

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

FILED
01/20/2023
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. DERWIN V. THOMAS

Appeal from the Criminal Court for Shelby County
Nos. 96-01296, -01297, -01298, -01299 & -01300 Paula Skahan, Judge

No. W2022-00109-CCA-R3-CD

In 1998, a Shelby County jury convicted the Defendant, Derwin V. Thomas, of two counts of especially aggravated kidnapping, one count of especially aggravated robbery, and two counts of first degree murder. The trial court sentenced him to consecutive sentences of life without the possibility of parole. The Defendant unsuccessfully sought review on multiple occasions, by direct appeal, post-conviction petition, a petition for a writ of habeas corpus, and a petition for a writ of error coram nobis. Most recently, the Defendant filed a “Motion for Life Imprisonment,” alleging that the State failed to give him proper notice of its intention to seek life imprisonment without the possibility of parole, and a Motion for Rule 36.1 relief¹, alleging that the trial court failed to charge the jury with relevant lesser-included offenses. The trial court summarily dismissed both the Defendant’s motions, and the Defendant now appeals. On appeal, he contends that the trial court erred when it dismissed his motions. After review, because the notice of appeal in this case was untimely filed and because the Defendant has offered no facts supporting a waiver of this untimely filing in the interests of justice, the appeal is hereby dismissed

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and KYLE A. HIXSON, JJ., joined.

Derwin V. Thomas, Only, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

¹The 36.1 motion is not included in the record. At the Defendant’s request, this Court ordered that the record be supplemented by a copy of the 36.1 motion. The clerk of the criminal court of the 30th judicial circuit filed an affidavit swearing that a copy of such item was not available but would be forwarded if it became so available.

OPINION

I. Facts

This case arises from the murder of two teenagers, Ira West and Malik Rashad Asberry, who were shot at point-blank range in an abandoned house in Memphis, Tennessee on May 30, 1995. In our summary of the facts presented at trial, we briefly recounted:

Kenji Lewis testified that he spoke with the victims earlier that day and that they said they were going to meet [the Defendant's co-defendant] Winters and smoke dope. There was testimony that in reality, Defendant Winters was angry at the victims for calling his mother's house and disturbing her.

Rodney Edwards, a fourteen year old boy who sold drugs for Defendant Thomas, testified that he met Defendant Thomas on the afternoon of the murder to drop off drug money. He then asked Defendant Thomas if he would have a smoke with him and Defendant Thomas agreed. A car drove up at that moment with [co-]defendant Winters, Sekour Barnes, the two victims, and two other men inside. Edwards, the two defendants, the two victims, and Barnes then proceeded to walk to an abandoned house which was frequented by drug dealers and users.

Edwards testified that he heard Defendant Thomas tell [co-]Defendant Winters, "Let's get these n_____s in the house so we can kill them." The Defendants went around to the front entrance, and [co-]defendant Winters soon returned brandishing a gun at the two victims. [Co-]defendant Winters then began to force the victims into the abandoned house through a side window. One of the victims said he would give them anything he had on him, but he was grabbed by the neck and physically forced into the house through the window by Barnes. Barnes never actually entered the house. At some point, victim Asberry's necklace was taken from him. Edwards did not enter the house, but he did hear the victims begging and pleading for their lives. Edwards then heard four shots and he and Barnes ran in opposite directions from the abandoned house.

A neighbor found the bodies lying one on top of the other in the kitchen. The kitchen was used as a bathroom by drug users and was covered with human waste. Victim Asberry's shoes had been stolen. One victim had been shot in the head and the other had been shot in the neck.

After receiving a [C]rimestoppers tip, investigators searched Room 230 of a nearby Motel 6. This was the room Defendant Thomas lived in and other people frequented. Defendant Thomas' wallet and [V]ictim Asberry's necklace were found in the same drawer in Room 230.

[Co-]defendant Winters was present when the search was conducted at the Motel 6. He told police he knew about the murder of two juveniles, and he took them to a vacant house where the murder weapon was hidden. [Co-defendant] Winters was then taken in for questioning, and he admitted to being at the scene when the victims were killed. He described how each victim was shot, and how someone in the room removed [V]ictim Malik's shoes. He claimed he had nothing to do with the murders, but was only a witness to the murders.

