

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 11, 2023

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STATE OF TENNESSEE v. DARREN MARION LITTLE

Appeal from the Circuit Court for Lincoln County
No. 2020-CR-154 Forest A. Durard, Jr., Judge

No. M2022-00738-CCA-R3-CD

The Defendant, Darren Marion Little, pleaded guilty to two counts of violating the Sex Offender Registry and one count of possessing a prohibited weapon. The trial court sentenced the Defendant as a Range III offender to an effective sentence of ten years of incarceration. On appeal, the Defendant contends, and the State concedes, that the trial court erred when it classified him as a Range III offender. After review, we agree with the parties. We reverse the trial court’s judgment and remand the case for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J. and Matthew J. Wilson, J., joined.

Dustin Faeder (on appeal), Brentwood, Tennessee, and Jefre S. Goldtrap (at trial), Fayetteville, Tennessee, for the appellant, Darren Marion Little.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Robert J. Carter, District Attorney General; and Amber L. Sandoval, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

A. Guilty Plea Hearing

This case arises from the Defendant’s violation of the Sex Offender Registry, and his pleading guilty to two counts of doing so, along with one count of possessing a prohibited weapon.

At the guilty plea hearing, the State articulated the facts it would have proven had the case gone to trial as follows:

You Honor, if this matter went to trial the proof would show the [D]efendant . . . is a Registered Sex Offender who was convicted in Madison County, Alabama of possession of obscene material

. . . .

That's the offense that got him on the Registry. As far as Count One that violation of the Sex Offender Registry involves a Kawasaki Motorcycle that was purchased June 30, 2020. It looks like that information did not reach Sandy Metcalf until August 17, 2020, and that was something that needed to be provided within 48 hours.

As far as Count Five Deputy Jonathan Allen went to 3 Blacky Road just for a verification of the address listed on the Registry. He noticed [a] child's toys outside, spoke with Lona Lugo and she did advise they had the baby there and advised they had been there earlier that morning.

Deputy Trey Minor went back the next day, September 16th, and did verify again that the minor had been staying there in that home.

And then Count Six when Deputy Minor went to the home [the Defendant] had a pair of brass knuckles on one of his motorcycles.

Upon questioning by the trial court, the Defendant agreed that these facts were accurate. The Defendant agreed that, as part of the Sex Offender Registry, he was required to inform the Tennessee Bureau of Investigation or other law enforcement agency within forty-eight hours of purchasing a motorcycle, and he failed to do so. The Defendant similarly admitted that he conducted an overnight visit in a residence where a minor resided, that minor being his grandchild. Finally, he agreed he possessed the brass knuckles, which were a weapon prohibited by the registry.

After the admissions by the Defendant, he expressed his desire to enter a plea of guilty to the three charges. The trial court ensured that he understood that these pleas would become convictions that could enhance his punishment if he were convicted of another offense in the future. The trial court accepted the Defendant's guilty pleas.

B. Sentencing Hearing

At the sentencing hearing, the State submitted that the Defendant was a Range III, persistent offender. The trial court noted that the Defendant has four prior Sex Offender Registry violations. The Defendant's attorney agreed that the Defendant was a Range III offender. The trial court admitted the presentence report into evidence.

Kayla Young, a probation officer, testified that she prepared the presentence report. During her testimony, the State presented certified copies of the Defendant's previous felony and misdemeanor convictions, and the trial court admitted the certified copies into evidence. Those convictions included two Tennessee convictions: a felony conviction from 2013 for violating the Sex Offender Registry; and a Tennessee felony conviction in 2009 for violating the Sex Offender Registry. Additionally, the State relied upon three Alabama convictions to establish the Defendant's range as Range III, which requires five prior felony convictions: a conviction for failing to register as a sex offender; a conviction for possessing obscene material; and a conviction for theft in the third degree.

Ms. Young testified about the Alabama convictions, saying that the Defendant's conviction for violating the Sex Offender Registry in Alabama is a Class C felony in Alabama but a Class E felony in Tennessee. He received a sentence of ten years for that conviction. The 2004 Alabama conviction for possessing obscene material was a Class C felony in Alabama but it would amount to a Class E felony in Tennessee. The Defendant received a sentence of three years on supervised probation and was required to register as a sex offender. Both of these convictions had associated probation violation offenses. Ms. Young testified that, in 1993, the Defendant was convicted in Alabama of theft of property in the third degree. He received a sentence of nine months in prison. It appeared that the parties considered the theft conviction to be a felony conviction, although Ms. Young did not specifically so state.

The trial court reviewed the theft conviction and stated "it notes on the docket [that it is] reduced and sentenced to 9 months, a misdemeanor." The State asserted that it would address that issue in their addendum but that it was "not a misdemeanor."

Ms. Young then stated that the Defendant's record included numerous misdemeanor convictions.

During cross-examination, Ms. Young stated that the Defendant's most recent conviction was for DUI in 2013. That same year, he was convicted of violating the Sex Offender Registry.

The Defendant's probation officer then testified and described the events surrounding her discovery of his violating the Sex Offender Registry. Her testimony comported with the State's summary of facts given during the guilty plea hearing.

The Defendant testified that his theft conviction began as a felony charge but that he was convicted of a misdemeanor. He then admitted that he had five previous felony convictions. He then discussed the events surrounding the young child staying in his home, explaining that the child was his fiancée's grandson and that the child was not in any harm but they did not have anywhere for him to go. He also said that the brass knuckles were ornamental and not intended as a weapon. The Defendant said that he was working to remove his status as a sex offender, but he understood he was subject to the Sex Offender Registry until the status was changed.

During cross-examination, the Defendant stated that he had a pending charge for drugs and that drugs were what led to his lack of success on probation. He articulated his resolve, however, to never use drugs again. The Defendant said that the theft conviction in Alabama was based upon theft of property valued at \$1,800. He pleaded guilty to theft "in the third degree," and he was unsure whether that was a felony or a misdemeanor. He stated, however, that he received a sentence of nine months, which led him to believe that it was a misdemeanor.

The trial court stated that Alabama law codified that theft of property in the third degree was theft of property valued at more than \$500 but less than \$1,149. The trial court stated that this was a Class D felony in Alabama but would be a Class E felony in Tennessee. The trial court said that the only dollar amount included in the record was \$1,800, so he treated the conviction as a Class E felony.

The trial court then sentenced the Defendant as a Range III offender to five years for each of the violations of the Sex Offender Registry convictions and 11 months and 29 days for the weapons conviction. The trial court ordered the sentences for the Sex Offender Registry to run consecutively to each other but concurrently with the weapons conviction for a total effective sentence of ten years. It is from these judgments that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that, although he conceded otherwise, the trial court erred when it classified him as a Range III offender. The State counters first that the Defendant did not timely appeal his sentencing, but it agrees that he was not properly classified as a Range III offender. It states that one of the convictions that it relied upon in seeking to have the Defendant sentenced as a Range III offender was "theft in the third degree," a conviction from Alabama. That conviction, the State concedes, amounted to a misdemeanor conviction and not a felony conviction, leaving the Defendant with only four prior felony convictions for the determination of his range, making him a Range II

offender. Because of this, and because the Defendant was sentenced outside of the Range II applicable sentencing range, the State asks this court to remand the case for resentencing.

We first agree with the State that, while the Defendant risked waiver by not timely filing his appeal, we should address this issue as the parties agree that the case should be remanded for resentencing. *See* Tenn. R. App. P. 4(a). We therefore turn to address the issue on its merits.

The trial court may sentence a defendant as a Range III persistent offender when the defendant has received “any combination of five (5) or more prior felony convictions within the conviction class or higher or within the next two (2) lower felony classes, where applicable” T.C.A. § 40-35-107(a)(1). “Prior convictions” include “convictions under the laws of any other state, government or country that, if committed in this state, would have constituted an offense cognizable by the laws of this state.” T.C.A. § 40-35-107(b)(5). In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.” *Id.* A defendant who is found by the court beyond a reasonable doubt to be a persistent offender shall receive a sentence within Range III. T.C.A. § 40-35-107(c). The State bears the burden of establishing the appropriate sentencing range beyond a reasonable doubt. *See State v. Vick*, 242 S.W.3d 792, 796 (Tenn. Crim. App. 2007).

A Range II multiple offender is a defendant who has received:

- (1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class or within the next two (2) felony classes, where applicable; or
- (2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

T.C.A. § 40-35-106(a)(1), (2). A prior conviction is a conviction that has been adjudicated prior to the commission of the more recent offense for which sentence is to be imposed. *State v. Blouvet*, 904 S.W.2d 111, 113 (Tenn. 1995); *see also State v. Morrell*, No. E1999-00924-CCA-R3-CD, 2000 WL 218188, at *3 (Tenn. Crim. App., at Knoxville, Feb. 25, 2000).

