

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

STATE OF TENNESSEE v. TERRY LYNN BYINGTON

**Direct Appeal from the Criminal Court for Sullivan County
No. S46,479 Phyllis H. Miller, Judge**

No. E2006-02069-CCA-R3-CD - Filed November 26, 2007

Defendant, Terry Lynn Byington, was convicted by a Sullivan County jury of DUI, fourth offense, and received a Range II, multiple offender, sentence of three years in the Department of Correction. In his initial direct appeal, a panel of this court affirmed, addressing issues relating to the sufficiency of the evidence and sentencing. However, this Court held that two other issues were waived because Defendant's motion for new trial was untimely filed. *See State v. Terry Lynn Byington*, No. E2003-02316-CCA-R3-CD, 2004 WL 1606993 (Tenn. Crim. App., at Knoxville, July 19, 2004) *perm. to app. denied* (Tenn., Dec. 28, 2004). Defendant filed a petition for post-conviction relief, and the trial court granted the petition insofar as ordering a delayed appeal after giving Defendant the opportunity to present a timely motion for new trial. T.C.A. §§ 40-30-111(a) and 40-30-113(a). *See Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003). Defendant has now again appealed from his conviction raising two issues: (1) the trial judge erred by declining to recuse herself from Defendant's trial, and (2) the trial court erred by permitting the State to impeach Defendant's testimony with his prior perjury conviction. Because there is no order in the record that the motion for new trial was denied, we are without jurisdiction to hear this appeal. Accordingly, the appeal is dismissed.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Michael F. McClellan Carrico, Gate City, Virginia, for the appellant, Terry Lynn Byington.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and William B. Harper, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

The record on appeal in this case contains what appears to be most, if not all, of the post-

conviction proceedings which resulted in the grant of a delayed appeal. Transcripts of the trial, the sentencing hearing, and the hearing of the timely presented motion for new trial are also in the record. However, the judgment of conviction and the motion for new trial are not contained in the appellate record. Most importantly, and the reason for our disposition of this case, is the fact that there is not a written order denying the motion for new trial.

Without going into detail, we recognize that this case has been a procedural nightmare. However, the Rules of Appellate Procedure require us to determine whether we have jurisdiction in every case on appeal. Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). The appeal is initiated by filing a notice of appeal within thirty days of the final judgment date. Tenn. R. App. P. 4(a). However, if a motion for new trial is timely filed, “the time for appeal for all parties shall run from entry of the order denying a new trial.” Tenn. R. App. P. 4(c). Until the trial court denies the motion for new trial, this Court does not have jurisdiction to hear the appeal. *See State v. James Lee Foreman, II*, No. M2002-02595-CCA-R3-CD, 2004 WL 404696 (Tenn. Crim. App., at Nashville, Mar. 4, 2004) *no perm. to app. filed*.

The Appellant in this case presented a timely filed motion for new trial. However, the record contains no written order denying the motion. Although Appellant filed a notice of appeal, the notice does not confer jurisdiction upon this Court. We, therefore, have no choice but to dismiss this appeal without prejudice for lack of jurisdiction.

CONCLUSION

For the foregoing reason, this appeal is dismissed. Because it appears Defendant is indigent, costs are taxed to the State of Tennessee.

THOMAS T. WOODALL, JUDGE