

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 9, 2010 Session

STATE OF TENNESSEE v. DEANDRE MARCELLUS HOWARD

**Appeal from the Criminal Court for Davidson County
No. 2007-C-1876 Mark J. Fishburn, Judge**

No. M2010-00327-CCA-R3-CD - Filed December 14, 2010

The defendant, Deandre Marcellus Howard, pleaded guilty to a single count of voluntary manslaughter and received an agreed term of three years' probation to be served pursuant to Tennessee Code Annotated section 40-35-313. In this appeal, the defendant contends that the trial court erred by denying him some 18 months of pretrial jail credit. For the procedural reasons explained more fully below, the appeal is dismissed.

Tenn. R. App. P. 3; Appeal Dismissed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Anne M. Davenport, Nashville, Tennessee, for the appellant, Deandre Marcellus Howard.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Rob McGuire, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On July 10, 2007, the Davidson County grand jury returned an indictment charging the defendant with the first degree premeditated murder of Alfred Thomas Caruthers. On April 23, 2008, the defendant entered an *Alford*¹ guilty plea pursuant to a plea agreement with the State to the reduced charge of voluntary manslaughter in exchange for

¹In *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes that his best interests would be served by a plea of guilty.

a three-year term on judicial diversion under the terms of Tennessee Code Annotated section 40-35-313. On that same date, the trial court attempted to memorialize in the record the terms of the plea agreement via the entry of a greatly-altered uniform judgment document. *See* Tenn. Sup. Ct. R. 17.

On December 9, 2009, the defendant filed a motion seeking to terminate his probation on grounds that he had served 18 months in jail pending resolution of the charge in this case. At the January 6, 2010 hearing on the defendant's motion, the defendant asked that his probation be terminated because, providing for the time he spent in jail prior to pleading guilty and being placed on probation, he had "flattened" a three-year sentence. The State argued that the defendant was aware of the time he had spent in jail prior to pleading guilty and should be made to honor his agreement to serve a three-year probationary term on judicial diversion. The trial court refused to terminate the defendant's probation, noting that there had been no material change in the defendant's circumstances since he entered into the plea agreement. The court granted the defendant's request to waive his payment of probation supervision fees for the remainder of his probationary term.

On February 4, 2010, the defendant filed a notice of appeal to this court indicating his intention to appeal "the final judgment of Criminal Court, Division VI, of Davidson County filed on January 6, 2010." The only action of the criminal court taken on January 6, 2010, was the denial of the defendant's motion to terminate his probation.

On September 7, 2010, the trial court revoked the defendant's judicial diversion probation, entered a judgment of conviction, and ordered the defendant to serve the original three-year sentence in the Tennessee Department of Correction ("TDOC"). The September 7, 2010 judgment of conviction also provided for pretrial jail credit from October 31, 2006 to April 23, 2008, and from July 26, 2010 to September 7, 2010.

I. Appeal of January 6, 2010 Order

The defendant has no right to appeal the January 6, 2010 denial of his motion to terminate probation. Tennessee Rule of Appellate Procedure 3 provides:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law . . . or if the defendant seeks review of the

sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b). The denial of a motion to terminate probation is not among the trial court actions from which a direct appeal as of right lies. For this reason alone, dismissal of the instant appeal is appropriate.

II. Appeal from April 23, 2008 Guilty Plea

Were we to construe the February 4, 2010 notice of appeal as an appeal from the action of the trial court following the defendant's guilty plea on April 23, 2008, the appeal faces a major procedural challenge. Pursuant to his plea agreement with the State, the defendant was placed on probation under the terms of Code section 40-35-313, commonly referred to as judicial diversion. Code section 40-35-313 provides for the deferral of "further proceedings against a qualified defendant" and the placement of such defendant "on probation upon such reasonable conditions as it may require *without entering a judgment of guilty* and with the consent of the qualified defendant." T.C.A. § 40-35-313(a)(1)(A) (2006) (emphasis added). Engendering procedural confusion, and perhaps creating the problem perceived by the defendant, the trial court attempted to commemorate the terms of the plea agreement and the defendant's placement on judicial diversion by entering a copy of the uniform judgment document, albeit modified by the handwritten entry of the word "deferred" in two locations and the notation "Not a Conviction" in the special conditions portion of the form.

The entry of the 2008 modified judgment document is problematic for several reasons, the greatest of which is that Code section 40-35-313 specifically requires that no judgment be entered in the case. A judgment of conviction, the sole purpose for which the uniform judgment document should be used, must include the plea of the defendant, "the verdict or findings," and "the adjudication and sentence." Tenn. R. Crim. P. 32(e)(2). When a defendant is placed on judicial diversion, there is no adjudication in the case. Indeed, Code section 40-35-313 provides that "[d]ischarge and dismissal" following successful completion of judicial diversion probation is to occur "without court adjudication of guilt." *Id.* § 40-35-313(a)(2). Although we recognize that the current version of the uniform judgment document provides a place for the trial court to indicate that a defendant pleaded guilty

