



State v. Boggs

2007 | Cited 0 times | Court of Criminal Appeals of Tennessee | May 30, 2007

Assigned on Briefs January 23, 2007

Thomas T. Woodall, J., delivered the opinion of the court, in which David H. Welles and Robert W. Wedemeyer, JJ., joined.

OPINION

I. Statement of the Evidence

The record of the proceedings in the trial court is contained in a Statement of the Evidence approved by the trial court. See Tenn. R. App. P. 24(c).

The charged offenses arose out of an altercation between Defendant and police officers of the Franklin Police Department in the critical care unit of the Williamson Medical Center in Franklin where Defendant's wife, Addie Elizabeth Boggs, had been admitted for treatment.

Cheri Young, a nurse at the Williamson County Medical Center, was assisting Ms. Boggs on the evening of August 1, 2004. Ms. Boggs condition had worsened, and Defendant insisted that Ms. Boggs undergo dialysis treatment. Ms. Young explained to Defendant that the attending doctors had excluded dialysis as a possible course of treatment because dialysis would hasten Ms. Boggs' death. Defendant became increasingly agitated "and verbally aggressive with the nurse on duty." Ms. Young was concerned that Defendant's conduct was disturbing the other patients in the critical care unit and asked Defendant to leave. Defendant "screamed at [Ms. Young] and jammed his finger in her face." Ms. Young called security.

Christy Anthony, a nurse assigned to Ms. Boggs' care, was conversing with one of Ms. Boggs' doctors on the telephone when Defendant approached her in a "menacing" manner. Ms. Anthony asked Defendant to leave Ms. Boggs' room, but Defendant refused and "threatened to kill" Ms. Anthony. Defendant grabbed Ms. Anthony and "slammed" her against a wall.

Officers Bryan Ward and Peter Ritchie, with the Franklin Police Department, responded to Ms. Young's call for assistance. The officers "tried to calmly escort" Defendant out of the critical care unit, but Defendant said, "If you want me to leave, you will just have to arrest me." Defendant assumed a "fighting stance." As Officer Ward was attempting to lead Defendant out of Ms. Boggs' hospital room, Defendant struck Officer Ward in the groin repeatedly, and a fight ensued during



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which Officer Ritchie was also struck. Officer Ward was later treated for his injuries at the medical center. Defendant continued to lash out with his fists and feet. Officer Darren Barnes with the Franklin Police Department arrived at the scene, and the three officers managed to subdue Defendant with pepper spray.

Defendant testified on his own behalf. He stated that he wanted to be left alone with Ms. Boggs to pray. Defendant was convinced that dialysis would help Ms. Boggs, but he said that the nurses on duty "persistently ignored him." At the time of the incident, Defendant had been in the hospital and awake for approximately fifty-five hours. Defendant denied touching any nurse in the critical care unit. Defendant denied that he "flailed his fists" or "was out of control." Defendant maintained that the officers "immediately tackled him" when they arrived in the critical care unit, and "began beating him."

II. Jury Instructions

Defendant was convicted of the offense of resisting arrest which, as relevant here, is committed when a person intentionally prevents or obstructs anyone known to the person to be a law enforcement officer from effecting that person's arrest by using force against the law enforcement officer. T.C.A. * 39-16-602. Pursuant to Rule 30 of the Tennessee Rules of Criminal Procedure, Defendant submitted a hand-written request that the trial court charge the jury as follows:

Based on Art. 1, * 2: That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power is absurd, slavish, and destructive of the good and happiness of mankind. You are further instructed that every citizen has the right to resist arrest if that arrest is unlawful.

The trial court responded to Defendant's request in writing, finding that the suggested special instruction was "not legally appropriate," and that the "evidence does not support such a charge."

We first observe that the unlawfulness of an arrest, except in limited circumstances, is not a defense to prosecution of the offense of resisting arrest. T.C.A. * 39-16-602(b) ("Except as provided in * 39-11-611, it is no defense to prosecution under this section that the stop, frisk, halt, arrest or search was unlawful."). Thus, Defendant's requested instruction that "every citizen has the right to resist arrest if that arrest is unlawful" is not an accurate charge of the law. See *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn.1986) (citing *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn.1975) ("It is the duty of a trial judge to give a complete charge of the law applicable to the facts of a case.")).

Defendant contends, however, that Article I, section 2, of the Tennessee Constitution specifically grants to a citizen of this State the right to resist an unlawful arrest and thus submits that subsection (b) of section 39-16-602 which statutorily limits a citizen's right to resist an arrest is unconstitutional. See Tenn. Const. art. I, * 2; T.C.A. * 39-16-202. Defendant does not cite any authority in support of his



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argument. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); see also Tenn. R. App. P. 27(a)(7).

