Cite as 2012 Ark. App. 503

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-1075

	Opinion Delivered September 19, 2012
TOM AARON DILLARD APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. CR 2010-2129-1]
V.	HONORABLE WILLIAM A. STOREY, JUDGE
STATE OF ARKANSAS APPELLEE	REMANDED TO SETTLE & SUPPLEMENT THE RECORD; REMANDED TO CLARIFY & CORRECT ORDER; REBRIEFING ORDERED

RITA W. GRUBER, Judge

Tom Aaron Dillard was tried by a jury and convicted of rape, aggravated robbery, and kidnapping. He was sentenced on each offense to terms of imprisonment enhanced with additional time for use of a firearm. He now appeals, challenging evidentiary rulings by the trial court. He contends that the court abused its discretion by allowing (1) evidence of his alleged plan to kill another person, and (2) hearsay statements by the victim about the crimes committed against her. We remand this case for settlement of the record, clarification and correction of the judgment and commitment order, and rebriefing.

In pretrial motions and during trial, Dillard sought to exclude both testimony that he allegedly told his victim of plans to go to Russellville to kill someone and a recording of the

victim's call to 911, including her statement that "he's, he's apparently gonna kill somebody." The trial court overruled his objections. A CD and transcript of the 911 call were introduced into evidence at trial through the testimony of the 911 dispatcher, and the audio recording was then played for the jury. The victim testified that she begged Dillard for her life and that he replied, "I'm not gonna shoot you. You're not on my list." Officer Tim Shepard testified that the victim relayed this statement to him. The admission of these testimonies and the recording are at issue in Dillard's first point on appeal. At issue in the second point on appeal is Officer Shepard's hearsay testimony about Dillard's acts against the victim, which she related to the officer at the hospital.

Settlement of the Record

Administrative Order No. 4 of the Arkansas Supreme Court provides: "Unless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings . . . pertaining to any contested matter before the court or the jury." Ark. Sup. Ct. Admin. Order No. 4(a) (2011). When an audio recording has been played to the jury and the statement is a point on appeal, abstracting is deferred only if the statement is completely incomprehensible. *Hodge v. State*, 329 Ark. 57, 945 S.W.2d 384 (1997). *See also Williams v. State*, 362 Ark. 416, 208 S.W.3d 761 (2005) (noting that it was the trial court's duty to require a verbatim record of the portion of a videotaped custodial statement played to the jury, and ordering the parties to settle the record).

The CD recording of the 911 call at issue was played at the pretrial hearing, was introduced into evidence at trial, was played for the jury, and clearly pertained to a contested

matter. Dillard's addendum, however, reflects that the 911 transcript that was introduced at trial was prepared by the district prosecutor's office. There is no indication that it was prepared at the direction of the circuit court in lieu of a transcription of the recording actually played at trial or that the parties waived on the record the making of an official transcription—as is required by Administrative Order No. 4(a). We therefore remand to the circuit court to settle the record. The court shall require a verbatim transcription of the audio recording as it was played to the jury, and the record shall be supplemented by the addition of the transcript within thirty days of this opinion.

Clarification of Judgment and Commitment Order

The judgment and commitment order, entered on July 18, 2011, reflects that the following sentences were imposed without suspended imposition of sentence: rape, 480 months enhanced by 180 months for use of a firearm in the commission of the offense; aggravated robbery, 120 months with firearm enhancement of 12 months; and kidnapping, 180 months with firearm enhancement of 120 months. The robbery sentence was to run consecutively to the rape and kidnapping sentences for a total of 792 months in the Arkansas Department of Correction. Although the order specified that there was no suspended imposition of sentence on any conviction, there appears at the bottom of the order—beneath the signatures of the circuit judge and the circuit clerk—the typed caption "Suspended Sentence Conditioned Upon." Beneath the caption are three conditions, including the requirement of "entering and completing the RSVP program @ ADC."[1] The docket entry

[1]Reduction of Sexual Victimization Program

for July 18, 2011, also reflects this condition.

A circuit court has no authority to impose conditions to sentences of incarceration unless a statutory provision allows otherwise. *McArty v. Hobbs*, 2012 Ark. 257. Sentencing in Arkansas is entirely a matter of statute, and a sentence is illegal when the law does not authorize the particular sentence. *Id.* "*If* a court suspends imposition of sentence on a defendant or places him or her on probation," the court may place conditions on a defendant. Ark. Code Ann. § 5-4-303(a) (Supp. 2011) (emphasis added). There is no provision in section 5-4-104(d) (Supp. 2011) for a court to place specific conditions on a sentence of incarceration; generally, absent a statute, rule, or available writ, once the court enters a judgment and commitment order, jurisdiction is transferred to the Department of Correction—the Executive Branch—and it is for that branch to determine any conditions of incarceration. *Richie v. State*, 2009 Ark. 602, at 8, 11, 357 S.W.3d 909, 914–15. *See White v. State*, 2012 Ark. 221, 408 S.W.3d 720 (holding that a condition of incarceration requiring sex-offender treatment was without statutory authority and therefore was illegal); *Richie*, *supra* (holding that a sentence was illegal where no statute authorized requiring appellant to undergo drug and alcohol treatment as a condition of incarceration).

In the present case, we remand to the circuit court for clarification of its order to resolve the incongruity within the judgment and commitment order itself, which refers to conditions of a suspended sentence despite specifying that there were no suspended impositions of sentence. Alternatively, if completion of the RSVP program was indeed ordered as a condition of incarceration, the circuit court also has the opportunity to correct

the judgment and commitment order to comply with the law as set forth herein.

Rebriefing

Finally, we remand for rebriefing because of deficiencies in Dillard's brief. In his initial brief, he did not follow the requirement of Arkansas Supreme Court Rule 4-2 that material parts of the transcript be abstracted without verbatim reproduction or use of a question-and-answer format. Ark. Sup. Ct. R. 4-2(a)(5)(A), (B) (2012); *Carter v. Cline*, 2011 Ark. 266. Additionally, the argument portion of his brief did not refer to portions of the victim's statement found in the abstract and addendum, followed by the page number of the abstract or addendum at which the material may be found. Ark. Sup. Ct. R. 4-2(a)(7) (2012). *See McCoy v. Jackson*, 2011 Ark. App. 456 (ordering rebriefing and abstracting of a transcript included in appellant's addendum because his argument included multiple citations to it and the information was material); *Lagoy v. State*, 2010 Ark. App. 509 (ordering rebriefing and directing appellant to include the substance of a tape-recorded statement in the abstract). We strongly encourage Dillard, prior to filing another substituted brief, abstract, and addendum, to review our rules and avoid any other deficiencies besides the ones we have pointed out.[2]

After settlement of the record and the filing of a supplemental record with this court, Dillard is given fifteen days to file a substituted brief, addendum, and abstract. *See* Ark. Sup. Ct. R. 4-2(b)(3) (2012) (allowing a party who files a deficient brief opportunity to file a conforming brief). The State may revise or supplement its brief within fifteen days of the

[2]In the substituted brief, reference in the argument shall be to the abstract of the verbatim 911 call transcript, which shall be created in the supplemental record.

filing of the substituted brief or may rely on its previously filed brief.

Remanded to settle and supplement the record; remanded with instructions to clarify and enter a corrected judgment and commitment order; rebriefing ordered.

PITTMAN and HOOFMAN, JJ., agree.

Paul M. Gehring, for appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.