“[p]ursuant to 40-35-313,” this provision cannot override the terms of Code section 40-35-313 that the proceedings be deferred and the defendant placed on probation without entering a judgment of guilty.²

In addition to the entry of the modified judgment document’s being problematic in and of itself, the document also indicates that the defendant is being “[s]entenced to” an alternative sentence of three years on probation. Our case law is clear that a judicial diversion term is not a sentence under the terms of the Sentencing Act. *See, e.g., State v. Turco*, 108 S.W.3d 244, 247 (Tenn. 2003); *Alder v. State*, 108 S.W.3d 263, 267 (Tenn. Crim. App. 2002) (“The judicial diversion probationary period is not a sentence nor is it punishment.”).³

Rather than attempt to shoehorn the terms of the defendant’s plea agreement into a document ill-designed for such a purpose, the trial court simply should have entered an order memorializing the defendant’s plea of guilty, the order of three years’ probation under the terms of Code section 40-35-313, and the conditions of that probation. That being said, the record clearly establishes that the defendant was placed on judicial diversion in April 2008 and remained on judicial diversion at the time of the filing of the notice of appeal on February 4, 2010. In consequence, at the time of the filing of the notice of appeal in this case, the defendant was without an appeal as of right under Tennessee Rule of Appellate Procedure 3. *See State v. Norris*, 47 S.W.3d 457, 462 (Tenn. Crim. App. 2000) (“An appeal [is] founded upon a judgment of conviction. As pointed out above, the guilty plea which results in an order of judicial diversion is not consummated into a judgment of conviction, unless the defendant breaches the conditions of his diversion/probation.”). In the absence of the later proceedings discussed below, dismissal of the defendant’s appeal would be appropriate on this basis.

Prior to the oral argument of this case, the defendant moved this court for leave to supplement the record in this case with the judgment of the trial court entered on September 7, 2010. That judgment, which was appended to the defendant’s written motion, provides that the defendant’s judicial diversion probation was revoked and a judgment of

²We also note that this portion of the uniform judgment document fails to take into account that judicial diversion may be granted following a jury conviction. Nothing in Code section 40-35-313 requires that a defendant plead guilty in order to enjoy the benefit of deferred proceedings and expungement upon successful completion of judicial diversion.

³Although not used in this case, the current version of the uniform judgment document also contains a box labeled “Diversion” in the portion of the document relating to the sentence imposed. The inclusion of this box as well as the box labeled “Guilty Plea - Pursuant to 40-35-313” is contrary to the action taken when deferring proceedings under Code section 40-35-313 and invites confusion, as is evident in this case.

conviction entered on September 7, 2010. Given the unique procedural posture of this case, we deem the defendant's February 4, 2010 notice of appeal premature and treat it as filed on the date of the entry of the judgment of conviction on September 7, 2010. *See* Tenn. R. App. P. 4(d); *see also generally State v. Byington*, 284 S.W.3d 220, 225 (Tenn. 2009).

III. Pretrial Jail Credits

Having found our way, at last, to the issue raised in the defendant's appeal, that the trial court had erroneously denied the defendant pretrial jail credits, we nevertheless conclude that the appeal must be dismissed because the September 7, 2010 judgment of conviction rendered the issue moot. Via the September 7, 2010 judgment of conviction, the trial court ordered the defendant to serve the original three-year sentence in the TDOC and provided the defendant with pretrial jail credit from October 31, 2006 to April 23, 2008, and from July 26, 2010 to September 7, 2010. Code section 40-23-101(c), governing the award of pretrial jail credits, provides:

The trial court shall, *at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment*, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail or juvenile court detention prior to waiver of juvenile court jurisdiction, or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

T.C.A. § 40-23-101(c) (emphasis added). As we explained above, judicial diversion is not a sentence and, as such, there was initially no sentence against which pretrial jail credits could be credited. Moreover, a defendant placed on judicial diversion is not "committed to jail, the workhouse or the state penitentiary for imprisonment." We have held that, "as a matter of law, pretrial jail credits do not affect or accelerate the expiration date of a defendant's probationary sentence." *See Barger v. Carlton*, No. E2006-01102-CCA-R3-HC, slip op. at 3 (Tenn. Crim. App., Knoxville, Apr. 17, 2007); *see also State v. Kendrick Lamont Brooks*, No. W2004-00475-CCA-R3-CD (Tenn. Crim. App., Jackson, Apr. 28, 2005); *State v. William A. Marshall*, No. M2001-02954-CCA-R3-CD (Tenn. Crim. App., Nashville, Oct. 14, 2002); *State v. Dennis R. Jacks*, No. E2000-00643-CCA-R3-CD (Tenn. Crim. App., Knoxville, May 7, 2001). By the plain terms of the statute, the defendant was not entitled to pretrial jail credit until the sentence was imposed and the defendant was committed to his

incarcerative sentence. That is exactly what the trial court did in this case on September 7, 2010. Because the trial court gave the defendant the pretrial jail credit to which he claims entitlement on appeal, the issue of the denial of the pretrial jail credit has been rendered moot.

Accordingly, the appeal is dismissed.

JAMES CURWOOD WITT, JR., JUDGE