Waiver aside, we observe that our Constitution's rejection of the "doctrine of non-resistance" recognizes that "our government serves at the will of the people of Tennessee, and expressly advocates active resistance against the government when government no longer functions to serve the people's needs." Tenn. Const. art. I, * 2; *Planned Parenthood of Middle Tennessee, et al. v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2000). The concept embodied in this section of our Constitution contemplates the collective actions available to our citizens "in the face of governmental oppression and interference with liberty." *Davis v. Davis*, 842 S.W.2d 588, 599 (Tenn. 1992).

An individual's right to rely on a constitutional right to rebel against governmental authority, however, is not unlimited. See *Dennis, et al. v. United States*, 341 U.S. 494, 501, 71 S.Ct. 857, 863, 95 L.Ed. 1137 (1951) (observing that "[w]hatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change"); *Nelson v. Wyman*, 105 A.2d 756, 770 (N.H. 1954) (interpreting that state's constitutional provision which is substantially similar to Tennessee's, and observing that "[t]he right reserved to the people by this Article is not such a broad and unlimited right of insurrection and rebellion as to permit any group which is dissatisfied with existing government to lawfully attempt at any time to overthrow the government by force or violence" when there is no showing that the government has acted arbitrarily or oppressively).

It is well-settled "that courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties." *State v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002); *DeLaney v. Thompson*, 982 S.W.2d 857, 858 (Tenn. 1998). Based on the facts and circumstances presented in this record, it is not necessary to determine Defendant's larger issue concerning the scope of Article I, section 2 because Defendant has failed to show that his arrest was, in fact, unlawful, or that the arresting officers acted arbitrarily or oppressively in effectuating Defendant's arrest.

Ms. Anthony and Ms. Young testified that Defendant was creating a disturbance in the critical care unit during which he acted aggressively toward them. Officer Ward initially attempted to diffuse the situation without arresting Defendant by leading Defendant out of the critical care unit. Defendant, however, struck Officer Ward in the groin area several times and refused to calm down. An officer may arrest a person for a public offense committed or a breach of peace threatened in the officer's presence. T.C.A. * 40-7-103(a)(1). Defendant continued to resist until he was subdued with pepper spray and placed under arrest. An officer after giving notice of the officer's identity may use or threaten to use force that is reasonably necessary to accomplish the arrest of a person who resists or flees from arrest. Id. * 40-7-108(a). Based on the facts before us, we conclude that the investigating officers had the statutory authority to arrest Defendant without a warrant based on his conduct, and



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the arresting officers' actions did not exceed the force necessary to accomplish Defendant's arrest. Defendant is not entitled to relief on this issue.

Defendant argues that the trial court erred in not providing a self-defense charge to the jury in connection with the charged offense of resisting arrest. Tennessee Code Annotated section 39-11-611(e) provides that "[t]he threat or use of force against another is not justified to resist a[n] . . . arrest . . . that the person knows is being made by a law enforcement officer, unless . . . the law enforcement officer uses or attempts to use greater force than necessary to make the arrest." There is no indication in the record that Defendant submitted a written request for such an instruction pursuant to Rule 30 of the Tennessee Rules of Criminal Procedure. Failure to submit a special request in writing constitutes a waiver of the issue. See *State v. Vickers*, 985 S.W.2d 1, 8 (Tenn. Crim. App.1997); *State v. Brewer*, 932 S.W.2d 1, 15 (Tenn. Crim. App.1996). Moreover, there is no plain error. That is, the record does not clearly demonstrate that there was error in the omission of a self-defense instruction or that the omission plainly affected a substantial right of the defendant. See *Tenn. R. Crim. P. 52(b)*; *State v. Caldwell*, 671 S.W.2d 459, 465 (Tenn. 1984). Defendant is not entitled to relief on this issue.

III. Sentencing Issue

Defendant contends that the trial court "erred further by not appropriately considering split confinement less than actual jail time." This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. T.C.A. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant circumstances. *State v. Pettus*, 986 S.W.2d 540, 543 (Tenn. 1999). The burden is upon the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments. The record on appeal does not contain the transcript or a statement of the evidence of the sentencing hearing. It is Defendant's duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal and will enable the appellate court to determine the issues. *Tenn. R. App. P. 24(b)*. This rule applies to sentencing hearings. *State v. Beech*, 744 S.W.2d 585, 588 (Tenn. Crim. App.1987). *State v. Meeks*, 779 S.W.2d 394, 397 (Tenn. Crim. App. 1988). Because Defendant did not include the sentencing transcript or a statement of the evidence presented at the sentencing hearing in the record, he is unable to carry his burden, and we must presume the sentence imposed by the trial court was correct. Defendant is not entitled to relief on this issue.

CONCLUSION

After review, we affirm the judgments of the trial court.