The foreign conviction analysis involves three parts. First, a trial court must determine whether the foreign conviction was a “cognizable” offense under Tennessee law. *See* T.C.A. §§ 40-35-106(b)(5), -107(b)(5), -108(b)(5). Second, a trial court must determine whether the foreign conviction was a “named felony” in Tennessee. To qualify as a “named felony,” a foreign felony conviction must have the exact same name as a crime

that is currently a felony in Tennessee. T.C.A. § 40-35-106(b)(5). Finally, if the foreign felony is not a named felony in Tennessee, a trial court is required to then analyze the elements of the foreign felony at the time of the defendant's conviction, to determine whether it "was analogous to a felony offense under Tennessee's law as it existed at the time it was committed." *Vick*, 242 S.W.3d at 795 (citing *State v. Brooks*, 968 S.W.2d 312, 313-14 (Tenn. Crim. App. 1997)). The length of sentence a defendant receives for an out-of-state conviction "is not determinative of what grade of felony the out-of-state offense might be assigned under Tennessee laws." *Id.* at 794.

The determinative factor for whether a foreign conviction constitutes a felony offense in Tennessee at the time of conviction "is the elements of the convicted offense, not the facts or the elements of the originally charged offense." *Id.* at 795. A foreign conviction cannot be used to elevate a defendant's range classification if it could be committed in several different ways, one of which would have constituted a misdemeanor rather than a felony under Tennessee law at the time of the foreign conviction. *Id.* at 794-95.

In *State v. Vick*, this court found that the State failed to carry its burden of proving a foreign conviction because it did not offer proof to show that the defendant's guilty plea was based upon the same facts alleged in the charging instrument. *Id.* at 796. Without proof of the underlying facts to support the conviction, there is no way to determine if the elements of the convicted offense are the equivalent of a felony in Tennessee. The State in *Vick* introduced:

A certified copy of the defendant's South Carolina indictment for assault and battery with intent to kill, as well as a certified copy of the original arrest warrant and affidavit . . . which alleged that on September 13, 1973, the defendant committed the offense of assault and battery with the intent to kill by shooting a man four times with a short-barreled, .22 caliber rifle. Attached to the indictment was a judgment sheet showing that the defendant plead guilty on October 8, 1973, to the offense of assault and battery of a high and aggravated nature and received a sentence of eight years.

Id. Based upon this evidence, the trial court sentenced the defendant as a Range II offender, finding beyond a reasonable doubt that the defendant's South Carolina conviction would constitute a Class C felony in Tennessee. *Id.* On appeal, the *Vick* court held that the State had failed to meet its burden by neglecting to show proof of the facts underlying the actual conviction. *Id.* This court reasoned that introducing evidence of the mere existence of a prior foreign conviction is insufficient to satisfy the State's burden of proof under Tennessee Code Annotated section 40-35-106(b)(5). *Id.* at 794. The trial court must analyze the elements of the out-of-state offense in order to determine whether the offense

was analogous to a felony offense under Tennessee’s law as it existed at the time the offense was committed. *Id.* (citing *State v. Brooks*, 968 S.W.2d 312, 314 (Tenn. Crim. App. 1997)). The length of sentence a defendant receives for an out-of-state conviction is not determinative of what grade of felony the out-of-state offense might be assigned under Tennessee laws. *Id.* (citing *State v. Hill*, 175 S.E.2d 227 (S.C. 1970)). The name of a foreign offense is also not determinative where the offense may be committed in a number of ways, some of which would constitute less than a felony if committed in Tennessee. *Id.* (citing *Pope v. State*, 528 S.W.2d 54, 56 (Tenn. Crim. App. 1975)). The trial court must determine the specific elements of the crime for which the defendant was convicted in the foreign jurisdiction, and from that correctly determine that the classification is a felony in Tennessee. *Id.*

In this case, the trial court erred in finding that the Alabama theft conviction constituted a felony offense. While relying upon information provided by the State, the State now correctly notes that, at the time of the theft offense, theft of property in the third degree involved a theft of property “which does not exceed \$250 in value,” which was a Class A misdemeanor. Ala. Code § 13A-8-5 (1992). This theft offense would also be a misdemeanor in the State of Tennessee. Therefore, the Defendant only has four prior felony convictions, and he is a Range II offender. Thus, we remand the case to the trial court for the Defendant to be sentenced as a Range II offender.

III. Conclusion

For the foregoing reasons, we reverse the trial court’s judgments and remand the case for resentencing.

ROBERT W. WEDEMEYER, JUDGE