IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 2000 SESSION

FILED

March 21, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**C.C.A. No. 03C01-9907-CR-00312**
	)	
vs.	)	**Knox County**
	)	
TADARYL DARNELL SHIPP,	)	**Hon. Mary Beth Leibowitz, Judge**
	)	
Appellant.	)	**(First Degree Murder and**
	)	**Conspiracy to Commit First**
	)	**Degree Murder)**

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OPINION FILED: _____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Tadaryl Darnell Shipp, brings his second direct appeal to this court from the Knox County Criminal Court, where a jury convicted him of first degree murder in the slaying of Colleen Slemmer and sentenced him to life with the possibility of parole. The jury also convicted him of conspiracy to commit the first degree murder of Slemmer, and on the conspiracy count, the trial court sentenced him to a maximum sentence of twenty-five years incarceration to be served consecutively to the life sentence. In the defendant's first appeal, this court affirmed the convictions and the sentences, except for the consecutive sentencing order. See State v. Tadaryl Darnell Shipp, No. 03C01-9711-CR-00492 (Tenn. Crim. App., Knoxville, Sept. 11, 1998). We remanded the case to the trial court for further proceedings to determine whether the two sentences would be served concurrently or consecutively. Id., slip op. at 13-14. On remand, the trial court again imposed consecutive sentences, and it is from this order that the defendant now appeals. After a review of the applicable law and the record, including the record of the trial and all sentencing proceedings conducted in this case, we affirm.

The facts of the murder are more fully detailed in this court's prior opinion. See id., slip op. at 2-6. We provide only a brief summary. On January 12, 1995, the defendant, who was seventeen years of age, Christa Gail Pike, and Shadolla Peterson, who were all enrollees of the Job Corps program in Knoxville, attacked another enrollee, Colleen Slemmer, ostensibly because of a romantic conflict. The three inflicted a brutal, barbaric series of assaults upon the victim which lasted approximately 30 to 45 minutes and included cutting the victim with a box cutter and a miniature meat cleaver and bashing her head with a rock or piece of asphalt. Most of the cutting, including the carving of a pentagram into her chest, was inflicted while she was alive. Although the defendant may not have delivered the lethal blow, he gagged the victim, twice prevented her from escaping the trio's rampage, and inflicted some of the cuts and wounds.

After the defendant's trial in which the jury imposed a first degree murder conviction with a life sentence and a conviction for conspiracy to commit first degree murder, the trial judge imposed a 25 year sentence for the conspiracy count and ordered that it be served consecutively to the life sentence. However, the trial court did not base consecutive sentencing upon the considerations promulgated by our supreme court in State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995). In Wilkerson, our supreme court said:

> [A]n imposition of consecutive sentences on [a dangerous] offender [,see Tenn. Code Ann. § 40-35-115(b)(4) (1997),[1]] in addition to the application of general principles of sentencing [requires] the finding that [1] an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that [2] the consecutive sentences must reasonably relate to the severity of the offenses committed.

Id. at 939. Because the trial court did not make these findings, and because this court was precluded from a *de novo* determination of the issue during the

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[1] Tennessee Code Annotated Section 40-35-114(b) lists the following categories of offenders for whom consecutive sentencing may be appropriate:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and the victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> (6) the defendant is sentenced for an offense committed while on probation; or
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b) (1997).

defendant's first appeal in light of the absence of the presentence report in the record in that appeal,[2] we remanded so that the trial court could make the appropriate Wilkerson findings and apply them to the case. We recognized that the trial court had heard the testimony of witnesses, had been in a position to assess the defendant's demeanor, and had been privy to the presentence report. We gave the trial court the option of conducting further evidentiary proceedings on remand, Tadaryl Darnell Shipp, slip op. at 14, but on remand the trial court heard only the arguments of counsel. It then announced certain findings: The defendant was a leader in the offense, he committed the crime for pleasure and excitement, and he had no hesitation about committing an offense in which the risk to human life was high. The trial court expressed understandable outrage about the torture involved in the offense and found the defendant to be a dangerous offender. See Tenn. Code Ann. § 40-35-114(b)(4) (1997). It concluded that consecutive sentences were necessary to protect the public from the defendant and that the extended sentence

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[2] During the remand hearing defense counsel expressed dismay that this court had not mentioned the absence of the report during oral argument, and the trial court was dismayed, if not doubtful, that the report had been omitted from the record. We point out that although members of the court read the parties' briefs prior to hearing oral argument, they generally do not see the record prior to argument. Furthermore, the record in the first appeal was diligently searched on multiple occasions prior to preparing the opinion in the first appeal. The presentence report neither appeared in the technical record, among the exhibits, nor with any other portion of the record.