Terrance Fitzgerald testified that he was with the defendants after the murder and that he heard Defendant Thomas talking to [co-]defendant Winters about killing two boys. Fitzgerald overheard Defendant Thomas say that one was shot in the neck and the other in the head. Defendant Thomas was talking about the struggling of one of the victims and how he had to be shot more than once. Fitzgerald also testified that Defendant Thomas took his revolver with him when he left the Motel 6 on the morning of the murders.

Alvinsea Fitzgerald, the sister of Terrance Fitzgerald and former girlfriend of Sekour Barnes, testified that she knew Defendant Thomas because a friend of hers had previously dated Defendant Thomas. Her friend and Defendant Thomas wrote letters to each other and Fitzgerald testified that she read Thomas' letters and knew his handwriting.

Soon after the murders, she began receiving anonymous threatening letters telling her to keep her brother Terrance quiet. She recognized the handwriting as being that of Defendant Thomas.

Sekour Barnes testified at trial as to several letters given to him in jail by Defendant Thomas through an intermediary. The letters he discussed were reviewed by a State handwriting expert and determined to be written by Defendant Thomas. The letters were written to Mike Boyland, Tadarrio Britt (a.k.a. Tech 9), as well as men nicknamed G. Wayne, Yo Yo, and Crazy Legs. In each of these letters, Defendant Thomas tells the recipient what to say, in detail, about their knowledge of the murders. The letters ask recipients to memorize their trial testimony, to contact him after they speak

with investigators, and to destroy the envelopes but keep the letters to prepare for their testimony. The letters also promise help in the future for this testimony. The trial court admitted the letters into evidence as statements against interest.

State v. Aaron A. Winters and Derwin V. Thomas, No. 02C01-9802-CR-00053, 1999 WL 628968, at *2-3 (Tenn. Crim. App., at Jackson, Aug. 19, 1999), *perm. app. denied* (Tenn. Mar. 6, 2000). Based upon this evidence, the jury convicted the Defendant of two counts of especially aggravated kidnapping, one count of especially aggravated robbery, and two counts of first degree murder. The trial court sentenced him to consecutive sentences of life without the possibility of parole.

The Defendant filed for direct appeal, raising multiple issues, and after careful review this court denied relief, affirming the trial court's judgments. *Id.* at *1.

In 2002, the Defendant filed for post-conviction relief in which he claimed that he was denied a speedy trial and the effective assistance of counsel at trial and on direct appeal. The post-conviction court dismissed the petition, and after review we affirmed. *Derwin Thomas v. State*, No. W2002-01964-CCA-R3-PC, 2003 WL 1860538, at *1 (Tenn. Crim. App., at Jackson, Apr. 7, 2003), *perm. app. denied* (Tenn. Oct. 6, 2003).

On December 4, 2003, the Defendant filed an application for the writ of error coram nobis. As grounds for issuance of the writ, the Defendant asserted that co-defendant Winters had provided an affidavit exculpating the Defendant from the crimes for which he stands convicted. Specifically, the affidavit of co-defendant Winters provided:

On May 31, 1995[,] myself, Rodney Edwards and Sekour Barnes were together, when Sekour Barnes killed Ira West, and Malik Matthews, inside the house. Mr. Derwin Thomas did not kill anyone, and was not present at the time the incident took place. I lied on Mr. Thomas, because the homicide detectives (as well as Sekour Barnes) had threaten [sic] me, and told me to say, that, Mr. Derwin Thomas had killed these two (2) individuals. They (homicide detectives) also promised to let me go, if I said Mr. Derwin Thomas committed these crimes.

By order entered January 26, 2004, the trial court summarily dismissed the petition for coram nobis relief as time-barred and as failing to state adequate grounds for issuance of the writ. This Court affirmed the trial court's judgment. *Derwin Thomas v. State*, No. W2004-00515-CCA-R3-CO, 2004 WL 2290494, at *1 (Tenn. Crim. App., at Jackson, Oct. 8, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005).

