IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 26, 2005

STATE OF TENNESSEE v. ELLEN COLLEEN SMITH

Direct Appeal from the Criminal Court for Hamilton County
Nos. 248261-248270 Douglas A. Meyer, Judge

No. E2004-02448-CCA-R3-CD - Filed September 9, 2005

This is a direct appeal as of right challenging the sentence imposed for convictions on ten counts of identity theft, ten counts of forgery, and nine counts of theft of property. The Defendant submitted a petition to enter an open guilty plea to all twenty-nine offenses, stemming from ten separate incidents. She was sentenced as a Range I, standard offender to partial consecutive sentences totaling twenty years, with four years to be served in confinement and the remainder on supervised probation. On appeal, the Defendant argues only that the trial court erred in running the sentences consecutively. Because it appears from the record that the Defendant's guilty pleas were never entered in open court, this cause is remanded to the trial court for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court
Remanded for further Proceedings

DAVID H. WELLES, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and J.C. MCLIN, J., joined.

Ardena J. Garth, Public Defender and Donna Robinson Miller, Assistant Public Defender, Chattanooga, Tennessee, for the appellant, Ellen Colleen Smith.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Bill Cox, District Attorney General; and Rodney C. Strong, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The record on appeal reflects that the Defendant, Ellen Colleen Smith, obtained pertinent identification information of the victim, Ms. Judy Orsini, and opened lines of credit in Ms. Orsini's name at ten separate retail establishments in the Chattanooga area over the course of five days in January of 2004.[1] A Hamilton County grand jury returned indictments against the Defendant for twenty-nine offenses grouped around the ten separate incidents. The Defendant was charged with identity theft, see Tenn. Code Ann. § 39-14-150, theft of property, see Tenn. Code Ann. § 39-14-103, and forgery, see Tenn. Code Ann. § 39-14-114, in nine of the cases.[2] In the tenth case, the Defendant was indicted on identity theft and forgery charges.[3]

On September 2, 2004, the Defendant signed a "Petition to Enter a Plea of Guilty and Waiver of Trial by Jury," which set forth her desire to enter an open guilty plea to all twenty-nine offenses. On this same day a sentencing hearing was conducted. At this hearing, the victim's husband, Mr. Peter Orsini, testified that he and his wife, both residents of Atlanta, first learned of the identity theft when they received several calls from retailers in Chattanooga to congratulate them on their new line of credit or to verify employment information. The Orsinis immediately contacted their credit bureau, and filed a report with the Chattanooga Police Department. Mr. Orsini believed the information the Defendant used to open the credit accounts in his wife's name was obtained from a medical form. Mr. Orsini further testified that he and his wife were not financially liable for any of the debts associated with the retail credit accounts opened by the Defendant, but suffered losses for their time, $35 in photocopying fees, and the expenses associated with traveling to Chattanooga for court proceedings.

The victim, Ms. Judy Orsini, testified that she is very nervous now that she has been the victim of identity theft. She further stated that the crime has hurt her reputation and her ability to obtain credit, noting that she had recently attempted to purchase a wedding dress for her daughter but was denied a line of credit to do so.

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[1] The factual information recited in this opinion was acquired from the testimony presented in the transcript of the sentencing hearing and from the presentence report admitted into the record.

[2] In these nine cases, all of the identity theft offenses were Class D felonies, and the theft of property and forgery offenses were Class D felonies in all the cases but one, in which these latter two offenses were listed as Class E felonies. Additionally, while not explained in the record, the one count of theft of property listed as a Class E felony in the indictment was reduced to a Class A misdemeanor in the final judgment.

[3] Because the Defendant was "caught in the act" at the tenth retail store she visited, she was apprehended before she was able to obtain any property by theft. Thus, she was charged only with Class D felony identity theft and Class E felony forgery in the tenth case brought against her.

Detective Jennifer Duggan of the Chattanooga Police Department was assigned to investigate these matters. Her investigation revealed that the Defendant obtained lines of credit in ten different retail establishments in Chattanooga, and had attempted to open more accounts but "snatched" the application forms away and left the premises when questioned by store employees. Det. Duggan testified at the sentencing hearing that the Defendant had all of the Orsinis' pertinent personal information, including their names, address, telephone number, and social security numbers. Det. Duggan further stated that identity thieves are usually not caught, and such offenses are a growing problem.

The Defendant was caught after one retailer, REX TV, phoned the Orsinis to inform them that Ms. Orsini's application for a line of credit had been approved. REX TV was apprised of the situation, and agreed to call the police if the Defendant came back to the store. The Defendant did return and was subsequently arrested. Det. Duggan testified that after her arrest, the Defendant cooperated with the investigation and took the detective to a hotel room where much of the merchandise was recovered. The Defendant also informed Det. Duggan that she obtained the Orsinis' personal information at a flea market in Atlanta from a man she knew only as "Stacy." The Defendant claimed that she had already delivered some of the merchandise to Stacy, and he was scheduled to return to Chattanooga with a moving van to collect the remainder.

