

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 30, 2008

STATE OF TENNESSEE v. TIMOTHY RUSSELL

**Appeal from the Criminal Court for Knox County
Nos. 80135A, 84456, 84457, & 84458
James B. Scott, Special Judge; Ray L. Jenkins, Judge**

No. E2007-01477-CCA-R3-CD - Filed December 4, 2008

The defendant, Timothy Russell, pleaded guilty to one count of theft of property valued \$10,000 or more but less than \$60,000, a Class C felony, and three counts of theft of property valued \$1,000 or more but less than \$10,000, a Class D felony. He was sentenced to eight years as a Range II offender for the Class C felony and six years as a Range II offender for each Class D felony to be served concurrently but consecutively to the eight-year sentence. The trial court denied probation and imposed incarceration for an effective sentence of fourteen years. Appealing the denial of his motion to withdraw the four guilty pleas, the defendant claims that he misunderstood he would not be guaranteed alternative sentencing and that he should be able to withdraw his guilty pleas to correct manifest injustice. Because the defendant's motion and notice of appeal were untimely, we dismiss the appeal.

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

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and CAMILLE R. MCMULLEN, JJ., joined.

Timothy Russell, Wartburg, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; and Randall E. Nichols, District Attorney General, for the appellee, State of Tennessee.

OPINION

The summary of facts at the plea hearing showed the following events. The defendant obtained \$13,606.72 from a "kiting" scheme at a bank. The defendant also obtained a Ford truck by writing a check for \$4,300 on a closed bank account. The defendant advertised a Mazda for sale, and Mr. Khalid Elbasit purchased the car from the defendant for \$1,500. As the defendant never conveyed title to the car, the victim returned it and asked for his payment to be returned. The defendant issued Mr. Elbasit a check for \$1,500 drawn on a closed account. The defendant attempted to purchase a truck from Mr. James Shipley, who would not allow the defendant to

pay with a check. The truck and its title were later stolen. The defendant altered the truck's title to make it appear to be the title for a Mazda, which the defendant sold to a Mr. Burk for \$2,500. Mr. Burk would have testified that the Mazda had a lien on it and that he lost the car to the creditor.

The transcript of the plea hearing reflects that the defendant was advised during the hearing of (1) the right to be proven guilty beyond a reasonable doubt by a jury and the presumption of innocence; (2) the ranges possible for the offenses as a multiple offender; (3) that these convictions could be used to enhance future sentences; (4) the right to counsel; (5) the right to plead not guilty; (6) the right to confront and cross-examine adverse witnesses and to compel favorable witnesses to testify; (7) the right to be protected against compelled self-incrimination and the right to testify; and (8) there would be no trial after the plea, but only a hearing to determine the propriety of probation. The court also clarified with the State that the defendant had not been promised probation but instead was told he could apply for probation. The defendant pled guilty to four felony theft charges, three of which were Class D felonies with sentences of six years as a Range II, multiple offender. The remaining felony conviction was a Class C felony with an eight-year sentence as a Range II, multiple offender.

At the probation hearing, the State moved the presentence report into evidence. The State requested that the trial court impose confinement for the defendant's sentences. The defendant informed the court that he wanted the "most extreme alternative sentencing possible." The trial court found that in view of the defendant's interest, behavioral record, employment history, social history, physical and mental condition, extensive prior record, refusal to conform his conduct to societal mores, the victim impact statements, the public interest, and deterrence value, confinement was necessary for the interests of the defendant and the public as a whole.

The defendant filed a pro se motion to withdraw his guilty pleas in which he alleged that the special judge had imposed a fourteen-year sentence to be served on two types of probation and that the subsequent trial judge had rejected this manner of service and imposed confinement. The trial court denied the motion after finding that the defendant had signed the waiver of right to jury trial form on which it stated that the agreed sentence was "only a recommendation and that the Court is not bound by this recommendation in any way." (emphasis in original.) The trial court found that the defendant understood the court had the discretion to accept his plea and either to deny or to impose probation. The defendant filed a pro se notice of appeal.

We note the following relevant dates to determine this court's jurisdiction over the defendant's appeal. The judgments were filed in this case on May 7, 2007. They became final thirty days later on June 6, 2007. See State v. Green, 106 S.W.3d 646, 648 (Tenn. 2003). The defendant mailed his motion to withdraw the guilty pleas on June 7, 2007, the date stamped on the envelope by the prison post office. Pursuant to Rule 49(d)(1) of the Tennessee Rules of Criminal Procedure, this date is the filing date for his motion, although the trial court clerk stamped the motion as filed on June 8, 2007. The trial court denied the motion to withdraw the guilty pleas on June 20, 2007. The defendant filed a notice of appeal on June 29, 2007.

We conclude the defendant's motion to withdraw his guilty pleas was filed outside the time prescribed by Tennessee Rule of Criminal Procedure 32(b). This rule provides only two

options for withdrawing a guilty plea: (1) filing before sentencing or (2) filing before the judgments of conviction became final thirty days after they were entered, i.e., on June 6, 2007. Tenn. R. Crim. P. 32(a), (b); Green, 106 S.W.3d at 648. The defendant's motion was filed a day late. After the judgment became final, the trial court had no jurisdiction to allow the defendant to withdraw the pleas. See Green, 106 S.W.3d at 648-49. The trial court also had no power to hear the defendant's untimely motion to withdraw his guilty pleas, and the order issued denying the motion to withdraw the pleas was a nullity. See id., 106 S.W.3d at 649 (citing State v. Peele, 58 S.W.3d 701, 704 (Tenn. 2001)).

The defendant's notice of appeal was untimely because the untimely motion to withdraw his guilty pleas did not toll the thirty-day filing period for a notice of appeal. See T.R.A.P. 4(c); Greene, 106 S.W.3d at 648; Peele, 58 S.W.3d at 704. The thirty-day period specified in Rule 4(a) of the Tennessee Rules of Appellate Procedure for filing a timely notice of appeal began to run when the judgments became final on May 7, 2007, and ended on June 6, 2007. The defendant filed his notice of appeal on June 29, 2007, almost two months after the judgments became final.

Although this court can waive the notice of appeal "in the interest of justice," T.R.A.P. 4(a), this case presents no issue other than review of the motion to withdraw the guilty pleas, which was untimely and erroneously heard by the trial court. Therefore, we do not conclude that the "interest of justice" requires waiver of the notice of appeal.

Based upon the foregoing and the record as a whole, we dismiss the appeal.

JOSEPH M. TIPTON, PRESIDING JUDGE