

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 4, 2023 Session

FILED
03/07/2023
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. QUINCY M. GORDON

**Appeal from the Circuit Court for Madison County
No. 20-489 Donald H. Allen, Judge**

No. W2021-01190-CCA-R3-CD

The defendant, Quincy M. Gordon, entered an open plea to one count of forgery, and based on his prior Michigan convictions, the trial court sentenced the defendant as a Range III, career offender to six years' incarceration in the Tennessee Department of Correction. On appeal, the defendant argues the trial court erred in sentencing him as a Range III, career offender based on his out-of-state convictions. Following our review, we reverse the judgment of the trial court and remand for a new sentencing hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

J. ROSS DYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JOHN W. CAMPBELL, SR., JJ., joined.

Brennan M. Wingerter, Assistant Public Defender, Tennessee District Public Defenders Conference (on appeal) and Brian Johnson (at guilty plea hearing), Jackson, Tennessee, for the appellant, Quincy M. Gordon.

Jonathan Skrmetti, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Shaun Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

I. Guilty Plea

On August 4, 2021, the defendant entered an open plea to one count of forgery, with sentencing to be determined by the trial court.¹ The facts underlying the plea, as explained by the State, were as follows:

[O]n August the 1st of 2016, [the defendant] entered the driver's testing station here in Madison County and obtained a driver's license being No. 134956950 in the name of Terrence L. Winfield, using Mr. Winfield's personal information and thus committing this forgery on the State of Tennessee and/or Mr. Winfield.

The State's contention is he had done that because he had received a letter from the Department of Safety saying that his license, Mr. Gordon's license, would be revoked on August the 18th of 2016. So on August the 1st, he went and got a license in somebody else's name. The indications have been to me that it's a relative of his in Michigan, but I don't know that for sure.

The victim, Mr. Winfield, is not a resident of the State of Tennessee.

This all came to light in 2018 when the State discovered all of this because Mr. Gordon on September the 18th actually went to Nashville at that point and obtained a driver's license No. 132229759 in his true identification and in his true name. So the Department of Safety then caught the two driver's license being in the system with his identification and his photograph and that is how this all came to light.

Thus the State would show at trial that on or about August the 1st of 2016, Mr. Gordon did unlawfully with intent to defraud upon the State of Tennessee or Mr. Winfield forge or endorse without authorization that application for driver's license with that being a forgery because it was not him.

All of this occurred here in Madison County, Tennessee.

II. Sentencing Hearing

On June 10, 2021, the State filed a notice of request for enhanced punishment based on the defendant's prior record. During the sentencing hearing, the State's only proof was

¹ The defendant was also indicted for identity theft, but that charge was dismissed as part of the plea deal.

the defendant's presentence report, which was entered without objection. The presentence report reflected several out-of-state convictions. The State argued, and the defendant conceded, that the defendant was a Range II offender.

The defendant testified on his own behalf, explaining that his motive for obtaining the driver's license in Mr. Winfield's name was not to defraud the State of Tennessee or to commit crimes. Instead, he simply wanted to get a job, which was difficult given his status as a felon. He also testified that he intended "to obtain employment and to stay out of trouble and help [his] family out."

In sentencing the defendant, the trial court considered the evidence presented during the guilty plea and sentencing hearings, including the presentence report and the arguments of counsel. In reviewing the applicable enhancement factors, the trial court found enhancement factors (1), the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; (8) the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community; and (13) at the time the felony was committed, one (1) of the following classifications was applicable to the defendant: (C) released on probation[.] Tenn. Code Ann. § 40-35-114(1), (8), (13). The trial court gave great weight to all three enhancement factors and found no applicable mitigating factors.

In reviewing the defendant's out-of-state convictions, the trial court noted,

it appears to the [c]ourt and I'm reading the presentence report that he actually has seven prior felony convictions on his record. What I'm reading from and this is on the bottom of Page 6 and Page 7, but it appears to the [c]ourt that on February the 1st of 2003, he's charged with three separate counts of aggravated burglary of what would be considered aggravated burglary in the state of Tennessee. It's listed as first[-]degree burglary and also second[-]degree burglary which in Tennessee that's what used to be the first[-]degree burglary was a home invasion at night and second[-]degree burglary was a home invasion during the daytime. But never the less, all three of those convictions it says, "home invasion, burglary." Convicted for those three separate what would be considered Class C felonies here in Tennessee. It looks like he was convicted on July 31st of 2003. For each count he was sentenced to four years and nine months to serve up to 15 years. It says, "concurrent with other counts." And then it says, "Confinement." That indicates to me that he was convicted of three separate aggravated burglaries or what would be the equivalent to aggravated burglaries here in Tennessee.

Now, even though those were committed on the same date, under the statute, this is under 40-35-108, convictions for aggravated burglary committed on the same date can be used separately to enhance someone within a higher range.

...

It also shows that after he committed those three burglaries on February the 1st of 2003, he's charged about one month later on March the 6th of 2003, he's charged with a home invasion. It says, "Burglary second[-]degree" in a different judicial district. It says it's the Fourth Judicial Circuit. He was convicted of that on August 14th of 2003. It says, "Sentence of 15 years confinement."

Then on March the 12th of 2003, he's again charged with committing another second[-]degree burglary, that is home invasion, in a different judicial circuit. It says it's the Thirty-Seventh Judicial Circuit. It looks like he was convicted of that on July 26th, 2004. It says, "Sentenced to five years to serve confinement." I guess that was in the Michigan Department of Corrections.

On April 23rd of 2003 which is about a month and a half later, he's again charged with committing a burglary. It says, "Second[-]degree burglary in the Third Judicial Circuit of Michigan." He was later convicted of that on September 15th of 2003. It says, "Confinement to the Michigan Department of Corrections." It says, "Six to 15 years."

...

So, you know, by my calculations he had six prior felony convictions, that is prior to this offense for which he's being sentenced today. He's got six prior felony convictions which are the equivalent to Class C felonies here in Tennessee.

Now I say all of that because I know the State indicated that he perhaps was a Range 2 multiple offender, but from what I'm reading he's more than just a Range 2 offender because as I said he had those six felony convictions. At least by July 26th of 2004, he had six felony aggravated burglary convictions.

...

Then, in 2013, he's charged in the Third Judicial Circuit in Michigan, on April 2nd of 2013, he's charged with grand larceny which would be a felony in Tennessee as well. It shows that he was convicted on August the 8th of 2013. It says, "Two[-]year sentence. Serve six months in the local jail and then granted probation for the balance of the two years."

...

Now, given what I've stated as far as the seven prior felony convictions with six being aggravated burglaries or what is equivalent to aggravated burglary in Tennessee along with the other grand larceny conviction which is at the very least a Class E felony conviction in Tennessee, it appears to me with those seven felony convictions that he actually is a career offender. He's not a Range 2 offender and not a Range 3 offender, but he's actually a career offender based upon this criminal history that I've talked about.

In this case the [c]ourt is going to sentence [the defendant] to a sentence of incarceration of six years in the Tennessee Department of Corrections as a career offender status. I'm not going to impose any fines in this case, but this case is consecutive to the sentence out of Michigan which he was on probation for at the time that he committed this offense.

This timely appeal followed.

Analysis

On appeal, the defendant argues the trial court erred in sentencing him as a Range III, career offender. Specifically, the defendant argues the trial court erred in finding the State satisfied its burden of proving the defendant's foreign convictions would have constituted felonies in Tennessee. The State contends that the defendant has waived this issue for failing to object at the sentencing hearing and that plain error review is not merited.

A. Waiver

As an initial matter, we will address the State's contention that the defendant waived this issue for failing to object to his offender classification at the sentencing hearing. In his reply brief, the defendant argues that this sentencing issue is not governed by the waiver provision of Tennessee Rule of Appellate Procedure 3(e) and that "the Tennessee Supreme

Court has explicitly held that a defendant's failure to file a timely motion for new trial does not waive appellate review of the sufficiency of the evidence or sentencing." However, this Court has repeatedly held that a defendant's failure to object to his offender classification will result in waiver. *See State v. Mark Anthony Clemmons*, No. M2017-01756-CCA-R3-CD, 2018 WL 3116636, at *2 (Tenn. Crim. App. June 25, 2018), *perm. app. denied* (Tenn. Oct. 10, 2018); *State v. George Robert Hamby*, No. M2014-00839-CCA-R3-CD, 2015 WL 3862688, at *8 (Tenn. Crim. App. May 28, 2015), *perm. app. denied* (Tenn. Aug. 13, 2015); *State v. Mark Fredrick Taylor*, No. E2007-02351-CCA-R3-CD, 2008 WL 2670180, at *3 (Tenn. Crim. App. July 9, 2008), *perm. app. denied* (Tenn. Jan. 26, 2009). Accordingly, the issue is waived. While the State argued waiver in its brief, the defendant did not request plain error review in his reply brief. Nonetheless, the parties were questioned concerning plain error and provided with the opportunity to address it during oral argument before this Court. We will, therefore, review this issue under the plain error doctrine.

