

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 18, 2016 Session

STATE OF TENNESSEE v. FRANKLIN CHILDS, JR.

**Appeal from the Criminal Court for Bradley County
No. 12-CR-146A Sandra Donaghy, Judge**

No. E2015-01817-CCA-R3-CD – Filed July 8, 2016

After an unsuccessful motion to dismiss the indictment against him, the Defendant, Franklin Childs, Jr., pled guilty to one count of promoting the manufacture of methamphetamine and sought to reserve a certified question of law. See Tenn. R. Crim. P. 37(b)(2). In this appeal, he attempts to challenge the trial court's refusal to grant his pre-trial motion to dismiss, alleging that the State's failure to preserve evidence foreclosed his right to a fundamentally fair trial and that dismissal of the indictment was the only appropriate remedy. Following our review, we conclude that we do not have jurisdiction to decide this appeal because the issue presented is not dispositive. Consequently, the appeal is dismissed.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Kenneth L. Miller, Cleveland, Tennessee, for the appellant, Franklin Childs, Jr.

Herbert H. Slatery III, Attorney General and Reporter; Lacy Wilber, Senior Counsel; and Rachel M. Sobrero, District Attorney General, pro tempore, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On April 18, 2012, a Bradley County grand jury returned an indictment charging the Defendant with one count each of promoting the manufacture of methamphetamine, initiating a process intended to result in the manufacture of methamphetamine, and possession of drug paraphernalia. See Tenn. Code Ann. §§ 39-17-408; -435; -425. The

indictments arose after officers with the Bradley County Sheriff's Office ("BCSO") responded to a domestic disturbance call involving the Defendant and his girlfriend, Tracy Parker, at the Defendant's home. During their investigation into the domestic disturbance, the officers saw what they believed to be evidence of a methamphetamine laboratory. After obtaining Ms. Parker's consent to search the home, officers seized numerous items that they believed to be components of a methamphetamine laboratory.

Prior to trial, the Defendant filed a motion to dismiss the indictment based on the State's failure to preserve alleged exculpatory evidence. In particular, the Defendant alleged that the BCSO had lost photographs of the items seized from his home, forming the basis of the charges against him. Further, the physical items had been destroyed without being submitted for forensic or chemical analysis. Thus, the Defendant asserted that the indictment should be dismissed in accordance with State v. Merriman, 410 S.W.3d 779 (Tenn. 2013), and State v. Ferguson, 2 S.W.3d 912 (1999). The trial court held a hearing on the Defendant's motion to dismiss on June 1, 2015.

At the beginning of the hearing, the State and the Defendant stipulated that the items constituting the alleged methamphetamine laboratory had been destroyed because they were considered hazardous materials; no forensic or chemical analysis was performed on any of the items before their destruction; and photographs of the items taken at the time of the seizure could not be located.

The only testimony presented at the hearing was that of BCSO Deputy Keith Arthur, who confirmed that photographs taken at the Defendant's home had been lost. He said that the photographs were taken as each item seized was logged on an inventory sheet. The inventory sheet was admitted as an exhibit at the hearing. Deputy Arthur was unsure what had happened to the photographs, testifying that he was "pretty sure" that the photos had been downloaded from the camera to a BCSO computer. However, they could not be located. Deputy Arthur acknowledged that the BCSO had suffered a computer crash, which had compromised many investigative files, but he was uncertain whether that was the cause of the loss of these particular photographs.

Following this testimony, the Defendant argued that the State had a duty to preserve the photographs but had lost them due to either simple or gross negligence. The Defendant averred that the only proof that these items were being used in a criminal fashion would be the testimony of the officers and that they could not be effectively cross-examined about their conclusions without the photographs. According to the Defendant, the only appropriate remedy was dismissal of the indictment.

