

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 8, 2006

STATE OF TENNESSEE v. JOHN ROBERT PERKINS

**Direct Appeal from the Circuit Court for Bedford County
No. 15723 Robert Crigler, Judge**

No. M2005-02894-CCA-R3-CD - Filed September 19, 2006

A Bedford County Circuit Court jury convicted the appellant, John Robert Perkins, of theft of property valued one thousand dollars or more but less than ten thousand dollars and misdemeanor assault. The trial court sentenced him as a Range II, multiple offender to seven years for the theft conviction and to eleven months, twenty-nine days for the assault conviction, ordering that the appellant serve the sentences consecutively to each other and consecutively to any other outstanding sentences. On appeal, the appellant claims that the trial court should have sentenced him as a Range I offender for the felony theft conviction because the State late-filed its notice to seek enhanced punishment. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. McLIN, JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, John Robert Perkins.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William Michael McCown, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

_____The Bedford County Grand Jury indicted the appellant for aggravated assault, felony theft, and two counts of aggravated kidnapping, and his trial was scheduled for July 26, 2005. On July 20, 2005, the State filed a Notice of Intent to Seek Enhanced Punishment based upon the

appellant's prior felony convictions. The next day, the appellant filed a Motion for Continuance, arguing that the State's Notice of Intent to Seek Enhanced Punishment was late-filed and that "failure to grant such continuance would result in undue prejudice to the defendant." At a July 22 hearing on the appellant's motion to continue, the appellant's attorney stated that the appellant was "ready to go to trial" and that "[w]e are not here asking the Court to continue this trial date that is set. We are simply here at this point asking the Court to strike the notice of enhanced punishment and allow us to go to trial as a Range I Offender." The trial court denied the motion, noting that the appellant had conceded he was ready to go to trial and that he was not claiming he had been prejudiced by the State's late-filed notice.

II. Analysis

On appeal, the appellant claims that the trial court "refused to grant a continuance" and that the court "should have either granted the appellant a reasonable continuance or struck the Notice of Enhancement late filed by the State."¹ Tennessee Code Annotated section 40-35-202(a) provides that "[i]f the district attorney general believes that a defendant should be sentenced as a multiple, persistent or career offender, the district attorney general shall file a statement thereof with the court and defense counsel not less than ten (10) days before trial." If the State's notice is late-filed, then the trial court "shall grant the defendant, upon motion, a reasonable continuance." Tenn. R. Crim. P. 12.3(a). However, a late-filed notice does not entitle the defendant to Range I sentencing unless he can demonstrate prejudice. State v. Stephenson, 752 S.W.2d 80, 81 (Tenn. 1988).

According to the plain language of the rule, a continuance is the proper remedy for a late-filed notice to enhance a defendant's sentence. However, we are somewhat bewildered as to how the appellant can claim that the trial court improperly refused to grant his motion for a continuance when the appellant stated several times during the hearing on his motion that he did not want a continuance. In effect, the appellant withdrew his request for a continuance at the hearing and, therefore, waived this issue. See Tenn. R. App. P. 36(a); see also Stephenson, 752 S.W.2d at 81 (stating that the defense's failure to move for a continuance waived any objection to the untimely filing). Moreover, although the appellant contends that he was prejudiced by the State's notice being late-filed, he gave no specific example at the motion hearing or in his appellate brief as to how he was prejudiced. Therefore, he is not entitled to relief.

We note that the appellant also requests that this court review the record and grant him probation. However, even if we had concluded that the appellant was entitled to some type of relief regarding his sentences, we could not review and modify his sentences because he has failed to include a transcript of the trial proceedings in the appellate record. See State v. Hayes, 894 S.W.2d 298, 300 (Tenn. Crim. App. 1994) (stating that "failure to include a transcript of the trial makes it impossible for [this court] to conduct an appropriate de novo consideration of the

¹ The appellant cites State v. Cornelius Boales, No. W2003-02724-CCA-R3-CD, 2005 Tenn. Crim. App. Lexis 189 (Jackson, Mar. 3, 2005), in support of this issue. However, on June 27, 2005, our supreme court designated the opinion "Not for Citation" when denying Boales application for permission to appeal. Rule 4(F)(2) of the Rules of the Supreme Court of Tennessee prohibits the citation of such an opinion in a litigant's brief.

case or to determine whether the trial court erred relative to its determinations which were based in any part on that evidence”).

III. Conclusion

Based upon the record and the parties’ briefs, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE