

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. IRINA GEICULESCU

Criminal Court for Davidson County
No. 2003-C-2272

No. M2007-02092-CCA-R3-CD

ORDER

This is a State appeal. Presently before the Court are the Appellee's motions for dismissal of the appeal and reimbursement of attorney fees and expenses and the State's motion for voluntary dismissal and its response to the request for attorney fees and expenses. The State filed notice of appeal from the trial court's grant of the Appellee's motion for judgment of acquittal following a mistrial. In her motion to dismiss, the Appellee argues that the State does not have an appeal as of right in this situation. In its motion for voluntary dismissal, which was filed after the Appellee's motion to dismiss, the State acknowledges that it cannot pursue this appeal.

The State's motion for voluntary dismissal is granted. See Tenn. R. App. P. 15. The Appellee's motion to dismiss is denied as moot. However, the Court hereby grants the Appellee's motion for attorney fees and expenses. The Legislature has seen fit to provide this Court with the discretion to award against an appellant expenses incurred by the appellee "[w]hen it appears . . . that the appeal from any court of record was frivolous or taken solely for delay." Tenn. Code Ann. § 27-1-122. A frivolous appeal is one that is devoid of merit or lacking in any reasonable chance of success. See Robinson v. Currey, 153 S.W.3d 32, 42 (Tenn. Ct. App. 2004). See also Tenn. Ct. Crim. App. R. 22 (B) (defining "frivolous appeal").

The statute authorizing the award of expenses in frivolous appeals is not limited to civil cases. There is nothing in the language of the statute which would prevent this Court from granting reasonable attorney fees in an appropriate case. Although the State may be correct in noting that it cannot find any case where this Court has awarded damages to a criminal defendant under the provisions of section 27-1-122, we have decided it would be unfair to require the Appellee to bear the expense and burden of defending against this frivolous appeal. This statutory provision was enacted to discourage the pursuit of frivolous appeals, and as discussed below, it should have been obvious to the State that it had no chance of success on appeal.

The State contends its filing of the notice of appeal was not frivolous. We disagree. The law regarding the State's right to appeal in a criminal case is clearly established. Neither the Rules of Criminal Procedure nor the Rules of Appellate Procedure, which grant the State the right to appeal in certain instances, authorize an appeal from the grant of a motion for judgment of acquittal when the jury does not return a verdict of guilt. Rule of Criminal Procedure 29(e)(2) expressly provides

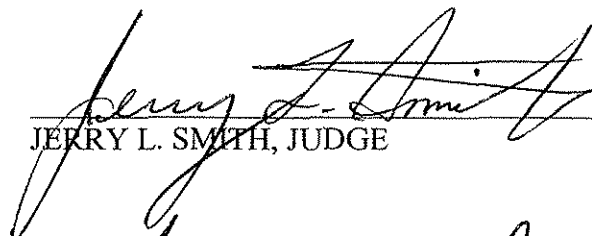
that the State "may appeal when the court sets aside a verdict of guilty and enters a judgment of acquittal." Similarly, Rule of Appellate Procedure 3(c), which enumerates the circumstances wherein a State may file an appeal as of right, specifically provides that the State may only appeal an order "setting aside a verdict of guilty and entering a judgment of acquittal." Moreover, both the federal and our state courts have long-recognized that an appeal by the State from the grant of a judgment of acquittal following a mistrial would violate the Double Jeopardy Clause. See Smalis v. Pennsylvania, 476 U.S. 140 (1986); State v. Hulse, 785 S.W.2d 373 (Tenn. Crim. App. 1990); see also State v. Michael Dewayne Mann, No. W2007-00017-CCA-R3-CD, 2008 WL 1788057 (Tenn. Crim. App., Apr. 18, 2008). It is evident that the appeal by the State in this case had no chance of success and thus was frivolous. As noted above, the State had no right to appeal from the outset. This Court does not believe the State filed its notice of appeal in bad faith. However, it is irrelevant whether or not the State acted in bad faith. The applicable statutory provision speaks to the merits of the appeal *or* the intent of the appealing party. § 27-1-122 (damages may be awarded when the appeal is deemed "frivolous or taken solely for delay").

Because the trial court is in a better position to determine what constitutes reasonable damages, this matter is remanded for the sole purpose of a hearing on the amount of attorney fees and expenses which shall be awarded to the Appellee as a result of her defense of this frivolous appeal. Costs otherwise associated with this appeal shall be taxed to the State.

So ORDERED.



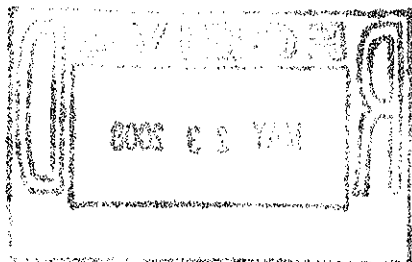
DAVID H. WELLES, JUDGE



JERRY L. SMITH, JUDGE



THOMAS T. WOODALL, JUDGE



IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION IV

*Filed
6/23/08
By M Waddell
D.C.*

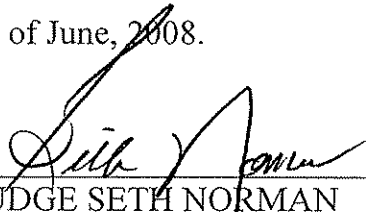
STATE OF TENNESSEE)
)
)
v.) NO. 2003-C-2272
)
IRINA GEICULESCU)
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ORDER

This cause came to be heard on remand from the Court of Criminal Appeals which determined that the appeal filed by the government was frivolous and remanded the matter for this Court to assess attorney fees and costs. Based on the entire record the Court determines that the damages in the nature of attorney fees and expenses are \$2,587.⁵⁰

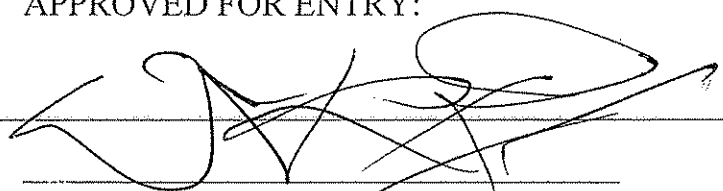
The State of Tennessee shall remit to counsel for Ms. Geiculescu this amount within thirty days from the date of this order. Thereafter statutory interest shall accrue until this amount is satisfied. Counsel for the Defendant shall then reimburse the defendant for these amounts that she paid to counsel's firm for representation in this appeal.

It is so ORDERED this the 20 day of June, 2008.



JUDGE SETH NORMAN

APPROVED FOR ENTRY:



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