

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2023

FILED

04/10/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. CHARLES LARRY NICHOLS, III

**Appeal from the Criminal Court for Davidson County
No. 2017-B-1508 Angelita Blackshear Dalton, Judge**

No. M2022-00802-CCA-R3-CD

The Defendant, Charles Larry Nichols, III, appeals the Davidson County Criminal Court's denial of his motion to correct an illegal sentence or clerical error, arguing that he was entitled to "street time" credit for the time he served on community corrections but was being supervised by state probation. Upon review, we conclude that the trial court properly determined that the Defendant was not entitled to the street time credit because he was on supervised probation, not community corrections. However, we remand the case to the trial court for correction of a separate clerical error in the amended judgment of conviction.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed,
Case Remanded**

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and TOM GREENHOLTZ, JJ., joined.

Will Allensworth (on appeal) and Annie Berry (at hearings), Nashville, Tennessee, for the appellant, Charles Larry Nichols, III.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Glenn R. Funk, District Attorney General; and A.C. Jodway, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On March 19, 2017, the Defendant, who had been drinking alcohol and using drugs, got into an argument with his girlfriend, Alicia Hanvy, and ended up running over her with his vehicle. In June 2017, the Davidson County Grand Jury indicted him for second degree murder in count one, vehicular homicide in count two, and aggravated assault in count

three. On September 26, 2018, the Defendant pled guilty to reckless homicide, a Class D felony, in count one, and the remaining counts were dismissed. Pursuant to the plea agreement and *Hicks v. State*, 945 S.W.2d 706, 709 (Tenn. 1997), the Defendant received an eight-year out-of-range sentence to be served at thirty percent release eligibility. The sentence was suspended to community corrections. Additionally, the Defendant was required to install an ignition interlock device on his vehicle for two years and participate in a fifty-two-week batterers' intervention program.

The record reflects that the Defendant filed a motion related to his community corrections sentence and that the trial court held a hearing on the motion on September 3, 2020. Although the motion is not in the technical record, the trial court stated at the outset of the hearing, "So this is a motion to transfer to State probation." The Defendant testified via Zoom that he currently was serving his eight-year sentence for reckless homicide on community corrections and was a registered sex offender. He said he violated his community corrections sentence one time by using heroin and, as a result, had to complete a six-month rehabilitation program for drug and alcohol abuse. As part of the rehabilitation program, the Defendant spent three months at Discovery Place, a half-way house in Dickson. At the time of the hearing, he was still residing at Discovery Place and working in the kitchen. The Defendant said that he loved his job and that he planned to continue living and working at Discovery Place. The Defendant stated that he had completed forty-eight weeks in a batterers' intervention program and that he had been attending Alcoholics Anonymous meetings via Zoom.

Caitlyn Smith testified for the Defendant that she was his community corrections supervisor and that he had only one violation: a positive drug screen due to heroin use. After the violation, the Defendant began residential treatment at Discovery Place in Dickson. Ms. Smith stated, "Since he's been at Discovery Place his whole attitude and everything has changed. Initially, he was very argumentative and wanted to leave, but he worked through it and he's not like that anymore." She said she thought the Defendant was in compliance with the sex offender registry and would be "better supervised" by state probation while he was in Dickson because state probation had resources for sex offender treatment. Defense counsel asked Ms. Smith, "And you would support this move to State probation?" Ms. Smith said yes.

After Ms. Smith's testimony, the trial court stated that it did not "have a problem with him stepping down" to state probation but that "the problem is the process of getting him to do that, because he's not [in Davidson County]. . . . He would have to come here to get signed up with probation and then get his probation transferred." Defense counsel responded that she would "figure out the logistical details" of the transfer, so the trial court continued the hearing until September 9. On September 9, the trial court asked defense counsel for an update, and defense counsel stated that the Defendant's "intake process"

was ready to begin, that the Defendant was going to schedule an appointment for an “intake meeting” in Dickson County, and that the trial court needed to sign “an order that says transferring him to State probation.” The State did not oppose the transfer, so the trial court said it was granting the Defendant’s motion and “transferring your supervision from Community Corrections to probation, State probation.” The trial court also signed and entered a prepared order, which stated that the remainder of the Defendant’s sentence “will be supervised by State probation.” The next day, the trial court entered a second order, stating that because the Defendant had successfully complied with the rules and regulations of community corrections, he was to be “transferred to Supervised Probation, Department of Probation.” The trial court further stated in the second order that “[t]he defendant is required to abide by the rules and regulations of the Tennessee Department of Probation and all special conditions of supervision imposed by the court.”

