

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 17, 2016

STATE OF TENNESSEE v. BILLY LOCKE

Appeal from the Criminal Court for Polk County
No. 98-036, 98-076 Andrew Mark Freiberg, Judge

No. E2015-00901-CCA-R3-CD – Filed March 31, 2016

In 1998, a jury convicted the Defendant, Billy Locke, for DUI, third offense. The trial court sentenced the Defendant to serve eleven months and twenty-nine days, 160 days of which was to be served in confinement with the remainder to be served on probation. In 1999, the Defendant pleaded guilty to burglary, evading arrest, assault, and possession of burglary tools, and the trial court sentenced him to an effective sentence of three years to run consecutively with any sentence he received for violating his probation for the DUI conviction. Fifteen years later, in January 2015, the Defendant filed a Tennessee Rule of Criminal Procedure 36.1 motion to correct an illegal sentence, arguing that the trial court was required to align his sentences consecutively because he was on probation and thus still “serving” his sentence for the DUI conviction when sentenced for the burglary-related convictions. The trial court denied the Defendant’s motion, and he appealed to this Court. After a thorough review of the record and applicable law, we affirm the trial court’s judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which THOMAS T. WOODALL, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Billy Locke, Atlanta, Georgia, pro se.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Stephen Davis Crump, District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's 1998 DUI third offense conviction and 1999 burglary-related convictions. In November 2014, the Defendant filed a motion to correct his illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. He alleged that he had been convicted of his burglary-related offenses on November 8, 1999, and that, on that same date, the trial court convicted him of violating his probation for his DUI conviction and revoked his probation. He further asserted that the trial court then illegally ordered his sentences for his burglary-related convictions to run concurrently with his sentence for violating his probation for his DUI conviction.

The trial court dismissed the motion without holding a hearing. In the order of dismissal, the trial court explained that the Defendant had been convicted of DUI, third offense, on July 22, 1998. The trial court sentenced the Defendant to serve eleven months and twenty-nine days, 160 days of which was to be served in confinement with the remainder to be served on probation. On November 8, 1999, the Defendant pleaded guilty to evading arrest, simple assault, possession of burglary tools, and burglary of a building other than a habitation. The trial court sentenced the Defendant to an effective sentence of three years in confinement. The trial court ordered that the sentences for the burglary-related convictions run concurrently with each other but consecutively to any violation of probation sentence related to the Defendant's DUI conviction.

The trial court found that the Defendant had not presented a colorable claim for relief. It stated:

As noted above, the [Defendant] was convicted and sentenced in two separate cases stemming from two separate criminal episodes. [The Defendant], in the pleading before this Court, does not challenge the terms of punishment in either individual case. This motion merely alleges that the sentences are illegal in that the [Defendant] believes his sentences were run concurrently in violation of law. [The Defendant] cites to Tenn. R. Crim. P. 32(c)(3) in arguing that his sentences were illegally run concurrently. [The Defendant's] claim is misplaced and is in direct conflict with the court filings in this matter, and of which this Court has taken judicial notice. *See Exhibit A judgments.* Again, the express terms of the agreed plea and sentence in case number 99-076 shows that while the [Defendant] did receive an effective three year sentence for the offense indicted in 99-076, said sentence was explicitly run consecutive to his prior Polk County conviction for DUI 3rd and subsequent violation of said probationary terms. FN2 This Court notes the consecutive intent of the parties by reference to the language contained in the "Consecutive to" and "special Conditions" boxes on the face of the judgments. Twice the

judgments indicate that the sentence in case number 99-076 was to be served consecutive to the DUI 3rd sentence in 98-036. [The Defendant's] motion clearly indicates he mistakenly believes he was sentenced concurrently in these two cases. While such mistake of fact, if genuinely held, may provide a litigant with other procedural means to collaterally attack a sentence, such claims are not contemplated by Tenn. R. Crim. P. 36.1 which only authorizes correction of illegal sentences. Nothing was illegal about the imposed sentence in this case as defined in Tenn. R. Crim. P. 36.1, and this Court will not disturb the terms of an agreed plea and sentence. [The Defendant] is not entitled to relief on this issue.

FN2 This Court notes that the clerk file does not clearly indicate if, how, or why [the Defendant's] eleven months and twenty-nine day sentence for DUI 3rd in 98-036 was still active on October 14, 1999 – the date of the commission of offenses indicted in 99-076 – given that [the Defendant] was sentenced in 98-036 on August 10, 1998. Nevertheless, this Court has afforded the [Defendant], a *pro se* litigant, great deference in taking [the Defendant's] claims at face value and substantively addressing [the Defendant's] allegations.

