

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 19, 2007 Session

STATE OF TENNESSEE v. JOHN HARVEY JENNINGS

**Direct Appeal from the Criminal Court for Davidson County
No. 2003-A-103 Steve Dozier, Judge**

No. M2006-02055-CCA-R3-CD - Filed September 11, 2007

The appellant, John Harvey Jennings, pled guilty in the Davidson County Criminal Court to two counts of rape, and he received a sentence of eight years incarceration in the Tennessee Department of Correction. Subsequently, he filed a motion for suspension of sentence, which motion was denied. On appeal, the appellant challenges the trial court's denial of his motion for suspension of sentence. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, John Harvey Jennings.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The appellant was originally indicted on two counts of rape of a child, five counts of aggravated sexual battery, and one count of attempted aggravated sexual battery. All of the offenses related to the appellant's sexual abuse of his twelve-year-old stepdaughter. Following a trial, which resulted in a hung jury, the appellant pled guilty to two counts of rape with an accompanying total effective sentence of eight years to be served as five months in confinement and twelve years on supervised probation. As part of the appellant's supervised probation, he was to complete a treatment program for sexual offenders at Centerstone.

The appellant began his treatment at Centerstone in March 2005. By October 2005, a probation violation warrant was filed against the appellant, alleging that he had failed to comply with his treatment. At the probation revocation hearing held on January 13, 2006, the State adduced proof that the appellant had repeatedly failed to complete assignments as ordered, to attend classes, and to consistently admit culpability. According to testimony at the hearing, the appellant put forth, at best, minimal effort toward his treatment and often referred to the victim as a “liar.” Moreover, the appellant repeatedly said that he could not attend classes due to injury; however, the GPS monitor he wore indicated that, during the time when he claimed he was too hurt to attend treatment, he was frequently traveling from Nolensville to Nashville. Further, proof at the hearing indicated that the appellant had damaged his GPS device.

At the hearing the appellant acknowledged that he perjured himself at trial by denying that he had molested his stepdaughter,. He admitted that he molested her, but he claimed that he did it to teach her about sex, not for sexual gratification. At the conclusion of the hearing, the trial court revoked the appellant’s probation and ordered him to serve his eight-year sentences in confinement. The appellant did not appeal the probation revocation.

Subsequently, on May 10, 2006, the appellant filed a “Motion for Suspended Sentence,” asking the court, “[p]ursuant to Tenn. R. Crim. P. 35,” to “suspend his sentence in this matter and place him on supervised probation.” On June 29, 2006, the trial court held a hearing on the matter during which the appellant called Dr. Reid Finlayson,¹ a psychiatrist and assistant professor at Vanderbilt University, to testify. Dr. Finlayson stated that ten percent of his practice involved the treatment of sexual disorders. Dr. Finlayson performed a two-hour evaluation of the appellant. Additionally, the doctor reviewed the appellant’s medical records from Centerstone and the transcript of the probation revocation hearing. Dr. Finlayson opined that the appellant had three levels of problems: (1) paraphilia, meaning his sexual behavior with his twelve-year-old stepdaughter, (2) a history of excessive drug and alcohol use, and (3) a “disordered personality with some clustered . . . or ant[i]social type features.”

Dr. Finlayson said that the appellant’s treatment at Centerstone was “done reasonable,” but the doctor believed that the program “wasn’t intensive enough to overcome [the appellant’s] denial and to present improvement in his behavior.” After his evaluation of the appellant, Dr. Finlayson recommended that the appellant participate in a “residential treatment of sexual offenders,” such as the treatment offered by the Keystone Center located in Chester, Pennsylvania. He said that the Keystone Center is designed to treat the appellant for his substance addictions as well as his behavior as a sexual offender. However, Dr. Finlayson acknowledged that “it’s hard for me to be able to predict who would benefit from it and who wouldn’t.” Additionally, Dr. Finlayson conceded that the appellant “has already failed a treatment program that was designed to treat him using the best techniques that we have for treatment of at least his sexual disorder.” Dr. Finlayson noted that the appellant’s three levels of problems “increase the risk factor for failure in society.” Regardless, Dr. Finlayson hoped that by participating in the Keystone program the appellant would improve to the point that he would be able to participate in other treatment such as the type that was offered by Centerstone.

¹ In the record, this Dr. Finlayson’s name is also spelled “Reed Findlandson.”

At the conclusion of the hearing, the trial court found that the appellant “has previously failed at a similar sexual offender program.” Additionally, the court noted that “numerous attempts by treatment providers have been unsuccessful in dealing with [the appellant’s] attitude toward treatment.” The court denied the appellant’s motion to suspend his sentence. On appeal, the appellant challenges the denial of his motion.

II. Analysis

The appellant raises his issue as a denial of his motion for suspended sentence under Rule 35 of the Tennessee Rules of Criminal Procedure. Rule 35 provides:

- (a) Timing of Motion. The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.
- (b) Limits of Sentence Modification. The court may reduce a sentence only to one the court could have originally imposed.
- (c) Hearing Unnecessary. The trial court may deny a motion for reduction of sentence under this rule without a hearing.

Tenn. R. Crim. P. 35(a)-(c). “This rule does not vest the defendant with a remedy as of right.” State v. Elvin Williams, No. M2006-00287-CCA-R3-CO, 2007 WL 551289, at *1 (Tenn. Crim. App. at Nashville, Feb. 22, 2007), perm. to appeal denied, (Tenn. 2007). The Advisory Commission Comments to Rule 35 explain that “[t]he intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice.”

The State argues that “Rule 35 pertains to a motion to *reduce* a sentence.” The State contends that, therefore, the appellant’s motion

is more properly understood as a motion to suspend the balance of his sentences pursuant to Tennessee Code Annotated section 40-35-306(c), which states, “At any time during the period of continuous confinement ordered pursuant to this section, the defendant may apply to the sentencing court to have the balance of the sentence served on probation supervision.”

“[A]n application to suspend the balance of a sentence is akin to a motion to reduce a sentence. Both pleadings ask a trial court to reconsider the sentence it originally imposed in favor of increased leniency.” State v. Ruiz, 204 S.W.3d 772, 777 (Tenn. 2006) (citations omitted).

Our review of Rule 35 reveals that “[t]he modification permitted by this rule is any modification otherwise permitted by the law when the judge originally imposed sentence

including but not limited to a transfer to the workhouse or probation to otherwise eligible defendants.” Tenn. R. Crim. P. 35, Advisory Comm’n Cmts. Accordingly, we conclude that we may properly review the appellant’s motion and the trial court’s subsequent denial of the motion under the standards established for a Rule 35 motion. See Williams, No. M2006-00287-CCA-R3-CO, 2007 WL 551289, at *1. Thus, we will review the denial of the appellant’s Rule 35 motion under an abuse of discretion standard. Ruiz, 204 S.W.3d at 777.

The trial court determined that, in light of the appellant’s previous failure to apply himself to a similar sexual offender program and the numerous unsuccessful attempts by treatment providers to deal with the appellant’s attitude toward treatment, the appellant was undeserving of a second grant of probation. Rule 35 allows modification of a sentence “where an alteration of the sentence may be proper in the interests of justice.” Tenn. R. Crim. P. 35, Advisory Comm’n Cmts. The appellant has failed to present any evidence that he is currently more amenable to treatment than he was during his previous unsuccessful attempt at treatment. Accordingly, we conclude that the trial court did not abuse its discretion in denying the appellant’s Rule 35 motion.

III. Conclusion

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

NORMA McGEE OGLE, JUDGE