IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 29, 2015 Session
Heard at the University of Tennessee at Martin[1]

STATE OF TENNESSEE v. DOUGLAS ZWEIG

Appeal from the Criminal Court for Shelby County
No. B78850 John Wheeler Campbell, Judge

No. W2015-00449-CCA-R3-CD – Filed November 30, 2015

Petitioner, Douglas Zweig, was convicted in 1981 of attempt to commit a felony: to wit, third degree burglary. *See* Tenn. Code Ann. § 39-603 (1975). He was sentenced to serve eleven months, twenty-nine days in the Shelby County Correctional Center, but the trial court suspended his sentence to two years of probation after service of thirty days in confinement. In 2014, he filed a motion under Tennessee Rule of Criminal Procedure 36, requesting that the trial court correct the judgment to reflect that he was convicted of a misdemeanor rather than a felony. The trial court denied his petition. Upon review, we conclude that petitioner's conviction was a felony and, therefore, affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROGER A. PAGE, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and TIMOTHY L. EASTER, JJ., joined.

Ronald D. Krelstein, Memphis, Tennessee, for the Appellant, Douglas Zweig.

Herbert H. Slatery III, Attorney General and Reporter; Rachel E. Willis, Senior Counsel; Amy P. Weirich, District Attorney General, for the Appellee, State of Tennessee.

[1] This case was heard on the campus of the University of Tennessee at Martin as a special project of the Tennessee Court of Criminal Appeals in furtherance of the educational process of students and faculty.

OPINION

On April 3, 1981, a Shelby County grand jury indicted petitioner for third degree burglary, larceny, receiving stolen property, and concealing stolen property. On June 18, 1981, petitioner pleaded guilty to attempt to commit a felony; to wit, third degree burglary, in exchange for a sentence of eleven months, twenty-nine days. Upon his petition for a suspended sentence, the trial court ordered him to serve thirty days in confinement, suspending the remainder of his sentence to two years of probation. The judgment does not indicate the class of offense for his conviction.

On July 15, 2014, petitioner filed a motion to correct his judgment under Tennessee Rule of Criminal Procedure 36, specifically requesting that the judgment be modified to reflect that his attempt to commit a felony was a misdemeanor conviction. The trial court denied his motion, relying on *Rafferty v. State*, 16 S.W. 728 (Tenn. 1892). Petitioner now appeals the denial of his motion to correct his judgment.

The ambit of Rule 36 of the Tennessee Rules of Criminal Procedure is the correction of clerical mistakes in judgments, orders, or the record. In considering whether there has been a clerical error, this court has held:

> [T]he record in the case must show that the judgment entered omitted a portion of the judgment of the court or that the judgment was erroneously entered. The most reliable indicator that clerical error was made is the transcript of the hearing or other papers filed in connection with the proceedings which show the judgment was not correctly entered. In the absence of these supporting facts, a judgment may not be amended under the clerical error rule after it has become final.

Adrian Wilkerson v. Howard Carlton, Warden, No. E2007-02453-CCA-R3-HC, 2008 WL 4949227, at *5 (Tenn. Crim. App. Nov. 20, 2008) (quoting *State v. Jack Lee Thomas, Jr.*, No. 03C01-9504-CR-00109, 1995 WL 676396, at *1 (Tenn. Crim. App. Nov. 15, 1995)). This court reviews the trial court's ruling on a Rule 36 motion for an abuse of discretion. *State v. Brian Webb*, No. E2002-02470-CCA-R3-CD, 2003 WL 21221961, at *5 (Tenn. Crim. App. May 27, 2003).

On appeal, petitioner contends that *State v. Smith*, 627 S.W.2d 356 (Tenn. 1982), stands for the proposition that an attempt to commit a felony is a misdemeanor when the punishment is for less than a year. He further argues that the principles of statutory construction lead to the same conclusion. The State responds that *Rafferty v. State* controls the issue and that the language in *Smith* is dicta. We agree with the State.

The statute under which appellant was convicted was Tennessee Code Annotated section 39-603 (1975):

> If any person . . . attempt[s] to commit[,] any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500).

In *Rafferty v. State*, the defendant was convicted of attempt to obtain money under false and fraudulent pretenses. 16 S.W. at 728. The defendant argued that the offense was a misdemeanor, but the supreme court reasoned that because the statute, which was the precursor to the statute *sub judice*, made an attempt to commit a felony punishable by imprisonment in the penitentiary, it followed that an attempt to commit a felony was a felony itself. *Id.* The court then stated, "The fact that the punishment for the attempt is in the alternative, either by imprisonment in the penitentiary or by fine and imprisonment in the county jail, does not make it any less an offense punishable by imprisonment in the penitentiary, *or take from it the characteristic of a felony*." *Id.* (emphasis added).

On the other hand, the supreme court stated in *Smith* that "T.C.A. [section] 39-603 establishes a range from one to five years if the jury deems the offense to be a felony, and a jail term of not more than one year, and a fine of up to $500, if it deems the offense to be a misdemeanor." *State v. Smith*, 627 S.W.2d 356, 359 (Tenn. 1982). If this statement is not dicta, then there is a clear contradiction in our case law; however, at issue in *Smith* was determinate versus indeterminate sentencing, not offense classification. Therefore, the statement quoted above appears to be dicta.

The Sixth Circuit Court of Appeals agrees with this conclusion, stating that the language in *Smith*

> strongly suggests that for Tennessee offenses where the sentence can be either a term in the penitentiary or the county jail, the offense is deemed a misdemeanor if the actual sentence imposed is confinement in the county jail for less than one year. However, two unreported Tennessee Court of Criminal Appeals decisions, in which the court considered prior convictions relied on for habitual criminal convictions, undermine this conclusion. In *State v. Martin*, No. 80-242-III (Tenn. Crim. App., Oct. 20, 1981), *aff'd on other grounds*, 642 S.W.2d 720 (Tenn. 1982) slip op. at 3, the court held that the statute which allows in cases of attempt to commit a felony discretionary punishment of less than one year "does not reduce the grade of the offense from a felony to a misdemeanor." More recently, in *State v.*

Prince, No. 8 (Tenn. Crim. App., January 5, 1984), slip op. at 2 the intermediate appellate court stated that

> In *State v. James Martin*, No. 80-242-III (Tenn. Cr. App., Nashville, October 20, 1981), this Court held that the statute which allows discretionary punishment of less than a year in appropriate cases did not reduce a felony conviction to a misdemeanor. The Supreme Court granted review of this case on another issue and on December 6, 1982, at 624 [642] S.W.2d 720 (Tenn. 1982), affirmed the conviction. Thus, sub silentio, the rule established by this Court was approved. The appellant relies upon *State v. Smith*, decided February 8, 1982, at 627 S.W.2d 356 (Tenn. 1982), to assert the contrary. In modifying an incorrect determinate sentence fixed by a jury, the Supreme Court did make a broad statement that if a jury fixed punishment at less than one year they found the offense to be a misdemeanor. However, a close reading of the case shows this statement to be dicta, and we conclude the subsequent opportunity presented to the Supreme Court in *Martin*, when this was a direct issue passed on by this Court, not to review our decision on this issue, established the rule to be as we have stated herein and in *Martin*.
>
> These statements subsequent to *State v. Smith* convince us that it is not sufficient authority upon which to rest our decision.

U.S. v. Knowles, 744 F.2d 539, 541 (6th Cir. 1984).

The reasoning in *Prince*[2] is sound. No other cases appear to have followed *Smith* in the intervening years, and the statement in *Smith* relied upon by petitioner in his argument to this court had no bearing on the court's decision in that case. Therefore, we conclude that the *Smith* language is dicta. Despite its age, *Rafferty* is still the controlling authority on this issue.[3] *See State v. Edward Darnell Seltzer*, C.C.A. No. 69, 1987 WL

[2] Unfortunately, *State v. Prince* has been lost in an archival void, and we are unable to provide proper citation to this unreported case.

[3] Petitioner argued in his rebuttal brief that *Rafferty* is actually dicta, an argument premised on the *Rafferty* defendant's having been convicted of obtaining money by false pretenses. However, the *Raffery* defendant was in fact convicted of *attempting* to obtain money by false pretenses and then argued on appeal that her conviction was a misdemeanor; thus, the court's ruling was precisely on point with the issue *sub judice*.

4867 (Tenn. Crim. App. 1987) (following *Rafferty* and stating, "[W]e conclude that even though jail sentences were imposed for these convictions, the convictions still qualify as felony convictions[.]"). Therefore, petitioner's conviction for attempt to commit a felony is a felony. *See Rafferty*, 16 S.W. at 728.

CONCLUSION

Based on the arguments of the parties, the applicable law, and the record, we affirm the judgment of the trial court.

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ROGER A. PAGE, JUDGE