The State admitted that it had a duty to preserve the photographs but asserted that this case was distinguishable from cases where the indictment had been dismissed prior to trial. The State argued that several officers were present when the evidence was collected and could testify as to what they saw. Additionally, Ms. Parker was jointly

indicted with the Defendant and had already pled guilty. The State said that if the case went to trial, Ms. Parker would be called as a witness and would testify that the Defendant was manufacturing methamphetamine. Additionally, the State pointed out that an inventory list was created at the time the items were photographed. The State suggested that the trial court should adopt a “wait-and-see” approach, allowing the case to proceed to trial. The State said that this approach would allow the trial court to more accurately assess the effect of the loss of the photographs in light of the entirety of the evidence presented and to fashion a remedy as necessary.

Thereafter, the trial court found that, based on the evidence available at that point, it appeared that the Defendant could still receive a fair trial without the photographs. Specifically, the court concluded that the State had a duty to preserve the photographic evidence and that the loss of the photographs was due to simple negligence. The court distinguished this case from ones in which the indictment had been dismissed prior to trial by the fact that there were multiple witnesses.¹ The court noted that having three officers testify about what they saw would “create[] great fodder for cross examination.” The court also pointed out that the inventory list did not simply name the items but provided relevant descriptions, such as “jar containing . . . a pill wash,” “red bottle containing a gasser,” and “shake bottles.” The court acknowledged that these descriptions involved an officer’s conclusion but also found them probative as to whether the items were “innocent” or were being used as part of a methamphetamine laboratory.

The court stated that “ruling on the [D]efendant’s motion [was] reserved until the conclusion of the State’s case to determine whether dismissal of the indictment [would be] appropriate at that time, or whether a less drastic remedy such as an instruction to the jury regarding lost evidence would be appropriate.” The trial court later entered a written order incorporating these findings. In that order, the court again stated that “[b]ased on the testimony and evidence received thus far in this case, . . . dismissal of the indictment at this stage [was] not the appropriate remedy, and that ruling on the [D]efendant’s motion [was] reserved until the conclusion of the State’s case to determine whether dismissal of the indictment [would be] appropriate at that time, or whether a less drastic remedy such as an instruction to the jury regarding lost evidence would be appropriate.”

The Defendant thereafter entered into a plea agreement with the State wherein he agreed to plead guilty to promoting the manufacture of methamphetamine; the remaining two counts were dismissed. Additionally, the Defendant sought to reserve his right to appeal a certified question. That question was “whether the [t]rial court erred in not

¹ The court reached this conclusion by considering the testimony of three officers who had participated in the search and seizure at the Defendant’s home and had testified at a hearing on the Defendant’s motion to suppress which was held prior to the hearing on the motion to dismiss.

dismissing the [i]ndictment under Merriman and Ferguson when the photographs taken of an alleged meth lab were not preserved.”

ANALYSIS

On appeal, the Defendant presents the certified question as reserved in the trial court’s final order, namely, whether the court erred in denying his motion to dismiss the indictment due to the State’s failure to preserve photographs of the alleged methamphetamine laboratory. In response, the State contends that the trial court’s refusal to dismiss the indictment prior to trial was proper.

Although not addressed by either party, our jurisdiction is dependent upon our finding that the Defendant has presented a certified question that is dispositive of this case and that he has otherwise complied with the requirements for reserving a certified question of law. Thus, we begin our analysis by considering whether we have jurisdiction to hear the appeal.

Our supreme court first set forth the prerequisites for certifying a question of law in State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988). In 2002, our legislature amended Tennessee Rule of Criminal Procedure 37 to expressly adopt the Preston requirements. The current version of Rule 37 states that a criminal defendant may plead guilty and appeal a certified question of law when the defendant has entered into a plea agreement under Rule 11(c) of the Tennessee Rules of Criminal Procedure and has “explicitly reserved—with the consent of the [S]tate and of the court—the right to appeal a certified question of law that is dispositive of the case.” Rule 37(b)(2) sets forth technical requirements that the Defendant must follow in order to properly reserve a certified question.²

² Those requirements are:

- (i) the judgment of conviction or order reserving the certified question that is filed before the notice of appeal is filed contains a statement of the certified question of law that the defendant reserved for appellate review;
- (ii) the question of law as stated in the judgment or order reserving the certified question identifies clearly the scope and limits of the legal issue reserved;
- (iii) the judgment or order reserving the certified question reflects that the certified question was expressly reserved with the consent of the [S]tate and the trial court; and
- (iv) the judgment or order reserving the certified question reflects that the defendant, the [S]tate, and the trial court are of the opinion that the certified question is dispositive of the case[.]