B. Plain Error

Before an error may be recognized, it "must be 'plain' and it must affect a 'substantial right' of the accused." *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *State v. Page*, 184 S.W.3d 223, 231 (Tenn. 2006). In *State v. Smith*, our Supreme Court adopted *Adkisson's* five-factor test for determining whether an error should be recognized as plain:

- (a) The record must clearly establish what occurred in the trial court;
- (b) A clear and unequivocal rule of law must have been breached;
- (c) A substantial right of the accused must have been adversely affected;
- (d) The accused did not waive the issue for tactical reasons; and
- (e) Consideration of the error is "necessary to do substantial justice."

24 S.W.3d 274, 282-83 (Tenn. 2000) (quoting *Adkisson*, 899 S.W.2d at 641-42). "[A]ll five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283.

The record before this Court contains the transcript of the sentencing hearing, including the presentence report which was introduced as an exhibit, so the first element

of plain error—that the record clearly establishes what occurred at trial, is satisfied. *State v. Smith*, 24 S.W.3d 271, 282 (Tenn. 2000).

The second element is that a clear and unequivocal rule of law was breached. *Id.* Here, the trial court determined the defendant was a Range III, career offender. Relevant to this case, the trial court may sentence a defendant as a Range III, career offender when the defendant has received “[a]t least six (6) prior felony convictions of any classification if the defendant’s conviction offense is a Class D or E felony.” Tenn. Code Ann. § 40-35-108(a)(3). “‘Prior convictions’ includes convictions under the laws of any other state, government or country that, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.” *Id.* § 40-35-108(b)(5). The court is to analyze the prior out-of-state conviction under Tennessee law as it existed at the time of the out-of-state conviction. *State v. Brooks*, 968 S.W.2d 312, 313-14 (Tenn. Crim. App. 1997). The State bears the burden of establishing the appropriate sentencing range beyond a reasonable doubt. *State v. Vick*, 242 S.W.3d 792, 796 (Tenn. Crim. App. 2007).

In determining whether a foreign conviction may be included in a defendant’s range classification analysis, the trial court must first determine whether the foreign conviction was a “cognizable” offense under Tennessee law. *See* Tenn. Code Ann. §§ 40-35-106(b)(5), -107(b)(5), -108(b)(5). Next, the trial court must determine whether the foreign conviction was a “named felony” in Tennessee. To meet the requirements for a “named felony,” a foreign felony conviction must have the same name as an offense that is currently a felony in Tennessee. *Id.* If the foreign felony is not a “named felony” in Tennessee, the trial court is required to analyze the elements of the foreign felony at the time of the defendant’s conviction to determine whether it “was analogous to a felony offense under Tennessee’s law as it existed at the time it was committed.” *Vick*, 242 S.W.3d at 795 (citing *State v. Brooks*, 968 S.W.2d 312, 313-14 (Tenn. Crim. App. 1997)).

The determinative factor for whether a foreign conviction constitutes a felony offense in Tennessee “is the elements of the convicted offense, not the facts or the elements of the originally charged offense.” *Id.* at 795. In meeting its burden of proof, “[t]he State cannot rely on the offense’s name or the length of sentence imposed but is instead required to show that the offense, as committed by the defendant, would have constituted a felony in Tennessee.” *State v. Jerry Reginald Burkes*, No. E2017-00079-CCA-R3-CD, 2018 WL 2194013, at *13 (Tenn. Crim. App. May 14, 2018) (citing *Vick*, 242 S.W.3d at 794-95), *no perm. app. filed*. “Unless the elements of the out-of-state conviction are identical to a Tennessee felony, the State must present facts to indicate that the defendant’s criminal conduct would have satisfied the elements of a Tennessee felony.” *Id.*