We take this opportunity, once again, to inform trial courts and the practicing bar that the absence of presentence reports from the appellate record is an all too frequent occurrence, despite the presentation of sentencing issues on appeal. On appeal, this court cannot conduct its statutorily mandated *de novo* review of sentencing issues when the required report is absent from the record. See Tenn. Code Ann. § 40-35-210(b)(2), -401(d) (1997). Even though the code directs that the presentence report be "filed with the clerk of the court," Tenn. Code Ann. §§ 40-35-208 (1997), we have encouraged trial courts to receive and authenticate the report as an exhibit to the sentencing hearing. See State v. Jerry Blaylock, No. 02C01-9602-CC-00069, slip op. at 15, n. 2 (Tenn. Crim. App., Jackson, Aug. 21, 1997), perm. app. denied (Tenn. 1998); State v. Richard Douglas Lowery, No. 03C01-9604-CC-00148, slip op. at 6-8 (Tenn. Crim. App., Knoxville, May 19, 1997), perm. app. denied (Tenn. 1998). Mere filing with the clerk results in the report's inclusion, if at all, in the technical record, which is not approved or authenticated by the trial judge. See Tenn. R. App. P. 24(a). Taking the additional step of receiving the report as an exhibit leads to trial court authentication before filing of the appellate record. Tenn. R. App. P. 24(f). This practice allows the trial court to be assured that the report was duly filed pursuant to section 40-35-208 and that the same report is used by the trial court and included in the record on appeal. We note that, on remand, the trial court did direct that the report be exhibited to the sentencing hearing. As a result, the report made its way to this court in the second appeal.

was commensurate with the gravity of the offense. See Wilkerson, 905 S.W.2d at 938-39.

In a perplexing consecutive sentencing issue, both parties are benefitted by certain facts. The horrific circumstances of the crime played a major role in the trial court's imposition of a consecutive sentence. On the other hand, the defendant argues that his youth and lack of prior criminal record negate the need to use an extended sentence in order to protect society. The state has argued that the conspiracy conviction should have full punitive impact because the concert of action among the conspirators contributed to the success of the plan. Without question, the trio "ganged up" on the victim, overwhelmed her, and prevented her escape. On the other hand, Colleen Slemmer was the victim of both offenses, and her murder, for which the defendant was convicted, was the object of the conspiracy. In a similar vein, although not raised by the defendant, we note that the murder theory upon which the defendant was convicted was his criminal responsibility for the act of another, or complicity, Tadaryl Darnell Shipp, slip op. at 8-10 (finding the convicting evidence sufficient to establish that the defendant was criminally responsible for the act of another via Tennessee Code Annotated section 39-11-402(2) (1997)), and as the trial court observed, the conspiracy continued up until the time of the killing. These circumstances arguably blend so as to cast the defendant into a conspiracy-complicity role whereby it is difficult to separate the conspiracy facets from the complicity facets.

Both parties also benefit by important propositions of law. Because the record as a whole, enhanced by the trial court's proceedings on remand, reflects that the trial court considered the applicable sentencing principles and all relevant facts and circumstances, our review of the trial court's action is *de novo* accompanied by a presumption that the trial court's determinations are correct. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Furthermore, "[a]ppropriate deference must be given to the trial court's factual determinations based on the

testimony of witnesses heard in open court." Wilkerson, 905 S.W.2d at 935. However, in order to support the consecutive sentencing of a "dangerous" offender, see Tenn. Code Ann. § 40-35-115(b)(4) (1997), "the proof ... *must establish* that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." Wilkerson, 905 S.W.2d at 938 (emphasis added). The commission of crimes which are "inherently dangerous" does not by that fact alone justify consecutive sentences, because there are "increased penalties" for such crimes. See Gray v. State, 537 S.W.2d 391, 393 (Tenn. 1976); Wilkerson, 905 S.W.2d at 398. Moreover, "consecutive sentences should not be routinely imposed." Tenn. Code Ann. § 40-35-115, Sentencing Comm'n Comments (paraphrasing State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987)).

Also, consecutive sentences are not automatically inappropriate because the criminal acts were part of a "single criminal episode." Gray, 537 S.W.2d at 933. However, crimes which are related or which were committed "serially against a single victim have been held not to warrant consecutive sentences." State v. Edwards, 868 S.W.2d 682, 704 (Tenn. Crim. App. 1993); see State v. McKnight, 900 S.W.2d 36, 57 (Tenn. Crim. App. 1994). But see, e.g., Greer v. State, 539 S.W.2d 855, 860 (Tenn. Crim. App. 1976) (trial court not precluded as a matter of law from considering consecutive sentencing of burglary and the rape which was the object of the burglary).

We agree that the extreme circumstances of the offenses demonstrate cogently that the defendant has little or no regard for human life and that, therefore, he is a dangerous offender. Furthermore, the extended sentence is commensurate with the gravity of the offenses. The most difficult issue to resolve is whether the extended sentence is necessary to protect the public from further criminal conduct by the defendant. The trial court expressed frustration with the defendant's argument that his youthfulness and potential for rehabilitation belied the need to

protect the public, and the trial judge expressed her hopes that this court would address the issue and make it "more clear."

In applying the public protection requirement of Wilkerson, trial courts should exercise caution when relying totally upon the circumstance of the offense. Before Wilkerson, a finding that the circumstances of the offense were "aggravated" was used to support consecutive sentencing. Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976); State v. Garren, 644 S.W.2d 701, 703 (Tenn. Crim. App. 1982); State v. Ford, 643 S.W.2d 913, 915 (Tenn. Crim. App. 1982). Gray listed categories of offenders for whom consecutive sentencing would be appropriate, one of which was the "dangerous" offender, one who "has little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Id. Consecutive sentencing of such dangerous offenders required the presence of "aggravating circumstances." Id. The 1989 sentencing law codified Gray and State v. Taylor, 739 S.W.2d 227 (Tenn. 1987) (establishing a consecutive sentencing category for multiple offenses involving sexual abuse of a minor), and the dangerous offender category which now appears in Code section 40-35-115(b)(4) utilizes the Gray definition; however, section 40-35-115(b)(4) makes no mention of aggravating circumstances. Compare subsection (b)(4) with subsection (b)(5) (multiple offenses involving sexual abuse of a minor); see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999) (indicating that Code section 40-35-115(b)(5) pertaining to sex offenses against a minor has "self-contained" aggravating circumstances). Nevertheless, Wilkerson says that the 1989 sentencing law "recognize[s]" the limitations that, with respect to dangerous offenders, consecutive sentences cannot be imposed "unless the terms reasonably relate to the severity of the offenses and are necessary to protect the public from further serious criminal conduct by the defendant." Wilkerson, 905 S.W.2d at 938; Lane, 3 S.W.3d at 461. Presumably, then, these two "limitations" go beyond the definition of a dangerous offender and channel the types of aggravating circumstances that are *required* in order to impose consecutive sentences upon a dangerous offender; at least, such

sentences may not be imposed unless these conditions are present and have been established by the proof. Id.; see State v. Willie J. Cunningham, No. 02C01-9801-CR-00022, slip op. at 9-10 (Tenn. Crim. App., Jackson, June 15, 1999); State v. Lavender, 967 S.W.2d 803, 809 (Tenn. Crim. App. 1998) (aggravating circumstances of robbery serve to meet definition of dangerous offender, but some of the circumstances, together with defendant's prior criminal record reflect that consecutive sentencing is necessary in order to protect the public). A reasonable synthesis of Gray, Taylor, the 1989 codification, and Wilkerson is that the two "Wilkerson" findings entail something more than that the defendant has "little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high," because this language supplies the *a priori* definition of a dangerous offender. Nevertheless, in an appropriate case, we see no reason why the circumstances of the offense could not be adequate to support all findings required by section 40-35-115(b)(4) and Wilkerson.