While the trial court and parties in this case agreed that the certified question was dispositive, we are not bound by that determination and must make an independent determination that the certified question reserved is dispositive of the case. State v. Dailey, 235 S.W.3d 131, 134-35 (Tenn. 2007) (citations omitted). “An issue is dispositive when this court must either affirm the judgment or reverse and dismiss.” State v. Wilkes, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). This court does not have jurisdiction to decide a certified question that is not dispositive. State v. Walton, 41 S.W.3d 75, 96 (Tenn. 2001). Ultimately, although the record in this case reveals that the Defendant met the technical requirements of Rule 37(b)(2), the Defendant’s failure to satisfy the threshold requirement that a certified question must be dispositive is fatal to this appeal.

Because it provides a helpful reference for our conclusion that the Defendant has not presented a dispositive question of law, we briefly recount the inquiry involved when a defendant claims that the State failed in its duty to preserve evidence with potential exculpatory value. In State v. Ferguson, our state supreme court adopted a test for courts to use in determining whether the State’s loss or destruction of evidence deprived a defendant of a fair trial. 2 S.W.3d at 916. The first step in analyzing whether a defendant’s trial was fundamentally fair “is to determine whether the State had a duty to preserve the evidence.” Id. at 917. Only if the proof establishes the existence of such a duty and that the State failed in that duty, will a trial court then conduct a balancing analysis involving the following factors: “[(1)] [t]he degree of negligence involved; [(2)] [t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and [(3)] [t]he sufficiency of the other evidence used at trial to support the conviction.” Id. (footnote omitted).

After considering all of these factors, if the trial court concludes “that a trial without the missing evidence would not be fundamentally fair,” it may dismiss the charges or “craft such orders as may be appropriate to protect the defendant’s fair trial rights.” Ferguson, 2 S.W.3d at 917. The trial court “is afforded wide discretion in fashioning a remedy,” which will depend upon the egregiousness of the conduct and the evidentiary value of the lost evidence. State v. Merriman, 410 S.W.3d 779, 796 (Tenn. 2013); see also Ferguson, 2 S.W.3d at 917. Additionally, although in some cases it may be appropriate for a trial court to make a final ruling on a Ferguson motion prior to trial, courts also have discretion to reserve ruling on a Ferguson ruling until the entirety of the State’s evidence is presented at trial. Merriman, 410 S.W.3d at 789-90.

Tenn. R. Crim. P. 37(b)(2)(A).

In the present case, after a hearing on the Ferguson motion, the trial court found that based on the evidence presented at that point, it was satisfied that the Defendant could receive a fundamentally fair trial without the photographic evidence. Nevertheless, the trial court explicitly stated, both orally at the conclusion of the hearing and later in a written order, that it was reserving making a final ruling on the Defendant's motion to dismiss the indictment until the conclusion of the State's case-in-chief. Although the Defendant frames his question as whether the trial court erred in denying his motion to dismiss, the court did not make a final ruling on that motion. Thus, his real challenge is to the court's fundamental fairness finding. However, even if we disagreed with the trial court's conclusion that the Defendant could receive a fundamentally fair trial without the photographs, the court's reservation of the issue until trial meant that dismissal of the indictment would not be the only possible remedy, and the certified question is therefore not dispositive. See Merriman, 410 S.W.3d at 796; see also State v. Steven J. Ballou, E2015-00399-CCA-R3-CD, 2015 WL 7720379, at *7 (Tenn. Crim. App. Nov. 20, 2015), perm. app. denied (Tenn. Mar. 23, 2016) (holding that challenge to trial court's determination that a defendant could receive a fundamentally fair trial without lost evidence was not dispositive because dismissal was not the only remedy). Consequently, we are without jurisdiction to consider this appeal and are constrained to dismiss it.

CONCLUSION

Based upon the foregoing and the record as a whole, the appeal is dismissed.

D. KELLY THOMAS, JR., JUDGE