

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 25, 2005 Session

STATE OF TENNESSEE v. FRANK McDONNELL

**Direct Appeal from the Circuit Court for Humphreys County
No. 10544 George C. Sexton, Judge**

No. M2004-03039-CCA-R3-CD - Filed November 23, 2005

ORDER

This case was heard on the Court's docket in Nashville on October 25, 2005. The record contains a motion for new trial timely filed by Defendant, Frank McDonnell, on July 1, 2004. The original judgment was entered June 21, 2004. While an amended judgment was entered October 29, 2004, and a timely notice of appeal therefrom was filed November 24, 2004, the record does not contain any order or transcript of any proceedings showing that a disposition was made on the motion for new trial.

Rule 4(c) of the Tennessee Rules of Appellate Procedure provides that in criminal cases, "if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant . . . under Rule 33(a) for a new trial [,] . . . the time for appeal for all parties shall run from entry of the order denying a new trial." Until the trial court denies the motion for a new trial, the appellate court does not have jurisdiction over the case. *See Hutchison v. ARO Corp.*, 653 S.W.2d 738 (Tenn. Ct. App. 1983); *State v. James Lee Foreman, II*, No. M2002-01595-CCA-R3-CD (Tenn. Crim. App., Nashville, March 4, 2004); *State v. Landy G. Kash*, No. 01C01-9705-CR-00179 (Tenn. Crim. App., Nashville, Feb. 23, 1998).

Thus, this Court to have jurisdiction to address the merits of the appeal, the record must contain an order disposing of the motion for new trial, either by denying it or by an order approving withdrawal of the motion for new trial.

Even though the issue presented for review does not necessitate the filing and hearing of a motion for new trial (that is, it is a sentencing issue and not a request for a new trial), a motion for new trial having been filed, there must be a disposition of the motion in the record in order for this appeal to be resolved on the merits.

Accordingly, this case is remanded to the trial court for the sole purpose of resolving this procedural issue. If an order has already been entered disposing of the motion for new trial, the

trial court clerk shall supplement the appellate record with the order disposing of the motion for new trial within twenty (20) days of the date of this order. If no order disposing of the motion for new trial has been entered, in order for this appeal to proceed to be heard on the merits, the trial court must enter an order disposing of the motion for new trial such that the record can be supplemented by the trial court clerk and sent to this Court within twenty (20) days of the date of this order. Failure to so supplement the record will necessitate dismissal of the appeal.

It is so ordered.

PER CURIAM

Thomas T. Woodall, Judge

James Curwood Witt, Jr., Judge

Robert W. Wedemeyer, Judge