On October 12, 2011, the Defendant filed a petition for habeas corpus relief, alleging that the indictment against him “fail[ed] to fully state [the] crime[] because criminal responsibility was never charged in [the] indictment.” The habeas corpus court dismissed the petition without a hearing, finding that the State was not required to allege the theory of criminal responsibility in the indictment. After review, we affirmed the lower court. *Thomas v. Westbrook*, No. E2011-02586-CCA-R3-PC, 2012 4005608, at *1 (Tenn. Crim. App., at Knoxville, Sept. 12, 2012), *perm. app. denied* (Tenn. Feb. 13, 2013).

On February 21, 2021, the Defendant filed a “Motion for Life Imprisonment Pursuant to T.C.A. 39-13-208(a)(b).” In the motion he alleged that the State had not provided him with adequate notice that it intended to seek a sentence of imprisonment without the possibility of parole. It appears that the Defendant also filed a motion pursuant to Rule 36.1, but such motion is not included in the record.

The State responded to both motions. It stated that in the Rule 36.1 motion, the Defendant contended that “pail error” review would entitle him to litigate for the first time whether the trial court erred when it failed to charge the jury with certain lesser-included offense instructions. The State noted that the Defendant’s claim should fail both on its merits and because the Defendant had not comported with the requirements of Rule 36.1 by failing to attach the judgment sheets or any other documentation regarding his sentence. About the other filing regarding the notice, the State asserted that it had provided adequate notice and that, even if the Defendant could prove his allegations, he is not entitled to relief because the issue is waived as untimely.

In its order dismissing the Defendant’s motions, the trial court found that the Defendant’s raising of the issue of the State’s notice was untimely. It noted that the issue was not included in the Defendant’s motion for new trial and that the Defendant was raising it for the first time over twenty years after his conviction, which was improper. The court further found that the Defendant was not entitled to relief pursuant to Tennessee Rule of Criminal Procedure 36.1. It noted that the Defendant had failed to attach the relevant documentation to the motion and that he failed to say whether this was his first such motion. The court held that, therefore, the motion had been “improperly filed with this Court.” The trial court entered its judgment on October 5, 2021.

It is from this judgment that the Defendant filed his notice of appeal on January 28, 2022.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it dismissed his motions. He asserts that he is entitled to relief because the State did not provide him

adequate notice of its intent to seek life without parole and because the trial court erred when it did not instruct the jurors on relevant lesser-included instructions.

First, we must address whether the Defendant's appeal is properly before us. Tennessee Rule of Appellate Procedure 4(a) provides that the notice of appeal must be filed "within 30 days after the date of entry of the judgment appealed from." Rule 4(a) also states, however, that "in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). A defendant bears the responsibility to properly perfect his appeal or to demonstrate that the "interests of justice" merit waiver of an untimely filed notice of appeal. *State v. Carl T. Jones*, No. M2011-00878-CCA-R3-CD, 2011 WL 5573579, at *1 (Tenn. Crim. App. Nov. 15, 2011) (citing Tenn. R. App. P. 4(a)), *perm. app. denied* (Tenn. Apr. 11, 2012).

"In determining whether waiver is appropriate, this court 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. Rockwell*, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007) (quoting *Markettus L. Broyld*, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App. Dec. 27, 2005), *no perm. app. filed*). "Waiver is not automatic and should only occur when 'the interest of justice' mandates waiver. If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction." *Id.* (citing *Michelle Pierre Hill v. State*, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996), *perm. app. denied* (Tenn. May 28, 1996)). Here, the trial court entered its order denying relief on October 5, 2021, and Defendant filed the notice of appeal on January 28, 2022.

Clearly the notice of appeal was untimely. Therefore, we must look to see if the interests of justice demonstrate a reason for us to waive the timely filing of the notice of appeal. A review of the record indicates that the Defendant has not requested a waiver nor has he offered any type of explanation as to why we should excuse him from the timeliness requirement.

III. Conclusion

Because the notice of appeal in this case was untimely filed and because Defendant has offered no facts supporting a waiver of this untimely filing in the interests of justice, the appeal is hereby dismissed.