In support of a finding of necessity to protect the public, this court has used the existence of a defendant's prior criminal record, sometimes in combination with the circumstances of the offense, as a basis for concluding that consecutive sentences are warranted in order to protect the public from a dangerous offender. State v. Freeman, 943 S.W.2d 25, 33 (Tenn. Crim. App. 1996); see Willie J. Cunningham, slip op. at 10; State v. Dion Andres Russell, No. 03C01-9803-CR-00092, slip op. at 7 (Tenn. Crim. App., Knoxville, Apr. 7, 1999), perm. app. denied (Tenn. 1999); Lavender, 967 S.W.2d at 809. Conversely, we have declined to approve consecutive sentencing when the need to protect the public via an extended sentence is belied by the defendant's youthfulness, lack of criminal record, and potential for rehabilitation. See State v. Robert William Holmes, No. 01C01-9303-CC-00090 (Tenn. Crim. App., Nashville, Aug. 11, 1994); State v. Ralph Thompson, Jr., No. 03C01-9306-CR-00177 (Tenn. Crim. App., Knoxville, June 15, 1994); State v. Norris, 874 S.W.2d 590, 602 (Tenn. Crim. App. 1991). Still, otherwise favorable factors may be offset in an appropriate case by the

circumstances of the offense and the dangerous offender's lack of remorse. See State v. Pike, 978 S.W.2d 904, 928 (Tenn. 1998) (Appendix, excerpts of Court of Criminal Appeals opinion);[3] State v. Martin Palmer Jones, No. 03C01-9803-CR-00084, slip op. at 10 (Tenn. Crim. App., Knoxville, Feb. 25, 1999), perm. app. denied (Tenn. 1999).

We agree with the trial court that the circumstances of the offenses are so egregious that they not only serve to identify him as a dangerous offender, but they also inform the inquiry into whether the extended sentence is necessary in order to protect the public. Had we the opportunity, we might question whether these circumstances alone would negate the defendant's youthfulness and lack of a criminal record. We observe that actions taken by a person before he or she has attained adulthood, much less mature adulthood, may poorly reflect the kind of person he or she may be upon release from confinement decades later, when the person is middle aged or in the declining years of life.[4] Nevertheless, in this case, the aggravated circumstances do not provide the only basis for consecutive sentencing. The presentence report indicates that the defendant has not been remorseful for his crimes, and he has failed to challenge or rebut this statement. The trial court was in a position to observe the defendant's demeanor and his state of contrition. This court has pointed to the nexus between a remorseful attitude and the potential for rehabilitation. See, e.g., Martin Palmer James, slip op. at 10; State

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[3] We have declined the state's invitation to affirm the trial court *because* consecutive sentences were approved in Pike, the defendant's accomplice's case. Different evidence was introduced in each case, and obviously the defendants are different individuals. Sentencing should be individualized. State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). However, we use the relevant legal principle of Pike as precedent.

[4] The homicide was committed on January 12, 1995, prior to the July 1, 1995 effective date of the amendment to Tennessee Code Annotated section 40-35-501, which specified a minimum incarceration of 51 years for first degree murder (85 percent of 60 years). See Tenn. Code Ann. § 40-35-501(i)(1) (Supp. 1999). Therefore, the minimum period of incarceration for first degree murder in this case is 25 years. See Tenn. Code Ann. § 40-35-501(h)(1) (1997). The 25 year sentence for the conspiracy conviction is to be served at the Range I percentage of 30 percent.

v. Richerson, 612 S.W.2d 194, 196 (Tenn. Crim. App. 1980). Under the facts of this case, we believe that circumstances of the offense *and* the lack of remorse overshadow the defendant's youthfulness and lack of criminal record. See Pike, 978 S.W.2d at 928 (appendix); Martin Palmer Jones, slip op. at 10. The result is that the presumption of correctness of the trial court's determination has not been overcome. Allowing the deference to which the trial court is entitled, we affirm its decision to impose consecutive sentences.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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GARY R. WADE, PRESIDING JUDGE

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NORMA MCGEE OGLE, JUDGE