Detective Duggan also testified that while some of the merchandise had been returned to the retailers, much of it was not recovered. Det. Duggan stated that approximately $14,000 was still owed to Lowes, Home Depot, Target, Zales, Tweeter, Gateway, Walmart, and Office Depot. On cross-examination, the detective acknowledged that the Defendant assisted the police in recovering the merchandise that was returned, and had also provided a first name and brief description of her partner, who had obtained the Orsinis' personal information and who was fencing the stolen goods.

At the sentencing hearing, the State conceded that the trial court was "bound by Blakely" to impose the minimum sentence, two years, for each of the Class D felony convictions, but requested that the sentences from each separate incident "run consecutive . . . based on [the Defendant] being a professional criminal."[4] The Defendant's counsel objected to consecutive sentences based on status as a professional criminal, arguing that the Defendant had not "knowingly devoted her life to criminal acts as a major source of livelihood."

At the conclusion of the sentencing hearing, the trial court noted for the record that identity theft crimes were "terrible crimes" that remain with the victims for the "rest of their lives."[5] The

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[4] We note that our supreme court has recently held, in a case released subsequent to the Defendant's sentencing hearing, that the enhancement component of Tennessee's sentencing structure does not violate a defendant's Sixth Amendment right to a trial by jury. See State v. Gomez, 163 S.W.3d 632 (Tenn. 2005).

[5] The trial court's findings and reasoning for imposing consecutive sentences were limited to its view of the seriousness of the crime of identity theft. No findings were placed on the record as to the Defendant's status as a professional criminal, as argued by the State at the sentencing hearing. Nor were any findings made to suggest the court (continued...)

court then imposed a sentence of "two years for each incident" with the sentences for the offenses in each incident to run concurrently. The ten two-year sentences were ordered to be served consecutively to each other for a total of twenty years. The Court further ordered that the Defendant serve the first two sentences, or four years, in the Tennessee Department of Correction (TDOC) and suspended the balance on supervised probation. In addition, a restitution plan was to be instituted upon the Defendant reaching the probation phase of the sentence. The Defendant filed a notice of appeal in October of 2004.

ANALYSIS

The Defendant raises only one issue on appeal, arguing that the trial court erred in imposing consecutive sentences. In support of her claim, the Defendant first argues that there was "absolutely no statutory basis for consecutive sentencing pursuant to Tenn. Code Ann. § 40-35-115." The Defendant also argues that the effective twenty year sentence, the result of consecutive sentencing, was greater punishment than that deserved for the offenses committed and was not the least severe measure necessary to achieve the purpose for which the sentence was imposed. While we are inclined to agree with the Defendant's first argument to the extent that the trial court failed to make findings of the statutory factors it considered in exercising its discretion to impose consecutive sentences, we are compelled to address a more serious problem: the Defendant's judgments of conviction appear to be void because she never entered guilty pleas in open court, and the trial court thus failed to follow the requisite guilty plea procedures.

I. Incomplete Record

In its appellate brief, the State alleges that the Defendant "failed to include the transcript of the guilty plea hearing in the record for review," and has therefore waived the sentencing issue before this Court. We note that the party who seeks appellate review is charged with the "duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)); see also Tenn. R. App. P. 24(b).[6] This Court has frequently ruled that an appellant waives an issue on appeal if the appellant fails to prepare a record with respect to the issues forming the basis of the appeal. See, e.g., State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990) (declining to consider the defendant's sentencing issue and holding that "[w]hen the record is incomplete, this Court is precluded from considering the issues; and we must conclusively presume the judgment of the trial court was correct").

However, the Defendant asserts that she did not provide a transcript of the plea colloquy only because there is none to provide. In the Defendant's original appellate brief, she states that "there

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[5](...continued)
determined the Defendant had an extensive record of criminal activity, as argued by the State on appeal.

[6]"If a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b).

was no plea colloquy whatsoever, but a sentencing hearing immediately followed the Defendant's signature on the guilty plea." Additionally, in a reply brief, the Defendant rebuts the State's claim that the sentencing issue should be waived for failure to include a transcript of the guilty plea by stating the following: "As Appellant noted in her original brief, there was NO PLEA COLLOQUY. The Trial Court simply forgot to do one. However, Appellant has never sought to withdraw her open guilty plea before the Trial Court." (emphasis in original).