Furthermore, this Court finds no merit in [the Defendant's] argument that his sentences are illegal even if they were imposed concurrently. Tenn. Code Ann. § 40-35-115(b)(6) provides that a court “may order sentences to run consecutively if the court finds by a preponderance of the evidence that [t]he defendant is sentenced for an offense committed while on probation.” This statutory language makes consecutive sentencing for a new offense committed while on probation permissive, not mandatory. *See also State v. Dorantes*, 331 S.W.3d 370, 392 (Tenn. 2011) (*Concurrent or consecutive sentencing is primarily within the sound discretion of the trial court*). [The Defendant's] reliance on Tenn. R. Crim. P. 32 is misplaced as the issue in this case involved a probationary sentence and a new conviction offense, not contemplated under the rule. [The Defendant] does not cite to any legal authority requiring a sentence other than the sentences imposed in this case.

Finally, this Court notes that the sentences at issue in this case have long since expired. Recently, the Tennessee Court of Criminal appeals opined that the doctrine of mootness may render a claim based upon an expired sentence non-justiciable, notwithstanding the permissive scope of

Tenn. R. Crim. P. 36.1. . . . This Court has the authority to deny a Tenn. R. Crim. P. 36.1 claim as moot in exercising its discretion, and does so in this case. *See State v. Wooden*, No. E2014-01069-CCA-R3-CD, at *3 (Tenn. Crim. App. Dec. 26, 2014).

The sentence imposed in this case is both legal and appropriate, and the [Defendant] fails to establish how said sentence is “illegal” as defined by Tenn. R. Crim. P. 36.1. [The Defendant] does not present a colorable claim as the petition does not state how the sentence was not authorized by statute, nor how the sentence is in direct contravention of any applicable statute or law. A sentence is not illegal when it is statutorily available, but ordinarily not applicable to a given defendant . . . Rather, an illegal sentence is one that is simply unavailable under the Sentencing Act. *Id.* In the present matter, [the Defendant’s] sentence was not illegal, as it was an appropriate sentence authorized by our Sentencing Act.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it denied his motion to correct an illegal sentence. He asserts that the trial court did not order his sentences from his burglary-related convictions to run consecutively two his sentence for his violation of probation related to his DUI conviction. Therefore, he maintains that his sentence is illegal and that he is entitled to relief. The Defendant contends that, although his sentence has expired, this issue is not moot. The State counters that, pursuant to the Tennessee Supreme Court’s recent ruling in *State v. Adrian R. Brown*, __ S.W.3d __, No. E2014-00673-SC-R11-CD, 2015 WL 7748275, at *8 (Tenn. Dec. 2, 2015), the Defendant is not entitled to relief. We agree.

We first note that the Defendant’s judgments of conviction reflect that his sentences were, in fact, ordered to run “consecutive to any [violation of probation] . . . on prior DUI conviction.” This fact alone belies the Defendant’s contention that his sentences are illegal because they were ordered to run concurrently. We further conclude that this issue is moot as the Defendant’s sentence has long since expired. Rule 36.1 provides that either the defendant or the state may “seek the correction of an illegal sentence.” Tenn. R. Crim. P. 36.1(a). An illegal sentence is defined as “one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1(a). Rule 36.1 provides for appointment of counsel for indigent defendants and a hearing if the motion “states a colorable claim.” Tenn. R. Crim. P. 36.1(b). A colorable claim is “a claim that, if taken as true and viewed in a light most

favorable to the moving party, would entitle the moving party to relief under Rule 36.1” *State v. James D. Wooden*, __ S.W.3d __, No. E2014-01069-SC-R11-CD, 2015 WL 7748034, at *6 (Tenn. Dec. 2, 2015).

“[W]hen determining whether a Rule 36.1 motion sufficiently states a colorable claim, a trial court may consult the record of the proceeding from which the allegedly illegal sentence emanated.” *Wooden*, 2015 WL 7748034, at *6. In *Brown*, our Supreme Court held that “Rule 36.1 . . . does not authorize the correction of expired illegal sentences.” __ S.W.3d __, 2015 WL 7748275, at *8. Additionally, the Court noted that while the collateral consequences of a challenged conviction “may prevent a case from becoming moot in the traditional sense of the mootness doctrine, . . . Rule 36.1 is not an appropriate avenue for seeking relief from collateral consequences.” *Id.* at *8 n.12.

In the case under submission, we conclude that the Defendant’s sentence has expired, so this issue is moot. *See Brown*, __ S.W.3d __, 2015 WL 7748275, at *8. Rule 36.1 is not an appropriate avenue for the Defendant seeking relief, and he is not entitled to relief.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court’s judgment.

ROBERT W. WEDEMEYER, JUDGE