Here, the trial court erred in finding the defendant's Michigan convictions were the equivalent of Tennessee felonies for the purposes of increasing the defendant's range. There was no proof entered into the record of the specific elements of the offenses for which the defendant was convicted in Michigan. Instead, the trial court relied solely on the names of the offenses and the terms of the defendant's sentences. Although it appears the defendant was convicted of two different offenses, first-degree burglary and second-degree burglary, the trial court determined that each of the defendant's six burglary convictions was equivalent to an aggravated burglary conviction in Tennessee, allowing the trial court to count the defendant's three convictions from July 31, 2003, as separate convictions for the purposes of enhancing the defendant's range. The trial court's only attempt at comparing the Michigan offenses' elements with comparable Tennessee offenses occurred when the trial court noted, "[the convictions are] listed as first[-]degree burglary and also second[-]degree burglary which in Tennessee that's what used to be the first[-]degree burglary was a home invasion at night and second[-]degree burglary was a home invasion during the daytime." It is clear the trial court did not properly conduct the analysis outlined in *Vick*, and accordingly, a clear and unequivocal rule of law was breached.

We next consider whether a substantial right of the defendant was adversely affected. *See Smith*, 24 S.W.3d at 282. Clearly, a defendant has a right to be sentenced in accordance with the applicable law. Moreover, in order for the defendant to be sentenced as a Range III offender, the State had the burden of establishing the appropriate sentencing range beyond a reasonable doubt. *See Vick*, 242 S.W.3d at 796. The State did not meet its burden in this case, and therefore, the defendant's rights have been adversely affected.

We next consider whether the defendant waived the election issue for tactical reasons. *See Smith*, 24 S.W.3d at 282. The record contains no indication that the defendant waived this issue for tactical reasons. Our supreme court has held that an absence of indicia in the trial record that a defendant has waived an issue for tactical reasons is sufficient to satisfy this criterion of plain error. *See State v. Gomez*, 239 S.W.3d 733, 742 (Tenn. 2007) ("[T]he record in this case is silent and does not establish that the Defendants made a tactical decision to waive their . . . claims Accordingly, we conclude that the fourth prerequisite for plain error has been met."); *State v. Cooper*, 321 S.W.3d 501, 506 (Tenn. 2010) (determining that the fourth element of plain error review had been established where "there [wa]s no indication that [the defendant] waived the issue for tactical reasons"). Accordingly, we hold that this element of plain error review is satisfied.

Finally, we conclude that consideration of the election error is "necessary to do substantial justice." *Smith*, 24 S.W.3d at 282. We reiterate that a defendant has a right to be sentenced within the law applicable to him, his circumstances, and his record, and a trial

court lacks authority and jurisdiction to sentence a defendant outside the appropriate range without evidence supporting that finding. Therefore, the State's failure to properly establish the defendant as a Range III offender, and the trial court's failure to require the State to do so, resulted in the defendant possibly receiving a sentence longer than he qualified for.

The issue presented by the defendant regarding the trial court's sua sponte decision to sentence the defendant as a Range III offender will be considered on its merits. The error is egregious. It is clearly established in the record, and the rule of law which governs this issue was, and is, clear and unambiguous. Moreover, a substantial right of the accused was adversely affected. Therefore, consideration of this issue is necessary to prevent a miscarriage of justice. The appellant did not waive this issue for tactical reasons. Accordingly, the defendant's sentence must be reversed, and the case remanded for a new sentencing hearing. On remand, we direct the trial court to conduct an appropriate analysis regarding the defendant's foreign convictions and their applicability in enhancing the defendant's range.²

Conclusion

For the aforementioned reasons, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

J. ROSS DYER, JUDGE

² In re-sentencing the defendant, the trial court should be mindful of the changes in Tennessee Code Annotated section 40-35-106(b)(4). For example, if, as the trial court originally determined, the defendant's burglary convictions from Michigan constitute aggravated burglary as defined under Tennessee law, the twenty-four-hour merger rule may apply. Though the legislature amended section 40-35-106(b)(4) in 2009 to exclude aggravated burglary from the twenty-four-hour merger rule, the amendment only applies to convictions occurring on or after August 17, 2009, and the convictions in question in the instant appeal appear to have occurred in 2003, meaning they would count as one offense when determining the defendant's offender classification. *See* Tenn. Code Ann. § 40-35-106(b)(4) (2010).