It is clear that no evidence of a plea colloquy is included in the appellate record. However, based on the record before this Court, we cannot be certain which of the following three possible scenarios accounts for this failure: 1) the Defendant entered her guilty plea in open court and this proceeding was transcribed but not submitted to this Court; 2) a plea colloquy took place but was not transcribed; or 3) the trial court did indeed neglect to accept the Defendant's guilty plea and failed to conduct the required plea colloquy prior to sentencing. The record before us suggests the latter.

II. Guilty Pleas

The entry of a valid guilty plea requires compliance with a litany of requirements, and is governed by a large body of federal and state case law as well as Tennessee's Rules of Criminal Procedure. The underlying purpose is to ensure that all guilty pleas, which by their very nature waive substantial rights, are entered knowingly and voluntarily.

There is no evidence in the record before this Court that the Defendant was physically present at a guilty plea hearing to submit her guilty plea in open court. The plea of guilty, like the verdict of a jury, is itself a conviction. See Brooks v. State, 213 S.W.2d 7, 9 (Tenn. 1948). Obviously, if no guilty plea was entered by the Defendant, there was no conviction. If the trial court did not "accept" the Defendant's guilty plea in her presence in open court, the resulting judgments of conviction are void. If, on the other hand, the Defendant did personally appear before the trial court and enter her guilty pleas in open court, a record of this proceeding should be compiled and certified upon remand.

Beyond mere physical presence, a defendant in Tennessee must be advised of a "full litany of information" pertaining to his or her rights under the law before a guilty plea can be accepted. State v. Neal, 810 S.W.2d 131, 134 (Tenn. 1991), overruled in part by Blankenship v. State, 858 S.W.2d 897 (Tenn. 1993). This mandatory communication between the trial court and a defendant during a plea colloquy is designed to inform a defendant of her rights under the federal constitution, our state constitution, the Tennessee Rules of Criminal Procedure, and those due process guarantees provided through "the pronouncements" of the Tennessee Supreme Court in the exercising of its "supervisory authority." Id. at 135. While originating from varying sources, the "common and compelling" purpose behind all of the requirements is to "insulate guilty pleas from coercion and relevant defendant ignorance," thereby ensuring that a guilty plea is entered voluntarily and intelligently. Id. An affirmative showing that a guilty plea was both intelligent and voluntary can only be met by a trial court's questioning and advising a defendant in open court. To this end, certain procedures have been instituted, and trial court compliance is required. See Boykin v.

Alabama, 395 U.S. 238, 243 (1969); State v. Mackey, 553 S.W. 2d 337 (Tenn. 1977); Tenn. R. Crim. P. 11.

In the case at hand, the record on appeal certainly indicates that the Defendant never personally stood in front of the trial court and entered, in open court, her plea of guilty to the twenty-nine offenses for which convictions were entered. The Technical Record indicates that there was no plea acceptance proceeding on a date prior to sentencing.[7] The sentencing transcript, the only transcript of any proceeding in this case included in the record on appeal, opens with the trial court asking "[W]hat is [the Defendant] facing?" Near the end of the sentencing hearing, the trial court asked the State's counsel, "[W]hat do you think the punishment should be?" The State's response was interrupted by the trial court, and the following exchange took place:

> THE COURT: Did she plead guilty? Isn't there a plea?
> THE CLERK: Your Honor, it was initially set today for possible diversion. If they have filled out plea papers, we don't have it.

This inquiry by the trial court near the conclusion of the sentencing hearing indicates that the court was unsure if a guilty plea had been entered. The answer from the court clerk indicates that the petition to enter a plea of guilty, included in the technical record, had not yet been submitted to the court. Furthermore, the Defendant, through her counsel, has stated in both her original appellate brief and a reply brief that the trial court never conducted a plea colloquy.[8] The record on appeal contains no evidence of the entry of a guilty plea in open court, or any plea colloquy.

In short, it appears from the record before us that the Defendant never personally entered a guilty plea in open court; the trial court never established a factual basis to support the convictions; and the trial court failed to advise the Defendant of any of her many rights before convicting her. Under these circumstances, the Defendant's convictions would be void. We therefore find it appropriate to remand this matter to the trial court for further proceedings.

We conclude, based on the record before this Court, that this case must be remanded to the trial court for further proceedings. If the Defendant properly entered guilty pleas in open court, the record should be supplemented with a transcript of that proceeding. Thereafter, the appeal process may proceed with the supplemental record. If guilty pleas have not been properly entered, the judgments of conviction must be vacated, whereupon the charges will again await disposition in the trial court.

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[7] The Technical Record does not contain any reference to a separate plea acceptance proceeding. Additionally, the Defendant's Petition to Enter Plea of Guilty is dated September 2, 2004, the same date as the sentencing hearing.

[8] The Defendant's counsel represented her both at trial and before this Court.

CONCLUSION

Based on the foregoing reasoning and authorities, we remand this cause for further proceedings consistent with this opinion

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DAVID H. WELLES, JUDGE