The record reflects that a probation violation warrant was issued on February 23, 2022, due to new charges. On March 22, 2022, the trial court entered an order stating that earlier on March 22, the Defendant had “conceded that he was in violation of his probation supervision and agreed to place his sentence into effect.” The trial court noted in the order that the Defendant had requested to receive “all jail credit, including ‘street time’ while being supervised by community corrections, as well as ‘street time’ while being supervised by the Department of Probation and Parole.” However, the trial court found that the Defendant had been “‘stepped down’” to supervised probation pursuant to Tennessee Code Annotated section 40-36-106(e)(3)(A); therefore, pursuant to Tennessee Code Annotated section 40-36-106(e)(3)(B), he was not entitled to credit for the street time he served on probation. The trial court entered an amended judgment of conviction, placing the Defendant’s original eight-year sentence into effect. In the amended judgment, the following statement was handwritten in the “Special Conditions” box: “On 3/22/22 [Defendant] conceded community correction violation & placed sentence into effect.” It was also written in the box that the Defendant was to receive the following jail credit: March 20, 2017, to April 24, 2017; June 23, 2017, to December 6, 2019; December 9, 2019, to September 9, 2020; and February 25, 2022, to March 22, 2022.

On April 26, 2022, the Defendant filed a motion to correct an illegal sentence or clerical error pursuant to Tennessee Rules of Criminal Procedure 36.1 and 36, respectively, on the basis that the amended judgment “does not reflect credit for time served on his community corrections sentence from September 9, 2020 to February 23, 2022.” The Defendant asserted in the motion that the trial court never terminated him from the community corrections program but merely transferred the supervision of his community corrections sentence to state probation and that he was entitled to street time credit from September 9, 2020, to February 23, 2022, because he was still serving his community corrections sentence while he was being supervised by state probation.

The trial court held a hearing on the motion on May 19, 2022. During the hearing, defense counsel noted that the September 9, 2020 order specifically provided that the remainder of the Defendant's sentence "will be supervised by State probation." The trial court then noted that the September 10, 2020 order stated that the Defendant was to be "transferred" to state probation, not "supervised by" state probation. Defense counsel responded that the trial court never officially terminated the Defendant from community corrections; therefore, he was entitled to his community corrections street credit from September 9, 2020, to February 23, 2022. The trial court said it disagreed with defense counsel but would take the matter under advisement. On June 1, 2022, the trial court entered an order denying the Defendant's motion to correct an illegal sentence or clerical error. In the order, the trial court found that pursuant to its September 10, 2020 order, the Defendant "was effectively transferred to the Tennessee Department of Probation and under supervised probation." Accordingly, the trial court ruled that the Defendant was not entitled to street time credit while he was on probation from September 9, 2020, to February 23, 2022, and denied his motion to correct an illegal sentence or clerical error.

ANALYSIS

On appeal, the Defendant contends that the trial court erred by denying his motion because he was on community corrections but being supervised by state probation when he committed the violation; thus, the trial court's failure to award street time credit from September 9, 2020, to February 23, 2022, resulted in an illegal sentence or a clerical error in the amended judgment of conviction. The State argues that the trial court properly denied the motion because the Defendant was on supervised probation when he committed the violation; therefore, the trial court correctly determined under Tennessee Code Annotated section 40-36-106(e)(3)(B) that he was only entitled to credit for the time he actually served on community corrections. We agree with the State.

Initially, we note that the Defendant questions whether the proper avenue for relief when a trial court fails to award street time credit while on community corrections is a motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1 or a motion to correct a clerical error pursuant to Tennessee Rule of Criminal Procedure 36. Rule 36.1 permits a defendant to seek correction of an unexpired illegal sentence at any time. *See State v. Brown*, 479 S.W.3d 200, 211 (Tenn. 2015). However, as noted by the Defendant, our supreme court has held that while a trial court's failure to award pretrial jail credits to which a defendant is statutorily entitled may affect the length of time the defendant is incarcerated, it does not render the sentence illegal and, therefore, does not establish a colorable claim for relief pursuant to Rule 36.1. *Id.* at 212-13. Therefore, we turn to Rule 36.

