

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 19, 2007

STATE OF TENNESSEE v. SHERMAN TYLER RUMSEY

**Direct Appeal from the Circuit Court for Cannon County
No. F04-76B James K. Clayton, Jr., Judge**

No. M2007-00093-CCA-R3-CD - Filed August 14, 2007

The appellant, Sherman Tyler Rumsey, was convicted in the Cannon County Circuit Court of aggravated burglary, and he received a three-year suspended sentence. After the appellant's probation was revoked, he filed a motion for a suspension of sentence. The trial court dismissed the motion, and the appellant appeals. 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 Circuit Court is Affirmed.

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

Kenneth R. McKnight, Murfreesboro, Tennessee, for the appellant, Sherman Tyler Rumsey.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and David Puckett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On December 16, 2004, the appellant pled guilty to aggravated burglary, and he received a sentence of three years. The appellant was placed on probation. On May 13, 2005, the appellant's probationary sentence was revoked by "[a]greed [r]evocation," and the trial court again granted the appellant probation. However, the revocation order cautioned that "[a]ny other [violation of probation and] the [appellant] will be required to serve the entire sentence." Thereafter, on January 13, 2006, the trial court again revoked the appellant's probation by "[a]greed [r]evocation," due in part to the appellant's arrest for possession of marijuana. As a result of this revocation, the trial court ordered the appellant to serve the

remainder of his sentence in confinement. The appellant did not appeal either revocation of probation.

On February 28, 2006, the appellant sent the trial court a letter saying that he was serving his sentence in the Cannon County Detention Center, and he wanted to know if he was eligible to serve his sentence in a rehabilitation center. Thereafter, on April 17, 2006, the appellant sent another letter to the trial court, asserting that he now understood the importance of complying with probation rules and asking that he again be considered for probation.

The trial court treated the April 17, 2006, letter as a motion for suspended sentence under Rule 35 of the Tennessee Rules of Criminal Procedure. The trial court held a hearing on the motion on December 7, 2006. At the hearing, the appellant told the trial court that he was currently in the Tennessee Department of Correction and had been there “about five or six months A little bit longer than that. I have no idea.” The appellant told the court that he had previously violated his probation because of a drug problem. However, he stated that he no longer had a drug problem and could pass a drug test. He said that he needed out of jail because his father was incarcerated, and his mother was not making enough money to pay the rent.

The State argued that “we had an agreement. . . . He had that offer, and he agreed to it.” The trial court noted that it had earlier cautioned the appellant that if he again violated his probation, he would have to serve his sentence in confinement. Therefore, the trial court refused to hear the appellant’s petition for a suspended sentence. The appellant appeals, arguing that the trial court abused its discretion in denying the appellant’s motion to suspend his sentence “based solely on the fact that he had previously agreed that if there were another violation of probation he would be required to serve the entire sentence.”

II. Analysis

As we noted earlier, the trial court considered the appellant’s April 17, 2006, letter as a 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. 27, 2007), perm. to appeal denied, (Tenn. 2007). The Advisory Commission Comments to Rule 35 explain that “[w]hile the judge may grant a hearing and modify the sentence, there is no requirement that a hearing even be held in the discretion of the court. . . . The 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.” A trial court’s ruling on a Rule 35 motion will not be overturned absent an abuse of discretion. See State v. Irick, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993).

The appellant’s probation was revoked on January 13, 2006, and he sent his letter in April, well within the 120-day time limit provided by the rule. The appellant complains that the trial court erred in dismissing the motion without a hearing based upon the court’s statement at the appellant’s first probation revocation hearing that a subsequent probation violation would result in the appellant serving his sentence in confinement. We need not address this concern as the trial court was without jurisdiction to entertain the motion.

Tennessee Code Annotated section 40-35-212 (2006) provides:

(c) Unless the defendant receives a sentence in the department, the court shall retain full jurisdiction over the manner of the defendant’s sentence service.

(d)(1) Notwithstanding the provisions of subsection (c), the court shall retain full jurisdiction over a defendant sentenced to the department during the time the defendant is being housed in a local jail or workhouse awaiting transfer to the department. Such jurisdiction shall continue until such time as the defendant is actually transferred to the physical custody of the department.

At the time of the hearing on the motion, the appellant had been in the custody of the Department of Correction for five or six months. The trial court no longer had jurisdiction over the appellant’s sentence. See State v. Immanuel Eldridge Harney, No. M2003-03004CCA-R3-CD, 2005 WL 94462, at *2 (Tenn. Crim. App. at Nashville, Jan. 12, 2005); State v. Timothy Potter, No. 01C01-9402-CR-00062, 1995 WL 2999, at *2 (Tenn. Crim. App. at Nashville, Jan. 5, 1995). As such, the trial court did not have the jurisdiction to entertain the appellant’s motion for a suspended sentence, even if the court had been so inclined. Accordingly, the trial court did not err in dismissing the motion.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE