to revoke his probation. The State claims that the we should dismiss the appeal because the Appellant's notice of appeal was untimely. We agree with the State.

Initially, we note that although the Appellant appears to be challenging his guilty plea in case number CR-12648, he has failed to include a transcript of the guilty plea hearing in the appellate record. It is an appellant's duty to prepare a record which conveys a fair, accurate, and complete record on appeal to enable meaningful appellate review. See Tenn. R. App. P. 24(a). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

Moreover, Tennessee Rule of Appellate Procedure 4(a) provides that a defendant must file a notice of appeal with the appellate court clerk within thirty days after the date of entry of the judgment. This includes an order revoking probation. Tenn. R. App. P. 3(b). Here, the trial court entered its order revoking the Appellant's probation on September 27, 2017. Therefore, he had until October 27, 2017, to file his notice of appeal. Instead, the Appellant filed a motion for new trial on November 9, 2017, and his notice of appeal on January 4, 2018. Ordinarily, the timely filing of a motion for new trial tolls the time for filing a notice of appeal after a judgment has been entered. See Tenn. R. App. P. 4(c). As noted by the Appellant in his reply brief, though, a probation revocation hearing is not a "trial." State v. Thomas Coggins, No. M2008-00104-CCA-R3-CD, 2009 WL 482491, at *4 (Tenn. Crim. App. at Nashville, Feb. 25, 2009). Therefore, even if he had timely-filed his motion for new trial, the motion would not have tolled the time for filing the notice of appeal. Accordingly, the Appellant's notice of appeal also was untimely.

A notice of appeal is not jurisdictional, and the requirement for an untimely notice of appeal may be waived in the interests of justice. Tenn. R. App. P. 4(a). "In determining whether waiver is appropriate, this [c]ourt will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case." State v. Markettus L. Broyld, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App. at Nashville, Dec. 27, 2005).

The Appellant has not requested that we waive the timely filing requirement. Furthermore, given the procedural history of this case, the state of the appellate record, and the nature of the issues presented for review, it is our view that the interests of justice do not require this court to waive the timely filing of the notice of appeal. Accordingly, the appeal is dismissed.

III. Conclusion

Based upon the record and the parties' briefs, the appeal is dismissed.

_____
NORMA MCGEE OGLE, JUDGE