

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 16, 2008 Session

STATE OF TENNESSEE v. RANDY LEE SALYER

**Direct Appeal from the Criminal Court for Loudon County
No. 2007-CR-7 E. Eugene Eblen, Judge**

No. E2008-01461-CCA-R3-CD - Filed June 24, 2009

After a bench trial, the Loudon County Criminal Court convicted the appellant, Randy Lee Salyer, of violating Tennessee Code Annotated section 55-8-132(b), often referred to as the “move over law,” and fined him fifty dollars. On appeal, the appellant raises various issues, including that the evidence is insufficient to support his conviction and that he was denied his constitutional right to a jury trial. We conclude that the record fails to demonstrate the appellant properly waived in writing grand jury consideration of the case, his right to a jury trial, and his right to counsel. Therefore, the appellant’s conviction is null and void, and the judgment of the trial court is vacated.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Randy Lee Salyer, Pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Russell Johnson, District Attorney General; and Kristin Rudden Kelley, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

The record reflects that on August 9, 2007, Tennessee Highway Patrol Trooper Samuel Holcomb stopped an eighteen-wheeler truck and cited the appellant, who was the driver, for violating the move over law. After a bench trial in the Loudon County General Sessions Court, the appellant was convicted and fined fifty dollars. He appealed to the criminal court, and a second bench trial occurred in which the appellant represented himself.

At trial, Trooper Holcomb testified that he was “wrapping up” a traffic stop on the north-bound shoulder of Interstate 75 in Loudon County and that the blue lights were flashing on his patrol car when the appellant’s tractor trailer truck approached in the right-hand lane. Although no traffic was around the appellant’s truck, the appellant did not move into the left-hand lane and passed the officer. Trooper Holcomb also did not notice a change in the truck’s speed. Trooper Holcomb stopped the appellant, and the appellant told the officer he was “messing with the CB at the time.”

The appellant testified that on the day the citation was issued, he was driving his truck on Interstate 75. He said that his “CB mic” fell onto the floor near the truck’s “pedal operation.” He reached to pick up the cord, and saw the officer parked in the grass. He said that he was hauling 40,000 pounds of steel and that he was unable to safely change lanes. However, he slowed down.

The criminal court found the appellant guilty of violating the move over law and fined him fifty dollars. The appellant timely filed a notice of appeal to this court.

II. Analysis

The appellant raises various issues on appeal, including that the evidence is insufficient to support the conviction and that he was denied his constitutional rights because the notice of appeal form did not offer him a jury trial when he appealed his conviction to the criminal court. The State contends that the appellant has waived all of his issues because they are not supported by argument, citation to authorities, or appropriate references to the record and that the appellant has waived all of his issues except sufficiency of the evidence because he failed to file a motion for new trial. The State also contends that, in any event, the evidence is sufficient to support the conviction, that the criminal court trial transcript reveals the appellant waived his right to a jury trial, and that the case should be remanded for resentencing because the minimum fine the trial court could impose for this offense was one hundred dollars.

Regarding the State’s contention that the appellant waived all of his issues except sufficiency of the evidence because he failed to file a motion for new trial, we note that the filing of a motion for new trial was not required in this case because the trial was a bench trial. See Tenn. R. App. P. 3(e) (providing that prior to initiating an appeal as of right, defendants must file a motion for new trial “in all cases tried by a jury”); McCormic v. Smith, 659 S.W.2d 804, 806 (Tenn. 1983) (noting that a motion for new trial is optional, not mandatory, in non-jury cases). Regarding the State’s claim that all of the appellant’s issues are waived because they are not supported by argument, citation to authorities, or appropriate references, we agree that the appellant’s brief is seriously deficient in this regard and that we could treat all of his issues as waived. See Tenn. Ct. Crim. App. R. 10(b). Nevertheless, we choose to address his claim that he was denied his constitutional right to a jury trial.

As this court has explained,

If the prosecutor does not object, a defendant charged with
a misdemeanor greater than a small offense may waive in writing

his right to a grand jury investigation and to a jury trial and have his case tried in general sessions court. See Tenn. R. Crim. P. 5(c)(2) (2004). If convicted, the defendant has a right to appeal the judgment to the circuit or criminal court for a trial de novo. Id. Such an appeal includes the right to a trial by jury, but only if a demand for one is made at the time of the filing of the appeal.

State v. Robert Banks, No. W2003-02353-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 970, at *9 (Jackson, Nov. 1, 2004). Tennessee Code Annotated section 27-3-131(b) also provides that in order to secure a jury trial for a case appealed from general sessions to circuit or criminal court, the demand for a jury trial must be made when the appeal is filed. However, “the statute contemplates that the Defendant has first waived in writing his right to a jury trial in general sessions court, because otherwise the Defendant should not have been tried on the merits in that court.” State v. Jarnigan, 958 S.W.2d 135, 137 (Tenn. Crim. App. 1997); see State v. Tommy R. Powell, No. M2001-02955-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 367, at *6 (Nashville, Apr. 24, 2002). Furthermore, if the record does not show that the defendant waived his or her right to a jury trial in the general sessions court, then “the failure to make a written request for jury trial at the time of filing the appeal does not waive trial by jury.” Powell, No. M2001-02955-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 367, at *7.

Turning to the instant case, the criminal court trial transcript begins with a summary paragraph stating that “[t]here was an agreement between the State and the Defendant to waive a jury,” and the appellant’s notice of appeal form does not demand a jury trial. Rule 23(b)(2)(A), Tennessee Rules of Criminal Procedure, provides that in criminal cases except small offenses,¹ a defendant’s waiver of the right to a jury trial must be in writing. Regardless of the court reporter’s statement, nothing in the record shows that the appellant’s and the State’s “agreement” was in writing.

Furthermore, our review of the warrant reveals that the appellant did not execute the written waiver of his right to have a grand jury consider the case or his right to a jury trial. Tennessee Code Annotated section 40-1-109 provides that a general sessions court has jurisdiction

to try and determine and render final judgment in all misdemeanor cases brought before the court by warrant or information where the person charged with the misdemeanor enters a plea of guilty in writing or requests a trial upon the merits and expressly waives an indictment, presentment, grand jury investigation and jury trial.

¹ A “small offense” is defined “as one in which the punishment cannot exceed a fine of \$50.00 and which carries no confinement in a jail or workhouse.” State v. Dusina, 764 S.W.2d 766, 768 (Tenn. 1989). Given that a first offense violation of the move over law is punishable by a fine not less than one hundred dollars and thirty days in confinement, it is not considered a small offense. See Tenn. Code Ann. § 55-8-132(e)(1).

The waiver must be in writing. Tenn. Code Ann. § 40-1-109 (citing Rule 5, Tenn. R. Crim. P.). We note that the indigent appellant also did not execute the written waiver of his right to counsel as required by Rule 44(b)(2), Tennessee Rules of Criminal Procedure. The written waiver on the warrant was signed by the general sessions judge, but it was not signed by the appellant, and no other writing in the record was signed by the appellant to show he waived these rights. Therefore, the appellant's conviction in the general sessions court is void, rendering any further proceedings in the criminal court void.

Although we have determined that the appellant's conviction is void, we will address the State's argument regarding his improper fine. We agree with the State and conclude that a fine less than one hundred dollars could not be imposed for the appellant's conviction. See Tenn. Code Ann § 55-8-132(e)(1) (providing that the first violation for this offense is a Class B misdemeanor and punishable by a fine from one hundred to five hundred dollars, thirty days in confinement, or both).

III. Conclusion

Based upon the record and the parties' briefs, the appellant's conviction is vacated.

NORMA McGEE OGLE, JUDGE