Tennessee Rule of Criminal Procedure 36 provides that “[a]fter giving any notice it considers appropriate, the court may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission.” The proper use of Rule 36 to correct clerical errors is as follows:

[T]he record in the case must show that the judgment entered omitted a portion of the judgment of the court or that the judgment was erroneously entered. The most reliable indicator that clerical error was made is the transcript of the hearing or other papers filed in connection with the proceedings which show the judgment was not correctly entered. In the absence of these supporting facts, a judgment may not be amended under clerical error rule after it has become final.

Cantrell v. Easterling, 346 S.W.3d 445, 449 n.2 (Tenn. 2011) (quoting *State v. Jack Lee Thomas, Jr.*, No. 03C01-9504-CR-00109, 1995 WL 676396, at *1 (Tenn. Crim. App. Nov. 15, 1995)). We review a trial court’s decision on a Rule 36 motion for an abuse of discretion. *Marcus Deangelo Lee v. State*, No. W2013-01088-CCA-R3-CO, 2014 WL 902450, at *3 (Tenn. Crim. App. Mar. 7, 2014).

Tennessee Code Annotated section 40-36-106(e)(3)(A) allows a trial court to terminate a defendant’s community corrections sentence and place the defendant on supervised or unsupervised probation “upon a showing that the offender did abide by the conditions imposed on the original sentence and that the offender’s placement on probation presents no substantial risk to public safety.” Moreover, Tennessee Code Annotated section 40-36-106(e)(3)(B) provides that if the defendant fails to comply with the terms of probation, the trial court may revoke probation and the defendant receives credit “only for actual time served in the community-based alternative program.”¹

At the hearing on September 3, 2020, the trial court stated that “this is [on] a motion to transfer to State probation” and that the court did not have a problem with the Defendant “stepping down” to state probation. Although the trial court signed and entered a prepared order on September 9, 2020, stating that the remainder of the Defendant’s sentence would be “supervised by State probation,” the trial court entered a second order the next day, stating that because the Defendant had successfully complied with the rules and regulations of community corrections, he was being “transferred” to supervised probation and that he

¹ We note that effective July 1, 2021, Tennessee Code Annotated section 40-35-310(a) provides that when a trial court revokes probation and orders a defendant to serve the original sentence, the trial court “may give credit against the original judgment by the amount of time the defendant has successfully served on probation.” In this case, the Defendant did not rely on the amendment to Tennessee Code Annotated section 40-35-310(a) seeking street credit but argued that he was entitled to street credit because he was never taken off community corrections.

was “required to abide by the rules and regulations of the Tennessee Department of Probation and all special conditions of supervision imposed by the court.” Making the trial court’s intentions even more clear, the trial court specifically referred to Tennessee Code Annotated subdivisions 30-36-106(e)(3)(A) and (B) in its March 22 order denying the Defendant’s request for street time credit from March 9, 2020, to February 23, 2022. Therefore, we agree with the trial court that the Defendant was serving his sentence on supervised probation when he committed the violation and that there is no clerical error in the amended judgment regarding the Defendant’s street time credit. See *State v. Jimmy Lee Pearce, Jr.*, No. W2020-00552-CCA-R3-CD, 2021 WL 3136727 at *5 (Tenn. Crim. App. July 22, 2021).

Nevertheless, we think the statement in the “Special Conditions” box that the Defendant conceded a “community corrections” violation is a clerical error. Therefore, we remand the case to the trial court for correction of that error pursuant to Rule 36, Tennessee Rules of Criminal Procedure.

CONCLUSION

Based upon our review, we conclude that the trial court properly concluded that the Defendant was not entitled to street time credit from September 9, 2020, to February 23, 2022, because he was on supervised probation when he committed the violation. However, we remand the case to the trial court for correction of the Special Conditions box on the amended judgment of conviction.

JOHN W. CAMPBELL, SR., JUDGE